

## Notice of Decision and Reasons for Decision

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Applicant:	Bass Coast Ratepayers and Residents Association Incorporated
Agency:	Bass Coast Shire Council
Decision date:	12 October 2022
Exemption considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 125(1) of the <i>Local Government Act 2020</i> (Vic)
Citation:	<i>Bass Coast Ratepayers and Residents Association Incorporated and Bass Coast Shire Council</i> (Freedom of Information) [2022] VICmr 227 (12 October 2022)

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FREEDOM OF INFORMATION – council documents – closed council meeting – waste management – contracts – tenders – *Local Government Act 2020* (Vic) – *Local Government Act 1989* (Vic)

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

I am satisfied the documents are exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the *Local Government Act 2020* (Vic) (**LG Act 2020**).

The effect of my decision is that no further information in the documents is to be released.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

12 October 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - Copy of recommendations from the feasibility study and organics option analysis carried out by Council consultants including the full cost of the 3 bin service.
  - Copy of the tender specification which was submitted on Tender Link - C16006 Waste Management Facility and Operation Services.
  - Copy of the signed awarded contracts for the following:
    - C16005 Waste Collection Service,
    - C16040 Facility Management and Operation Wonthaggi,
    - C16039 Facility Management and Operation Services Grantville.
2. The Applicant specified they did not seek access to the following information:
  - (a) organisation and/or team charts;
  - (b) employee contact information and/or resumes;
  - (c) address or contact information of subcontractors;
  - (d) contact information of any referees;
  - (e) previous experience and/or projects contractors have worked on; and
  - (f) specific pages of the Tender Specifications for contract 16005 and 16006 that were provided to the Applicant outside of the FOI Act.
3. This FOI request reflects part of an original FOI request to the Agency that the Applicant subsequently agreed to be processed in two parts.
4. Prior to making its decision, the Agency released documents to the Applicant outside the FOI Act.<sup>1</sup>
5. The Agency identified three documents falling within the terms of the Applicant's request to which it refused access in part under sections 32(1), 34(1)(a), 34(1)(b) and 38 in conjunction with section 125(1) of the LG Act 2020.
6. The Agency's decision letter sets out the reasons for its decision.

### Review application

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
8. I have examined a copy of the documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

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<sup>1</sup> The documents released to the Applicant outside of the FOI Act are not included in the Schedule of Documents in **Annexure 1** as they do not form part of this review.

10. I have considered all communications and submissions received from the parties.
11. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
12. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
13. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>2</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

### **Review of exemption**

14. As stated above, the Agency refused access to the documents in part under sections 32(1), 34(1)(a), 34(1)(b) and 38 in conjunction with section 125(1) of the LG Act 2020.
15. I first consider the application of section 38 in conjunction with section 125(1) of the LG Act 2020.

### ***Section 38 – Documents to which secrecy provisions of enactments apply***

16. A document is exempt from release under section 38 if the following three requirements are met:
  - (a) there is an enactment in force;
  - (b) the enactment applies specifically to the kind of information in a document; and
  - (c) the enactment prohibits persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

#### *Is there an enactment in force?*

17. The Agency refused access to certain information in the documents under section 38 in conjunction with section 125(1) of the LG Act 2020.
18. Section 125 of the LG Act 2020 provides:

#### **125 Confidential information**

- (1) Unless subsection (2) or (3) applies, a person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, must not intentionally or recklessly disclose information that the person knows, or should reasonably know, is confidential information.  
Penalty: 120 penalty units.
- (2) Subsection (1) does not apply if the information that is disclosed is information that the Council has determined should be publicly available.
- (3) A person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, may disclose information that the person knows, or should reasonably know, is confidential information in the following circumstances—

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<sup>2</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

- (a) for the purposes of any legal proceedings arising out of this Act;
- (b) to a court or tribunal in the course of legal proceedings;
- (c) pursuant to an order of a court or tribunal;
- (d) in the course of an internal arbitration and for the purposes of the internal arbitration process;
- (e) in the course of a Councillor Conduct Panel hearing and for the purposes of the hearing;
- (f) to a Municipal Monitor to the extent reasonably required by the Municipal Monitor;
- (g) to the Chief Municipal Inspector to the extent reasonably required by the Chief Municipal Inspector;
- (h) to a Commission of Inquiry to the extent reasonably required by the Commission of Inquiry;
- (i) to the extent reasonably required by a law enforcement agency.

...

19. I am satisfied the LG Act 2020 is an enactment in force for the purposes of section 38.

*Does the enactment apply specifically to the kind of information in the documents?*

20. For section 38 to apply to a document, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.<sup>3</sup>

21. Following the Agency's decision, amendments were made to the LG Act 2020 by the *Local Government Legislation Amendment (Rating and Other Matters) Act 2022 (Vic)*. At the time of the Agency's decision, certain classes of 'confidential information' were exempt from release under section 125(1) of the LG Act 2020 in conjunction with section 38 of the FOI Act. However, sections 125(4) and 125(5) of the LG Act 2020, which came into operation on 10 August 2022, amended the classes of 'confidential information' that can be considered exempt from release under section 38 of the FOI Act.

22. Accordingly, the following categories of 'confidential information', as defined in section 3(1) of the LG Act 2020 and upon which the Agency relied, are no longer exempt from release under section 38 of the FOI Act:

- (a) Council business information, being information that would prejudice the Council's position in commercial negotiations if prematurely released;

...

