

Notice of Decision and Reasons for Decision

Applicant:	'FG6'
Agency:	Horsham Rural City Council
Decision date:	30 June 2023
Exemptions and provisions considered:	Section 25, 25A(5), 36(2)(b) and 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:	'FG6' and Horsham Rural City Council (Freedom of Information) [2023] VICmr 68 (30 June 2023)

FREEDOM OF INFORMATION – council records – local government – contract of employment – work performance – Executive Officer – communication between Councillors – refusal to process request on grounds all documents, should any exist, would be exempt – secrecy provision – *Local Government Act 2020* (Vic) – section 25 – applicant agrees to receive partial access to a document during review

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 it is apparent from the nature of the documents, as described in the Applicant's request, that all documents to which the request relates would be exempt from release under sections 36(2)(b) and 38 in conjunction with section 125(1) of the *Local Government Act 2020* (Vic).

Accordingly, the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 June 2023

Reasons for Decision

Background to review

1. The Applicant, [description], made a request to the Agency seeking access to certain documents concerning the Agency, which is a local council.
2. Following consultation with the Agency, the Applicant clarified and amended the terms of their request to:
 - 1) Any document, including incomplete or partially completed, as defined by Section 5 of the FOI Act that relate (see definition below) to communication/s between Councillors that relate (see definition below) to the [Agency officer] performance and/or contract of employment, from [date].

The documents requested are to include, but not be limited to include:

 - any file notes,
 - e-mails,
 - text and/or SMS messages,
 - diary entries of any Councillor of the Horsham Rural City Council,
 - formal and/or informal meeting minutes of any Councillor of the Horsham Rural City Council, and/or
 - communications with representatives of the government of the State of Victoria.

For the purposes of this request, the phrase **and/or** is “used to refer to both things, or either one of the two mentioned) either ‘and’ or ‘or’” (Cambridge Dictionary).

“For the purpose of this request, the word **relate** is defined as:

 - to make or show a connection” “(be related) be casually connected”, “(relate to) have reference to; concern” (Oxford English Dictionary);
 - “be related &c. adj.; have a relation &c. n.; relate to, refer to; bear upon, regard, concern, touch, affect, have to do with; pertain to, belong to, appertain to; answer to; interest. bring into relation with, bring to bear upon; connect, associate, draw a parallel; link”; connect correspond, correlate, associate, link, pertain, apply, have to do with, concern, bear up; associated, connected, correlated, linked, allied, affiliated, akin, kindred, cognate (Roget’s Thesaurus)”
 - 2) A copy of the previous and current contract for the Chief Executive Officer of the Horsham Rural City Council. (“**amended request**”)
3. The Agency relied upon section 25A(5) to refuse to grant access to documents in accordance with the Applicant’s request. In denying access to documents under section 25A(5), the Agency determined all requested documents, should any exist, would be exempt from release under sections 36(2)(b) and/or 38 of the FOI Act in conjunction with section 125(1) of the *Local Government Act 2020 (LG Act)*.
4. In refusing access to the requested documents under section 25A(5), an agency is not required to identify any or all documents that would be captured by an applicant’s request, should any

exist. Accordingly, an agency's decision to refuse access to the requested documents under this provision is not to be taken as confirmation that the requested documents exist.

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. I have considered all communications and submissions received from the parties.

Initial view provided to Agency

7. During the review, an initial view was provided to the Agency advising that it was not apparent from the nature of the documents, as described on the face of the Applicant's request, that sections 36(2)(b) and 38 in conjunction with section 125(1) of the LG Act would apply to all relevant documents in full. The Agency was invited to provide further submissions or consider making a fresh decision.
8. The Agency provided a written response. In summary, the Agency maintained its decision to refuse access to documents on grounds any documents relevant to the terms of the request would be exempt in full under sections 36(2)(b) and 38 in conjunction with section 125(1) of the LG Act.
9. 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.
10. 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 section 25A(5) to refuse access to documents

11. The power in section 25A(5) is carefully circumscribed. A decision maker must be satisfied of the following three elements, which operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all documents in the request are exempt.
 - (c) Third, it must be apparent from:
 - (1) the nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document; or

- (2) the request or through consultation with the applicant that the person would not wish to have access to an edited copy of the document.¹

What is the essential character of the documents requested?

12. The Agency summarised the essential character of the documents sought as ‘the current or previous contract of employment of the CEO; and communications between Councillors that relate to the contract of employment of the CEO or performance of the CEO or both’.
13. Specifically, the Applicant is seeking any information in the following form that includes, but is not limited to, file notes, email correspondence, text messages, diary entries, informal or formal meeting minutes and communications with representatives of government.
14. I am satisfied the essential nature or character of the documents, as described in the Applicant’s amended request, is apparent from the terms of the request.
15. Accordingly, I am satisfied the first requirement for section 25A(5) is met.

