

Notice of Decision and Reasons for Decision

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| Applicant: | 'AH7' |
| Agency: | VicRoads |
| Decision Date: | 26 July 2019 |
| Exemptions considered: | Sections 34(1)(b), 34(4)(a)(ii) |
| Citation: | 'AH7' and VicRoads (<i>Freedom of Information</i>) [2019] VICmr 70 (26 July 2019) |

FREEDOM OF INFORMATION – agency engaged in trade or commerce – information of a business, commercial or financial nature – compensation valuation report – compulsory acquisition of land

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 the documents in full 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

26 July 2019

Reasons for Decision

Background to review

1. The Applicant, through its legal representative, made a request to the Agency for access to the following documents:
 1. any permit applications made by [company name]...in relation to the land contained in Certificate of Title Volume [number] Folio [number];
 2. any notices of refusal with respect to the above permit application/s, together with any supporting evidence or letters provided by a referral authority;
 3. the claim documents submitted to the VicRoads by [company name] pursuant to section 98(2) of the Planning & Environment Act 1989 in relation to the permit refusal/s, together with any supporting evidence;
 4. VicRoads statutory response to [company name's] above claim, together with any supporting evidence;
 5. the final valuation report prepared by the Valuer-General Victoria in relation to the land contained in Certificate of Title Volume [number] Folio [number] (or part therefor);
 6. the final valuation report prepared by the check-valuer engaged by the Valuer-General Victoria in relation to the land contained in Certificate of Title Volume [number] Folio [number] (or part thereof);
 7. the Certificate of Valuation relied upon by [company name] in making its claim pursuant to section 98(2) of the Planning & Environment Act;
 8. any settlement agreement between VicRoads and [company name]; and the
 9. Deed of Release between VicRoads and [company name] dated 23 February 2009.
2. The Valuer-General Victoria (**VG**V) is the responsible authority for providing advice on valuation issues regarding property transactions for sale, purchase, leave and compulsory acquisition for government agencies. To effectively perform its advice function, the VGV established and manage a Valuation Service Panel (**VSP**). The VSP comprise professionals in allied disciplines who provide valuation services, such as land valuations, on behalf of the VGV to advise government agencies involved in land transactions.
3. In the case where land is required for a public purpose, the VGV is engaged by an agency to assess the amount of compensation to be paid. Under the *Land Acquisition and Compensation Act 1986* (Vic) (**LAC Act**), land resumed for a public purpose, for example the widening of an arterial road (the subject of the documents under review), the VGV will often retain the services of a private company to provide valuation advice.¹
4. Compensation can also be paid under the provisions of the *Planning and Environment Act 1987* (Vic) (**PE Act**). This occurs where 'loss' is assessed following the sale of a property affected by an acquisition overlay or, where a planning application is refused on grounds the property is required for a public purpose.
5. In its decision, the Agency identified seven documents falling within the terms of the Applicant's request. It decided to grant access to two documents in full, four documents in part and refuse access to one document in full.

¹ Victorian State Government, Department of Environment, Land, Water and Planning website: <https://www.propertyandlandtitles.vic.gov.au/valuation/government-valuations> (accessed on 16 July 2019).

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review. On 6 May 2019, the Agency advised it did not wish to make a submission in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated 11 April 2019 and information provided with the Applicant's review application; and
 - (c) publicly available information regarding the office of the Valuer-General and its functions.
10. 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

11. The Agency relied on the exemptions in sections 34(1)(b) and 34(4)(a)(ii) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 34(4)(a)(ii)

12. A document will be an exempt document 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) the disclosure of which, would be likely to expose the Agency unreasonably to disadvantage.
13. In its decision, the Agency submits the documents contain information of a business, commercial or financial nature and release of the documents would expose the Agency unreasonably to disadvantage as:
 - (a) the information relates to settlement claims under the PE Act and compensation claims made under the LAC Act. Disclosure of the financial information connected to a settlement claim can compromise the independence of the process and bring into question any similar future process; and
 - (b) in balancing accountability and confidentiality, this is not a situation where full transparency is required.
14. For information to be exempt under section 34(4)(a)(ii) I must be satisfied the agency was engaged in trade or commerce.

