

Notice of Decision and Reasons for Decision

Applicant:	'DY1'
Agency:	Fire Rescue Victoria
Decision date:	8 February 2022
Exemption considered:	Section 34(4)(a)(ii)
Citation:	'DY1' and Fire Rescue Victoria (Freedom of Information) [2022] VICmr 10 (8 February 2022)

FREEDOM OF INFORMATION – government advertising campaign – expenditure of public funds – information of a business, commercial or financial nature – agency not engaged in trade or commerce – agency not exposed unreasonably to disadvantage – varied decision

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 in part to a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied the document is not exempt under section 34(4)(a)(ii). Accordingly, I have determined to grant access to the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
8 February 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

A list detailing the following information relating to advertising campaign being paid for by Fire Rescue Victoria (FRV) which commenced between [Date] and the date of this request:

 - 1) Title of Campaign
 - 2) Purpose of Campaign
 - 3) Start Date of Campaign
 - 4) Finish Date of Campaign
 - 5) Mediums involved (press | radio | TV | Social Media | Magazines | other)
 - 6) Total expenditure for Campaign
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in part under section 34(4)(a)(ii).

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 copies of the documents 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 all 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.

Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage

9. A document is exempt under section 34(4)(a)(ii) if:
 - (a) the agency is engaged in trade or commerce;
 - (b) the document contains information of a business, commercial or financial nature; and
 - (c) disclosure of which would be likely to expose the agency unreasonably or disadvantage.

Is the Agency engaged in trade or commerce?

10. Whether an agency is engaged in trade and commerce depends on the facts and circumstances of each case. While the phrase 'trade and commerce' may be interpreted broadly,¹ it has been held trade and commerce activities must 'of their nature, bear a trading and commercial character'.²
11. The Victorian Civil and Administrative Tribunal (**VCAT**) has held 'the terms 'trade' and 'commerce' are expressions of fact and terms of common knowledge',³ and has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.⁴
12. An agency may be engaged in trade and commerce even if the trade or commerce activities in which it is engaged are insignificant and incidental to its other functions.⁵
13. The fact an agency's main activities may be described as 'governmental' does not preclude an agency from relying on the exemption under section 34(4)(a)(ii).⁶
14. An agency may also be engaged in trade and commerce activities even if profit is not one of its express statutory objectives.⁷
15. The Agency relies on section 34(4)(a)(ii) to refuse access to the total expenditure for two specific advertising campaigns.
16. Taking into consideration the above factors, I must be satisfied the Agency's engagement with external service providers to supply advertising services amounts to the Agency engaging in 'trade or commerce' for the purposes of the FOI Act.

17. The Agency submits:

FRV engages external suppliers on commercial terms to provide specialist services, such as in advertising. In doing so, FRV is required to comply with its procurement policies. In this way, FRV engages in trade and commerce with third parties.

18. Further, the Agency submits:

FRV undertakes advertising campaigns as one means of meeting its strategic objectives. FRV's joint annual smoke alarms campaign with the [another Victorian Government Agency] aims to encourage Victorians to install smoke alarms in all bedrooms, living areas and hallways.

In 2021 FRV also ran a small-scale advertising campaign encouraging women, regional Victorians and culturally diverse Victorians to consider a career in firefighting. The aim of this campaign was to further FRV's diversity aims and targets.

19. I adopt the view of VCAT expressed in *Pallas v Roads Corporation* (**Pallas decision**) that a government agency engaged in meeting its public functions is not engaged in trade or commerce. In the Pallas decision, VCAT held in relation to expenditure by VicRoads:

In carrying out its road building functions the Corporation engages in Governmental activities rather than in trade or commerce...

¹ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 per Deane J, which whom Brennan J agreed.

² *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [35]; *Concrete Constructions (NSW) Pty LTD v Nelson* (1990) 169 CLR 594, 690.

³ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

⁴ *Ibid* at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at 649.

⁵ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

⁶ *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41].

⁷ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR 427 at [473].

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is. A consumer who purchases a consumer item from a department store is not, for that reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.⁸

20. In my view, the financial and operating expenditure information referred to by the Agency in the documents is not evidence of it being 'engaged in trade or commerce' for the purposes of section 34(4)(a)(ii). Rather, I consider such expenditure is 'part of the processes of trade and commerce' in which the Agency purchases services as part of carrying out its governmental functions.
21. Accordingly, I am satisfied the Agency is not engaged in trade and commerce in the context of section 34(4)(a)(ii) for the purposes of this matter and the first requirement under section 34(4)(a)(ii) is not met.
22. While I am not satisfied the Agency is engaged in trade or commerce, for completeness, I have considered the second and third requirements under section 34(4)(a)(ii).

Do the documents contain information of a business, commercial or financial nature?

23. The phrase 'information of a business, commercial or financial nature' is not defined in the FOI Act. I accept the words 'business, commercial or financial' should be given their ordinary meaning.⁹
24. The documents contain two financial figures relating to expenditure paid to advertising companies for services received for a recruitment and smoke alarm advertising campaign. The expenses are represented as a total amount for each campaign.
25. Based on my review of the relevant information in the document, I am satisfied it contains commercial and financial information.

Would disclosure of the document be likely to expose the Agency unreasonably to disadvantage?

