

## Notice of Decision and Reasons for Decision

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Applicant:	'EC3'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	27 June 2022
Exemptions considered:	Sections 30(1), 34(1)(b), 34(4)(a)(ii)
Citation:	'EC3' and Department of Jobs, Precincts and Regions (Freedom of Information) [2022] VICmr 47 (27 June 2022)

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FREEDOM OF INFORMATION – Digital Skills and Jobs Program – government outsourcing – recruitment outsourcing – recruitment agency -- Privacy Impact Assessment – privacy risk assessment – contract for the supply of services – contracting with private company – constructive possession

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 as I am not satisfied information in the documents is exempt under sections 30(1), 34(1)(b) or 34(4)(a)(ii).

As the Applicant does not seek access to personal affairs information in the documents, the information determined exempt under section 33(1) is irrelevant to the request.

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 to the documents is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Sven Bluemmel**  
Information Commissioner

27 June 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:  
  
Project: Digital Jobs program. Dates: approx. [date range].  
  
Documents: 1
  1. Privacy Impact Assessment of Digital Jobs program.
  2. Contract of the Department of Jobs, Precincts and Regions and [company 1] for Digital Jobs project.
  3. Report by [company 2] First Interview assessing personality and employability of the applicant of Digital Jobs program [name and date].
2. The Agency identified two documents falling within the terms of the Applicant's request and decided to grant access to one document in part and refuse access to one document in full. The Agency relied on the exemptions under sections 30(1), 33(1), 34(1)(b) and 34(4)(a)(ii) to refuse access to information in the documents. The Agency's decision letter sets out the reasons for its decision.

### 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 all communications and submissions received from the parties.
7. During the review, the Applicant advised they do not seek access to personal affairs information exempted by the Agency under section 33(1).
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.

### *Point 3 of the Applicant's request*

10. Alongside their review application, the Applicant raised concerns regarding the Agency's decision that it did not locate any documents falling within the scope of point 3 of their FOI request.
11. In accordance with section 61B(3), OVIC determined to address these concerns as part of this review.
12. The Applicant's request concerns the Digital Jobs Skills and Jobs Program (the **Program**), which offers 12 weeks of training followed by a 12-week placement in a digital job with a Victorian business. Applicants are selected through a competitive recruitment process facilitated through a recruitment agency, [company 1].

13. [Company 2] is a separate entity to [company 1] that use a behavioural interview tool in the recruitment process. [Company 1] are provided with a summary 'report' of the candidates ranked. This document is purely a list ranking of applicants scores with no further detail or information included. The ranked score allows [company 1] to determine who will progress to the next stage of the assessment process. [Company 1] determine this via a cut-off score. There is no further information within this document.
14. In response to point 3 of the Applicant's request, the Agency submits it does not hold any [company 2] assessments of candidates who have applied for a position through [company 1].
15. Whether a document is a 'document of an agency' depends on whether the agency is in possession of the document.<sup>1</sup> It is accepted that the term 'possession' in the context of the FOI Act is not confined to actual or physical possession of a document. A document can be constructively held by an agency, such that it has a right and power to deal with the documents, or an immediate right to possession of the document.<sup>2</sup>
16. Having considered the following factors –
  - (a) the contractual relationships between the Agency, [company 1] and [company 2];
  - (b) the Agency and [company 1] do not hold the requested document;
  - (c) the Agency and [company 1] cannot access the [company 2] behavioural interview tool; and
  - (d) there appears to be no other type of report that can be provided to the Applicant by [company 2] which meets the applicants request terms,
17. I am satisfied the Agency does not have constructive possession of a document of the type requested by the Applicant in point 3 of their request.

## **Review of exemptions**

### ***Section 30(1) – Internal working documents***

18. Section 30(1) has three requirements:
  - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
  - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
  - (c) disclosure of the matter would be contrary to the public interest.
19. The exemption does not apply to purely factual material in a document.<sup>3</sup>

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<sup>1</sup> Section 5.

<sup>2</sup> *Re Guide Dog Owners' and Friends Association and Northern Thanet Pty Ltd v Commissioner for Corporate Affairs* (1988) 2 VAR 405; *Mildenhall v Department of Premier & Cabinet (No 2)* (1995) 8 VAR 478.

<sup>3</sup> Section 30(3).

*Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?*

20. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
21. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
22. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>4</sup>
23. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant information deleted, where it is practicable to do so.
24. The Agency has applied section 30(1) to a risk assessment table within a Privacy Impact Assessment of the Program. The purpose of a risk assessment table is to identify any privacy risks, the impact level of the risk, the likelihood of occurrence, mitigation strategies, and residual risk rating and risk ownership.
25. I am satisfied the risk assessment table is matter in the nature of opinion, advice or recommendation prepared by an officer of the Agency.