15. The Agency's decision letter does not specifically address the basis upon which it is engaged in trade or commerce.
16. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case. While the phrase 'trade and commerce' may be interpreted broadly,² it has been held that trade and commerce must 'of their nature, bear a trading or commercial character'.³
17. The fact an agency's predominant activities may be described as 'governmental' does not preclude it from relying on the exemption in section 34(4)(a)(ii).⁴
18. However, in this instance, I am not satisfied the Agency is engaged in trade or commerce. I rely on the decision of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Pallas and Roads Corporation*,⁵ where the Tribunal did not accept the Roads Corporation (also known as VicRoads) is an agency engaged in trade or commerce where it is involved in arterial road building.⁶ Instead, VCAT held the Agency, in carrying out its road building functions, is engaged in governmental activities and not trade or commerce.
19. It was further noted by VCAT that, even where property transactions are carried out, they are carried out for governmental purposes and not for commercial purposes. This is because the transactions would involve the government's compulsory acquisition of land and payment of compensation for that land, which is an exercise of sovereign power rather than a commercial process, even though the Agency may carry out this function in a 'business like' manner.
20. While I do not accept the Agency is engaged in trade or commerce, I also note it has not provided any specific evidence to support its view that disclosure of the information would expose it unreasonably to disadvantage.
21. The redacted information is the market valuations, the planning schemes reserve amount and the offer of purchase for the transfer of reserved land. I accept confidentiality of valuations instructions is required so as not to bias negotiations of parties involved in the acquisition of land. However, as noted in the Applicant's submissions, the parcel of land, the subject of the documents under review, no longer exists as the land has subsequently been subdivided and sold. The documents are more than 12 years old. It is difficult to see what disadvantage the Agency would suffer by the release of this information now.
22. I note it has generally been accepted the exemption in section 34(4)(a)(ii) will not be upheld when the financial arrangements referred to are concluded matters.⁷ Therefore, I am satisfied disclosure of the information would not prejudice the Agency's negotiating position in the consideration of compensation and/or acquisition of reserved land in the future.
23. In these circumstances of this case, I do not consider the Agency is an agency engaged in trade or commerce or that disclosure of the information would expose the Agency unreasonably to disadvantage.
24. Accordingly, I am not satisfied the documents are exempt under section 34(4)(a)(ii).

² *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 per Deane J, which whom Brennan J agreed.

³ *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35]; *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, 690.

⁴ *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41].

⁵ *Pallas v Roads Corporation* [2013] VCAT 1967 (per Judge Macnamara, Vice President).

⁶ VCAT considered a number of authorities on the matter including: *Gibson v Latrobe City Council* [2008] VCAT 1340, *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, *City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR 170, *Chapman v Luminis Pty Ltd (No. 5)* (2002) 123 FCR 62, *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268, *Unilan Holdings Pty Ltd & Ors v Kerin* (1992) 35 FCR 272, *Auswest Timbers Pty Ltd v The Secretary to the Department of Sustainability and Environment* [2010] VSC 389.

⁷ See Bowman J's remarks in *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [48]; *Re City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR.

