

## Notice of Decision and Reasons for Decision

---

Applicant:	'AG3'
Agency:	City of Stonnington
Decision Date:	25 June 2019
Exemptions considered:	Sections 33(1) and 34(1)(b)
Citation	'AG3' and City of Stonnington ( <i>Freedom of Information</i> ) [2019] VICmr 57 (25 June 2019)

---

FREEDOM OF INFORMATION – tender process – commercially sensitive information – unreasonable disadvantage to an undertaking

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 in that I have decided to release additional information in the documents.

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

25 June 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to documents relating to a tender process concerning a [sporting] centre, specifically, [they] requested:
  - (a) all applications submitted by tendering organisations;
  - (b) any meeting notes or records made in relation to the decision to award the contract;
  - (c) a list of individuals involved in the decision-making process;
  - (d) any document outlining the decision-making process; and
  - (e) the final signed contract between Stonnington and the winning tenderer.
2. In its decision, the Agency identified six documents falling within the terms of the Applicant's request. It decided to grant access to those documents in part.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. On 15 May 2019, the Applicant advised they did not seek a review of the Agency's decision to delete information relating to the unsuccessful tenderer's information and the personal affairs information of third parties such as administrative staff, individuals who witnessed the signing of contracts and staff of a bank. Accordingly, this information is irrelevant to this review.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application;
  - (c) the Agency's submission dated 25 March 2019; and
  - (d) communications between OVIC staff, the Applicant and the Agency.
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.

### Review of exemptions

9. The Agency relied on the exemptions under section 33(1) and 34(1)(b) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

### **Section 34(1)(b)**

10. A document is exempt under section 34(1)(b) if it contains information acquired 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 would be likely to expose the undertaking unreasonably to disadvantage
11. In *Thwaites v Department of Human Services*,<sup>1</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.
12. VCAT has also recognised the words ‘business, commercial or financial nature’ have their ordinary meaning.<sup>2</sup>
13. The use of ‘unreasonably’ in section 34(1)(b) contemplates an undertaking may be exposed to a certain level of disadvantage. The question is whether the exposure to disadvantage would be unreasonable in the circumstances.
14. Section 34(2) provides:

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;
- (a) whether the information would be exempt matter if it were generated by an agency or a Minister;
- (b) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
- (c) 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—

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

15. As stated above, in undertaking my review, I have had regard to the object of the FOI Act. I also note the narrowing by Parliament of the exemption under section 34(1)(b) by the passing of the *Freedom of Information (Miscellaneous Amendments) Act 1999* (Vic). In the second reading speech, it was stated:

The Freedom of Information Act provides an exemption for a range of information relating to business, commercial and financial matters that is obtained by government agencies from business organisations. This exemption has been employed in the past, under the guise of commercial confidentiality, to prevent disclosure of documents that should be open to public scrutiny.

The bill narrows the ambit of this exemption. Under the proposed amendments documents will be exempt only if disclosure of information relating to business, commercial or financial matters would be likely to expose a business organisation unreasonably to a disadvantage. This narrower exemption will operate in conjunction with the government’s policy commitment to post all contracts for the delivery of services to the

---

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

<sup>2</sup> *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

community on behalf of the government on the Internet. This will ensure that Victorians are aware of and better able to scrutinise business undertakings entered into by the government.<sup>3</sup>

16. In considering whether release of the information would expose the successful tenderer unreasonably to disadvantage, I have considered the following relevant factors:
- (a) the Agency's decision letter stated the successful tenderer was agreeable to the release of the documents relating to trade secrets and other matters of a business, financial or commercial nature;
  - (b) promoting good governance, transparency and accountability in government decision making and the oversight of the spending of public funds is strongly in the public interest;
  - (c) private companies tendering for government contracts should reasonably expect a greater degree of transparency and accountability given the use of public funds for the procurement of goods and services. Standard government tender documents and contracts should make clear that information submitted to a government tender process may be subject to access under the FOI Act or other lawful means;<sup>4</sup> and
  - (d) a key purpose of access to information under the FOI Act is to ensure contracts awarded by government to business undertakings are better able to be scrutinised.
17. In light of the above, I have determined disclosure of the successful tenderer's information would not expose it unreasonably to disadvantage. As such, I am satisfied this information is not exempt under section 34(1)(b).

### **Section 33(1)**

18. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>5</sup> and
  - (b) such disclosure would be 'unreasonable'.

*Do the documents contain personal affairs information of individuals other than the Applicant?*

19. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>6</sup>
20. I note the documents contain the names, email addresses, position titles, contact numbers and statements provided by various individuals in the course of the tender process. I am satisfied this relates to the personal affairs information of individuals other than the Applicant.

---

<sup>3</sup> Victorian Parliamentary Debates, Legislative Assembly, 11 November 1999, 350.

<sup>4</sup> See for example, the Victorian Government's 'Buying for Victoria' website at <https://buyingfor.vic.gov.au/probity-maintain-confidentiality-tender-participants-confidential-information-construction-guidance> (accessed 23 April 2019) which states: 'Maintaining confidentiality is not absolute and should be assessed in terms of contract disclosure requirements for Freedom of Information and audit purposes'.