*Was the document made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?*

26. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>5</sup>
27. In *Re Waterford and Department of Treasury (No.2)*,<sup>6</sup> the former Victorian Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
28. I am satisfied the document was made in the course of the deliberative processes involved in the functions of the Agency, specifically the process of undertaking a Privacy Impact Assessment of the Program.

*Would disclosure of the document be contrary to the public interest?*

29. In deciding whether release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
30. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>7</sup>

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<sup>4</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>5</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>6</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>7</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.

31. The Agency's decision states:

It is not in the public interest to release this information as it is speculative in nature. The provision of opinions and considerations of incidents that 'may' occur, and the likelihood of those incidents is speculative only and based on the assessment of relevant staff members. It is not based in fact and is not reflective of actual experiences in using the relevant programs in practice.

32. During the review, the Agency made the following submission:

The [Program] is a current and ongoing program. [Company 1] hold the current contract for Tranche One of the [Program] with Tranche Two being open for tender.

As the tender is currently open and not yet finalised, the release of departmental staff opinions, recommendations, or advice, particularly in relation to the department's view of risk in respect of this program, would impact the ability for the tender process to be conducted in fair manner. It must be always be considered that there are no restrictions on the further distribution or publication of released material. In this instance, the fact that the department is in the process of making business and financial decisions relating to the contract for the [Program] outweighs any public interest that would be fulfilled by release of the information.

33. Having carefully reviewed the exempted information, I do not consider the information to be sensitive or controversial. The purpose of undertaking a privacy risk assessment is for public sector agencies to understand and identify potential privacy risks and develop risk mitigation strategies to address these privacy impacts before a project or initiative commences. The risk assessment table in this matter describes the possible privacy risks associated with the Program and how those risks can be managed or mitigated. I consider such information is what would be reasonably expected in relation to public sector agency projects, as managing privacy risks are a critical aspect of public sector governance.

34. While I note conducting a Privacy Impact Assessment or a privacy risk assessment is not mandatory, public sector agencies are required to comply with *Privacy and Data Protection Act 2014 (Vic) (PDP Act)*, which governs public sector agency handling of personal information.

35. I consider it is in the public interest to disclose this information as it tends to show:
- (a) the Agency has considered the privacy of candidates during the design and implementation of the program;
  - (b) the Agency has considered various privacy risks and controls in place to mitigate or manage such risks; and
  - (c) the Agency's commitment to respecting and protecting the privacy of candidates.
36. Disclosure is also likely to contribute to constructive public scrutiny of the way in which the Agency handles personal information of candidates for recruitment or placement purposes, which is particularly important where aspects of this process are outsourced. In this respect, I also consider there is a public interest in the community being better informed about the way in which the Agency handles personal information of candidates of the Program and may promote public trust and confidence in the agency's handling of personal information and the program more generally.
37. While I have considered the Agency's concern regarding the potential impact that disclosure would have on the negotiations for Tranche Two of the Program, I do not consider the content of the document would have any impact on the tender process and in any case, at the time of making my decision, Tranche Two is no longer open for tender. As such, disclosure is unlikely to impact the tender process.
38. Accordingly, I am not satisfied the risk assessment table in Document 1 is exempt under section 30(1).

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

39. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking and:
- (a) the information relates to other matters of a business, commercial or financial nature; and
  - (b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
40. The Agency exempted the following information under section 34(1)(b):
- (a) an information flow diagram that maps how the Program deals with personal information of candidates (Document 1); and
  - (b) a contract between the Agency and [company 1] (Document 2).

***Was the information acquired from a business, commercial or financial undertaking?***

41. In *Thwaites v Department of Human Services*,<sup>8</sup> the Victorian Civil and Administrative Tribunal (VCAT) observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
42. I consider the information in Document 1 to be information acquired by the Agency from a business undertaking.
43. Whether a contractual agreement constitutes 'information acquired' by an agency for the purposes of section 34(1) is not settled.

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<sup>8</sup> (1999) 15 VAR 1.

44. In *Thwaites v Metropolitan Ambulance Service*,<sup>9</sup> the former Administrative Appeals Tribunal of Victoria (**Tribunal**) held:

[The contracts between Metropolitan Ambulance and the successful tenderers] do not so much consist of information acquired by the agency from a business, commercial or financial undertaking but rather constitute the record of the transaction between the parties. Such documents, recording the agreement as to the arrangements between the parties, are, in effect, the contractual outcome of negotiations. However, at the same time, they contain information of a business, commercial or financial nature.

