

## Notice of Decision and Reasons for Decision

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Applicant:	'BC6'
Agency:	Bayside City Council
Decision Date:	17 February 2020
Exemption considered:	Section 34(1)(b)
Citation:	'BC6' and Bayside City Council ( <i>Freedom of Information</i> ) [2020] VICmr 30 (17 February 2020)

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FREEDOM OF INFORMATION – documents acquired by an agency – documents submitted to council – use of public land – community market – business affairs information

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.

I am not satisfied the documents are exempt under section 34(1)(b).

As I am satisfied it is practicable to delete irrelevant information from the documents, namely the personal affairs information, I have decided to grant access to the documents in part in accordance with section 25.

The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
17 February 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the initial request.
2. The clarified request sought access to:
  1. All documents which were provided by the operator of the [specified] market to the Council in connection with the decision.
  2. All documents which record any information (letters, emails, reports, etc) which was provided by or sent to the operator of the [specified] Market to the Council in connection with this decision.
  3. All documents on which the Council relied to make the decision.

The request search should be between the [specified date] and the [specified date].
3. In its decision, the Agency identified four documents falling within the terms of the Applicant's request. It decided to release one document in full, grant access to two documents in part and refuse access to one document in full.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant indicated they only seek review of the Agency's application of section 34(1)(b) to Document 4 and certain parts of Document 1 and did not require review of information not considered under section 14 or personal affairs information of any individuals named in the documents. Accordingly, this review relates to information in Documents 1 and 4 which the Agency exempted under section 34(1)(b).
6. I have examined copies of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. 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 and subsequent correspondence with OVIC; and
  - (c) the Agency's submission dated 5 February 2020.

### Review of exemptions

9. The Agency relied on the exemption in section 34(1)(b) to refuse access to Document 4 and parts of Document 1. The Agency's decision letter sets out the reasons for its decision.

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

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10. 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.
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. Section 34(2) also 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.

14. I have also had regard to VCAT's approach in *Dalla-Riva v Department of Treasury and Finance*,<sup>3</sup> where VCAT held documents are exempt under section 34(1)(b) if disclosure would:
  - (a) give competitors of a business undertaking a financial disadvantage;
  - (b) enable competitors to engage in destructive competition with the business undertaking; and
  - (c) would lead to the drawing of unwarranted conclusions as to the business undertaking's financial affairs and position with detrimental commercial and market consequences.

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

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

<sup>3</sup> [2007] VCAT 1301 at [33].

*Do the documents contain information acquired from a business undertaking related to matters of a business, commercial or financial nature?*

15. The documents consist of a letter sent to the Agency concerning a request for planning advice along with seven attachments and an email authored by the business undertaking.
16. I am satisfied the document was acquired by the Agency from a business undertaking and relates to matters of a business, commercial or financial nature.
17. Therefore, I must consider whether disclosure of the documents would be likely to expose the business undertaking unreasonably to disadvantage.

*Would disclosure of the information likely expose the undertaking unreasonably to disadvantage?*

18. In summary, the Agency determined disclosure of the documents would be likely to expose the business undertaking unreasonably to disadvantage on grounds:
  - (a) The documents were provided to the Agency 'for the purpose of seeking information about the need for a planning permit on a particular site. It was not expected that this document would be distributed further'.
  - (b) Having consulted with the business undertaking under section 34(3), the Agency stated the undertaking objected to release of the document and 'has concerns that releasing the document will make it available to competitors who may take advantage of the information contained within the document and seek to use it for an advantage in the competitive market place in which the business plies its trade'.
  - (c) 'There is a risk the professional reputation of the business owner could be compromised, and the business would be adversely affected if the document is released'.
  - (d) '[I]t is in the public interest to preserve' the intention of confidentiality with which the documents were provided to the Agency.
19. I acknowledge the business undertaking objects to disclosure of documents concerning their operation of the community market.
20. I note another council and the relevant school council did not object to release of documents sought by the Applicant in relation to which they were consulted by the Agency as part of its FOI decision making process.
21. Having carefully considered the purpose and content of the documents, I am not satisfied their disclosure would be likely to expose the business undertaking unreasonably to disadvantage, for the following reasons:
  - (a) The Agency sought the views of the business undertaking in accordance with section 34(3). Although the business undertaking objected to disclosure of the documents, in my view, the response was general in nature and did not provide specific information about how disclosure of the documents would 'unreasonably' expose the business undertaking to disadvantage.
  - (b) I consider the phrase in section 34(1)(b) to 'expose the undertaking unreasonably to disadvantage', contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word 'unreasonably' in section 34(1), it is my view, Parliament determined this exemption only apply where a business undertaking would be exposed 'unreasonably' to any disadvantage, rather than where disclosure would result in any exposure to disadvantage.

