

## Notice of Decision and Reasons for Decision

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Applicant:	'B16'
Agency:	Department of Education and Training
Decision Date:	25 March 2020
Exemption considered:	Section 34(4)(a)(ii)
Citation:	'B16' and Department of Education and Training ( <i>Freedom of Information</i> ) [2020] VICmr 84 (25 March 2020)

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FREEDOM OF INFORMATION – invoices – external legal services – information of a business, commercial or financial nature – trade or commerce – agency not exposed unreasonably to disadvantage

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 documents are exempt under section 34(4)(a)(ii).

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

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

25 March 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  1. All documents from an ARIBA snapshot of all invoices paid against the following [reference numbers] which relate to my personal affairs:  
  
[list of [specified number of] reference numbers labelled '[redacted]' to '[redacted]']  
  
Please note: an ARIBA snapshot looks like what is shown on the next page (Attachment A). For each matter, there is a monthly invoice issued as required from law firms who comprise the Victorian Government Legal Services panel. So, for each of the above [specified number of] matters, there should be a one-page document of an ARIBA snapshot unless the matter has been ongoing for a long time. Therefore, what I have requested is a total of [specified number of] pages plus maybe a couple more pages.
  2. Documents which show the total amount paid for each invoice in each of the above matters. The total amount should be in the ARIBA snapshot page itself in which case no other document would be required for that invoice. Otherwise, the tax invoice referred to in the ARIBA snapshot is requested which shows the total amount of each invoice listed for each matter above...  
  
Please arrange the ARIBA snapshots as requested above from [redacted] to [redacted] for [reference number] to [reference number], respectively. Additionally, I am willing to eliminate s.33 privacy concerns by agreeing to redact the personal information of third parties. To that end, the first part of the email address can be redacted but not the last bit of the email address such as [example of email address] or @[name of law firm].com.au. But names of the officers of the [Agency] above the VPS6 level should not be eliminated. To expedite processing, other than the total amount of each invoice, I would be agreeable to redact most of the information in a tax invoice if it is legitimately allowed as an exemption under the FOI Act.
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request and refused to grant access to the document 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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. 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
  - (c) the Agency's submission dated 18 February 2020.

### Review of exemptions

6. The Agency relied on the exemption under section 34(4)(a)(ii) to refuse access to the document in part. In its decision, the Agency states in part:

The Department regularly engages outside legal support. Disclosing financial amounts that the Department is prepared to spend for legal representatives would place the Department at an unreasonable disadvantage when engaging external legal providers, both now and into the future.

### **Section 34(4)(a)(ii)**

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

#### *Trade and commerce*

8. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>1</sup>
9. In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*, the Federal Court of Australia held, '[t]he terms "trade" and "commerce" are not terms of art. They are expressions of fact and terms of common knowledge'<sup>2</sup> and are terms 'of the widest import'.<sup>3</sup>
10. An agency may be regarded as being engaged in trade or commerce, even the amount of trade or commerce engaged in is insignificant and incidental to the agency's other functions.<sup>4</sup>
11. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.<sup>5</sup>
12. The fact an agency's predominant activities may be described as 'governmental' does not preclude it from relying on the exemption under section 34(4)(a)(ii).<sup>6</sup>
13. While the phrase 'trade and commerce' may be interpreted broadly,<sup>7</sup> it has been held trade and commerce must 'of their nature, bear a trading or commercial character'.<sup>8</sup>

#### *Expose an agency unreasonably to disadvantage*

14. Section 34(4) contemplates disclosure of a document containing information of a business, commercial or financial nature under the FOI Act may expose an agency to a certain measure of disadvantage.
15. In the context of section 34(4)(a)(ii), 'disadvantage' has been interpreted to be in the nature of an agency engaged in trade and commerce being exposed to commercial or competitive disadvantage. For example, in *Accident Compensation Commission v Croom* [1991] 2 VR 322, 'disadvantage' contemplated by this section is 'disadvantage in a business, commercial or financial sense'.<sup>9</sup> In particular, O'Bryan J states:

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<sup>1</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

<sup>2</sup> [1978] FCA 50; (1978) 22 ALR 621 at 648.

<sup>3</sup> *Ibid* at 649.

