



Office of the Victorian  
Information Commissioner

# Information Access Series

*Sections 34(1) and 34(4) of the  
FOI Act*

*29 July 2019*

# In today's presentation

- Key differences between sections 34(1)(a), 34(1)(b) and 34(4)
- Requirements of these sections
- VCAT decisions
- When to apply sections 34(1)(a), 34(1)(b) and 34(4)(a)(ii)
- Practical tips

# So...what are the differences?!

- To remember the differences, keep in mind:
  - section 34(1)'s objective is to protect certain information of **an undertaking**
  - section 34(4)'s objective is to protect certain information of **agencies**

## Requirements of section 34(1)(a)

Section 34(1)(a) 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
- the information relates to trade secrets.

## ‘information acquired by’

- Requires some positive handing over of information.
- Information can be ‘acquired by’ an agency regardless of whether the document itself originated within the agency or the commercial undertaking.
- Information does not need to have come directly from the commercial undertaking.

# ‘business, commercial or financial undertaking’

- An entity other than the agency itself.
- The object of section 34(1) is to protect the relevant undertaking.

## ‘trade secrets’

- Normal legal meaning.
- Does not include every piece of commercially sensitive information.
- The information must be secret, and it must be used or usable in trade. Information may be a trade secret even if it is not of a technical nature.

## Requirements of section 34(1)(b)

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:

- the information relates to **other matters of a business, commercial or financial nature**; and
- the disclosure of the information would be likely to expose the undertaking **unreasonably to disadvantage**.



# What is 'unreasonable disadvantage'?

- The disadvantage must be unreasonable.
- Consider the elements set out in **section 34(2)**.
- In deciding whether the disclosure of information would expose an undertaking unreasonably to disadvantage, **if practicable**, an agency must consider consultation under section 34(3).

# *Byrne and Swan Hill Rural City Council [2000]*

## VCAT 666



# *Byrne and Swan Hill Rural City Council:*

## Background

- The applicant requested a number of documents relevant to the tender process for the contract for the Robinvale Swimming Pool in 1998.
- Six documents in dispute.
- Sections **34(1)(b)** and 34(4).

## ***Byrne and Swan Hill Rural City Council: s 34(1)***

*The new provision requires not only that the information be of a business or commercial character but also that its release would expose the undertaking not just to some disadvantage but to **unreasonable** disadvantage.*

## Requirements of section 34(4)(a)(ii)

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.*

## ‘engaged in trade or commerce’

- As at the date of the FOI request.
- Can be engaged in trade or commerce even if insignificant and incidental to other functions.

## ‘unreasonable disadvantage’ to the agency

- List in section 34(2) is not applicable to section 34(4) – different test.
- The test is one of likelihood rather than certainty.
- Does not need to involve ‘substantial harm’.

# ***Pallas and Roads Corporation (Review and Regulation) [2013] VCAT 1967***





# ***Pallas and Roads Corporation: Background***

- The applicant requested:

*copies of all presentations, briefings and supporting documents (including any consultants' reports) provided by VicRoads to the Minister for Roads during 2010, which relate to options for addressing traffic congestion on Hoddle Street and/or Punt Road.*

- Eight documents in dispute.
- **Section 34(4).**

## ***Pallas and Roads Corporation: Engaged in trade or commerce?***

- ‘Activities in trade or commerce must *‘of their nature, bear a trading or commercial character’*’.
- The exemption claimed in section 34(4) was not made out.
- Vice President, Judge Macnamara, held:

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

# Summary – section 34(1)

Section 34(1)	Examples
'information acquired by an agency'	<ul style="list-style-type: none"> <li>• Tender submissions of unsuccessful tenderers</li> <li>• Parts of contracts</li> </ul>
Section 34(1)(a) Is it a trade secret?	<ul style="list-style-type: none"> <li>• Secret recipe for Coca-Cola</li> <li>• Commercial methodology</li> </ul>
Section 34(1)(b)  Or is it information of business, commercial or financial nature?  Will disclosure expose the undertaking unreasonably to disadvantage?	<ul style="list-style-type: none"> <li>• Pricing methodology</li> </ul>

## Summary – section 34(4)

Section 34(4)	Examples
<p>Section 34(4)(a)(i)</p> <p>Does the document contain a trade secret of the agency?</p> <p>Will disclosure expose the agency unreasonably to disadvantage?</p>	<ul style="list-style-type: none"> <li>• Secret chemical formula for a research agency</li> </ul>
<p>Section 34(4)(a)(ii)</p> <p>Is the agency engaged in trade or commerce?</p> <p>Is it information of business, commercial or financial nature?</p> <p>Will disclosure expose the agency unreasonably to disadvantage?</p>	<ul style="list-style-type: none"> <li>• Tender evaluation matrix</li> <li>• Negotiations around pricing</li> </ul>
<p>Section 34(4)(b) and (c)</p>	<ul style="list-style-type: none"> <li>• Scientific/technical research</li> <li>• Examination papers</li> </ul>

# How agencies can assist OVIC

- Provide detailed written submissions, setting out:
  - Each limb of the exemption;
  - Clearly outline how your agency is engaged in trade or commerce;
  - Clearly outline how disadvantage would be unreasonable (if applicable).
- Provide timely responses to OVIC queries.
- Provide copies of consultation responses received by your agency from undertakings (pursuant to section 34(3)).

# Upcoming Information Access Series event

- **Next seminar in October 2019**
- Please visit our website: [www.ovic.vic.gov.au](http://www.ovic.vic.gov.au)

# Contact us

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