

Notice of Decision and Reasons for Decision

Applicant:	'EV8'
Agency:	Yarra City Council
Decision date:	14 October 2022
Exemptions considered:	Sections 30(1), 33(1), and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with the section 125(1) of the <i>Local Government Act 2020</i> (Vic)
Citation:	'EV8' and Yarra City Council (Freedom of Information) [2022] VICmr 226 (14 October 2022)

FREEDOM OF INFORMATION – council documents – community leisure centre fees and charges – councillor briefings – briefing reports – *Local Government Act 2020* (Vic) – internal working documents – personal affairs information of Agency officers – names and position titles – disclosure not contrary to the public interest

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.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied the documents are exempt under sections 30(1) and 33(1).

Accordingly, I have determined to grant access to the documents in full.

My decision in relation to each document is set out in the Schedule of Documents in **Annexure 1**.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
14 October 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

Council recently invited the Yarra community to provide feedback as part of the 2022/23 budget process. One component of this process was a review of Yarra Leisure fees and charges. The review included benchmarking against comparable venues on existing fees and charges across all categories.

My request under Freedom of Information is to receive copies of the following documents:

1. The list of “comparable venues” that were considered
 2. The specific data that was collected in relation to fees and charges in those comparable venues
 3. The analysis that was undertaken in relation to the above data
 4. The data-based conclusions (i.e. supported by the above mentioned analysis) which led to decisions relating to:
 - a. Leisure centre fee and charge increases
 - b. The discontinuance of 50+ memberships and the Senior Access Pass which has disproportionality affected those aged 50 and above.
2. The Agency identified three documents falling within the terms of the Applicant’s request and refused access to all documents in full under sections 30(1) and 38 of the FOI Act in conjunction with section 125(1) of the *Local Government Act 2020 (Vic) (LG Act 2020)*. The Agency’s decision letter sets out the reasons for its decision.

Review application

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

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

Review of exemptions

Section 38 – Documents to which secrecy provisions of enactments apply

10. Having reviewed the documents and the information provided by the Agency to support its decision made under section 38, the Agency was asked to provide further evidence that the documents are exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act 2020.
11. Subsequently, the Agency advised OVIC staff that it no longer seeks to rely on section 38 to refuse access to the documents.
12. Accordingly, my review will focus on the application of sections 30(1) and 33(1) to the documents.

Section 30(1) – Internal working documents

13. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
14. The exemption does not apply to purely factual material in a document.²

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

15. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.³
16. The documents are councillor briefing reports and presentations in relation to the Council's fees and charges structure for its leisure centre programs and services.
17. I am satisfied the documents contain information in the nature of opinion, advice and recommendations prepared by Agency officers.

Were the documents made in the course of, or for the purpose of, the deliberative process involved in the functions of an agency or Minister or of the government?

18. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.⁴
19. In *Re Waterford and Department of Treasury (No.2)*,⁵ the former Victorian Administrative Appeals Tribunal held:

² Section 30(3).

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁵ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

20. I am satisfied the documents were created in the course of the Agency’s deliberative process in relation to the consideration of fees and charges for their leisure centre programs and services.

Would disclosure of the documents be contrary to the public interest?

21. In determining if disclosure of the documents would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have given weight to the following relevant factors:⁶

- (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (b) the right of every person to gain access to documents under the FOI Act;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency’s functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

22. The Agency submits:

The referenced documents were all prepared for presentation to a Councillors Briefing as Working Documents and to assist Officers in developing a then proposed report to be then presented to the Council for formal consideration / determination at a later date.

The Working Documents as noted included benchmarking and other aspects of possible fees and charges with the intention of the Council at a formal Council Meeting giving consideration and potential determination on possible changes to fees and charges.

The Briefing Reports never proceeded to a formal Council Meeting and as such, the referenced Working Documents have not been presented to the Council...

...the Council did later consider and determine on a change of leisure fees as a component of its annual statutory budget process and which included public consultation as part of that statutory budget process. The Council did adopt revised leisure fees in that budget process;

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

whilst there was a similarity in the fees subsequently adopted to those which had been referenced in the Briefing Paper of [date], that Paper was not presented to the Council as such.

23. On the information before me, I am satisfied disclosure of the documents would not be contrary to the public interest for the following reasons:
- (a) I do not consider the information regarding the proposed fees and charges for the Council's leisure centre programs and services is particularly sensitive. I note there is publicly available information about Council fees and charges in the Agency's annual draft budget and finalised budgets for 2021-2022 and 2022-23.⁷
 - (b) I acknowledge the Applicant, [description of Applicant], has a strong interest in obtaining access to information concerning the Agency's fees and charges.
 - (c) There is a public interest in the community being better informed about fees and charges for public services and the information provided to government when deliberating on and determining these rates. Providing access to information that demonstrates the basis upon which a government decision is made that impacts upon local residents and the broader public, builds community trust in government decision making processes. Therefore, I consider disclosure of the documents serves the public interest in promoting transparency of and accountability for government decision making.
 - (d) I acknowledge the Agency's submission that the documents were not presented at a formal council meeting. However, I do not accept their disclosure would be likely to misinform or confuse the public or cause unnecessary debate. In any case, it is open to the Agency to provide an explanation when releasing the document, should it be necessary to do so, to clarify they were created at a particular point in time and may be one of a number of sources of information that contributed to the Agency's overall assessment of the fees and charges for its leisure centre programs and services.
 - (e) I am not satisfied disclosure of the relevant information would negatively impact upon the nature or quality of advice and recommendations prepared by Agency officers in the future. I note the views of the Victorian Civil and Administrative Tribunal (VCAT) in *Graze v Commissioner for State Revenue*,⁸ which observed the possibility of public scrutiny in some circumstances provides for better administrative decision making. In any case, Agency officers are responsible for ensuring advice provided to agencies, ministers and the government is accurate, properly considered and impartial regardless of whether such information is intended to be publicly released.
24. Accordingly, I am satisfied disclosure of the documents would not be contrary to the public interest, and the documents are not exempt from release under section 30(1).
25. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

⁷ Yarra City Council '2021 Council Meetings' at <https://www.yarracity.vic.gov.au/about-us/council-and-committee-meetings/past-council-and-committee-meetings/2021-council-meetings> and Yarra City Council '2022 Council Meetings' at <https://www.yarracity.vic.gov.au/about-us/council-and-committee-meetings/past-council-and-committee-meetings/2022-council-meetings>.

