

Contact: Ela Alexander
Telephone No: (03) 5153 9500
Email: foi@egipps.vic.gov.au

23 October 2024

Ms Patsy Lisle

By email only: foi+request-11357-1f70896f@righttoknow.org.au

Corporate Centre
273 Main Street (PO Box 1618)
Bairnsdale Victoria 3875
Telephone: (03) 5153 9500
National Relay Service: 133 677
Residents' Info Line: 1300 555 886
Facsimile: (03) 5153 9576
Email: feedback@egipps.vic.gov.au
ABN 81 957 967 765

Dear Ms Lisle

Freedom of Information request

We refer to your complaint to the Office of the Victorian Information Commissioner (“OVIC”), regarding your Request for access to documents under the *Freedom of Information Act* 1982 (Vic) (“FOI Act”). Your Request under the FOI Act was for access to:

“Documents about the Bastion Point ocean access facility received from consultants investigating problems with the facility and/or providing proposed solutions dating from the facility’s opening in December 2014 until now. That includes the dilapidation report provided by Magryn and Associates in 2023.” (“Request”)

The OVIC has notified Council that you seek the following outcomes following your complaint about your Request:

Council has provided further information below to address each of your concerns as set out in the OVIC’s notice. We hope that this assists with your concerns.

You have asked Council to provide you with a better understanding as to why it processed your Request in the way it did and its reasons for delay. You have asked for the response to address whether one officer is left to act alone in judgement of your Request as invalid, or whether FOI officers have a responsibility to confer with other officers, and if so, who was consulted about the clarity of my request in this case and why.

When Council receives an FOI request, FOI officers review the request to see whether the documents requested can be clearly identified or understood. It is not always obvious as to what documents are being sought under FOI and Council asks questions to try to understand exactly what is being requested. It does this to make sure that it is going to provide the person with the documents they want.

Council is aware that, in the past, the Victorian Civil and Administrative Tribunal has reviewed decisions on access being refused to documents, where while the agency (not Council) thought they were documents that had been requested, during the hearing it became apparent that they were not, and the applicant sought some other type of document altogether.

Council believes that while it may delay the progress of a request, taking this additional time to confirm what documents are being requested at an early stage is a much less expensive and time consuming outcome than making assumptions which are not identified until an OVIC or VCAT review. When Council receives an FOI request, the request will be looked at by several Council officers. An FOI officer will look at the request to see whether the request meets the requirements set out in section 17 of the FOI Act (in writing, application fee paid and identifies documents sought). The FOI officers have a broad range of knowledge, but to understand what

documents are requested, they will speak to the relevant Council officer/s who created or manage the requested documents.

By taking these Council officer's expertise in the subject of the documents, the FOI officer can then get a better understanding of any issues that may not be immediately obvious, such as the types of documents likely to exist, whether a date range would assist to identify the documents requested, or whether a particular word or phrase does not make sense to the Council officer in the context of the particular documents sought. While conferring with other officers is not a specific requirement of the FOI Act, it is the best way for FOI officers to gain an understanding of the Council's document holdings so that it can respond to a request.

For your Request, one of Council's FOI officers and the manager of the relevant area had discussed your Request to ascertain what documents you wanted. That information was used in letters to you where Council asked whether it had interpreted your Request correctly. As it had not, Council officers met with you to discuss what you were seeking. This was to assist you to explain what you wanted in light of the types of documents held by Council.

The letter you received in response was delayed due to sickness of staff involved, the letter reflected what the Council officers' who attended the meeting understood was the outcome. Ms Skipworth, who authored the letter, wrote it with input of the staff who attended. As Council's understanding was different to yours, Council believes that the time taken to understand what documents you wanted was necessary.

You have asked for the names or descriptions of the remaining five documents Council deem relevant to my request to be provided.

The 6 documents that you have been granted access to, are as follows:

1. Coastal Engineering Solutions Report – 11 May 2015;
2. Water Technology Report – 19 June 2016;
3. Magryn Report – February 2023;
4. Appendix 1 to Magryn Report - Site Plan by Symonds Ryan & Cornish;
5. Appendix 2 to Magryn Report – Ports Australia Wharf Structures Condition Assessment Manual November 2022 (the link to the this public document was provided with decision); and
6. Appendix 3 to Magryn Report – Drawings by various third parties showing detail of site (9 pages).

You have asked for a timeline of actions taken by Council in responding to my request, including details of document searches and details of consultations with third parties.