26. Section 34(4) contemplates disclosure of a document containing information of a business, commercial or financial nature under the FOI Act may expose an agency to a certain measure of disadvantage.
27. In the context of section 34(4)(a)(ii), 'disadvantage' has been interpreted to be in the nature of an agency engaged in trade or commerce being exposed to commercial or competitive disadvantage. For example, in *Accident Compensation Commission v Croom*,¹⁰ 'disadvantage' contemplated by this section is interpreted as 'disadvantage in a business, commercial or financial sense'.¹¹

In my opinion, the word "disadvantage" in the context of trade or commerce and information of a business, commercial financial in nature means injury of a financial kind.¹²

28. The term 'likely' in the context of this section means 'probable, such as well might happen or be true'.¹³

⁸ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [57]-[58].

⁹ *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

¹⁰ [1991] 2 VR 322.

¹¹ *Ibid* 325.

¹² *Ibid* 331.

¹³ *Asher v Department of Innovation, Industry and Regional Development* [2005] VCAT 2702 at [38]; *Gibson v Latrobe City Council (General)* [2008] VCAT 1340 at [39].

29. Whether any disadvantage would be 'unreasonable' depends on the particular facts and circumstances of the matter and involves a balancing exercise.¹⁴
30. Further, it is not enough to establish there is a likelihood of disadvantage as any such exposure to disadvantage must be 'unreasonable' in the circumstances.¹⁵
31. Unlike section 34(1)(b), which is to be considered in conjunction with the factors under section 34(2), there is no list of factors to be considered in relation to section 34(4)(a)(ii).
32. I note VCAT has taken the following factors into consideration:¹⁶
- (a) the nature of the information to be disclosed;
 - (b) the circumstances in which the information was obtained by the agency;
 - (c) the likelihood that concerned persons would not wish the information to be disclosed without their consent; and
 - (d) the current relevance and sensitivity of the information.
33. The Agency submits in its submission that disclosure of the document would expose it unreasonably to disadvantage as:
- (a) It will reduce FRV's capacity to compete in a market or to negotiate future contracts, even where they are mere possibilities,¹⁷ by creating a floor to the rates bid/offered to it or the State in the future in respect of similar work;
 - (b) It will remove the uncertainty from the market that contributes to competitive bids for Government work (and for FRV's work);
 - (c) It is likely to allow any commercial entity with which FRV seeks to obtain advertising services to access information which could then be used to strengthen their bargaining position at the expense of FRV;
 - (d) It would damage the trust built up over time between FRV and [named third party companies], such that future agreements with FRV, for advertising would be likely to be impacted. This would financially disadvantage FRV in the immediate term given that further advertising campaigns are intended over upcoming years; and
 - (e) Releasing the rates through FOI is a breach of confidentiality and commercial in confidence information, and gives the impression that FRV is untrustworthy, causing damage to FRV and the State of Victoria's reputation not only with [named third party companies] but other private companies who may wish to work with FRV.¹⁸
34. The Applicant submits:
- The money used on advertising spend by Government Agencies or Entities is public money, so the public has a right to know how much of their money has been spent and where it is being spent;
- I did not ask for, nor have I received or am aware of, the individual date, medium and details of each appearance of campaign collateral. As this information is not known, it is impossible for any individual to determine the rates achieved by FRV with each individual media company. Therefore, I disagree with

¹⁴ *Asher MP v Department of Innovation, Industry and Regional Development (General)* [2005] VCAT 2702 at [28] and [38].

¹⁵ *Re Byrne and Swan Hill Rural City Council* (2000) 16 VAR 366 as cited in *Dalla-Riva v Department of Treasury and Finance* [2005] VCAT 2083 at [30].

¹⁶ *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366 at 372-3; *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 246; *Dalla Riva v Department of Treasury and Finance* [2005] VCAT 2083 at [30]; as cited in *Gibson v Latrobe City Council (general)* [2008] VCAT 1340 at [41].

¹⁷ *Binnie v Department of Industry and Technology* (1986) 1 VAR 345, 348; *Gibson v Latrobe CC* [2008] VCAT 1340 at [40].

¹⁸ See *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363.

FRV's assertion that they would be disadvantaged in future negotiations if they were to release the expenditure to me.

35. Having considered the relevant information and the parties' submissions, I do not consider disclosure would expose the Agency unreasonably to disadvantage for the following reasons:
- (a) The Agency is a large government department which would be reasonably likely to procure external advertising associated with its statutory and governmental functions. The total cost of the services would have been negotiated based on the specific services rendered for those projects.
 - (b) The expenditure of each advertising campaign does not reveal detailed information. I do not consider disclosure of the information will cause any uncertainty from the market in the procurement by the Agency of advertising services, as such pricing is determined by a range of contributing factors.
 - (c) The government has considerable market power such that I do not consider disclosure would have any impact on it or cause it financial disadvantage in procuring such services in the future.
 - (d) Given the lack of detail in the information subject to review, I do not consider entities bidding for advertising work from the Agency could obtain an advantage from such information or gain bargaining power. Similarly, I do not consider its disclosure would have any impact on the Agency's reputation or its relationships with commercial entities.
 - (e) While disclosure could expose the Agency to some disadvantage, I do not consider any such expose would be unreasonable where the public interest lies in favour of disclosure. In this instance, I consider disclosure would promote accountability for government's use of public funds for advertising expenditure.
36. Accordingly, I am not satisfied the information is exempt under section 34(4)(a)(ii).

Conclusion

37. On the information before me, I am satisfied the document is not exempt under section 34(4)(a)(ii). Accordingly, I have determined to grant access to the document in full.

Review rights

38. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁹
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²¹
41. 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.

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁰ Section 52(5).

²¹ Section 52(9).

42. 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.²²

When this decision takes effect

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

²² Sections 50(3F) and (3FA).