- (c) While information in the documents may or may not be known to competitors of the business undertaking, in my view, it is unlikely the documents can be exploited for the purposes of other similar projects as the documents were prepared for a specific local community market and location. While the nature of issues discussed and considered in the documents may be similar between markets, I consider it is reasonably likely each market will have specific requirements or issues unique to the location and operation of the particular market. Therefore, on the information before me, I am not satisfied information in the documents is of a nature that it would give a competitor of the business undertaking a financial advantage or allow them to engage in destructive competition with the business undertaking.
  - (d) I am satisfied the Applicant's interest in obtaining access to the documents relates to an Agency decision to permit the operation of a privately run community market on the grounds of a public school. While I acknowledge the nature of release under the FOI Act is unrestricted and unconditional, I do not consider the documents are being sought by a commercial competitor of the business undertaking. The Applicant appears to seek the documents in relation to concerns arising from the operation of the market, rather than for the purpose of obtaining a competitive financial advantage.
  - (e) I am not satisfied the documents would be exempt if they were generated by an agency or a Minister given the public interest in members of the public being able to inform themselves about the use of public land, including by private business undertakings, and decisions made in relation to and the regulatory oversight by public sector agencies of such land use.
  - (f) Finally, in undertaking my review, I have had regard to the object of the FOI Act in section 3(1), which is to create a general right of access to information in the possession of government or other public bodies, limited only by exceptions and exemptions necessary to protect 'essential' public interests, privacy and business affairs. This broad right provides any person may request access to any document held by an agency without cause or connection to a document or its subject matter. Further, section 3(2) of the FOI Act provides it is Parliament's intention the provisions of the FOI Act must be interpreted to further the object of the Act.
22. In light of the above factors, I am not satisfied disclosure of Documents 1 and 4 would expose the business undertaking unreasonably to disadvantage and, therefore, the documents are not exempt under section 34(1)(b).
23. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each document.

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

24. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
25. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>4</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>5</sup>

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<sup>4</sup> *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].

<sup>5</sup> *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].

26. I have considered the effect of deleting irrelevant information from the documents. I am satisfied it is practicable to delete the irrelevant information, as to do so would not require substantial time and effort and the edited documents would retain meaning.

### **Conclusion**

27. On the information before me, I am not satisfied the documents are exempt under section 34(1)(b).
28. As I am satisfied it is practicable to delete irrelevant information from the documents, namely, the personal affairs information, I have decided to grant access to the documents in part in accordance with section 25.

### **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>6</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>7</sup>
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>8</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>9</sup>

### **When this decision takes effect**

34. I have decided to release documents that contain information relating to matters of a commercial nature relating to a third party business undertaking.
35. The business undertaking will be notified of my decision and is entitled to apply to VCAT for a review of my decision within 60 days from the date they are given notice of my decision.
36. 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.

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<sup>6</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> 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]	Request for Planning Advice	62	Released in part  Sections 14 and 34(1)(b)	Release in part  Section 25  The document is to be released with the following irrelevant information deleted in accordance with section 25:  <ul style="list-style-type: none"> <li>• First and last name of the recipient at top of page 1;</li> <li>• Email cc above the date on page 1;</li> <li>• Mobile phone number and email address at the bottom of page 1;</li> <li>• Signature and name at the bottom of page 8;</li> <li>• Seven pages in Attachment 2, except for the cover page;</li> <li>• Seven pages in Attachment 4, except for cover page; and</li> <li>• Names, emails, position title and mobile phone number on the page titled, 'Attachment 5'.</li> </ul>	<p><b>Section 34(1)(b):</b> I am not satisfied disclosure of the document would be likely to expose the business undertaking unreasonably to disadvantage for the reasons set out in the notice of decision above.</p> <p><b>Section 25:</b> Personal affairs information and information falling under section 14 has been deleted as I am satisfied it falls outside the scope of the review and is irrelevant.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
2	[date]	Online Request for Planning advice	10	Released in part Section 14	Not subject to review	
3	[date]	Email with Attachment	3	Released in part	Not subject to review	
4	[date]	Email	1	Refused in full Section 34(1)(b)	<p>Release in part Section 25</p> <p>The document is to be released with the following irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> <li>• The first and last name at the top of the page;</li> <li>• The email address of the sender;</li> <li>• The first name in the subject line and in the opening sentence of the email; and</li> <li>• First and last name of the sender at the bottom of the page.</li> </ul>	<p><b>Section 34(1)(b):</b> I am not satisfied disclosure of the document would be likely to expose the business undertaking unreasonably to disadvantage for the reasons set out in the notice of decision above.</p> <p><b>Section 25:</b> Personal affairs information has been deleted as I am satisfied it falls outside the scope of the review and is irrelevant.</p>