<sup>5</sup> Sections 33(1) and (2).

<sup>6</sup> Section 33(9).

*Would the release of the personal affairs information be unreasonable?*

21. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
22. The deleted information relates to the various individuals involved in the tender process such as the Agency's staff and the staff of the successful tenderer.
23. I do not consider this information to be particularly sensitive given it was provided in the ordinary course of the various individuals' professional duties. I also consider the name of the successful tenderer's CEO and the names of the Agency's staff who were involved in the tender process would be publicly available. Given the successful tenderer was agreeable to the release of the business' commercially sensitive information, I am of the view the CEO would not be likely to object to the release of his personal affairs information. Accordingly, I do not consider the release of this information to be unreasonable and I have determined this information is not exempt under section 33(1).
24. However, I consider the release of the personal affairs information of the individuals who were listed as the successful tenderer's referees and staff to be unreasonable. This is because these individuals were not directly involved in the tender process and it is also unclear which ones of the listed referees were contacted by the Agency. I have determined this information is exempt under section 33(1).

#### ***Deletion of exempt or irrelevant information***

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>7</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>8</sup>
27. As stated above, the Applicant has agreed to exclude the review of the Agency's decision to delete certain information. I consider this information to be irrelevant.
28. 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 such information, because it would not require substantial time and effort, and the edited documents would retain meaning.

#### **Review rights**

29. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>9</sup>
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>

---

<sup>7</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 [82].

<sup>8</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
32. 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.
33. 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>12</sup>

**When this decision takes effect**

34. I have decided to release documents that contain information relating to the personal affairs of third parties and matters of a commercial nature relating to third party business undertaking.
35. The relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.
36. For that reason, my decision does not take effect until that 60-day period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

---

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Doc	Document Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
A	Questions to Tenderers	3	Release in part Section 34(1)(b)	Release in part Section 25	Section 25: The deleted information relates to questions from the Agency to the unsuccessful tenderer. The Applicant agreed to exclude the review of the deletion of such information from the documents. This information is irrelevant.
B	Table	7	Release in part Sections 33(1), 34(1)(b)	<p>Release in part Section 25</p> <p>The following information is not exempt and it is to be released to the Applicant:</p> <ul style="list-style-type: none"> <li>- the monetary sum on Page 3 relating to the successful tenderer; and</li> <li>- all personal affairs information on Page 7.</li> </ul>	<p>Section 34(1)(b): To enable greater a degree of transparency and accountability in the use of public funds, I do not consider the release of the successful tenderer's business information would unreasonably expose it to disadvantage.</p> <p>Section 33(1): I do not consider the release of the personal affairs information of Agency staff acting in the ordinary course of their professional duties would be unreasonable.</p> <p>Section 25: See comments for Document A.</p>
C	CEO Minutes	12	Release in part Sections 33(1), 34(1)(b)	<p>Release in part Section 25</p> <p>The document is to be released to the Applicant with only information relating to the unsuccessful tenderer to be deleted under section 25.</p>	See comments for Document B.
D	Formal Instrument of Agreement	2	Release in part Sections 33(1), 34(1)(b)	<p>Release in part Section 25</p> <p>The document is to be released to the Applicant with only information relating to</p>	<p>See comments for Document B.</p> <p>Section 25: The Applicant agreed to exclude the review of the Agency's decision to delete the personal affairs information of individuals who</p>

Annexure 1 – Schedule of Documents

Doc	Document Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
				the names and signatures of the witnesses on Page 2 to be deleted under section 25.	witnessed the signing of contracts. This information is irrelevant.
E	Formal Letter of Acceptance	4	Release in part Sections 33(1), 34(1)(b)	Release in full	See comments for Document B.  Section 33(1): I do not consider it would be unreasonable to release the personal affairs information of the successful tenderer's CEO.
F	Contract Conditions	419	Released in part Sections 33(1) and 34(1)(b)	<p>Release in part Sections 25 and 33(1)</p> <p>This document is to be released to the Applicant with the following information to be exempt under section 25:</p> <ul style="list-style-type: none"> <li>- the name of the Agency's administrative staff in the two emails [on date] and the one email [on date] (Part 7); and</li> <li>- the personal affairs information of the Commonwealth bank staff member (Part 1).</li> </ul> <p>The following information is exempt under section 33(1):</p> <ul style="list-style-type: none"> <li>- the names of the successful tenderer's staff in the emails [on two dates] under section 33(1) (Part 7); and</li> <li>- the names of the tenderer's referees in the email [on date]</li> </ul>	<p>See comments for Document B.</p> <p>Section 25: The Applicant agreed to exclude from the review of the Agency's decision to delete:</p> <ul style="list-style-type: none"> <li>- the personal affairs information of the bank staff; and</li> <li>- the names of administrative staff.</li> </ul> <p>This information is irrelevant.</p> <p>Section 33(1): I consider it would be unreasonable to release the names and contact details of:</p> <ul style="list-style-type: none"> <li>- the successful tenderer's staff; and</li> <li>- the successful tenderer's referees.</li> </ul>



Annexure 1 – Schedule of Documents

Doc	Document Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
				(Part 7).	