<sup>4</sup> *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

<sup>5</sup> *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

<sup>6</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

<sup>7</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

<sup>8</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690 and *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35] (per Acting President Justice I J K Ross).

<sup>9</sup> At 325.

In my opinion, the word "disadvantage" in the context of trade or commerce and information of a business, commercial financial nature means injury of a financial kind.<sup>10</sup>

16. The term 'likely' in the context of this section means 'probable, such as well might happen or be true'.<sup>11</sup>
17. Further, it is not enough to establish there is a likelihood of disadvantage alone. Any such exposure to disadvantage must be 'unreasonable'.<sup>12</sup>
18. Whether disadvantage is 'unreasonable' depends on the particular facts and circumstances of a matter and involves a balancing exercise.<sup>13</sup> Unlike section 34(1)(b) in conjunction with section 34(2), there is no list of factors to be considered in relation to section 34(4)(a)(ii). However, VCAT has taken the following factors into consideration:<sup>14</sup>
  - (a) the nature of the information;
  - (b) the circumstances in which the information was obtained;
  - (c) the likelihood that concerned persons would not wish the information to be disclosed without consent; and
  - (d) the current relevance and sensitivity of the information.
19. As such, I consider the exemption is concerned with protecting an agency from being unreasonably exposed to disadvantage of a commercial, competitive or financial nature.

*Is the Agency engaged in trade or commerce?*

20. The first limb of the exemption requires me to be satisfied the Agency is engaged in trade or commerce.
21. I do not consider the broad definition relied on by the Agency reflects the operation of this section, which is to protect commercially or financially sensitive information in the context of an agency engaged in commercial or trade related activities. This exemption applies when a public sector agency conducts itself, or part of its operations, in a manner similar to a commercial entity.
22. In this matter, I adopt the view expressed in *Pallas v Roads Corporation*,<sup>15</sup> in which VCAT did not accept the agency was engaged in trade or commerce where it is involved in arterial road construction:

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is a consumer who purchases a consumer item from a department store is not, for that reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.<sup>16</sup>

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<sup>10</sup> At 331.

<sup>11</sup> *Asher v Department of Innovation, Industry and Regional Development* [2005] VCAT 2702 at [38]; *Gibson v Latrobe City Council (general)* [2008] VCAT 1340 at [39].

<sup>12</sup> *Re Byrne and Swan Hill Rural City Council* (2000) 16 VAR 366 as cited in *Dalla-Riva v Department of Treasury and Finance* [2005] VCAT 2083 at [30].

<sup>13</sup> *Asher MP v Department of Innovation, Industry and Regional Development (General)* [2005] VCAT 2702 at [28] and [38].

<sup>14</sup> *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366 at 372-3; *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 246; *Dalla Riva v Department of Treasury and Finance* [2005] VCAT 2083 at [30]; as cited in *Gibson v Latrobe City Council (general)* [2008] VCAT 1340 at [41].

<sup>15</sup> [2013] VCAT 1967.

<sup>16</sup> *Ibid* at [58] (per Deputy President McNamara J).

23. In my view, the Agency is not engaged in trade or commerce when procuring external legal services. While I acknowledge the Agency is engaging in a commercial transaction, transactions of this nature are associated with and arise from their governmental activities; in this case, the conduct of litigation funded by public monies, rather than associated with and arising from a commercial, competitive or financial purpose or function. Therefore, in my opinion, such a transaction and amounts paid for external legal services is not indicative of the Agency being engaged in trade and commerce.
24. Accordingly, I am not satisfied the first limb of section 34(4)(a)(ii) is met.
25. Nonetheless, for the purpose of this review, I will consider the second and third limbs of section 34(4)(a)(ii).

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

26. 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.<sup>17</sup>
27. The document subject to review discloses:
  - (a) reference numbers of the legal matters;
  - (b) invoice numbers;
  - (c) the number of invoices per legal matter;
  - (d) supplier pay site;
  - (e) status; and
  - (f) total amount charged per invoice.
28. I am satisfied the legal costs invoiced by an external legal service provider amounts to 'information of a business, commercial and financial nature' for the purposes of section 34(4)(a)(ii).

