

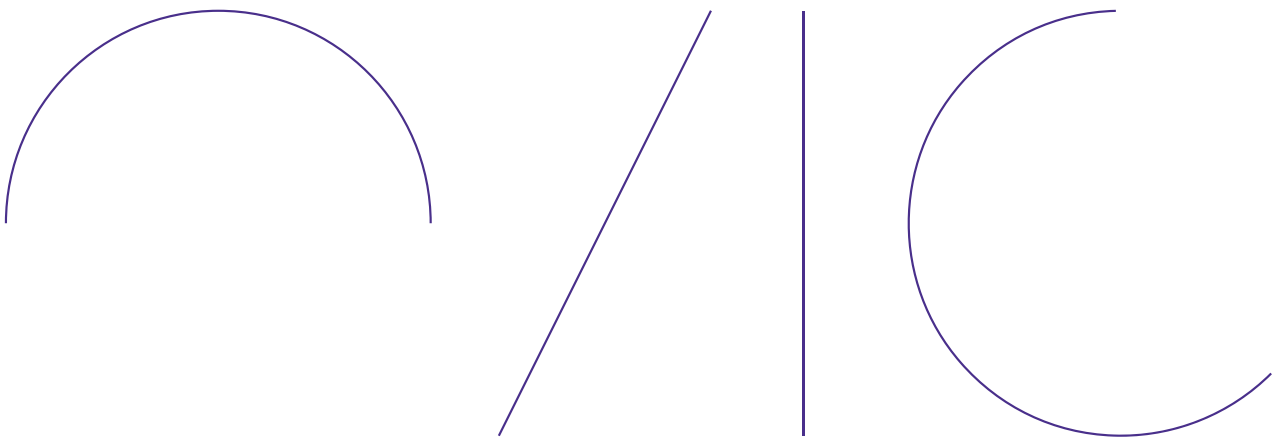
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Office of the Victorian
Information Commissioner

Proactive and Informal Release – Councils

Framework for releasing council information under the *Local Government Act 2020* (Vic) and the *Freedom of Information Act 1986* (Vic)



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Why council decisions, actions, and information need to be publicly available

The *Local Government Act 2020* (Vic) (**LG Act**) requires councils to adopt and maintain a public transparency policy.¹

The public transparency policy must give effect to the public transparency principles.²

This means:

- council decision-making processes must be transparent except when dealing with information that is confidential by virtue of the LG Act or any other Act
- council information must be publicly available unless:
 - the information is confidential by virtue of the LG Act or any other Act, or
 - making the information publicly available would be contrary to the public interest.
- council information must be clear, capable of being understood, and accessible to members of the local community
- council must make the public aware of the availability of council information.

The public transparency principles establish that council information must be publicly available, except in very specific and limited circumstances. These public transparency requirements are enhanced and complemented by the *Freedom of Information Act 1982* (Vic) (**FOI Act**).

The FOI Act supports councils to release information proactively and informally outside of the FOI Act where it is possible and lawful to do so,³ and to make the maximum amount of information available to the community promptly and inexpensively.⁴

Consequently, the LG Act and FOI Act both require and support councils to publish information proactively and informally.

¹ LG Act, section 57(1).

² LG Act, section 58.

³ FOI Act, section 16(2).

⁴ FOI Act, section 3.

How councils can use this framework to release information proactively and informally

The steps set out in this framework detail how councils can identify, assess and publicly release council information under both the LG Act and FOI Act.

The framework can be used:

- to support the development, review, and update of a council's public transparency policy
- alongside a council's public transparency policy, to determine if information that has been requested can be informally (administratively) released to an individual or the community⁵
- to determine if information should be proactively released to the community irrespective of council's public transparency policy or a request for certain information.⁶

The steps in the framework

Step 1. Identify council information and make it available to the community proactively or informally when requested, unless an exception in Step 2 applies.

Step 2. Consider if a specific or limited exception applies to release of the information.

Step 3. Consider if the information is 'confidential information' under section 125(1) of the LG Act.

Step 4. If the information is 'confidential information', consider whether the information can be made publicly available under section 125(2) or 125(3) of the LG Act.

Step 5. Consider if council should seek the views of any third party on release of the information.

Step 6. Consider whether release of the information would be contrary to the public interest.

Step 7. If there is information that cannot be made publicly available, consider whether that information can be removed, deleted, or redacted to enable the remainder of the information to be released.

Step 8. Proactively or informally release the information, or otherwise make it publicly available.

⁵ For detailed information on informal release, see OVIC's resource on *Informal release of information* on OVIC's website here: <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/informal-release-of-information/>.

⁶ For detailed information on proactive release, see OVIC's resource on *Proactive release of information* on OVIC's website here: <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/proactive-release-of-information/>.