Would the documents requested, as described by the Applicant, be exempt?

16. In refusing access under section 25A(5), without having identified any or all of the documents sought, the Agency determined it was apparent that all of the requested documents sought, should any existed, would be exempt from release under sections 36(2)(b) and/or 38 in conjunction with section 125(1) of the LG Act.

Section 38 – Documents to which a secrecy provision applies

17. A document is exempt from release under section 38 if the following three requirements are met:
- (a) there must be an enactment in force;
 - (b) the enactment must apply specifically to the kind of information in the document; and
 - (c) the enactment must prohibit persons referred to in the enactment from disclosing that specific kind of information, either absolutely or subject to an exception or a qualification.

Is there an enactment in force?

18. 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?

19. 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.²

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

² *News Corporation Ltd v National Competition & Securities Commission* 52 ALR 277 at 281.

20. 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.

...

21. 'Confidential information' is defined in section 3 of the LG Act and relevantly includes:

(h) confidential meeting information, being the records of meetings closed to the public under section 66(2)(a);

...

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

22. In its decision letter, the Agency highlighted a previous OVIC decision which found the employment contract of the Agency's Chief Executive Officer (**CEO**) dated 19 February 2018 (the same contract as falling within this request) fell within the definition of 'confidential information' and was exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act.

23. The Agency also submits that the CEO continues to be employed by the Agency and their 2018 employment contract remains current. The Agency further submits in its decision letter:

Similarly, any communications which may exist between the Councillors from 1 January 2021 that relate to the contract of employment would equally inherently be about that contract, which is exempt confidential information and would equally be exempt under s 38 of the FOI Act.

Further, I have become aware from inquiries that the CEO's contract of employment contains performance criteria and provisions dealing with monitoring and review of performance, any communications which may exist between the Councillors from 1 January 2021 that relate to the performance of the CEO (which is necessarily about performance under the current contract) would equally inherently be about that contract, which is exempt confidential information and would equally be exempt under s 38 of the FOI Act.

24. At the time the employment contract was considered by the Council at a meeting, the former *Local Government Act 1989 (Vic) (LG Act 1989)* was in force. The LG Act 1989 contained a secrecy provision under section 77 which, with the repeal of the LG Act 1989, was replaced by the secrecy provision in section 125(1) in the LG Act.

25. Section 77 of the LG Act 1989 provided:

- (1) 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.

...

- (2) For the purposes of this section, information is confidential information 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 and the Council or special committee has not passed a resolution that the information is not confidential; or
 - (b) the information has been designated as confidential information by a resolution of the Council or a special committee which specifies the relevant ground or grounds applying under section 89(2) and the Council or special committee has not passed a resolution that the information is not confidential; or
 - (c) the information has been designated in writing as confidential information by the Chief Executive Officer specifying the relevant ground or grounds applying under section 89(2) and the council has not passed a resolution that the information is not confidential.

26. As detailed above, the definition of 'confidential Information' in section 3(1)(l) of the LG Act relevantly includes: 'information that was confidential information for the purposes of section 77 of the Local Government Act 1989'.

27. I am satisfied that section 125(1) of the LG Act is formulated with sufficient precision for it to be a secrecy provision for the purposes of section 38 of the FOI Act.

28. Section 125(1) applies to 'confidential information' as defined in section 3 of the LG Act, and as set out above. In relation to the CEO's 2018 employment contract, I am satisfied that the relevant subsection (l), defines information with sufficient specificity to be captured by section 38 of the FOI Act.

29. Similarly, I consider potentially some other documents requested by the Applicant may 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)’. 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.
 - ...

30. Accordingly, given the nature of the information requested by the Applicant, it may be that certain documents are exempt from release due to the application of an exemption under the FOI Act.
31. However, in circumstances where the Applicant has made a broad request for a variety of documents relating to the remuneration and performance of the Agency’s CEO, I am unable to be satisfied on the face of the request that all documents sought would fall within the definition of ‘confidential information’ under the LG Act.
32. Accordingly, given the high bar posed by section 25A(5) and the broad terms of the Applicant’s request, which appear to go beyond confidential matters discussed at a closed council meeting, I am not able to be satisfied that the first requirement of section 25A(5) is met in this instance.

Application of section 36(2)(b) – Disclosure contrary to the public interest

33. Section 36(2)(b) provides a document is an exempt document if:

... in the case of a document of a council, its disclosure under this Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided for the use of guidance of, officers of a council on the procedures to be followed or the criteria to be applied in negotiation, including financial, commercial and labour negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to the financial property or personnel management and assessment interests of the council.