45. In contrast, the Tribunal has also concluded a contract of itself, does not disqualify it from exemption under section 34(1) as a term of a concluded contract may include information of a business nature. To determine otherwise would 'read down the subsection considerably'.<sup>10</sup>
46. Having considered the above issues, I consider that each case needs to be examined on its merits.
47. While I acknowledge the document represents the outcome of concluded negotiations between the State and the business undertaking, for the purposes of this review, I accept the document contains information acquired from the business undertaking within the terms of the agreement.

*Does the information relate to matters of a business, commercial or financial nature?*

48. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.<sup>11</sup>
49. In relation to Document 1, the Agency submits it contains proprietary information that specifically relates to the way in which [company 1's] systems operate. I am not satisfied the dataflow of information is necessarily of a business, commercial or financial nature. In the context of the present matter, I consider that this information represents how the Program deals with personal information of candidates generally and does not reveal any commercial information of the undertaking.
50. I accept Document 2, which is a contract between the Agency and [company 1] for the provision of recruitment related services for the Program, contains information relating to matters of a business, commercial and financial nature.

*Would disclosure of the information be likely to expose the undertaking unreasonably to disadvantage?*

51. Section 34(2) provides that in deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—
- (a) whether the information is generally available to competitors of the undertaking;
  - (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
  - (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
  - (d) 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—

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<sup>9</sup> (1996) 9 VAR 427 at 473.

<sup>10</sup> *Hulls v Department of Treasury and Finance* (1998) 13 VAR 381; *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [20].

<sup>11</sup> *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

52. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,<sup>12</sup> in which VCAT held documents are exempt under section 34(1)(b) if their disclosure would:
- (a) give competitors of a business undertaking a financial advantage;
  - (b) enable competitors to engage in destructive competition with a business undertaking; and
  - (c) would lead to the drawing of unwarranted conclusions as to a business undertaking's financial affairs and position with detrimental commercial and market consequences.
53. I consider the phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b), contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word 'unreasonably' in section 34(1)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed 'unreasonably' to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.
54. Accordingly, section 34(1)(b) contemplates a business undertaking may be exposed to a certain level of disadvantage. The question is whether any such disclosure would expose the undertaking unreasonably to disadvantage.
55. In determining whether disclosure of commercially sensitive information in a document would expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify an undertaking and seek its views on disclosure.<sup>13</sup> The Agency consulted with [company 1], who advised the contract is currently under negotiation and disclosure may cause commercial disadvantage to both parties.
56. The Agency submits:

The tender formally opened on [date] and closes on [date]. Although the department's decision in relation to this request was made on [date], the program area and [company 1] were both of the knowledge that the new tender for Tranche Two would be commencing imminently, therefore understanding that the release of the contract would be of an unreasonable disadvantage to both parties.

Releasing a contract that is under negotiation would be detrimental to [company 1] in that it would allow any competitors a chance to examine and understand their business, effectively giving those competitors the ability to undercut them, offer conditions that would be considered more favourably or give insight into [company 1's] business practices. With particular concern is that once released under FOI there is no restriction on the further publication of the document.

....

The details of current contracts are not available to competitors during a tender process and therefore not generally available to competitors of [company 1]. In the current situation of contract negotiations and open tenders, the release of this information would substantially cause harm to [company 1's] ability to lodge a tender for the open contract and undermine their competitive position.

The department's position is that an open tender process and the competitive nature of a tender position outweigh any public interest considerations for the release of the information.

57. For the reasons set out below, I am not satisfied disclosure of the contract (Document 2) would be likely to expose [company 1] unreasonably to disadvantage:

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<sup>12</sup> [2007] VCAT 1301 at [33].

<sup>13</sup> Section 34(3).