In processing your request, the Council took the following steps:

DATE	ACTION
25 April 2024	<p>Council received your FOI request from the Right to Know website seeking:</p> <p>“A copy of the dilapidation report on the Bastion Point groyne wall prepared by Magryn and Associates, as well as a copy of the report on the wall commissioned from other consultants but not preferred by you? if there were more than the two reports received, I'd appreciate a copy of all of them”.</p> <p>No application fee was included.</p>

DATE	ACTION
Internal Consultation	<p>Council officers discussed the request. Council officers with knowledge of the documents and with knowledge of FOI were unsure what you meant by “other consultants”.</p> <p>As the report referred to was created during 2022-23, Council officers thought that this may be the relevant time period for “other consultants” reports sought.</p>
13 May 2024	<p>Council sent a clarification letter, explaining why the request was not valid and seeking payment of the application fee and clarification of the Request. The Council officer reframed your Request to a form of wording that its officers understood and invited you to email Council if this assumption was incorrect:</p> <p style="padding-left: 40px;">“all dilapidation reports on the Bastion Point Groyne Wall held by the Council during 2022-2023” and.</p> <p>You responded on 13 May 2024, referring to other consultancies being engaged by Council to prepare reports.</p>
15 May 2024	Application fee paid.
17 May 2024	<p>You sent a further email to clarify that you were seeking:</p> <p style="padding-left: 40px;">“1. The dilapidation report Council has publicly acknowledged receipt of, generated by Magryn and Associates in 2023; 2. Documents with information provided to Council from engineering consultants or coastal infrastructure experts, with advice about problems with the Bastion Point facility outlining expert views of what is wrong with the break wall and what should be done, or not done, by Council to manage the problems, including advice from Magryn and Associates not included in the dilapidation report; but excluding documents about the dredge(s).”</p> <p>Council officers discussed your response.</p> <p>As Council had engaged in a public tender process for a consultant to undertake a single dilapidation report, which was awarded to Magryn and Associates and undertaken in 2022-23, Council officers were unsure what other documents or reports you sought.</p>
11 June 2024	Council sent a letter referring to your emails of 13 May and 17 May 2024, and offering to meet with you to get a better understanding of what documents you sought.
12 June 2024	<p>You responded by restating your request for:</p> <p style="padding-left: 40px;">“I’m seeking the dilapidation report Council has publicly acknowledged receipt of, generated by Magryn and Associates in 2023. In addition, I'm seeking information provided to Council by at least one other consultancy on the problems with the Bastion Point groyne wall ... If Council has been provided with documents by any other consultancies engaged to try to deal with this \$6million disaster, which outline their expert views of what is wrong with the break wall and what should be done, then I'd like a copy.”</p>

DATE	ACTION
13 June 2024	Council officers proposed to meet with you to discuss your request on 14 June 2024.
14 June 2024	<p>A telephone meeting occurs between an FOI officer of Council, the applicant and the manager of the relevant area.</p> <p>After the meeting, the Manager was unexpectedly on extended personal leave. Following her return to work, she confirmed that her understanding of the request as being for:</p> <p>“documents about the Bastion Point wall, focussing on its current issues and resolution from 2015 to current. I’m not seeking documents on the historical detail and routine maintenance and dredging schedules on the wall.”</p>
2 July 2024	<p>Council sends you an email with reframed wording, following the meeting. The Council officer who sent the email was not at the meeting, but used the phrasing understood by the Manager Infrastructure Projects:</p> <p>“documents about the Bastion Point wall, focussing on its current issues and resolution from 2015 to current. I’m not seeking documents on the historical detail and routine maintenance and dredging schedules on the wall.”</p> <p>You responded by email, with further clarification of your request:</p> <p>“Documents about the Bastion Point ocean access facility received from consultants investigating problems with the facility and/or providing proposed solutions dating from the facility’s opening in December 2014 until now. That includes the dilapidation report provided by Magryn and Associates in 2023.”</p> <p>Your Request became valid on 2 July 2024 making it due on 1 August 2024.</p>
11 July 2024	Council confirmed that the Request was valid and asked additional queries such as whether you sought access to edited copies of documents.
Internal consultation	Council officers searched for documents and conducted internal consultations on the content of documents and other research on information that was in the public arena and contractual arrangements involving the documents. This occurred from 12 July through to 8 August 2024.
29 July 2024	Thirty day extension of time sought as processing not completed and external consultation required.
30 July 2024	Extension of time granted.
External consultation	Consultation letters sent to 5 businesses with two others not being practicable to consult.

