

Notice of Decision and Reasons for Decision

Applicant:	'A15'
Agency:	City of Stonnington
Decision date:	9 August 2019
Exemptions considered:	Sections 34(1)(a), 34(1)(b)
Citation:	'A15' and City of Stonnington (<i>Freedom of Information</i>) [2019] VICmr 77 (9 August 2019)

FREEDOM OF INFORMATION – commercially sensitive information – service pricing – invoices

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 to the Applicant.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
9 August 2019

Reasons for Decision

Background to review

1. The Applicant made the following request to the Agency:

During [specified time period], all documents in relation to the quotations which resulted in the selection of [specified undertaking] for Corporate Performance Reporting. That is to include RFQs [request for quotation] that were issued to suppliers, the final contract, all emails related to this RFQ from the commencement of this process until the date the contract was [specified undertaking] was signed, all documents that include assessment scores and calculations used to evaluate each applicant to this RFQ.

2. In its decision, the Agency identified seven documents falling within the terms of the Applicant's request. It decided to partially release the documents to the Applicant.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Applicant limited the review to the Agency's decision in relation to the following documents only:
 - (a) Annexure A – Page 10 of 18 relating to an Email dated [redacted];
 - (b) Annexure B – Page 24 of 25; and
 - (c) Annexure C – Pages 1 to 5.
5. On 3 June 2019, the Applicant advised the information sought is the 'value of the contract awarded and the value on subsequent invoices'.
6. On 5 June 2019, the Applicant further clarified that information sought is 'the vendor name and the total amount only, inclusive or excluding GST'. Further, the Applicant does not seek details within 'the invoice nor the contract, just the total amounts'.
7. To assist my review, the Applicant provided a copy of the documents with redactions, as released to [them] by the Agency.
8. I have examined copies of the documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) communications between OVIC staff, the Applicant and the Agency.
11. 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

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

Section 33(1)

13. As stated above, on 5 June 2019, the Applicant advised the only personal affairs information sought is the name of the vendor. The Applicant is aware of the successful tenderer following the Agency's procurement process.
14. Having reviewed the documents, I note the personal affairs information exempted by the Agency relates to the names of Agency officers who were involved in the procurement process and the Agency officer who received invoices issued by the vendor.
15. Given the exempted personal affairs information does not identify the vendor's name, the personal affairs information of Agency officers in the documents is irrelevant for the purposes of this review.

Section 34

16. In its decision letter, the Agency exempted certain information under section 34 claiming the information related to trade secrets.

Section 34(1)(a)

17. Section 34(1)(a) provides a document is exempt if its disclosure under the FOI Act:
 - (a) would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking; and
 - (b) the information relates to trade secrets.
18. An 'undertaking' means an entity other than the agency itself.¹
19. The Full Federal Court of Australia held 'trade secret' does not have a technical legal meaning and the term should be given its ordinary meaning.²
20. Further, what constitutes a trade secret is primarily a question of fact. The information must comprise secrets used or useable in trade, but does not need to be technical or confidential information.
21. Given the nature of the information sought, I am not satisfied the total contract value and invoiced amounts constitutes a trade secret. I consider a trade secret to be information in the nature of an undertaking's intellectual property that is generally not widely known and the release would enable a competitor to gain an unfair advantage over the undertaking.
22. Accordingly, I am not satisfied the relevant information in the documents is exempt under section 34(1)(a).

¹ *Thwaites v DHS* [1999] VCAT 11; *Re Marples and Department of Agriculture* (1995) 9 VAR 29 at 56.

² *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 108 ALR 163.

Section 34(1)(b)

23. For completeness, I will also consider if the relevant information is exempt under section 34(1)(b).
24. 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.
25. In *Thwaites v Department of Human Services*,³ 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.
26. VCAT has also recognised the phrase 'business, commercial or financial nature' should be given its ordinary meaning.⁴
27. 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;
 - (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—
- and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.
28. The Agency advised it consulted with the undertaking in accordance with section 34(3) in response to which the undertaking, through its legal representative, responded:
- The disclosure of information in relation to matters of a business, commercial or financial nature that is not generally available to [the undertaking's] competitors would cause substantial hard to [the undertaking's] competitive position and expose [the undertaking] and its business to an unreasonable disadvantage.
29. 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:

³ (1999) 15 VAR 1.

