

Notice of Decision and Reasons for Decision

Applicant:	'BF7'
Agency:	Department of Education and Training
Decision Date:	12 March 2020
Exemptions considered:	Sections 30(1), 34(1)(b) and 35(1)(b)
Citation:	'BF7' and Department of Education and Training (<i>Freedom of Information</i>) [2020] VICmr 58 (12 March 2020)

FREEDOM OF INFORMATION – documents acquired by an agency – use of public land – community market – business affairs information – business proposal – confidential information – internal working documents

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.

Joanne Kummrow

Public Access Deputy Commissioner

12 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to documents relating to the operation of a community market on the premises of a public school.
2. In its decision, the Agency identified 59 documents falling within the terms of the Applicant's request and decided to:
 - (a) grant access to 11 documents in full;
 - (b) release 43 documents in part; and
 - (c) refuse access to five documents in full.

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 indicated they seek review of the following documents only: Documents 1, 2, 3 – 6, 9, 10, 14, 17-20, 24, 26, 56 and 59 to the extent the Agency relied upon section 34(1)(b) to exempt these documents. However, certain information exempted under section 34(1)(b) was also exempted by the Agency under other exemptions. In such circumstances, where necessary, I will consider all exemptions relied on the Agency.
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) the Applicant's submission dated 3 February 2020 and information provided with the Applicant's review application;
 - (c) the Agency's submission dated 31 January 2020; and
 - (d) correspondence between OVIC staff, the Agency and the Applicant.
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 sections 30(1), 32(1), 33(1), 34(1)(b) and 35(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 34(1)(b)

10. Section 34(1)(b) provides a document is an exempt document if:
 - (a) its disclosure under the FOI Act would disclose information acquired by an agency from a business, commercial or financial undertaking;
 - (b) the information relates to matters of a business, commercial or financial nature; and
 - (c) disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
11. In *Thwaites v Department of Human Services*,¹ 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. The words 'business, commercial or financial nature' have their ordinary meaning.²
13. 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.
14. I have also had regard to VCAT's approach in *Dalla-Riva v Department of Treasury and Finance*,³ where VCAT held documents are exempt under section 34(1)(b) if disclosure would:
 - (a) give competitors of a business undertaking a financial advantage;
 - (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.

¹ (1999) 15 VAR 1.

² *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

³ [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 relate to business proposals, insurance documentation and other communications relating to specific details concerning business practices.
16. Accordingly, I am satisfied the documents contain information acquired from a business undertaking relating to matters of a business, commercial or financial nature.

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

17. The Agency determined disclosure of the documents would be likely to expose the business undertaking unreasonably to disadvantage.
 18. Following consultation, in accordance with section 34(3), the business undertaking advised the Agency it objected to the disclosure of information in the documents on the grounds release of the information would allow for its competitors to access information relating to the undertaking's specific processes and industry expertise (in relation to the operation of community markets and events) and this would subsequently enable them to have a competitive advantage over the undertaking.
 19. 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 undertaking objected to disclosure of the documents, in my view, the response was general in nature and did not provide specific information as to how disclosure of the documents would 'unreasonably' expose the undertaking to disadvantage.
 - (b) I consider the phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b), 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)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed 'unreasonably' to disadvantage only, rather than where disclosure would result in any measure of 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 its location and operation. Therefore, on the information before me, I am not satisfied information in the documents is of a nature such that it would give a competitor of the business undertaking a competitive 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.
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- (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) 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.

20. In light of the above factors, I am not satisfied disclosure of the documents would expose the undertaking unreasonably to disadvantage and the documents are not exempt under section 34(1)(b).

Section 30(1)

21. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

22. The exemption does not apply to purely factual material in a document.⁴

23. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁵

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;

⁴ Section 30(3).

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the agency would not otherwise be able to explain upon disclosure of the documents;
- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.

24. My decision in relation to the application of section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 35(1)(b)

25. A document is exempt under section 35(1)(b) if two conditions are satisfied:

- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
- (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

26. Whether information communicated by an individual was communicated in confidence is a question of fact.⁶ When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁷ Confidentiality can be express or implied from the circumstances of a matter.⁸

27. In deciding whether disclosure would be contrary to the public interest, I must consider whether disclosure of the document would be reasonably likely to impair the Agency's ability to obtain similar information in the future.

28. My decision in relation to the application of section 35(1)(b) is set out in the Schedule of Documents in **Annexure 1**.

Deletion of exempt or irrelevant information

29. 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.

30. 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

⁶ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

⁷ *Ibid*, XYZ at [265].

⁸ *Ibid*.

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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁰

31. The Applicant has out-scoped certain documents and the Agency's application of exemptions other than section 34(1)(b) from this review. Accordingly, these documents and such information are irrelevant to my review.
32. I have considered the effect of deleting irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable to delete irrelevant information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

33. On the information before me, I am not satisfied the documents are exempt under sections 30(1), 34(1)(b) or 35(1)(b).
34. As I am satisfied it is practicable to delete irrelevant from the documents, I have decided to grant access to the documents in part in accordance with section 25.

