

Notice of Decision and Reasons for Decision

Applicant:	'BH7'
Agency:	Monash University
Decision date:	20 March 2020
Exemptions considered:	Sections 33(1) and 34(4)(a)(ii)
Citation:	'BH7' and Monash University (<i>Freedom of Information</i>) [2020] VICmr 76 (20 March 2020)

FREEDOM OF INFORMATION – heads of agreement – research agreement – senior staff members – professional obligations and duties – university research agreement – business contract – commercially sensitive 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 the document in part.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

20 March 2020

Reasons for Decision

Background to review

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

The research agreement that was signed this month between Monash University and [international Corporation].
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to the document 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. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. 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;
 - (c) the Agency's submissions dated [two dates specified]; and
 - (d) correspondence between OVIC staff and the Agency.
7. 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

8. The Agency relied on the exemptions under sections 33(1) and 34(4)(a)(ii) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Section 34(4)(a)(ii)

9. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, 'in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage'.

Is the Agency engaged in trade or commerce?

10. The Victorian Civil and Administrative Tribunal (**VCAT**) has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'.¹ VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.²

¹ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

11. In its submission, the Agency stated:

The *Monash University Act 2009*, [section] 5(i), specifically states that one of the objects of the University is to “utilise or exploit its expertise and resources, whether commercially or otherwise”. The [agreement] is itself evidence of the University engaging in trade or commerce.

12. On the information before me, I am satisfied the Agency is engaged in trade or commerce.

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

13. The phrase ‘information of a business, commercial or financial nature’ is not defined in the FOI Act. VCAT has recognised these words have their ordinary meaning.³

14. The document is a contract between the Agency and the [international Corporation]. I am satisfied it contains information of a business, commercial or financial nature.

Would disclosure be likely to expose the Agency unreasonably to disadvantage?

15. The exemption under section 34(4)(a)(ii) contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage; however, any such exposure must be unreasonable.

16. The Agency submitted the release of the contractual information in the document would expose it unreasonably to disadvantage for the following reasons:

- (a) it would damage the trust built up between the Agency and [the international Corporation] such that [the international Corporation] would be reluctant to enter into future agreements with the Agency;
- (b) release of documents though FOI would constitute a breach of confidentiality;
- (c) the subsequent loss of funding and research opportunities from the business entity;
- (d) the knowledge that the Agency was not able to retain its agreement with a large private company is likely to disadvantage the Agency’s ability to enter into agreements with other business entities; and
- (e) the release of the information would allow other competing universities from access information from which they could strengthen their bargaining position in future negotiations.

17. Having carefully reviewed the documents, I am of the view disclosure of the document would not unreasonably expose the Agency to disadvantage for the following reasons:

- (a) I am of the view it is in the public interest to disclosure such documents as it promotes good governance, transparency and accountability in government decision-making and contracting with private entities.
- (b) Most of the contract appears to contain standard forms of contracts that discuss the parties’ rights, responsibilities and obligations as well as other aspects such as governance structures, branding and avenues for dispute resolution. In my view, these clauses do not contain

² *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

³ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

information that is particularly commercially sensitive – the disclosure of which would expose the Agency to any competitive, reputational or other disadvantage.

- (c) I do not consider the release of the document would unreasonably expose the Agency to disadvantage in future negotiations with [the international Corporation] or with other similar entities because private entities contracting with public institutions should reasonably expect a greater degree of public scrutiny and transparency.
- (d) I note there may exist a certain measure of disadvantage arising from government agencies not being able to afford a level of confidentiality in dealings with commercial entities. However, VCAT has held this measure of disadvantage should not be regarded as unreasonable.⁴
- (e) The Agency determined it was not practicable for it to consult with [the international Corporation] in accordance with section 34(3). Accordingly, I note the Agency's submissions are based on [the international Corporation's] assumed responses to the disclosure of the document. There is no information before me to indicate [the international Corporation's] actual views in relation to the disclosure of the document and whether this would, in fact, unreasonably expose the Agency to disadvantage by impacting its professional relationship with [the international Corporation].

18. In balancing the above factors, I have determined disclosure of the document would not be likely to expose the Agency unreasonably to disadvantage. Accordingly, I am not satisfied this document is exempt under section 34(4)(a)(ii).

Section 33(1)

19. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;⁵ and
 - (b) such disclosure would be 'unreasonable'.
20. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.⁶
21. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
22. The Applicant indicated they did not seek a review of the Agency's decision to delete the names of the individuals listed in the document. I consider this information to be irrelevant.
23. However, the Applicant does seek information relating to the individuals' position titles and functions.

Do the documents contain the personal affairs information of individuals other than the Applicant?

⁴ *Byrne v Swan Hill Rural City Council* [2000] VCAT 666 at [43].

⁵ Sections 33(1) and (2).

⁶ Section 33(9).

24. Having reviewed the documents, I am satisfied the position titles in the contract relates to the personal affairs information of individuals other than the Applicant.

Would the disclosure of this information be unreasonable?

25. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information with the personal interest in privacy. The following matters are particularly relevant in the circumstances of this case:
- (a) The nature of the personal affairs information – I do not consider the position titles of senior executive staff of the Agency or [the international Corporation] listed in a document relating to their duties and obligations to be particularly sensitive. As such, I consider the personal affairs information in the document concerns these individuals' professional roles rather than their personal or private lives. This supports disclosure.
 - (b) The circumstances in which the information was obtained – The information relates to the professional roles of senior executive staff of the Agency and [the international Corporation]. I do not consider this information was obtained in any particularly confidential circumstances. This supports disclosure.
 - (c) Whether any public interest would be promoted by release of the information – I consider the release of the position titles would promote the public interest by ensuring transparency and accountability in any decision-making by the relevant senior officers. This supports disclosure.
 - (d) Whether the individuals to whom the information relates objects, or would be likely to object, to the release of the information – The Agency consulted with certain third parties, in accordance with section 33(2B). I note only one individual responded to the consultation by objecting to the release of their personal affairs information. While this factor is not determinative, this weighs against disclosure.

[Several] other individuals did not respond to the consultation. I am of the view it is reasonably likely that the third parties who did not respond to the consultation, would not object to the release of their personal affairs information. This supports disclosure.

The Agency also determined it was not practicable to consult with a certain class of individuals. For the reasons set above, I am of the view it is reasonably likely that the third parties, who were not consulted, would not object to the release of their personal affairs information. This supports disclosure.

26. Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.
27. In balancing the above factors, I am of the view it would not be unreasonable to release the personal affairs information contained in the documents. Accordingly, I have determined the information is not exempt under section 33(1).

Deletion of exempt or irrelevant information

28. 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.

29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸
30. The Applicant agreed to exclude the names of individuals from the scope of the review. I consider such information to be irrelevant to this review.
31. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete such information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

32. On the information available, I am satisfied the exemptions in sections 33(1) and 34(4)(a)(ii) do not apply to the document.
33. As it is practicable to edit the document to delete irrelevant information, I have determined to grant access to the document in part.

Other matters

34. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
35. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.⁹

36. The document subject to review contains the position titles of [a specified number of] individuals who reside overseas.
37. I have decided it would not be practicable to notify those individuals of their rights of review as these individuals are not reasonably contactable.

Review rights

38. 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.¹⁰
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹

⁷ *Mickelburgh v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁸ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

⁹ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
41. 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 (international callers dial +61 3 8685 1462).
42. 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.¹³

When this decision takes effect

43. I have decided to release documents that contain the personal affairs of certain third parties (who reside within Australia).
44. The relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.
45. 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.

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).