Section 34(1)(b)

25. Based on its application of section 34(1)(b), the Agency refused access to Document 5 in full. Document 5 is a Compensation Valuation Report, compiled by [company name] (the **Undertaking**), a private company, on behalf of the VGV.
26. A document is exempt under section 34(1)(b) if:
 - (a) its disclosure would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking;
 - (b) the information relates to other matters of a business, commercial or financial nature; and
 - (c) disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
27. In *Thwaites v Department of Human Services*,⁸ 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.
28. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.⁹
29. The Agency advised it had consulted with the business Undertaking who objected to the release of the report on the grounds that:
 - (a) the information was obtained by the Agency in confidence on the basis of the Undertaking's appointment to the VSP. The undertaking is protected from financial liability for negligence by that appointment and wish for the confidence to be maintained; and
 - (b) disclosure to a party to whom the valuation is not addressed would result in the undertaking falling outside the protection of VGV, but also jeopardise its own Professional Indemnity Insurance. Valuations frequently become the subject of litigation. Disclosure would expose the undertaking unreasonably to potential financial disadvantage without VGV protection and possible reputational risk.
30. For the purposes of this review, I am satisfied information in the document has been acquired by the Agency from the Undertaking as required by section 34(1)(b). I am also satisfied the document contains information that relates to matters of a business, commercial or financial nature. Therefore, I must consider whether disclosure of the document would expose the Undertaking unreasonably to disadvantage.
31. In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, an agency may take account of the factors set out in section 34(2) and consider:
 - (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

⁸ (1999) 15 VAR 1.

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

- (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.

32. I have also had regard to the VCAT decision, *Dalla Riva v Department of Treasury and Finance*¹⁰ in which the Tribunal held a document will be exempt under section 34(1)(b) if disclosure would:
- (a) give a competitor of the undertaking a competitive financial advantage;
 - (b) enable that competitor to engage in destructive competition with the undertaking; or
 - (c) would lead to the drawing of unwarranted conclusions as to the undertaking's financial affairs and position with commercial market consequences.
33. I consider the exemption in section 34(1) contemplates a commercial undertaking may be exposed to a certain level of disadvantage due to disclosure of a document under the FOI Act. However, something more than commercial disadvantage is required in order to satisfy the requirements of this exemption; namely, whether the undertaking is likely to be exposed unreasonably to disadvantage.
34. Based on the information before me, I am not satisfied disclosure of the documents would be likely to expose the Undertaking unreasonably to disadvantage. I form this view, notwithstanding the submissions of the Agency and the Undertaking that release of the document would cause substantial financial or commercial harm to the Undertaking.
35. I have considered the following factors relevant to my decision:
- (a) The document was created to provide valuation services to the VGV on a section of land 'resumed' by the government. The Undertaking compiled the document as part of its ordinary course of business and provided the document to the VGV in accordance with the principles set out in Part 4 of the LAC Act. I consider there is nothing sensitive about the document or the way in which the information was acquired by the Agency such that release would give a competitor of the Undertaking a financial advantage or would allow destructive competition in respect to the Undertaking as a VSP appointed valuer.
 - (b) I accept there are circumstances where disclosure of a document provided in confidence to an agency will impact upon the expectation of confidential dealings, which may satisfy the requirement that it 'would be likely to expose the undertaking unreasonably to disadvantage'. However, I am not persuaded by such arguments in this case, particular when compensation negotiations are concluded matters and arrangements regarding the subject land have already been put in place. I am not satisfied disclosure of the document would discourage others, including the government, from engaging in business with the Undertaking in the future.
 - (c) As submitted by the Applicant, due to the passage of time since the document was provided to the Agency (approximately 12 years ago) the document is not relevant to any trade or commerce. I accept the Applicant's submission and further remark, that given the fluctuating and changing nature of property prices in Victoria over a period of time, I consider information of a financial nature in the document would be substantially out of date. This means

¹⁰ [2007] VCAT 1301 at [33].

commercial or financial information in the document could not be reasonably relied upon by a competitor of the Undertaking in relation to a future or similar transaction.