What councils should consider when applying each step of the framework

Step 1: Identify council information and make it available to the community proactively or informally when requested, unless an exception in Step 2 applies

Consider the following points.

- The LG Act requires councils to ensure they are transparent about their decisions, actions and information.⁷ This means the default position assumed by the LG Act is that councils should make their information available to the public and should be transparent about their operations and decision-making.
- Council information is broad and includes all documents and electronically stored information in Council's possession.⁸
- Council information should be current, accessible, and easy to find. If it is not published but is otherwise available, councils should explain on their website or to the individual requesting the information, where and how to access the information.⁹
- If a council decides not to release information, the decision should be supported by reasons.
- When specific information is requested, it can be more efficient in terms of time and resources to informally release the information.
- Without limiting what information should be released, the LG Act and FOI Act promote the public release of the following types of council information:¹⁰
 - information commonly requested by the community
 - information that would promote community understanding and awareness of council's decisions, actions, and decision-making processes
 - information that would facilitate effective community engagement in a council's performance of its many and varied responsibilities
 - information about council operation and performance

⁷ LG Act, section 9(2)(i).

⁸ See the definition of 'document' in section 3 of the FOI Act.

⁹ For example, Part II of the FOI Act requires Councils to publish, list, or otherwise make available a wide array of information and documents, including how to find and access that information.

¹⁰ For example, see section 9, 55, 56, 57 and 58 of the LG Act, and section 3 and 16 of the FOI Act.

- information on council expenditure of public monies
- information on council rules and practices that affect the community in their dealings with Council
- information on environmental or health risks to individuals or the community
- information and documents required to be published or listed as required by Part II of the FOI Act.

Step 2: Consider if a specific or limited exception applies to release of the information

If a specific or limited exception applies, councils are not required to release information.

This includes where:

- the information is ‘confidential information’ as defined under the LG Act (see Steps 3 and 4)¹¹
- public availability of the information would be contrary to the public interest¹² (see Step 6)
- the information has been requested under the FOI Act and is exempt from release. Note, the FOI Act permits exempt information to be released despite being exempt if a council chooses to release it¹³
- the information is ‘personal information’ or ‘health information’ and disclosure would breach the Information Privacy Principles¹⁴ or Health Privacy Principles¹⁵
- the information is prohibited from release or subject to a secrecy provision under other legislation, for example, under the *Public Interest Disclosure Act 2012* (Vic).

Step 3: Consider whether the information is ‘confidential information’ under section 125(1) of the LG Act

Section 125(1) of the LG Act prohibits the intentional or reckless disclosure of confidential information. However, section 125(2) of the LG Act permits councils to determine that confidential information should be made publicly available.

¹¹ LG Act, section 3.

¹² LG Act, section 58(b)(ii).

¹³ FOI Act, section 16.

¹⁴ See Schedule 1 of the *Privacy and Data Protection Act 2014* (Vic).

¹⁵ See Schedule 1 of the *Health Records Act 2001* (Vic).

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Confidential information is defined in section 3 of the LG Act as:

- (a) council business information, being information that would prejudice the Council's position in commercial negotiations if prematurely released;
- (b) security information, being information that if released is likely to endanger the security of Council property or the safety of any person;
- (c) land use planning information, being information that if prematurely released is likely to encourage speculation in land values;
- (d) law enforcement information, being information which if released would be reasonably likely to prejudice the investigation into an alleged breach of the law or the fair trial or hearing of any person;
- (e) legal privileged information, being information to which legal professional privilege or client legal privilege applies;
- (f) personal information, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs;
- (g) private commercial information, being information provided by a business, commercial or financial undertaking that relates to trade secrets; or if released, would unreasonably expose the business, commercial or financial undertaking to disadvantage;
- (h) confidential meeting information, being the records of meetings closed to the public under section 66(2)(a) [of the LG Act];
- (i) internal arbitration information, being information specified in section 145 [of the LG Act];
- (j) Councillor Conduct Panel confidential information, being information specified in section 169 [of the LG Act];
- (k) information prescribed by the regulations to be confidential information for the purposes of this definition; and
- (l) information that was confidential information for the purposes of section 77 of the *Local Government Act 1989* (Vic).

Note that section 125(1) of the LG Act does not apply to the disclosure of confidential information in response to a request under the FOI Act.¹⁶

¹⁶ For detailed guidance on the interaction between section 125 of the LG Act and the FOI Act, see paragraphs 1.25 – 1.35 of OVIC's *FOI Guidelines* here: <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-38/#councils-and-section-125-of-the-local-government-act-2020>.