⁸ [2013] VCAT 869 at [25]-[27].

Section 33(1) – Personal affairs information of third parties

26. As I have determined certain information to which the Agency refused access under section 30(1) is not exempt information, I have considered the application of section 33(1), as the information includes the personal affairs information of persons other than the Applicant (**third parties**).
27. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI Act would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a third party; and
 - (b) such disclosure would be ‘unreasonable’ in the circumstances.

Do the documents contain the personal affairs information of individuals other than the Applicant?

28. 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.⁹
29. The documents contain the names and position titles of Agency officers and I am satisfied such information is ‘personal affairs information’ for the purposes of section 33(1).

Would the release of the personal affairs information be unreasonable in the circumstances?

30. Determining whether disclosure of a document would be unreasonable involves balancing the public interest in the disclosure of official information held by a government agency with the interest in protecting an individual’s personal privacy in the circumstances.¹⁰
31. The proper application of section 33(1) involves consideration of ‘all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend’.¹¹
32. Whether or not an agency officer’s personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.¹²
33. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances of this matter, I have given consideration to the following factors:¹³
- (a) the nature of the personal affairs information;
 - (b) the circumstances in which information was obtained by the Agency;
 - (c) the Applicant’s interest in the information and whether their purpose for seeking the information is likely to be achieved;
 - (d) whether any public interest would be promoted by the release of the information;
 - (e) whether any individuals to whom the information relates object, or would be likely to object to the release of the information;
 - (f) the likelihood of further disclosure of the information if released;

⁹ Section 33(9).

¹⁰ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

¹¹ [2008] VSCA 218 at [104].

¹² *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

¹³ *Ibid.*

- (g) the likelihood disclosure would cause distress or anxiety to individuals it relates to; and
- (h) whether disclosure of the information would be reasonably likely to endanger the life or physical safety of any person.

34. As stated above, the documents contain the names and position titles of Agency staff.
35. Having considered the circumstances of this matter and nature of the information, it is unclear whether the third parties would be likely to object to the release of the information.
36. The personal affairs information was acquired by the Agency in the course of Agency officers carrying out their usual work duties and responsibilities in fulfilling the Agency's functions and obligations. As such, I consider the personal affairs information concerns these individuals in their professional capacity rather than in relation to their personal or private lives.
37. As noted above, the Applicant seeks access to the documents to further understand government decision making in relation to the fees and charges imposed for the Council's leisure centre programs and services.
38. I am also required to consider whether disclosure of the personal affairs information would, or would be reasonably likely, to endanger the life or physical safety of any person.¹⁴ The term 'any person' is broad and extends to any relevant endangerment involving the safety of an applicant, a related third party or any other person. However, I do not consider this is a relevant factor in this matter.
39. In the circumstances, I am satisfied disclosure of the position titles and names of third parties would not be unreasonable where the information appears in an official document and concerns their professional work duties and responsibilities.
40. Accordingly, I am not satisfied this information is exempt from release under section 33(1).

Conclusion

41. On the information before me, I am not satisfied the documents are exempt from release under sections 30(1) and 33(1). Accordingly, the documents are to be release in full.
42. My decision in relation to each document is set out in the Schedule of Documents in **Annexure 1**.

Review rights

43. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
46. 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.

¹⁴ Section 33(2A).

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

47. 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.¹⁸

Third party review rights

48. As I have determined to release documents that contain information the Agency exempted under section 33(1), if practicable, I am required to notify the relevant third parties who provided the information to the Agency of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁹
49. Having considered the nature of the documents, the information to be disclosed and the number of third parties whose personal affairs information appears in the documents, I am satisfied it is not practicable to notify the relevant individuals of their review rights in this matter given the nature of the personal affairs information to be disclosed and the official context within which it appears.
50. However, I note it is open for the Agency to notify the relevant individuals, should it wish to do so.

When this decision takes effect

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

¹⁸ Sections 50(3F) and 50(3FA).

¹⁹ Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Councillor Briefing Presentation	9	Refused in full Sections 30(1), 38	Release in full	<p>Section 38: During the review, the Agency advised it no longer relies on section 38 of the FOI Act in conjunction with section 125(1) of the LG Act 2020 to refuse access to the document.</p> <p>Section 30(1): For the reasons outlined in the Notice of Decision above, I am not satisfied the document is exempt from release under section 30(1).</p> <p>Section 33(1): For the reasons outlined in the Notice of Decision, I am not satisfied the remaining personal affairs information in the document is exempt under section 33(1).</p>
2.	[Date]	Councillor Briefing Report	10	Refused in full Sections 30(1), 38	Release in full	<p>Section 38: See comments for Document 1.</p> <p>Section 30(1): See comments for Document 1.</p> <p>Section 33(1): See comments for Document 1.</p>
3.	[Date]	Councillor Briefing Report	24	Refused in full Sections 30(1), 38	Release in full	<p>Section 38: See comments for Document 1.</p> <p>Section 30(1): See comments for Document 1.</p>

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						Section 33(1): See comments for Document 1.