34. In its decision letter, the Agency submits:

Under s 45 of the LGA, the Council must (and has) developed a CEO Employment and Remuneration Policy (“**Policy**”) which deals with, among other things, provisions to be included in the contract of employment, performance monitoring, annual review and other matters.

Consistently with that requirement, the Council has adopted such a Policy, the current version of which is available on the Council's website.³

The Policy applies to all Councillors and Council staff in relation to the CEO's contract of employment and performance and review, and provides, among other things:

- the Council establishes a CEO Employment and Remuneration Committee ("Committee") which is an advisory committee to the Council;
- the Council (including via the Committee) is to draft and approve any Contract of Employment entered into between the Council and the CEO, and provide processes for the monitoring of the CEO's performance including setting a Performance Plan and conducting an annual review;
- the Committee is to consider and make recommendations to the Council with respect to, among other things, performance monitoring of the CEO, including with respect to achievement of the KPIs, annual review of performance, and provisions to be included in the contract of employment from time to time.
- the Committee is to hold quarterly meetings and prepare documents relevant to the CEO's employment and remuneration (including contractual documents and Council reports) for approval by Council, conduct performance reviews of the CEO and review conditions of employment of the CEO;
- after each meeting the Committee is to provide a report to a confidential meeting of Council. The Policy expressly provides:

"Where any item in the report relates to a Council resolution regarding recruitment, appointment, reappointment, or contract of employment of the CEO, the item will not be reported in the Minutes of the Council Meeting until the matter has been determined by the Council, in accordance with Section 125 of the Local Government Act 2020."

- Under the heading "**Confidentiality**" the Policy provides that the Council is not required to disclose any personal information, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs, and that all Committee minutes, negotiations, and details of the CEO's employment contract will remain confidential.

The fact that all Committee matters are dealt with in closed session as confidential information is evidenced by a perusal of agendas and minutes of the Council available on its website⁴ where there are items for Committee reports to the Council, and in recorded Council meetings (see also Order of Business accompanying those recordings).⁵

Therefore, as is evidenced in part by the relevant provisions of the LGA and the Policy, documents sought in the amended request would also be exempt under s 36(2)(b) as they would disclose information provided to officers (which includes Councillors – see s 5(1), FOI Act), in relation to the negotiation of the CEO's contract, performance under the CEO's contract, and similar activities relating to personnel management and assessment interests of the Council.

35. In my view, there is a clear distinction between the outcome of negotiations in the form of a finalised employment contract, and any documents described by section 36(2)(b) that are

³ Horsham Rural City Council, *CEO Employment (Council) and Remuneration Policy* at https://www.hrcc.vic.gov.au/files/assets/public/document-resources/our-council/policies-amp-procedures/ceo-employment-remuneration-policy_2.pdf.

⁴ Horsham Rural City Council, *Council Minutes and Agendas*, at <https://www.hrcc.vic.gov.au/Our-Council/Inside-Council/Council-Minutes-and-Agendas>.

⁵ Horsham Rural City Council, Recording of Council meeting held on 12 December 2022, at <https://webcast.hrcc.vic.gov.au/archive/video22-1212.php#placeholder>.

instructions or guidance documents issued to council officers on the procedures to be followed or the criteria to be applied in negotiations or personnel management.

36. Accordingly, I am not satisfied on the face of the FOI request terms that each and every document would meet the definitions specified under section 36(2)(b) to be exempt in full under the FOI Act.

Is there an obligation to grant access to an edited copy of a requested document in accordance with section 25?

37. As stated in *Knight v Corrections Victoria*:⁶

Under s 25A(5)(b), it must be objectively apparent from the nature of the documents, as described in the request, that “no” obligation would arise under s 25 to provide edited copies of “any” of the documents (sub-par (i)), or that edited copies are not wanted by the applicant (sub-par (ii)). It follows that if the obligation arises in respect of even one of the documents - that is, “any of them” - the power of categorical refusal in s 25A(5) is not available.

38. Section 25 provides:

Deletion of exempt matter or irrelevant material

Where—

- (a) a decision is made not to grant a request for access to a document on the ground that it is an exempt document or that to grant the request would disclose information that would reasonably be regarded as irrelevant to the request;
- (b) it is practicable for the agency or Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document or a document that would not disclose such information (as the case requires); and
- (c) it appears from the request, ***or the applicant subsequently indicates***, that the applicant would wish to have access to such a copy—

the agency or Minister shall grant access to such a copy of the document.

[Emphasis added]

39. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁷ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’ and release of the document is not required under section 25.⁸

⁶ *Knight v Corrections Victoria* [2010] VSC 338 at [50].

⁷ *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].

⁸ *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].

