

Notice of Decision and Reasons for Decision

Applicant:	'EZ8'
Agency:	Glen Eira City Council
Decision date:	16 February 2023
Provision and exemption considered:	Sections 25A(5), 38 in conjunction with section 125 of the <i>Local Government Act 2020</i> (Vic)
Citation:	'EZ8' and Glen Eira City Council (Freedom of Information) [2023] VICmr 8 (16 February 2023)

FREEDOM OF INFORMATION – local council – local government – tender documents – tender evaluation – infrastructure project – [details of project] redevelopment – closed session of council – council meeting minutes – secrecy provision – *Local Government Act 2020* (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 requirements for the application of section 25A(5) are met.

Accordingly, I have decided to refuse access to the requested documents in accordance with the Applicant's FOI request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

16 February 2023

Reasons for Decision

Background to review

1. [Contextual information redacted]. The Applicant seeks information to understand and confirm the integrity of the Council's decision making process in its appointment of the successful tenderer [for a redevelopment project].
2. The Applicant made a request to the Agency seeking access to the following documents:
 1. The tender evaluation and recommendation submitted to Council at the Ordinary Council meeting of [date] for the award of Contract [details of project] Redevelopment - Construction Tender.
 2. The minutes of the closed session of the Ordinary Council meeting of [date] where item [number] "Confidential Items" was discussed and voted upon.
3. The Agency determined any documents falling within the terms of the Applicant's request, should any exist, would be 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**) and refused to grant access to the request under section 25A(5). In refusing the request, the Agency was not required to identify any documents relevant to the terms of the request.
4. The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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.

Review of application of section 25A(5)

10. The refusal power under section 25A(5) is 'carefully circumscribed'.¹ In *Knight v Corrections Victoria*,² the Supreme Court of Victoria held section 25A(5) will apply to an FOI request only where the following three elements are met:
 - (a) First, the exempt nature of the documents sought must be objectively apparent from terms of the applicant's request. The 'nature' of a document refers to their inherent or essential quality or character.

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

² *Ibid.*

- (b) Second, it must be apparent from the terms of the applicant's request that all documents relevant to the request would be exempt.
- (c) Third it must be apparent from:
 - i. the nature of the documents, as described in an applicant's request, that no obligation would arise under section 25 for an agency to grant access to an edited copy of a document with exempt or irrelevant information deleted; or
 - ii. an applicant's request, or through consultation with the applicant, they do not seek access to an edited copy of a document.

What is the essential character of the documents requested?

- 11. The Applicant seeks access to documents containing a tender evaluation and recommendations regarding a contract that was submitted to the Agency at an Ordinary General Meeting on [date] and minutes of items that were discussed during a closed session of Council at an Ordinary General Meeting on [date].
- 12. I am satisfied the essential nature or character of the documents, as described in the Applicant's FOI request, is apparent from the terms of the request.
- 13. Accordingly, I am satisfied the first limb of section 25A(5) is met.

Would all requested documents be exempt from release?

- 14. In refusing access under section 25A(5), the Agency determined the requested documents would be exempt under section 38 in conjunction with section 125(1) of the LG Act.

Section 38 – Documents to which a secrecy or confidentiality provision applies

- 15. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information contained in the documents; and
 - (c) the enactment must prohibit 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?

- 16. Section 125 of the LG Act 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—

- (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.
- (4) Despite section 38 of the Freedom of Information Act 1982, a document containing information of the kind described in paragraph (a), (b), (c), (d), (e), (f) or (g) of the definition of confidential information is not an exempt document within the meaning of the Freedom of Information Act 1982 by virtue of section 38 of that Act.

...

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

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

18. 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.³

19. The Agency submits the requested documents would fall within the definition of ‘confidential information’ under section 3(1)(h) of the LG Act, which provides ‘confidential meeting information, being the records of meetings closed to the public under section 66(2)(a)’.

20. Section 66 of the LG Act provides:

Meetings to be open to the public unless specified circumstances apply

- (1) A Council or delegated committee must keep a meeting open to the public unless the Council or delegated committee considers it necessary to close the meeting to the public because a circumstance specified in subsection (2) applies.
 - (2) The circumstances are—
 - (a) the meeting is to consider confidential information; or
- ...
- (5) If a Council or delegated committee determines that a meeting is to be closed to the public to consider confidential information, the Council or delegated committee must record in the minutes of the meeting that are available for public inspection—
 - (a) the ground or grounds for determining to close the meeting to the public by reference to the grounds specified in the definition of confidential information in section 3(1); and
 - (b) an explanation of why the specified ground or grounds applied.