- (a) For the most part, I consider the document contains standard industry and contract clauses reasonably expected to be included in such an agreement. In fact, many of the clauses are contained in the templated 'Agreement for the provision of services standing offer (sole entity multiple purchases)' published on the 'Buying for Victoria' website.<sup>14</sup> Neither the Agency nor [company 1] provided evidence to demonstrate how disclosure of the concluded agreement terms would cause unreasonable disadvantage to [company 1]'s operations. Rather, I consider the nature of the document largely concerns each party's contractual responsibilities under the agreement.
- (b) Where the document contains more specific information, such as in the Schedules, I consider it lacks substantive detail such that its disclosure would divulge particular commercial information that could reasonably expose [company 1] to commercial, business, or financial detriment.
- (c) While I note certain information concerns financial information not generally known to competitors of [company 1], this is one factor for consideration only and is not determinative.
- (d) I am not satisfied its disclosure would harm the ability of [company 1] to negotiate with the Agency in relation to Tranche Two of the Program, negotiate other agreements with the State or other contracts of a similar nature or harm its competitive position.
- (e) In this instance, I do not accept disclosure would allow competitors to draw unwarranted inferences on [company 1]'s current and future projects given the information does not provide any insight into the undertaking's current or future business and financial affairs.
- (f) Where commercial entities engage with government, and where public funds are utilised to fund such projects, it is not unreasonable to expect greater transparency than a commercial entity would experience when dealing with other commercial entities and that information provided by a company to a government agency may be released under the FOI Act or other means.<sup>15</sup>
- (g) I accept the release of commercial documents within a commercially competitive environment, may cause a certain measure of disadvantage. However, the test in regard to section 34(1)(b) is whether disclosure would be likely to expose a business undertaking unreasonably to disadvantage. This provision contemplates some disadvantage may be experienced by an entity that enters into a commercial agreement with government on behalf of the State. In this instance, there is not sufficient information to satisfy me any such disadvantage to which [company 1] may be exposed would be unreasonable.
- (h) The FOI Act requires access be provided to information in the possession of government 'limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs' and that any discretion conferred by the FOI Act be exercised, as far as possible, to facilitate and promote the disclosure of information. In my view, there is a strong public interest in transparency about the way in which the Government outsources its functions to private companies, particularly where this practice is becoming more commonplace. Therefore, I consider any disadvantage to which the business undertaking would likely be exposed due to disclosure of the document is outweighed by the public interest in favour of government transparency and accountability and the use of public funds.
- (i) I am satisfied the Applicant is not a competitor of the undertaking. Rather, the Applicant seeks access to the document for research purposes and [because of their connection] to the program.

58. Accordingly, I am not satisfied information in the documents is exempt under section 34(1)(b).

<sup>14</sup> See <https://www.buyingfor.vic.gov.au/goods-and-services-standard-contract-templates#contracts-for-the-supply-of-services>

<sup>15</sup> This was noted by Deputy President Galvin in *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR 427 at [477].

59. My decision on section 34(1)(b) is further set out in the Schedule of Documents in **Annexure 1**.

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

60. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, ‘in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage’. 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 to disadvantage.

61. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>16</sup>

62. VCAT has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.<sup>17</sup> VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.<sup>18</sup> An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency’s other functions.<sup>19</sup>

63. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.<sup>20</sup>

64. While the phrase ‘trade and commerce’ may be interpreted broadly,<sup>21</sup> it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.<sup>22</sup>

65. The fact an agency’s predominant activities may be described as ‘governmental’ does not preclude it from relying on the exemption under section 34(4)(a)(ii).<sup>23</sup>

66. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself, or part of its operations, in a manner similar to a commercial entity.

67. I consider the exemption contemplates an agency may be exposed to a certain measure of disadvantage should information of a business, commercial or financial nature be disclosed. Therefore, I must be satisfied such disclosure would be likely to expose the Agency unreasonably to disadvantage and it is incumbent on an agency to provide evidence of this likely outcome.

*Is the Agency engaged in trade and commerce?*

68. The Agency exempted the contract between the Agency and [company 1] (Document 2) and a small amount of information in Document 1 with respect to Key Performance Indicators (**KPI**).

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<sup>16</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

<sup>17</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

<sup>18</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

<sup>19</sup> *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

<sup>20</sup> *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

<sup>21</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

<sup>22</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

<sup>23</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

69. In my view, where the Government enters into a contract on behalf of the State of Victoria with a private entity in exchange for the provision of services for the benefit of the public, it does not do so as an activity in the capacity of engaging in trade or commerce, but rather to fulfil its role to deliver governmental services, functions and deliver publicly funded projects on behalf of the community.
70. In this instance, while there is a contractual relationship between the Agency and the recruitment agency, the Agency is not engaged in trade or commerce in contracting with [company 1], but rather carrying out its governmental functions in the delivery of the Digital Skills and Jobs Program, specifically recruitment for the program. For this reason, I do not consider that section 34(4) can apply to the documents.
71. For completeness, I will consider the remaining limbs of section 34(4)(a)(ii).

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

72. I am not satisfied the information exempted in Document 1, which concerns a KPI, is of a business, commercial or financial nature.
73. I accept Document 2 contains information of a business, commercial and financial nature.

