

Notice of Decision and Reasons for Decision

Applicant:	'AU2'
Agency:	Victorian WorkCover Authority
Decision date:	3 December 2019
Exemption considered:	Section 34(4)(a)(ii)
Citation:	'AU2' and Victorian WorkCover Authority (<i>Freedom of Information</i>) [2019] VICmr 183 (3 December 2019)

FREEDOM OF INFORMATION – expenses incurred in engaging contractors via recruitment agencies – temporary contractors – salary information – commercially sensitive information – agency engaged in trade and commerce

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 fresh 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.

I am not satisfied information deleted by the Agency in Document 3 is exempt under section 34(4)(a)(ii).

As I am satisfied it is practicable to edit Document 3 to delete irrelevant information, I have decided to grant access to Document 3 in part.

The Schedule of Documents in **Annexure 1** sets out my decision.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
3 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

The Salary Maximum hourly rate including agency on costs ex GST Soft/Technical skill set requirements & Position Description. Salary Grading of the position From [the Agency]. For the temporary role [the Applicant] was engaged in from [dates].
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to release the 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. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
5. In making its fresh decision on [date], the Agency identified an additional document relevant to the terms of the Applicant's request. It decided to refuse access to the document in full.
6. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
7. On [date], the Applicant advised they no longer seek review of the Agency's decision in relation to Documents 1 and 2. Accordingly, my review concerns Document 3 only.
8. I have examined a copy of the document 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 dated [date];
 - (b) the Applicant's submission dated [date]; and
 - (c) all correspondence from the Agency and the Applicant in relation to this review and concurrent complaint.
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 exemption under section 34(4)(a)(ii) to refuse access to Document 3 in full.
13. Document 3 contains various columns with quarterly figures setting out expenses incurred by the Agency in engaging contract staff through recruitment agencies and a table setting out how the

Applicant's hourly rate may have been calculated by a recruitment agency during the relevant contract period.

14. The terms of the Applicant's FOI request specifically refer to 'salary maximum hourly rate including agency on costs excluding GST' regarding the Applicant's employment from [month] to [month and year].
15. Having reviewed the table titled 'Maximum Hourly Rate including Agency on Costs ex GST', I consider the relevant column of quarterly figures that applied during the Applicant's employment is the column titled [month and year] which covers salary figures for the relevant period.
16. Accordingly, I am satisfied information in the table that relates to quarterly figures for periods outside the relevant contract period fall outside the scope of the Applicant's request and is irrelevant.

Section 34(4)(a)(ii)

17. A document is exempt under section 34(4)(a)(ii) if:
 - (a) the agency is engaged in trade or commerce;
 - (b) the information is of a business, commercial or financial nature; and
 - (c) the disclosure of which would be likely to expose the agency unreasonably to disadvantage.

Is the Agency engaged in trade or commerce?

18. The Agency's decision letter does not explain the basis upon which it considers it is engaged in trade and commerce for the purposes of section 34(4).
19. Whether an agency is engaged in trade and commerce depends on the facts and circumstances of each case. While the phrase 'trade and commerce' may be interpreted broadly,¹ it has been held trade and commerce must 'of their nature, bear a trading and commercial character'.²
20. Further, the Victorian Civil and Administrative Tribunal (**VCAT**) has held 'the terms 'trade' and 'commerce' are expressions of fact and terms of common knowledge'.³ VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.⁴
21. An agency may be engaged in trade and commerce even if the trade or commerce in which it is engaged is insignificant and only incidental to its other functions.⁵
22. The fact an agency's main functions may be described as 'governmental' does not preclude it from relying on the exemption in section 34(4)(a)(ii).⁶
23. An agency may also be engaged in trade and commerce even if profit is not one of its express statutory objectives.⁷
24. Therefore, I must be satisfied the Agency's engagement of contract staff through recruitment agencies amount to the Agency engaging in 'trade or commerce' for the purposes of the FOI Act.

¹ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 per Deane J, which whom Brennan J agreed.

² *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [35]; *Concrete Constructions (NSW) Pty LTD v Nelson* (1990) 169 CLR 594, 690.

³ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

⁴ *Ibid* at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at 649.

⁵ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

⁶ *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41].

⁷ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR 427 at [473].

25. In this instance, the Agency engaged the services of a recruitment agency to provide the Agency with temporary contract staff. Contract staff engaged through this process are not employed nor paid by the Agency directly.
26. While I accept there is a contractual relationship between the Agency and the recruitment agency, I am not satisfied the Agency is necessarily engaged in trade and commerce by means of procuring temporary staff through a recruitment agency as I am of the view it is not an activity that is inherently commercial in nature as it relates to the Agency's ordinary staffing and resourcing functions.
27. While I am not satisfied the Agency is engaged in trade in commerce, for completeness, I have considered the second and third limbs of section 34(4)(a)(ii).