- (d) It is not the role of this review to comment on whether the Undertaking was negligent in its duties and whether disclosure would risk a possible claim against the Undertaking. In any event, as previously noted above, given the passage of time and that the document concerns a property transaction long since concluded, I do not consider the disadvantage contemplated by the Agency would be likely in the circumstances.
- (e) In *Green v Department of Human Services*,¹¹ VCAT accepted disclosure of an undertaking's methodology, where its competitors do not use the same approach, would cause it unreasonable disadvantage because it would provide a ready-made starting point. However, I am not satisfied the Agency, or the Undertaking has provided evidence to satisfy me the documents would reveal any special methodology, technology, equipment or tactics used by the Undertaking that, if released, would impair it from continuing to compete within the property and land industry.
- (f) Lastly, in circumstances where the transfer of responsibility for the provision of public services is undertaken by a private body, such as in this case, commercial undertakings should expect that their dealings with government will be subject to a higher level of scrutiny and accountability. Further, information provided to an agency by a commercial undertaking may be released under the FOI Act.¹²

Transactions between private entities and the government take on a different hue and the same level of commercial confidence cannot be afforded to such transactions and the subsidiary documents related to them, particularly where it involves the spending of public funding. I consider disclosure of the document to the Applicant is in the public interest and supports open and accountable actions of government in the compulsory acquisition of land. Disclosure of such information serves to 'inform the values required by legislation' to allow a person with an interest in acquired land (such as in the Applicant's case) to 'accurately assess and prepare a claim(s) for compensation'.

36. Having considered the document in conjunction with the factors outlined in section 34(2), I am satisfied any disadvantage to which the Undertaking may be exposed is not unreasonable in the circumstances. I therefore do not consider the document is exempt under section 34(1)(b).

Conclusion

37. On the information available, I am not satisfied the exemptions in sections 34(1)(b) and 34(4)(a)(ii) apply to the documents. I have decided to grant access to the documents in full.
38. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

39. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴

¹¹ [2014] VCAT 1233 at [25].

¹² This was noted by Deputy President Galvin in *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR 427 at [477].

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
42. 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.
43. 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.¹⁶

When this decision takes effect

44. I have decided to release documents that contain matters of a commercial nature relating to third party business undertaking.
45. 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.
46. 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.

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

| Document No. | Date of Document | Document Description | Number of Pages | Agency's Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|--|-----------------|---|-----------------|--|
| 1. | [Date] | Correspondence – WCC documents | 7 | Released in full | N/A | Not subject to review |
| 2. | [Date] | Letter – URBIS Valuations | 4 | Released in full | N/A | Not subject to review |
| 3. | undated | Letter from VicRoads | 1 | Refused in part Section 34(4)(a)(ii) | Release in full | <p>Section 34(4)(a)(ii): As the Agency is not engaged in trade or commerce in this context, I am not satisfied the document is not exempt.</p> <p>In any case, I am not satisfied its disclosure would expose the Agency unreasonably to disadvantage given the passage of time and that the financial information in the documents concerns matters long since concluded.</p> |
| 4. | [Date] | Letter from the Valuer General to VicRoads | 3 | Refused in part Section 34(4)(a)(ii) | Release in full | See my reasons in Document 3 above. |
| 5. | [Date] | [Company name] – Compensation Valuation Report | 36 | Refused in full Section 34(1)(b) | Release in full | <p>Section 34(1)(b): I am not satisfied the Undertaking would be exposed unreasonably to disadvantage as I do not consider release of the document would result in giving a competitor of the Undertaking a competitive financial advantage or would allow destructive competition against the Undertaking.</p> <p>Further, I accept the position of the Applicant that given the age of the document and the</p> |

Annexure 1 – Schedule of Documents

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|---------------------|-------------------------|----------------------------------|------------------------|---|----------------------|--|
| | | | | | | subject land no longer exists that the document no longer relevant in trade or commerce. |
| 6. | [Date] | Deed of Release – Financial Loss | 5 | Refused in part Section 34(4)(a)(ii) | Release in full | See my reasons in Document 3 above. |
| 7. | [Date] | Deed of Release | 4 | Refused in part Section 34(4)(a)(ii) | Release in full | See my reasons in Document 3 above. |