*Would disclosure be likely to expose the Agency unreasonably to disadvantage?*

74. Whether disclosure is likely to expose an undertaking *unreasonably* to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that are likely to follow from disclosure of the information.
75. The provision contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage, and that any such exposure must be unreasonable.
76. The Agency submits:

In this instance, the current contract is open for Tender, as published on the Buying for Victoria website.<sup>24</sup> Releasing any details contained within the current contract during an open tender process for the second Tranche of the same program unreasonably exposes the department to disadvantage as the tender process would be unduly influenced and reduce the agency's capacity to compete in a competitive market for the buying of goods or services.<sup>25</sup>

Given that release under the Act places no restriction on the further publication of those documents, risking the undue impact on a fair and unbiased tender process.

77. With respect to Document 2, even if I were to accept the Agency is engaged in trade or commerce, I do not consider it has demonstrated disclosure of the document would expose it unreasonably to disadvantage. The document represents its concluded negotiations with the business undertaking and does not reveal the process of negotiations between the State and the business undertaking.
78. Further, as the primary body responsible for managing the Program, the Agency is not subject to the same market forces or competition, as a commercial entity would be. As such, I consider it would be reasonably likely to overcome any exposure to disadvantage arising from disclosure of the document.
79. I also consider, in general terms, any contract depends on a number of factors including the subject of the contract, the bargaining power of the contracting parties and the existence of competitive pressures to obtain the benefit of the contract. I consider government agencies have considerable bargaining strength in the provision of services. In this case, I am not satisfied there is sufficient evidence before me to support the view that disclosure would impact the ability of the State government to attract future

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<sup>24</sup> [www.tenders.vic.gov.au](http://www.tenders.vic.gov.au) - Tender reference number: FY22-138

<sup>25</sup> *Binnie v Department of Industry, Technology & Resources* (1986) 1 VAR 345 at [348]

offers from private sector companies, or from continuing to enter into future negotiations in good faith, because the terms in which it did business would become publicly known. Ultimately, businesses will more likely than not be prepared to do business with government agencies where they consider it is in their commercial interests to do so.

80. Accordingly, I am not satisfied information in the documents is exempt under section 34(4)(a)(ii).

### **Section 25 – Deletion of exempt or irrelevant information**

81. 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.

82. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>26</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless they are not ‘practicable’ and release of the document is not required under section 25.<sup>27</sup>

83. As the Applicant does not seek access to the personal affairs information, such information is to be deleted in accordance with section 25 as it is irrelevant for the purposes of this review.

84. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

85. On the information available, I am not satisfied the exemptions under sections 30(1), 34(1)(b) or 34(4)(a)(ii) apply to the documents.

86. As I am satisfied it is practicable for the Agency to provide the Applicant with an edited copy of the documents with irrelevant personal affairs information deleted, access to the documents is granted in part.

### **Review rights**

87. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>28</sup>

88. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>29</sup>

89. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>30</sup>

90. 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.

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<sup>26</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>27</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

<sup>28</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>29</sup> Section 52(5).

<sup>30</sup> Section 52(9).

91. 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.<sup>31</sup>

***Third party review rights***

92. As I have determined to release documents that contain information that the Agency exempted under section 34(1)(b), if practicable, I am required to notify the undertaking of its right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>32</sup>
93. I am satisfied it is practicable to notify the undertaking of its review rights and confirm they will be notified of my decision on the date of decision.

***When this decision takes effect***

94. My decision does not take effect until the third parties' 60 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>31</sup> Sections 50(3F) and (3FA).

<sup>32</sup> Sections 49P(5), 50(3A) and 52(3).

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Privacy Impact Assessment	28	Released in part Sections 30(1), 33(1), 34(1)(b), 34(4)(a)(ii)	Release in part Section 25 The document is to be released with personal affairs information deleted under section 25.	Sections 30(1), 34(1)(b), 34(4)(a)(ii): I am not satisfied the document contains information that is exempt under these provisions, for the reasons provided in the Notice of Decision, above.  Section 25: I am satisfied the information that the Agency exempted under section 33(1) is irrelevant information for the purposes of this review.  I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant personal affairs information deleted in accordance with section 25.
2.	[Date]	Contract between Agency and [company 1]	54	Refused in full Sections 34(1)(b), 34(4)(a)(ii)	Release in part The document is to be released with personal affairs information deleted under section 25.	Sections 34(1)(b), 34(4)(a)(ii) and 25: See comments for Document 1.