- (g) private commercial information, being information provided by a business, commercial or financial undertaking that—
  - (i) relates to trade secrets; or
  - (ii) if released, would unreasonably expose the business, commercial or financial undertaking to disadvantage;

23. Prior to these legislative changes, the Agency advised it no longer considers the category of 'council business information' applies.

24. My decision is based on the law in force at the time of my decision, not at the time of the Agency's decision. As such, OVIC consulted with the Agency to confirm whether it sought to rely on any other

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<sup>3</sup> *News Corporation Ltd v National Competition & Securities Commission* 52 ALR 277 at 281.

exemption in place of 'private commercial information'. The Agency advised it does not seek to rely on another exemption.

25. Accordingly, I have only considered whether the documents contain 'confidential information' within the following definition of 'confidential information' in section 3(1):

- (l) information that was confidential information for the purposes of section 77 of the *Local Government Act 1989*;

26. Section 77(1) of the former *Local Government Act 1989* (Vic) (**LG Act 1989**) provided:

A person who is, or has been, a Councillor or a member of a special committee, must not disclose information that the person knows, or should reasonably know, is confidential information.

Penalty: 120 penalty units

27. Section 77(2) of the LG Act 1989 provided that Council information would be confidential if:

- (a) the information was provided to the Council or a special committee in relation to a matter considered by the Council or special committee at a meeting closed to members of the public;
- (b) the information was designated as 'confidential information' by a resolution of the Council or a special committee specifying the relevant ground or grounds under section 89(2) of LG Act 1989; and
- (c) the information was designated in writing as 'confidential information' by the Chief Executive Officer specifying the relevant ground or grounds under section 89(2) of the LG Act 1989.

28. The documents subject to review are contracts between the Agency and private commercial entities.

29. During the review, the Agency submitted an extract from the minutes of the Closed Ordinary Council Meeting held on [date] (**the Minutes**), which records the award of Tender Numbers 16005 and 16006, to which the documents subject to review relate.

30. The Minutes record that the meeting was closed to members of the public under section 89(d) of the LG Act 1989.

31. The Agency also submits the reports and attachments relating to the tenders were provided to Councillors on [date] ahead of the Closed Ordinary Council Meeting.

32. The minutes for an Ordinary Council Meeting held on [date] and 'Contracts Awarded Report [date]' confirm the contracts subject to review were awarded on [date] at the Closed Ordinary Meeting.<sup>4</sup>

33. In these circumstances, I am satisfied the contracts contain information that was submitted and/or considered at a Closed Council Meeting, and therefore fall within the definition of 'confidential information' for the purposes of section 77 of the LG Act 1989 and the definition of 'confidential information' in section 3(1)(l) of the LG Act 2020.

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<sup>4</sup> Bass Coast Shire Council, *Minutes for Ordinary Meeting Wednesday, [date]* <[URL redacted]>; Bass Coast Shire Council, *Contracts Awarded Report [date]* <[URL redacted]>.

*Does the enactment prohibit persons from disclosing information in the documents?*

34. Section 125(1) of the LG Act 2020 prohibits Agency officers, specifically Councillors and Council staff, from disclosing 'confidential information'.
35. As I am satisfied the documents contain 'confidential information', section 125(1) of the LG Act 2020 prohibits disclosure of the documents.
36. Accordingly, I am satisfied the documents are exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act 2020.

### **Section 25 – Deletion of exempt or irrelevant information**

37. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
38. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>5</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>6</sup>
39. The Agency provided the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25. Most of the information to which the Agency refused access was on the basis of irrelevance, as it considered the information fell outside of the terms of the Applicant's request.
40. As I am satisfied the documents are exempt from release under section 38 in conjunction with section 125(1) of the LG Act 2020, I have not considered the remaining exemptions relied on by the Agency or the information it considered as irrelevant.
41. Accordingly, I have decided not to release any further information in the documents as I am satisfied it is exempt from release under section 38.

### **Conclusion**

42. On the information before me, I am satisfied the documents are exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act 2020.
43. The effect of my decision is that no further information in the documents is to be released.
44. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

45. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>7</sup>
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>

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<sup>5</sup> *Mickelborough v Victoria Police* (General) [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier* (General) [2012] VCAT 967 at [82].

<sup>6</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division* (Review and Regulation) [2013] VCAT 1267 at [140] and [155].

<sup>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
48. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
49. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>10</sup>

***When this decision takes effect***

50. My decision does not take effect until the Agency's 14 day review period expires.
51. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>9</sup> Section 52(9).

<sup>10</sup> Sections 50(3F) and 50(3FA).

**Annexure 1 – Schedule of Documents**

<b>Document No.</b>	<b>Date of Document</b>	<b>Document Description</b>	<b>No. of pages</b>	<b>Agency Decision</b>	<b>OVIC decision</b>
1	[Date]	Contract No 16039 Waste Facility Management and Operation Services at Grantville Landfill and Transfer Station Form of Agreement	503	Released in part Sections 34(1)(a), 34(1)(b), 38	Release in part Sections 38 in conjunction with section 125 of the LG Act 2020, 25 No further information is to be released
2	[Date]	Contract No 16005 Waste Collection Services Form of Agreement	355	Released in part Sections 34(1)(a), 34(1)(b), 38	Release in part Sections 38 in conjunction with section 125 of the LG Act 2020, 25 No further information is to be released
3	[Date]	Contract No 16040 Management of Resource Recovery Centre (Transfer Station) in Wonthaggi Form of Agreement	212	Released in part Sections 34(1)(a), 34(1)(b), 38	Release in part Sections 38 in conjunction with section 125 of the LG Act 2020, 25 No further information is to be released