

Notice of Decision and Reasons for Decision

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| Applicant: | 'GD6' |
| Agency: | Moonee Valley City Council |
| Decision date: | 16 October 2025 |
| Exemptions and provision considered: | Sections 32(1), 34(1)(b), 25 |
| Citation: | 'GD6' and Moonee Valley City Council (Freedom of Information) [2025] VICmr 95 (16 October 2025) |

FREEDOM OF INFORMATION – legal advice – no lawyer-client relationship – legal privilege not applicable – waiver of legal privilege – letter from the client's lawyer

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 and more information is to be released.

A marked-up copy of the documents showing irrelevant information in accordance with my decision has been provided to the Agency.

Please refer to the end of my decision for information about review rights through the Victorian Civil and Administrative Tribunal (VCAT).



The Applicant has 60 days from the date they receive this decision to apply to VCAT.

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

16 October 2025

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. Internal correspondence, reports, memos and attachments between council officers in relation to the application to amend the planning permit [permit number] between [dates].
 2. Internal correspondence, reports, memos and attachments between council officers in relation to the VCAT compulsory conference in relation to the application to amend the planning permit [permit number].
 3. Communications between the Permit Holder and council officers, in relation to the application to amend the planning permit [permit number] between [dates].
 4. Communications between council officers and the permit holder in relation to enforcement action relating to planning permit [permit number] between [dates].
 5. Internal communications between council officers in relation to enforcement action relating to planning permit [permit number] between [dates].
2. The Agency identified 85 documents falling within the terms of the Applicant's request and granted access to 83 documents in part with irrelevant information removed and refused access to 2 documents in full under section 32(1).
3. 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 to 2 documents in full.
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 relevant 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.

Initial view

10. OVIC staff provided an initial view to the Agency detailing that the two letters exempted under 32(1) would likely be released as legal privilege did not apply.
11. OVIC did not receive a response from the Agency in relation to the initial view.

Review of exemptions

Section 32(1) – Documents affecting legal proceedings

12. Section 32(1) exempts documents subject to legal professional privilege or client legal privilege. The principles of legal professional privilege are found in common law (case law). Client legal privilege is codified in sections 118 and 119 of the *Evidence Act 2008* (Vic).
13. Legal privilege is intended to protect confidential communications between a lawyer and client.
14. A document or information attracts advice privilege, and is exempt under section 32(1), if it would disclose:
 - a confidential communication between a client (or their agent) and their lawyer that was made for the dominant purpose of obtaining or providing legal advice
 - a confidential communication between two or more lawyers acting for their client that was made for the dominant purpose of obtaining or providing legal advice
 - the contents of a confidential document (whether delivered or not) prepared by a client, their lawyer, or another person for the dominant purpose of obtaining or providing legal advice.
15. A document will not be exempt under section 32(1) if legal privilege has been lost or waived. Privilege can be either expressly waived, or waiver can be implied from the circumstances. Legal privilege can be lost or ‘waived’ where the client acts inconsistently with the confidentiality of legal privilege.¹
16. In this matter, Document 1 is a letter containing legal advice between a third party and their lawyer. While there is a lawyer-client relationship between the third party and their lawyer, privilege has been waived by reason that the legal advice provided to the third party was subsequently provided to the Agency.
17. Document 2 is a letter from the third party’s lawyer to the Agency, meaning there is no lawyer-client relationship between the Agency and the lawyer acting for the third party. As such, it is not subject to legal privilege.
18. Therefore, because the documents are not subject to legal privilege, they are not exempt under section 32(1).

¹ Sections 121 to 126 in the *Evidence Act 2008* (Vic) deal with different circumstances in which client legal privilege may be lost.

Section 34(1)(b) – Business, commercial or financial information of an undertaking

19. A document or information is exempt under section 34(1)(b) if three conditions are satisfied:
- the document or information was acquired from a business, commercial, or financial undertaking
 - the information relates to matters of a business, commercial or financial nature
 - disclosure of the information is likely to expose the undertaking unreasonably to disadvantage (based on matters listed in section 34(2) and any other relevant considerations).
20. The Agency acquired the documents either from the third party or the third party's lawyers.
21. Both parties are engaged in trade and commerce. The third party's lawyers were providing legal services on behalf of their client, the third party. The third party is a commercial undertaking, and the documents concern their trade and commerce activities under the planning permit for the premises.
22. In considering whether disclosure will expose an undertaking to unreasonable disadvantage, I should, along with any other relevant consideration, have regard to the factors set out in section 34(2). These are:
- whether the information is generally available to competitors of the undertaking
 - whether the information would be exempt if it were generated by an agency or a Minister
 - whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking
 - whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls.
23. Other relevant considerations include whether disclosure would:
- give a competitor of the undertaking a competitive financial advantage
 - enable that competitor to engage in destructive competition with the undertaking
 - lead to unwarranted conclusions about the undertaking's financial affairs and position that result in commercial and market consequences.²

² *Dalla-Riva v Department of Treasury and Finance* [2007] VCAT 1301, [33].

24. I have considered the following factors:

- The information is tailored to the specific circumstances of the third party's venue, therefore, its release won't cause substantial harm to the venue's lawyers.
- The documents do not include commercially sensitive information that other venues could use to the third party's disadvantage.
- Similarly, other law firms would not be able to use this information to engage in destructive competition with the third party's lawyers.
- Competitors of both the third party and their lawyers would not have access to this information.
- The information would most likely be exempt under section 32(1) if it were generated by the Agency; however, this would only be the case if the lawyers were acting for the Agency.
- The documents could impact the public's perception of the venue's compliance with the permit conditions, without full context. However, in my view, it is unlikely that disclosure would impact its business operations.
- The documents concern planning permit and enforcement activities.
- There is no information before me concerning the views of either party. I consider it is reasonably likely that both parties would object to disclosure of the documents.

25. While there are factors weighing in favour and against release, on balance, I am not satisfied that release of these documents would likely expose either of the business undertakings unreasonably to disadvantage. Accordingly, the documents are not exempt from release under section 34(1)(b).

Section 25 – Deletion of exempt or irrelevant information

26. 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.

27. Deciding whether it is 'practicable' to delete exempt or irrelevant information requires an agency or Minister to consider:

- (a) the effort involved in making the deletions from a resources point of view³ and
- (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.⁴

³ *Mickelburgh v Victoria Police* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967, [82].

⁴ *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.

28. Irrelevant information is information which is clearly outside the scope, or beyond the terms of the applicant's request.
29. In this matter, the Applicant has removed the personal affairs information of third parties. Therefore, the documents can be provided to the Applicant with irrelevant information removed.
30. It is practicable to edit the documents to delete irrelevant personal affairs information.

Conclusion

31. On the information before me, I am not satisfied the documents are exempt from release under sections 32(1) or 34(1)(b).
32. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant information deleted in accordance with section 25, access is granted in part.
33. A marked-up copy of the documents indicating irrelevant information in accordance with my decision has been provided to the Agency.

Timeframe to seek a review of my decision

34. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁵
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
37. 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.
38. 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.⁸

Third party review rights

39. As I have determined to release documents that contain information of a business, financial, commercial nature relating to business undertakings, if practicable, I am required to notify those undertakings of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.⁹

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and 50(3FA)

⁹ Sections 49P(5), 50(3A) and 52(3).

40. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights and confirm they will be notified of my decision as soon as practicable.

When this decision takes effect

41. This decision takes effect 60 days after the third parties are notified of their review rights.
42. If a review application is made to VCAT, my decision will be subject to any VCAT determination.
43. If an application is not made to VCAT, the Agency is required to release the documents in accordance with my decision.