DATE	ACTION
External consultation	Consultation responses received from 4 businesses some of which requested information not to be disclosed.
Consultation taken into account	Documents reviewed and processed with decision made on whether to apply exemptions or not.
3 September 2024	Council makes its decision to release documents to you.

A detailed explanation as to why Council relied on section 23(1)(a) to permit inspection of the documents rather than access to the documents.

Council's decision was to release all documents found to you in full other than where irrelevant information that you did not seek was removed (such as personal information). To do this it reviews every page and marks up what can be provided.

The documents to be provided to you included drawings where copyright has been claimed by the author of the drawings. It is not clear who holds the copyright in these types of instances, and Council is aware that it may hold the documents only under a licence with copyright being retained by the author. If that is the case, which is not clear under FOI, then it would be breaching copyright if Council gave you a copy of the document.

This risk is dealt with under section 23 of the FOI Act, which sets out ways that agencies can provide access to documents, two of which apply to the documents you seek. These forms of access are by providing a reasonable opportunity to inspect the document or by providing a copy of the document. Later in this provision, section 23(3)(c) says that where Council or another government agency does not hold copyright in a document, then it cannot provide access to the document by providing a copy of that document. Instead, it can give access in another form, which for copyright documents that are drawings or plans, is to provide an opportunity to inspect them as inspection does not infringe copyright.

Further information about the timeframe of 70 days applied for third party review rights.

Five organisations outside Council prepared the documents that are to be released to you. Before Council made its decision to provide you with access to the documents, it had to consider whether it could consult with these organisations, and where it was able to do so, it wrote to the organisations and asked whether disclosing documents to you would impact upon their business under section 34 (1)(b) of the FOI Act.

While you agreed not to receive personal information or commercial information, none of the documents could have been provided to you unless Council considered commercial information as it was implicit in the documents. Therefore Council sent letters to organisations and consulted with them in August, and received some responses to those consultation letters.

Council decided to provide you with access to the documents despite some of the responses asking Council to not provide you with access. Because Council's decision was different to the responses from some of those organisations, Council needed to notify the organisations of the decision to release to you documents with their business information. This needed to be done at the same time as the decision letter was sent to you, and provided the organisation with review rights over the decision to disclose documents. This legal requirement is set out in the FOI Act at section 50(3A).

Section 52(3) of the FOI Act says that a business has 60 days to make an application for review to the Victorian Civil and Administrative Tribunal (“Tribunal”). As the Tribunal can take a week or so to notify agencies of a review application, Council includes an additional period of time in its decision letters to FOI applicants to assist manage their expectations. That way, if a third party business makes an application to the Tribunal on the very last day possible from receiving notice of the intention to disclose the document, and the Tribunal takes a week to notify Council, then an FOI applicant will not have expected Council to provide access to the documents at an earlier time.

An explanation as to why only one option for review (going to VCAT about costs) was included in the decision letter. Also, an explanation of why the letter refusing an internal review falsely claimed, ‘Information about your review rights and how to exercise them is set out in the decision letter,’ when in fact only one avenue, and not a very useful one under the circumstances, was included.

As the decision was to grant you full access to the documents, subject to a charge for access, there were no review rights. Section 49A of the FOI Act sets out when an applicant may apply to the Information Commissioner for review, and none of these provisions applied to the decision made by Council on your Request. The OVIC has a power to review a decision where exemptions have been applied, but this did not occur in your decision.

Council did not apply any exemptions to the documents you sought, you are receiving access in full to the documents you sought, just in a different timeframe to what you anticipated because Council must also manage the legal rights of third party businesses as a part of its decision making process.

Council requested payment of charges for you to access documents and for search time which leads to a right to seek review of those charges. As a result, your decision included only your right to seek review of charges.

You have sought an assurance Council will review its processes and procedures for more timely access to information.

Council always tries to meet its obligations as set out by the FOI Act. If it can improve its processes and procedures in dealing with FOI requests, it will do so and it will always try to be more timely with its responses where it is able and while balancing the various rights and expectations of FOI applicants, members of the public referred to within documents and the OVIC.

You have sought an apology from Council for its handling of ‘my request and delay in providing me with a decision’.

Council apologises for not meeting your expectations in providing the notice of decision within your timeframe. However, Council does understand how important it is to receive timely updates and considers Council did provide correspondence to you, which you confirmed and accepted throughout the FOI process.

We understand that you may be disappointed by this and confirm that Council acted and provided you with a decision regarding your Request within the Professional Standards and the legal requirements of the FOI Act.

Yours sincerely

Ela Alexander

ELA ALEXANDER
Freedom of Information Officer