*Would disclosure of the documents expose the Agency unreasonably to disadvantage?*

29. I am of the view release of the total costs incurred by the Agency in procuring external legal services would not expose the Agency unreasonably to commercial, competitive or financial disadvantage.
30. The Agency is a large government department which would be reasonably likely to procure regular external legal services associated with its statutory and governmental functions. The total costs incurred by a government department on such services will be influenced by the nature of a legal proceeding and the legal services required.
31. I am not satisfied the Agency would be likely to be exposed unreasonably to disadvantage, either financially when engaging external legal providers, both now and into the future given the competitive nature of the legal services market, in particular, in the provision of legal services to government.
32. The total costs of each invoice do not reveal detailed information showing itemised costs for each invoice. I do not consider the total monetary amounts in the document could be reverse engineered to reveal instructions, advice, actions or any other work done in any legal or litigation matters between the Agency or the Applicant or in relation to any legal advice sought by the Agency concerning the Applicant.

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<sup>17</sup> *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

33. As such, I do not consider other external legal firms the Agency may engage in the future could reasonably take advantage of the total invoice costs paid by the Agency. I am not satisfied other legal firms would be able to utilise such information to provide higher estimates for services or charging higher fees in future matters, given the documents do not disclose the nature of the legal work carried out. As such, I am not satisfied release of the information would undermine the Agency's ability to obtain external legal services at a fair and reasonable cost.
34. Further, I do not consider the Applicant will be able to utilise the information to the financial detriment of the Agency. For example, as leverage for settlements, influence the Applicant's decision to pursue further litigation against the Agency, or undermine the Agency's ability to properly defend future proceedings.
35. The Agency's conduct in legal proceedings is bound by the *Model Litigant Guidelines (Guidelines)*, which sets the standards for the conduct of the Victorian Government as a party to litigation. Accordingly, the Agency is required to conduct litigation as a model litigant in accordance with the Guidelines.
36. I am of the view transparency and accountability in the expenditure of public funds for the procurement of legal services outweighs any potential disadvantage to which the Agency may be exposed, if the document is disclosed. I also consider the Agency should reasonably expect a greater degree of transparency and accountability given the use of public funds for the procurement of external legal services in its conduct of litigation.
37. 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.
38. Accordingly, I am not satisfied disclosure of the document would expose the Agency unreasonably to disadvantage and the document is not exempt under section 34(4)(a)(ii).

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

39. 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 and the applicant agrees to receiving such a copy.
40. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>18</sup> 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.<sup>19</sup>
41. I have reviewed information the Agency deleted as it determined it to be irrelevant to the Applicant's request. I confirm this information relates to the legal service provider and the name of the Agency officer who accessed ARIBA for the purposes of retrieving the documents for the request. I am satisfied it falls outside the scope of the Applicant's request.
42. 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 such information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

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<sup>18</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>19</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].

### **Conclusion**

43. On the information before me, I am not satisfied the documents are exempt under section 34(4)(a)(ii).
44. As I am satisfied it is practicable to edit the documents to delete irrelevant information, I have determined to grant access to the documents in part in accordance with section 25.

### **Review rights**

45. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>20</sup>
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>21</sup>
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>22</sup>
48. 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.
49. 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>23</sup>

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

50. 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>20</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>21</sup> Section 52(5).

<sup>22</sup> Section 52(9).

<sup>23</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.	N/A	ARIBA snapshots	[specified number of pages]	Released in part Section 34(4)(a)(ii), 25	<p>Release in part Section 25</p> <p>The document is to be released with the following information, which is irrelevant to the Applicant's request, deleted in accordance with section 25:</p> <ul style="list-style-type: none"> <li>• names of supplier; and</li> <li>• names of third parties other than the Applicant.</li> </ul>	<p><b>Section 34(4)(a)(ii):</b> For the reasons outlined above, I am not satisfied the Agency is engaged in trade and commerce in the context of this matter. In any case, I am not satisfied disclosure of the information in the document would be likely expose the Agency unreasonably to disadvantage. Accordingly, I am not satisfied the information deleted by the Agency is exempt under section 34(4)(a)(ii).</p> <p><b>Section 25:</b> The names of persons other than the Applicant and the names of legal firms are irrelevant to the scope of the Applicant's request.</p> <p>I am satisfied it is practicable to delete irrelevant information in the documents in accordance with section 25.</p>