Review rights

35. 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
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
38. 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.
39. 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

40. I have decided to release documents that contain information relating to matters of a commercial nature relating to a third party business undertaking.
41. The business undertaking 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 of my decision.
42. 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.

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).

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	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	[date]	School Council Licence	10	Released in part Sections 33(1) and 34(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): For the reasons in my decision above, I am not satisfied the release of the commercial information in the documents would expose the undertaking unreasonably to disadvantage. Section 25: The Applicant excluded personal affairs information from the scope of their FOI request to the Agency. I consider any personal affairs information to be irrelevant.
2	[date]	Certificate of Currency	2	Refused in full Sections 33(1) and 34(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 25: See comments for Document 1 above.
3	Undated	Market Operation Plans	22	Refused in full Sections 33(1) and 34(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 25: See comments for Document 1 above. The personal affairs information in this document also extends to images of individuals.
4	Undated	Expression of Interest Letter	3	Released in part Sections 33(1) and 34(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is	Section 34(1)(b): See comments for Document 1 above. Section 25: See comments for Document 1 above.

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Document No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					to be deleted in accordance with section 25.	
5	Undated	Market Operation Plans	16	Released in part Sections 33(1) and 34(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 25: See comments for Document 1 above.
6	[date]	Property Enquiry Letter	2	Released in part Sections 33(1), 34(1)(b) and 35(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 35(1)(b): The document is a letter from the Council. The deleted information relates to planning controls in relation to a community market event. I do not consider this information was communicated to the Agency in confidential circumstances. Even if it were, I do not consider the disclosure of this information would impair the Agency's ability to obtain similar information from planning applicants in the future. Accordingly, this information is not exempt under section 35(1)(b). Section 25: See comments for Document 1 above.
9	[date]	Email	2	Released in part Sections 33(1), 34(1)(b) and 35(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 35(1)(b): The deleted information relates to information provided by the business undertaking to the Agency in the course of discussing the operation of the community market on the school's premises. I do not consider the release of such information would impact on the Agency's ability to obtain similar information in future negotiations or discussions with business undertakings of this nature. Accordingly, this information is not exempt under section

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Document No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						35(1)(b). Section 25: See comments for Document 1 above.
10	[date]	Email	3	Released in part Sections 33(1), 34(1)(b) and 35(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 35(1)(b): See comments for Document 9 above. Section 25: See comments for Document 1 above.
14	[date]	Email	2	Released in part Sections 33(1), 34(1)(b) and 35(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 35(1)(b): See comments for Document 9 above. Section 25: See comments for Document 1 above.
17	[date]	Email	2	Released in part Section 33(1)	Not subject to review	On [date], the Applicant agreed to exclude this document from the scope of the review.
18	[date]	Email	2	Released in part Sections 33(1), 34(1)(b) and 35(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 35(1)(b): See comments for Document 9 above. Section 25: See comments for Document 1 above.

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19	[date]	Tax Invoice	7	Refused in full Sections 33(1), 34(1)(b) and 35(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 35(1)(b): The document is an insurance tax invoice. See comments for Document 9 above. Section 25: See comments for Document 1 above.
20	Undated	Risk Assessment for jumping castles	6	Refused in full Sections 33(1) and 34(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 25: See comments for Document 1 above.
24	[date]	Email	1	Released in part Sections 33(1) and 34(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1 above. Section 25: See comments for Document 1 above.
26	[date]	Email	1	Released in part Sections 33(1) and 34(1)(b)	Release in part Section 25 The document is to be released except for personal affairs information which is	Section 34(1)(b): See comments for Document 1 above. Section 25: See comments for Document 1 above.

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					to be deleted in accordance with section 25.	
56	[date]	Email	6	Released in part Sections 30(1), 33(1), 34(1)(b) and 35(1)(b)	Release in part Sections 25 The document is to be released except for personal affairs information which is to be deleted in accordance with section 25.	<p>Section 25: The Applicant does not seek review of the Agency's application of sections 35(1)(b), 33(1) and 30(1). I consider the circumstances where these exemptions have been applied in isolation to be irrelevant to the review.</p> <p>However, the email dated [date] applies the above exemptions in conjunction with section 34(1)(b). This email is within the scope of this review.</p> <p>Section 34(1)(b): See comments for Document 1 above.</p> <p>Section 35(1)(b): The email was sent by an Agency officer in the course of their professional duties. I am not satisfied the release of this email would impair the Agency's ability to obtain such information in the future. Accordingly, this information is not exempt under section 35(1)(b).</p> <p>Section 30(1): I do not consider the release of the deleted information would be contrary to the public interest because it is not particularly sensitive. I am not satisfied the release of this information would mislead the public or be likely to stifle internal debate and discussion. Accordingly, this information is not exempt under section 30(1).</p>
59	Undated	Working with Children Check	1	Refused in full Section 33(1)	Refuse in full Section 25	<p>This document relates to an individual's Working with Children Check certification.</p> <p>Section 25: The Applicant agreed to redact any personal affairs information from the document. I do not consider it is practicable to delete such information in this document as to do so would render the document meaningless. Accordingly, access to this document is</p>

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						refused in full.