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

28. The phrase 'information of a business, commercial or financial nature' is not defined in the FOI Act. Therefore, the words 'business, commercial or financial nature' should be given their ordinary meaning.⁸
29. As discussed above, Document 3 contains various tables setting out the Agency's expenses engaging contractors through recruitment agencies. The expenses are broken down by salary bands in six-month increments for a period of 3.5 years. It includes information relating to the total cost of employment and the maximum daily and hourly rate, including the Agency's on costs excluding GST.
30. I am satisfied the document contains commercial and financial information.

Will disclosure likely expose the Agency unreasonably to disadvantage?

31. I consider the exemption contemplates disclosure of a document under the FOI Act may expose an agency to a certain measure of disadvantage, and that any such exposure must be unreasonable in the circumstances.
32. In its fresh decision, the Agency advised disclosure of Document 3 will expose the Agency unreasonably to disadvantage as:
 - (a) the information is commercially sensitive because the document sets out the maximum daily and hourly rates that the Agency pays per salary band;
 - (b) this information is not generally known to the Agency's employees, contractors or competitors;
 - (c) disclosure of this information would compromise the Agency's negotiations with current and future contractors and employees; and
 - (d) if the information were known to recruitment agencies, it could reasonably be expected the Agency's on costs will increase.
33. The Applicant submitted:

The reason I am requesting my own salary information is that there is currently an allegation of Payment Below the Legislated minimums in line with the Award and Fair Work Act.

⁸ *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

It would not be considered unreasonable or a disadvantage to the organisation to pay contractors in line with the legal minimums and it is in the public interest that they do so and that they are transparent and accountable and come under scrutiny for this.

The right to access government held information is essential for transparent and accountable government in a democratic society, by promoting and facilitating greater public participation and scrutiny and supporting better decision-making.

34. Having reviewed the document and considered the submissions made, I am not satisfied disclosure of relevant information in the document would be likely to expose the Agency unreasonably to disadvantage. While I accept the information is not generally known to the Agency's employees, contractors or recruitment agencies, I do not consider the figures to be commercially sensitive as they are no longer current. In addition, the Applicant only seek information relating to a specific period of time, which limits any potential disadvantage to which the Agency may be exposed. Therefore, I do not consider recruitment agencies, employees and contractors could or would take advantage of such information in future negotiations.
35. Accordingly, I am not satisfied the information is exempt under section 34(4)(a)(ii).
36. The Schedule of Documents in **Annexure 1** contains a brief summary of my decision with respect to the document.

Deletion of exempt or irrelevant information

37. 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.
38. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰
39. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

40. On the information available, I am not satisfied the exemption in section 34(4)(a)(ii) applies to the document.
41. As I am satisfied it is practicable to edit the documents to delete irrelevant information, I have determined to grant access to the document in part.

Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹

⁹ *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].

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
45. 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.
46. 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.¹⁴

When this decision takes effect

47. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ 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]	Email chain between the Agency and the Applicant	2	Released in part Section 33(1)	Not subject to review	On [date], the Applicant advised they no longer sought review of this Document.
2.	[Date]	Email chain between the Agency and an employment agency	3	Released in part Section 33(1)	Not subject to review	On [date], the Applicant advised they no longer sought review of this Document.
3.	N/A	Maximum daily and hourly rates per salary band	1	Refused in full Section 34(4)(a)(ii)	Release in part Section 25 The document contains irrelevant information that falls outside the scope of this review, which is to be deleted under section 25, except relevant and non-exempt information in the table titled 'Maximum Hourly Rate including Agency on Costs ex GST' which is to be released: <ul style="list-style-type: none"> • column one, 'Salary Band'; • column four, '[month-year]'; and • row one, containing the title of the table. 	<p>Section 34(4)(a)(ii): For the reasons outlined above, I am not satisfied the Agency was engaged in trade and commerce. Further, I do not consider release of the financial and commercial information in the document would be likely expose the Agency unreasonably to disadvantage.</p> <p>Section 25: I consider all tables except for the table titled 'Maximum Hourly Rate including Agency on Costs ex GST' outside of the scope of the Applicant's FOI request. Further, I consider only columns one and four and row one (title of the table) are within the scope of the Applicant's FOI request.</p> <p>The remainder of the document is</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						to be deleted in accordance with section 25.