

Notice of Decision and Reasons for Decision

Applicant:	'EN7'
Agency:	Moonee Valley City Council
Decision date:	7 June 2022
Exemptions and provisions considered:	Section 38 in conjunction with section 125(1) of the <i>Local Government Act 2020</i> (Vic)
Citation:	'EN7' and <i>Moonee Valley City Council</i> (Freedom of Information) [2022] VICmr 152 (7 June 2022)

FREEDOM OF INFORMATION – council documents – planning documents – planning application – plans – land use permit – secrecy provision – *Local Government Act 2020* (Vic) – personal information

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 information to which the Agency refused access under sections 33(1) and 34(1)(b) is exempt from release under section 38 in conjunction with section 125(1) of the *Local Government Act 2020* (Vic) (**LG Act**).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access to documents is refused in full.

Accordingly, my decision is the same as the Agency's decision.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
7 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request as follows:
 - In relation to [address] –
 - (a) Full Building/construction plans
 - (b) Proof of permit and permit conditions eg hours of work, times - Building Permit
 - (c) surveyed plans as they are trying to build to close to our lines
 - (d) demolishing permits as heritage home and house is over our boundary
3. The Agency identified three documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 33(1) and 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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.
10. 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'.¹ 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 exemptions

Section 38 – Secrecy provision

11. A document is exempt under section 38 if the following three requirements are met:
 - (a) there is an enactment in force;

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

- (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).
12. 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.

Is there an enactment in force?

13. Section 125 of the LG Act concerns ‘confidential information’ and provides:

- (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—
 - (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.

14. I am satisfied the LG Act is an enactment in force for the purpose of section 38 of the FOI Act.

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

15. ‘Confidential information’ in section 125(1) of the LG Act is defined in section 3(1) of that Act and includes:

personal information, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs²

16. The above definition of ‘confidential information’, which includes ‘personal information’, is similar to the exemption under section 33(1) of the FOI Act, which concerns ‘personal affairs information’ and provides a document is exempt from release if:

- (a) its disclosure would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person other than the Applicant (or personal affairs information) (a **third party**);³ and

² Section 3(1)(f) of the LG Act.

³ Sections 33(1) and (2).

(b) disclosure of the personal affairs information would be 'unreasonable' in the circumstances.

17. Information relating to the 'personal affairs' of a person includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.⁴

Do the documents contain 'personal affairs' for the purposes of section 125 of the LG Act?

18. In determining whether the documents contain 'personal information' about a third party, and whether disclosure of that information would be unreasonable in the circumstances, I have had regard to the similar considerations that arise under section 33(1) of the FOI Act.

19. 'Personal information' encompasses a broad range of information concerning an individual. For example, their name, address, correspondence or detail about their property, or other personal details.

20. The documents subject to review are planning permits and plans concerning land owned by a third party, which I am satisfied is 'confidential information' for the purposes of section 125(1) of the LG Act.

Would disclosure be unreasonable in the circumstances?

21. I have considered the following factors in determining whether disclosure of personal information would be unreasonable:

- (a) the nature of the personal information and the circumstances in which it was obtained by the Agency;
- (b) the Applicant's interest in the information;
- (c) the likelihood of further disclosure of the information, if released under the FOI Act;
- (d) whether any public interest would be promoted by release of the information;
- (e) whether the third party to whom the personal information relates object or would be likely to object to the release of the information; and
- (f) whether the disclosure of the personal information would or would be reasonably likely to endanger the life or physical safety of any person.⁵

22. Having reviewed the relevant information and considered the circumstance of this matter, I am satisfied disclosure of the personal information that was exempted from release by the Agency would be unreasonable for the following reasons:

- (a) The information was provided and collected by the Agency in the context of its statutory obligations in administering the relevant building permit application process under the *Building Act 1993* (Vic) and any associated planning laws.
- (b) Given the nature of the information, I accept it is reasonably likely the third party would expect their personal information in the documents will be used and disclosed in connection with the Agency's regulatory responsibilities only and not released to a third party under the FOI Act.

⁴ Section 33(9).

⁵ Section 33(2A).

- (c) The likelihood, based on the submission of the Applicant, of further disclosure of the personal information in the documents if disclosed under the FOI Act.
- (d) The public interest in disclosure of the personal information submitted by the Applicant, balanced with the impact disclosure of the personal information would have on the personal privacy of the relevant third party. In this case, I consider personal privacy considerations outweigh any public interest factors in disclosure.
- (e) The third party to whom the information relates objects to the disclosure of their personal information under the FOI Act. In the circumstances of this matter I consider this factor is particularly important where, based on the submissions of the Applicant and the third party, the relationship appears to be strained.
- (f) Finally, section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. On balance, given the circumstances that gave rise to the Applicant's request and the submissions provided by both parties, I am unable to discount the possibility disclosure of the documents under the FOI Act would be reasonably likely to pose a safety risk to any person.

23. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal information in the documents would be unreasonable in the circumstances.

24. Accordingly, I am satisfied section 38 of the FOI Act applies to the personal information of the third party in conjunction with section 125(1) of the LG Act as:

- (a) section 125 of the LG Act is an enactment in force;
- (b) the definition of 'confidential information' in subsection 3(1)(f) of the LG Act refers specifically to the 'personal information' in the documents; and
- (c) section 125(1) of the LG Act prohibits Agency officers, specifically councillors and council staff, from disclosing 'confidential information'.

25. Accordingly, I am satisfied the personal information in the documents, which the Agency exempted from release under section 33(1) of the FOI Act, is exempt under section 38 in conjunction with section 125(1) of the LG Act.

26. As I am satisfied the documents are exempt from release under section 38, it is not necessary to consider the additional exemptions relied on by the Agency.

Section 25 – Deletion of exempt or irrelevant information

27. 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.

28. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ and the effectiveness of the deletions. Where

⁶ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁷

29. I have considered the effect of providing the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to do so, as deleting the exempt information would render the documents meaningless.

Conclusion

30. On the information before me, I am satisfied the information to which the Agency refused access under section 33(1) is exempt under section 38 in conjunction with section 125(1) of the LG Act.
31. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access to the documents is refused in full.

Review rights

32. 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.⁸
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
35. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
36. 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.¹¹

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
15.	[Date]	[reference number] Applications – [Address]	16	Refused in full Sections 33(1), 34(1)(b)	Refuse in full Section 38 in conjunction with section 125(1) of the LG Act	Section 38: I am satisfied the document is exempt from release under section 38 in conjunction with section 125(1) of the LG Act for the reasons set out in the Notice of Decision above.
16.	[Date]	[reference number] Applications – [Address]	2	Refused in full Section 34(1)(b)	Refuse in full Section 38 in conjunction with section 125(1) of the LG Act	Section 38: See comments in Document 15 above.
17.	[Date]	Survey plan	1	Refused in full Section 34(1)(b)	Refuse in full Section 38 in conjunction with section 125(1) of the LG Act	Section 38: See comments for Document 15 above.