⁴ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

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 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.⁵

30. Accordingly, the inclusion 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.
31. Having regard to the factors under section 34(2), given the Applicant seeks access to total contract and invoice amounts only, I consider:
 - (a) 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;
 - (b) a key purpose of access to information under the FOI Act is to ensure contracts awarded by government to commercial undertakings, as well as the expenditure of the public funds, are better able to be subject to public scrutiny;
 - (c) there is a public interest in favour of disclosure of the information sought in order to provide transparency and accountability around government procurement and tendering processes;
 - (d) private companies contracting with government agencies should reasonably expect a greater degree of transparency and accountability given the use of public funds for the procurement and purchase of goods and services;
 - (e) while the undertaking was not agreeable to the release of the information in the documents, this is only one factor relevant to my consideration of the exemption under section 34(1)(b); and
 - (f) given the narrowed scope of information sought by the Applicant, I consider the total contract and invoice amounts can be disclosed without causing harm to the competitive position of the undertaking.
32. On the information before me, I do not accept disclosure of the relevant information would expose the undertaking unreasonably to disadvantage, for example, by putting the undertaking at a competitive disadvantage.
33. Accordingly, I am not satisfied the relevant information in the documents is exempt under section 34(1)(b).

Deletion of exempt or irrelevant information

34. 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.

⁵ Victorian Parliamentary Debates, Legislative Assembly, 11 November 1999, 350.

35. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
36. The Applicant agreed to exclude certain information from the scope of this review. Accordingly, I have determined this information to be irrelevant.
37. I have considered the effect of deleting irrelevant information from the documents. I am satisfied it is practicable to delete such information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

38. For the reasons set out above, I am not satisfied narrowed scope of information sought by the Applicant is exempt sections 34(1) or 34(1)(b) and have decided to release further information in the documents.
39. The Schedule of Documents in Annexure 1 contains my decision with respect to each document.

Review rights

40. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
43. 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.
44. 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.¹¹

When this decision takes effect

45. I have decided to release documents that contain matters of a commercial nature relating to third party business undertaking.
46. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
47. For that reason, my decision does not take effect until that 60 day period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁷ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
Annexure A Page 10 of 18	[Date]	Email	1	Released in part Sections 33(1) and 34(1)(b)	Release in part Section 25 The information in the table is not exempt under section 34 and is to be released to the Applicant. The Agency's staff name is irrelevant and is to be deleted under section 25.	Section 34(1)(a): Having reviewed the deleted information, I do not consider the deleted information to be a 'trade secret'. Section 34(1)(b): To enable a greater degree of transparency and accountability in the use of public funds, I do not consider the release of the pricing information of a business undertaking (that contracts with a government agency) would expose it unreasonably to disadvantage. Section 25: On 5 June 2019, the Applicant advised the only personal affairs information sought is the vendor's name. Further, the Applicant did not seek details within 'the invoice nor the contract, just the total amounts'. The deleted information in the documents relates to the Agency's staff's names and their contact details. I consider this information to be irrelevant.
Annexure B Page 24 of 25	[Date]	Software as a Service Subscription Licence Agreement	1	Released in part Sections 33(1) and 34(1)(b)	Release in part Section 25 The total costs in the two tables in Schedule 4 is to be released to the Applicant. The information relating to the undertaking's daily and hourly rates and costs are to be deleted under section 25.	The Applicant advised they only sought a review of Schedule 4 in Annexure B. The deleted information relates to the undertaking's daily rate and other pricing information. Sections 34(1)(a) and 34(1)(b): See comments for Document 1. Section 25: See comments for Document 1. I consider the information relating to the undertaking's daily and hourly rates and costs (other than the total amounts) to be irrelevant.

Annexure 1 – Schedule of Documents

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
Annexure C Pages 1 - 5	Various	Invoices	5	Released in part Sections 33(1) and 34(1)(b)	Release in part Section 25 The information relating to the subtotal, GST and total costs in the five invoices is not exempt and is to be released to the Applicant. Other information relating to the staff's personal information, banking details and the individual costs for the vendor's services is to be deleted under section 25.	The Applicant seeks review of the Agency's decision in relation to the invoices dated [various dates]. Sections 34(1)(a) and 34(1)(b): In relation to monetary amounts exempted by the Agency in the invoice, see comments above for Document 1. Section 25: See comments for Document 1. The document is addressed to the Agency's staff rather than the vendor. Therefore, the following information is irrelevant: <ul style="list-style-type: none"> - the Agency's staff's personal information; - the vendor's banking details; and - the individual costs for the vendor's services.