Step 4: Consider whether any ‘confidential information’ can be made publicly available under section 125(2) or 125(3) of the LG Act

Councils should regularly review confidential information they hold to determine if it can be made publicly available.

When determining whether confidential information can be made publicly available, councils should consider:

- the benefit to the community if the information is released. For example, the information would promote community understanding and awareness of council decisions, actions, and decision-making processes
- the views of any third parties consulted about the release of the information (see Step 5)
- any time limits to the confidentiality. For example, if the confidentiality of the information is time limited, councils can release the information as soon as practicable after that timeframe expires
- any reasons for maintaining confidentiality, making sure that no irrelevant considerations are considered (see Step 6)
- the objects of the LG Act
- section 125(3) of the LG Act which lists the circumstances in which councils are permitted to disclose ‘confidential information’. The circumstances include:
 - legal proceedings
 - internal arbitration
 - in the course of Councillor Conduct Panel hearings
 - disclosing the information to the Municipal Monitor, Chief Municipal Inspector or a Commission of Inquiry
 - to the extent reasonably required by a law enforcement agency.

Step 5: Consider whether the views of any third party should be sought on releasing the information

If any information being considered for public release contains the information of third parties, councils should consider consulting those third parties, regardless of whether the information is confidential information.

It may not always be practicable to undertake consultation, for example, if the third parties can no longer be contacted.

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Consultation should generally be conducted with third parties in the following circumstances:

- With an individual, if release would disclose that individual's personal or health information.
- With an individual, if release would disclose information the individual provided in confidence.
- With a business, financial or commercial undertaking, if release would disclose business, commercial or financial information of that undertaking.
- With a relevant law enforcement body, agency, or authority if the information relates to law enforcement.

Step 6: Consider whether the release of the information would be contrary to the public interest

Release of information should only be considered contrary to the public interest where councils determine the harm likely to be created by releasing the information will exceed the public benefit in being transparent with your community. Deciding not to disclose information because it would be contrary to the public interest is a high threshold to meet and must be supported by clear reasons.

General principles when considering the public interest and potential harm include:

- Harm refers to harm to the community or members of the community.
- Harm to the council should only be considered if it is also a harm to the community.
- It is irrelevant for a council to consider whether disclosure:
 - would cause embarrassment to or criticism of the council
 - would result in a possible misinterpretation by the community of council actions, decisions, or decision-making processes.

Councils should identify and weigh any public interest factors to determine whether the harm likely to be created by release will outweigh the public benefit of release. If the community benefit outweighs the risk of release, the information should be made publicly available.

Examples of public interest factors weighing in favour of release include:

- the factors outlined in Step 1 of this framework
- the public interest in the community being better informed about council's deliberative, consultative, and decision-making processes
- the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process.

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Examples of public interest factors weighing against release may include:

- harm to individuals or groups in the community, contrary to the *Charter of Human Rights and Responsibilities Act 2006* (Vic)
- harm to community health, safety, or security
- harm to the fair treatment of individuals where it is about unsubstantiated allegations of misconduct or improper conduct
- harm resulting from the disclosure of defamatory information or a breach of confidence in disclosing the information
- harm resulting from the disclosure of the information amounting to a criminal offence, or otherwise being contrary to law.

Step 7: If there is information that cannot be made publicly available, consider whether that information can be removed, deleted, or redacted to facilitate the remainder of the information being released

Often information that cannot be made publicly available only forms a small part of the total information or document proposed for public release. For example, an individual's name or email address, or other confidential information in a council policy or report could be redacted to make the remainder of the document or information available for release.

Where possible, councils should remove, delete, or redact information that cannot be publicly released and make the remainder of the information or document publicly available to ensure council is fulfilling its statutory obligations under the LG Act and FOI Act.

If councils receive a request under the FOI Act for a particular document or information and are considering releasing the information informally with redactions, councils should first obtain the applicant's consent or agreement and explain the consequence of releasing the information informally. In particular, councils should explain to the individual that they will not have review or complaints rights under the FOI Act, if the information is released to the individual informally. If information is being redacted, the applicant may prefer a decision be made under the FOI Act so they can retain their right to an independent review of the decision by OVIC.

Where a request is made under the FOI Act, but council provides information informally, it is best practice to waive or refund the application fee.

Step 8: Proactively or informally release the information, or otherwise make it publicly available

Before releasing information, consider:

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- whether council's public transparency policy should be updated to reflect the availability of the council information (for example, updating the policy to include any new policies, plans and reports in accordance with section 57(2)(c) of the LG Act)
- if any third parties that were consulted in Step 5 should be notified of the release
- how and where the information should be published, to ensure the information is understandable and accessible to the community
- any resourcing implications of publication, and how these can be mitigated
- how the community will be made aware of the publication.

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