

Notice of Decision and Reasons for Decision

Applicant:	'BH9'
Agency:	Bayside City Council
Decision date:	24 March 2020
Exemption considered:	Section 34(1)(b)
Citation:	'BH9' and Bayside City Council (<i>Freedom of Information</i>) [2020] VICmr 78 (24 March 2020)

FREEDOM OF INFORMATION – council documents – structural engineering report – neighbouring retaining wall – diagrams – drawings

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 a document 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 the document is exempt under section 34(1)(b).

As I am satisfied it is practicable to delete irrelevant information from the document in accordance with section 25, I have determined to grant access to the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
24 March 2020

Reasons for Decision

Background to review

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

...a copy of a Structural engineer's report, by [named third party], [date] about a rear retaining wall & lower brick section between my property at [named address] (also in some records as [named alternate address]) & [named address], next door.
2. In its decision, the Agency identified a document falling within the terms of the Applicant's request and refused 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. During the review, the Applicant advised they do not seek access to personal affairs information of any person. Accordingly, this information is not subject to review.
5. I have examined information in 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) information provided with the Applicant's review application;
 - (c) information provided by the Agency on [date]; and
 - (d) communications between the Agency and the third-party business undertaking.
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 following exemption under section 34(1)(b) to refuse access to the document. 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 other matters of a business, commercial or financial nature; and

- (c) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
11. 'Undertaking' means a private or commercial business entity with which an agency has had financial, commercial or business dealings or from which the agency has acquired or received documents.¹
12. The phrase 'information acquired' signifies the need for some positive handing over of information in some precise form.²
13. The words 'business, commercial or financial nature' have their ordinary meaning.³
14. The phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b) contemplates disclosure of a document may involve a certain measure of disadvantage for an undertaking. The issue for consideration is whether an undertaking will be exposed unreasonably to disadvantage.
15. 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.
16. I have also had regard to *Dalla-Riva v Department of Treasury and Finance*,⁴ in which the Victorian Civil and Administrative Tribunal (**VCAT**) held documents will be exempt under section 34(1)(b) if disclosure would:
- (a) give the undertaking's competitors a financial disadvantage;
 - (b) enable competitors to engage in destructive competition with the undertaking; and
 - (c) would lead to the drawing of unwarranted conclusions as to the undertaking's financial affairs and position with commercial and market consequences.

Does the document contain information related to matters of a business, commercial or financial nature and acquired by the Agency from a business undertaking?

17. The document contains a detailed report regarding a retaining wall for a private residential property that was acquired from a business undertaking by the Agency.

¹ *Thwaites v DHS* [1999] VCAT 11; *Re Marples and Department of Agriculture* (1995) 9 VAR 29 at [56].

² *Thwaites v Department of Human Services* (1999) 15 VAR 1.

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

⁴ [2007] VCAT 1301 at [33].

18. I am satisfied information in the documents relates to matters of a business and commercial nature as it relates to the operation of a consulting company which undertook work to assess and provide recommendations about a retaining wall in accordance with its technical expertise.

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

19. The Agency consulted with the business undertaking under section 34(3). The business undertaking responded as follows:

I do not want to permit access to my Structural Engineer's Report dated [date] for the retaining wall at the above address in accordance with the Freedom Information Act (1982) for the following reasons:-

1/ The report was issued in confidence.

2/ Items mentioned in the Report may expose my company unreasonably to disadvantage as competitors may challenge the opinions expressed in my Report.

3/ There is the risk that my professional reputation could be adversely affected.

20. While I have taken into consideration the views of the business undertaking, those views are not necessarily determinative.
21. For the following reasons, I am not satisfied disclosure of the document would be reasonably likely to expose the business undertaking unreasonably to disadvantage:
- (a) The information in the document relates to a specific retaining wall and advice regarding its structure and maintenance. While this information is not generally available to competitors of the undertaking, given its specific nature, I do not consider it could be used by a competitor to cause the business undertaking commercial disadvantage.
 - (b) I note also the document does not contain information relating to rates charged, nor any specific technical or other expertise that could be used by a competitor. Rather, it relies on the specific circumstances of the retaining wall the subject of the report.
 - (c) Therefore, I consider the document could be disclosed without causing substantial harm to the business undertaking.
 - (d) As noted above, the phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b) contemplates disclosure of a document may involve a certain measure of disadvantage for a business undertaking. While I have carefully considered the business undertaking's view and accept disclosure may cause some concern for the business undertaking, I am not persuaded disclosure of the document under the FOI Act would expose the business undertaking unreasonably to disadvantage.
22. In light of the above factors, I am not satisfied disclosure of the document would expose the business undertaking unreasonably to disadvantage and, accordingly, the document is not exempt under section 34(1)(b).

Deletion of exempt or irrelevant information

23. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information in the document and the applicant agrees to receiving such a copy.

24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁶
25. As stated above the Applicant does not seek access to personal affairs information of any person. Accordingly, this information is irrelevant.
26. I have considered the effect of deleting irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable for the Agency to delete such 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 document is exempt under section 34(1)(b).
28. As I am satisfied it is practicable to delete irrelevant information from the document in accordance with section 25, I have determined to grant access to the document in part.
29. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

Review rights

30. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
33. 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.
34. 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.¹⁰

Third party review rights

35. I have decided to release documents that contain information relating to the personal affairs of individual third parties and matters of a commercial nature relating to a third party business undertaking.
36. If I decide to disclose a document claimed to be exempt under section 34(1)(b) I must, if practicable, notify any third party individual and business undertaking that has a right to apply to VCAT for a review of my decision of their right to do so.¹¹

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).

37. I am satisfied it is practicable to notify the relevant third party individuals and business undertaking of their right to seek review of my decision to disclose their personal affairs information and business affairs information respectively.
38. Accordingly, 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.

When this decision takes effect

39. For that reason, my decision does not take effect until that 60 day period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

¹¹ Section 49P(5).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Structural Engineer's Report	10	Refused in full Section 34(1)(b)	<p>Release in full</p> <p>Section 25</p> <p>The document is to be released with the following irrelevant information deleted in accordance with section 25:</p> <p><u>Page 1:</u></p> <ul style="list-style-type: none"> • The qualification details underneath the header of the letter; • The name and address of the party to whom the letter is addressed, and the salutation underneath; • The pronoun and following name at the end of the first sentence of the letter. <p><u>Page 2:</u></p> <ul style="list-style-type: none"> • The sign-off, signature, name and subsequent qualification details. <p><u>Page 8:</u></p> <ul style="list-style-type: none"> • The name at the bottom of the page underneath the box containing the business name information that conducted the report. 	<p>Section 34(1)(b): I am not satisfied disclosure of the document would expose the business undertaking unreasonably to disadvantage and, accordingly, the document is not exempt under section 34(1)(b).</p> <p>Section 25: The Applicant does not seek access the personal affairs information of any person, as defined in section 33(9). Accordingly, I am satisfied the personal affairs information is irrelevant to the review and it is practicable to delete irrelevant information from the document in accordance with section 25</p>