

## Notice of Decision and Reasons for Decision

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Applicant:	'FW3'
Agency:	City of Melbourne
Decision date:	7 May 2025
Exemption considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with Section 125 of the <i>Local Government Act 2020</i> (Vic)
Citation:	'FW3' and City of Melbourne (Freedom of Information) [2025] VICmr 30 (7 May 2025)

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FREEDOM OF INFORMATION – council meeting voting records – minutes of meeting – confidential information – closed meeting – section 125 of the *Local Government Act 2020* (Vic) – secrecy provision

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 is the same as the Agency's decision and no further information is to be released.

Please refer to page 6 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
Public Access Deputy Commissioner

7 May 2025

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to the Agency seeking access to the following documents:

Minutes from the full council meeting of the City of Melbourne on Tuesday, April 18, 2023, specifically the agenda item title and councillor voting records for the following three items - 14.1, 14.2 and 14.3 - listed under Reports from Management (confidential business). I do not seek any commercial in-confidence details from the reports, just the name of the report and the councillor voting record for each item.
2. The Agency found one document, consisting of five pages, falling within the terms of the request. The Agency refused access to the document in full under section 38 of the FOI Act in conjunction with section 125 of the *Local Government Act 2020* (Vic) (the **LG Act**).

### 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 document 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 relevant 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'.<sup>1</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.

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<sup>1</sup> *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. For more information about section 38 see the FOI Guidelines.<sup>2</sup>
11. Section 38 exempts documents where information in those documents is protected by a secrecy provision.
12. A document is exempt under section 38 if three requirements are met:
  - (a) there is an enactment that is in force; and
  - (b) the enactment applies specifically to information contained in the document; and
  - (c) the enactment prohibits specific persons from disclosing the specified information.

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

13. An enactment is defined broadly in section 5. It means an Act or instrument made under an Act, including rules, regulations, local laws, or by-laws.
14. Section 125 of the LG Act is an enactment in force.

#### *Does the enactment apply specifically to information contained in the document?*

15. Section 125 of the LG Act provides:

##### **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.

16. Confidential information is defined by the LG Act to include confidential meeting information, being the records of meetings closed to the public under section 66(2)(a) of the LG Act.
17. Section 125(3) of the LG Act sets out the circumstances when confidential information can be disclosed.
18. In support of their decision, the Agency provided OVIC with a public link to the meeting minutes relevant to the request, available via the Agency's website here.<sup>3</sup>. Relevantly, those minutes note:

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<sup>2</sup> <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-38/>.

<sup>3</sup> <https://mvga-prod-files.s3.ap-southeast-4.amazonaws.com/public/about-council/committees-meetings/meeting-archive/MeetingAgendaItemAttachments/1020/APR23%2520CCL%2520MINUTES%2520CONFIRMED%2520%28OPEN%29.p>

**9. Closure of meeting to the public**

Moved: [name]

*1. That pursuant to section 66 of the Local Government Act 2020 (Act), the meeting of the Council be closed to members of the public for the consideration of the items under the following categories:*

*1.1 Agenda items 14.1, 14.2 and 14.3 as they contain private commercial information which if released would unreasonably expose the business to disadvantage by disclosing financial information to competitors.*

*1.2 Agenda item 15.1 as it contains Council business information which if released would prejudice Council's position in commercial negotiations.*

Seconded: [name]

The motion was put and carried unanimously with the following Councillors present: [names].

[Name] declared the meeting closed to the public at 6:07pm.

19. Given the above specifically refers to the items about which the Applicant has requested, I am satisfied the enactment refers specifically to the document sought by the Applicant. This would include the names of reports and voting record for each item.

*Does the enactment prohibit persons referred to from disclosing the information?*

20. The provision must prohibit a person from disclosing the specified information.
21. Section 125(1) of the LG Act makes it an offence for a person to disclose confidential information.
22. I am therefore satisfied that the enactment prohibits persons from disclosing the information sought by the Applicant.

*Are there any exceptions to the secrecy provision?*

23. Section 125(2) of the LG Act advised that the information may be disclosed if the Agency determined it should be publicly available.
24. The Applicant's review submission noted:

...I do not seek any commercial in-confidence details from the reports, just the name of the report and the councillor voting record for each item.

Given the contracts have been awarded since, I seek these documents under public interest provisions of the Act. And I would prefer that the request be filled outside the FOI process in the interests of public accountability, disclosure and government transparency.

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<https://mvga-prod-files.s3.ap-southeast-4.amazonaws.com/public/about-council/committees-meetings/meeting-archive/MeetingAgendaItemAttachments/1020/APR23%2520CCL%2520MINUTES%2520CONFIRMED%2520%28OPEN%29.pdf>.

As stated, the refusal to the voting record on a council contract does not afford transparency to council democratic procedures. The public has a right to know how votes are cast by elected councillors on a matter of public expenditure and ensure no conflicts of interest exist.

I believe these details should be exempt from confidentiality, especially as the awarding of the council contract has been made public, and that work has commenced. Hence, the wholesale refusal of the confidential material should be reconsidered in the spirit of the FOI Act.

25. I note in the course of the review, OVIC staff made enquires with the Agency about whether as per section 125(2) of the LG Act, it had considered whether the names of the councillors and how they voted in each agenda item 'should be publicly available'. In response, the Agency advised that it had not resolved to make this information public and therefore considered it remained 'confidential information' for the purpose of the LG Act.
26. There is no information before me to suggest that any of the other exceptions under section 125(3) of the LG Act authorise disclosure of the documents to [the Applicant] in this instance.
27. While I note the Applicant's submission, public interest factors only relate to certain exemptions under the FOI Act, and for the reasons above, do not apply in this instance.

#### Section 25 – Deletion of exempt or irrelevant material

28. Section 25 requires an agency to grant access to an edited copy of the document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receive such a copy.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>4</sup> 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.<sup>5</sup>
30. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. In my view, it is not practicable to delete exempt information in such a way for the edited document to retain meaning.

#### Conclusion

31. I am satisfied the document is exempt from release under section 38 in conjunction with section 125 of the LG Act because I find:
  - (a) the LG Act is an enactment in force;
  - (b) the enactment refers specifically to the information contained in the document sought;
  - (c) the enactment prohibits disclosure of the document; and

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<sup>4</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>5</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].

(d) there are no exemptions that apply.

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

**Timeframe to seek a review of my decision**

33. If the Applicant to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>6</sup>
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>
35. 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.
36. The Agency is required to notify the Information Commissioner in writing as soon as practicable if the Applicant applies to VCAT for a review of my decision.<sup>8</sup>

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<sup>6</sup> Section 50(1)(b).

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 50(3FA)