21. The requested documents concern a contract tender considered at an Ordinary General Council meeting held on [date].

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

22. During the review, the Agency provided OVIC with a copy of the minutes of that meeting (**Minutes**). Agenda Item [number] concerns the tender the subject of the Applicant's FOI request and the Minutes record Item [number] was closed to members of the public under sections 66(1) and 66(2)(a) of the LG Act, as Council was to consider matters that it determined constituted 'confidential information' under sections 3(1)(a) and 3(1)(g) of the LG Act.
23. Accordingly, I am satisfied the Minutes fall within the meaning of 'confidential information' under section 3(1)(h) of the LG Act as it records the minutes of a Council meeting closed to the public under section 66(2)(a) of the LG Act.
24. I am also satisfied the requested tender evaluation and recommendation submitted at the Ordinary Council meeting on [date] for the award of '[details of project] Redevelopment - Construction Tender' were prepared for the purpose of consideration at the Ordinary Council meeting. Accordingly, I am satisfied this document also falls within the meaning of 'confidential information' in section 3(1)(h) of the LG Act.

Applicant's submission

25. The Applicant submits that as the provisions the Agency relied upon to close Agenda Item [number] to members of the public, being sections 3(1)(a) and 3(1)(g) of the LG Act, are not categories of 'confidential information' for the purposes of section 38, this prevents the Agency from refusing access to the relevant documents under this provision.
26. Sections 125(4) and 125(5) of the LG Act exclude various categories of 'confidential information' including sections 3(1)(a) and 3(1)(g) of the LG Act, from the exemption under section 38 of the FOI Act.
27. I am satisfied the Agency utilised sections 3(1)(a) and 3(1)(g) of the LG Act to close Agenda Item 11 from members of the public. Closing a meeting to the public under these provisions is not impacted by the operation of sections 125(4) and 125(5) of the LG Act, which specifically concern the application of section 38 of the FOI Act. I also note the Agency does not rely on the definitions of 'confidential information' in sections 3(1)(a) and 3(1)(g) of the LG Act in conjunction with section 125(1) of the LG Act.
28. Accordingly, for the reasons described above, I am satisfied the requested documents were either submitted or prepared for a Council meeting closed to the public under section 66(2)(a) of the LG Act, and therefore any documents would fall within the definition of 'confidential information' in section 3(1)(h) of the LG Act.

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

29. Section 125(1) of the LG Act prohibits Agency officers, specifically Councillors and Council staff, from disclosing 'confidential information'. Accordingly, the enactment prohibits persons from disclosing the requested documents, should any exist.

Conclusion on section 38

30. I am satisfied the requested documents would be exempt from release under section 38 in conjunction with section 125(1) of the LG Act as:
 - (a) section 125(1) of the LG Act is an enactment in force;
 - (b) the definition of 'confidential information' in section 3(1)(h) of the LG Act refers specifically to the requested documents; and
 - (c) section 125(1) of the LG Act prohibits Agency officers from disclosing 'confidential information'.

31. Accordingly, I am satisfied the second limb of section 25A(5) is met.

Is there scope to provide the Applicant with an edited copy of the requested documents?

32. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of an edited copy of a document is not required under section 25.⁵

34. Given the nature of the requested documents and the information to which the Applicant seeks access, I am satisfied it would not be practicable to provide an edited copies of the documents as any substantive information would be exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act and any remaining information would be minimal and devoid of meaning.

35. Accordingly, I am satisfied the third limb of section 25A(5) is met.

Conclusion

36. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:

- (a) the exempt nature of the requested documents is apparent from the terms of the Applicant's FOI request;
- (b) it is apparent from the terms of the Applicant's request that each document would be exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act; and
- (c) there would be no capacity to provide the Applicant with an edited copy of the requested documents in accordance with section 25.

37. Accordingly, I have decided to refuse access to the requested documents in accordance with the Applicant's FOI request under section 25A(5).

Review rights

38. 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.⁶

39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷

40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸

⁴ *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].

⁵ *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].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

41. 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.
42. 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.⁹

⁹ Sections 50(3F) and 50(3FA).