40. The Agency submits in relation to section 25:

Section 25(c) of the FOI Act places an onus on an applicant to indicate, before a decision is made by an agency considering the request, whether they wish to have access to a copy of the documents with such deletions as to make the copies not exempt documents.

The applicant's request or clarified request did not state that the applicant sought partial access for the purposes of s 25(c) of the FOI Act. The President of the Victorian Civil and Administrative Tribunal (among others) has previously stated that this is enough to confirm that an applicant does not seek partial access.⁹ That is, it is apparent from the request that the person making the request would not wish to have access to an edited copy of the documents.¹⁰

Further, now that the matter is before you on review, it is too late for the applicant to amend the request to indicate otherwise. Even if the applicant advised your office that he was amenable to receiving edited copies of documents, you are required to be held to the terms of the request on which the Council made its decision.¹¹

In any event, given the nature of the requested documents, the information in them sought by the applicant, and the connection to substantive information in them being exempt under s 38 (with s 125 LGA) and/or s 36(2)(b), it is submitted that it would not in any event be practicable to delete information from the documents without rendering them meaningless – the information sought by the applicant would be what is being deleted so any remaining information would be minimal and devoid of meaning.¹² This would satisfy s 25A(5)(b)(i) of the FOI Act.

In summary, there would be no obligation to provide partial access.

41. During the review, the Applicant advised OVIC that they would accept edited copies of documents under the terms of their request.
42. As quoted above, the Agency submits, '[s]ection 25(c) of the FOI Act places an onus on an applicant to indicate, before a decision is made by an agency considering the request, whether they wish to have access to a copy of the documents with such deletions as to make the copies not exempt documents'. I do not accept this is an accurate interpretation of section 25 and imports words into the provision that do not exist. Nor do I consider the VCAT cases quoted in the Agency's submission fairly support the Agency's interpretation of section 25.
43. In practice, an applicant will generally prefer to receive a copy of a document with irrelevant or exempt information deleted, as opposed to not receiving any information at all in response to their request. As would be reasonably expected, in relation to whether they agree to receive an edited copy of a document, some applicants (most of whom are general members of the public) are clear when making their FOI request, and some may change their mind during the processing of their request by an agency or Minister, or may change their mind when seeking merits review by either OVIC or VCAT. Similarly, during a merits review by OVIC or VCAT, an agency can change its position on the exemptions upon which it relies— including adding or changing exemptions. Such is the nature of merits review.
44. Consistent with the object and purpose of the FOI Act, if an applicant's FOI request is silent on whether they wish to receive a copy of the document with exempt or irrelevant material deleted, as a matter of fairness and consistent with the purpose and object of the FOI Act, the

⁹ *Davies v Victoria Police* [2022] VCAT 713 at [90]; *Gullquist v Victorian Legal Services Commissioner* [2017] VCAT 764 at [31].

¹⁰ Section 25A(5)(b)(ii).

¹¹ *Davies v Victoria Police* [2022] VCAT 713 at [91]-[92] per VCAT President Quigley J; *Victorian Legal Services Commissioner v Grahame (No.2)* [2019] VCAT 1878 at [20]-[29].

¹² *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police* [2013] VCAT 1267 at [140] and [155].

agency may consult with the applicant to confirm whether they would be agreeable to receiving an edited copy of a document.

45. In this case, I am not satisfied it is objectively apparent on the face of the request that all documents requested by the Applicant in relation to the Agency's CEO, as described in the Applicant's request, that there would be no scope for providing the Applicant with access to edited copies of those documents, should any exist.
46. Accordingly, I am unable to be satisfied that the third requirement of section 25A(5) is met.

Conclusion

47. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.
48. Having considered the provision in section 25A(5) and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant's request that all documents relevant to the request would be exempt under sections 36(2)(b) and 38 in conjunction with section 125(1) of the LG Act.
49. I am also satisfied it would be practicable to potentially provide an edited copy of certain documents to the Applicant in accordance with section 25 should they exist.
50. Accordingly, I am not satisfied that each of the requirements of section 25A(5) are met such that the Applicant's request for access to the requested documents can be categorically refused.
51. The effect of my decision is the Agency is required to search for and identify documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

Review rights

52. 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.¹³
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
55. 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.

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

When this decision takes effect

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

Time frame for Agency making a new decision in accordance with this review

- 58. Subject to the Agency making an application to VCAT for review of my decision, in processing the Applicant's request, the Agency is expected to comply to the time frames and processes under the FOI Act, including section 21 which prescribes that an agency has 30 days to make a decision on an FOI request.
- 59. Finally, to avoid any uncertainty on the issue of section 25, I consider it is open to the Applicant to advise the Agency prior to the Agency making its decision as to whether or not they agree to receiving an edited copy of a document in accordance with section 25.