



Office of the Victorian
Information Commissioner

t 1300 00 6842
e enquiries@ovic.vic.gov.au
w ovic.vic.gov.au

PO Box 24274
Melbourne Victoria 3001

Notice of Decision and Reasons for Decision

Applicant: 'CR9'
Agency: Department of Treasury and Finance
Decision date: 19 February 2021
Exemptions considered: Sections 34(1)(b), 34(4)(a)(ii)
Citation: 'CR9' and Department of Treasury and Finance (Freedom of Information) [2021] VICmr 54 (19 February 2021)

FREEDOM OF INFORMATION – ministerial brief – Invest Victoria – agency engaged in trade or commerce

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 relation to a small amount of information.

I am satisfied the exemptions in sections 34(1)(b) and 34(4)(a)(ii) apply to certain parts of the document.

As it is practicable to edit the document to delete irrelevant and exempt information, I have determined to grant access to the document in part.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

19 February 2021

Reasons for Decision

Background to review

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

A copy of brief Reference [brief reference number] as identified in previous Freedom of Information Request [reference number].
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to grant access to the document in part. The Agency relied on the exemptions in sections 30(1), 34(1)(b) and 34(4)(a)(ii) to refuse access to parts of the document. The Agency's decision letter sets out the reasons for its decision.

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 indicated they do not seek personal information or information otherwise falling under section 33(1).
5. I have examined the document 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.
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.
9. I also note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Agency submission

10. The Agency submitted the following information about the application of sections 34(1)(b) and 34(4)(ii)(a):

Invest Victoria sits within the Economic Development portfolio of the Department of Treasury and Finance. Invest Victoria is responsible for leading the Victorian Government's approach and engagement with international investment attraction with a focus on securing international foreign direct investment (FDI) from global investors. Both the agency and international investors operate in a highly competitive environment. The Invest Victoria team works in partnership with the Victorian Government Trade and Investment office network, strategically placed in key international markets. In-market investment staff identify potential new technologies and capabilities that do not exist in Victoria, build investor relationships with source companies and work with Invest Victoria to secure these companies' expansion into Australia, and specifically Victoria.

The US is Victoria's largest source of FDI. Before these investments are made, US companies carefully survey their options, often working with multiple competing Australian and international investment facilitation agencies, assessing locations across the Asia Pacific region, before choosing a preferred location to establish what is often a regional headquarter and operations base, creating high skilled jobs.

As a consequence, international jurisdictions and their investment agencies compete intensively to attract new market entrants. Detail of the methodology and strategies provided by each jurisdiction's investment agency is therefore closely guarded.

...

In addition, Invest Victoria cannot provide this facilitation support to FDI investment projects without investors sharing commercial-in-confidence information. This information is in part contained in the Brief in question. An inability to protect commercial-in-confidence information will make Invest Victoria an unreliable state actor, unable to confidentially or competitively engage in this domain with international investors.

In short, the release of confidential information acquired from [named company] would expose the company to disadvantage (by revealing to competitors [named company name's] key commercial drivers and internal decision making process for international expansion); it would disclose sensitive information that would impair Invest Victoria's ability to attract similar companies (by revealing information which companies would consider sensitive and would expect to be withheld); and it would reveal business methodology of Invest Victoria, disclosure of which similarly would expose Invest Victoria to competitive disadvantage in attracting investment over other jurisdictions.

Review of exemptions

Section 34(1)(b)

11. 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.
12. In *Thwaites v Department of Human Services*, 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.
13. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.
14. The Agency advised it consulted with the third party undertaking and I have taken its response into consideration below.
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. The Agency applied section 34(1)(b) to information it acquired from a business undertaking. I am satisfied this information relates to matters of a business, commercial or financial nature, being specific information about the way in which the business operates and financial information about the business.
17. I note the Agency considers exempt the number of employees of the business undertaking in paragraph 1 (c) of the document. I understand that this is publicly available information, it is therefore not exempt from release under section 34(1)(b) and is to be released to the Applicant.
18. I am satisfied disclosure the remainder of the information identified by the Agency would expose the business undertaking unreasonably to disadvantage for the following reasons:
 - (a) it is not publicly available or available to its competitors;
 - (b) based on the information before me and the business undertaking's submission, I am satisfied disclosure would be likely to cause substantial harm to the business undertaking's competitive position;
 - (c) in the circumstances of this matter, I am satisfied the public interest weighs against, rather than in favour of disclosure. The business undertaking provided the information to the Agency in confidence and in the course of [negotiating] a financial relationship. I consider disclosure of such information would have a detrimental affect on the Agency's ability to negotiate such agreements in the future and therefore disclosure would be contrary to the public interest.
19. I have therefore determined most of the information identified by the Agency in the document is exempt under section 34(1)(b).

Section 34(4)(a)(ii)

20. 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'.
21. 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'. VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.
22. The provision contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage, and that any such exposure must be unreasonable for the exemption to apply.
23. I note the Agency applied section 30(1) to parts of the document. However, I have determined such information is appropriate to be considered under section 34(4)(a)(ii).

Is the Agency engaged in trade or commerce?

24. In my view, whether an Agency is engaged in trade or commerce must be read narrowly. That is, an Agency cannot be said to be engaged in trade or commerce merely because it engages in transactions that have some commercial nature such as purchasing good or services.

25. I am limited in the information I can provide in this decision about this matter, as to discuss certain details would disclose exempt information. However, in the circumstances of this matter, and limited only to the activities described in this document, I am satisfied the Agency is engaged in trade or commerce. This is because, based on the information before me, I am satisfied the Agency is actively engaged in a competitive environment. That is, its engagement with the business undertaking was subject to commercial, competitive pressures.

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

26. Further I am satisfied disclosure would be likely to expose the Agency unreasonably to disadvantage for the following reasons:
- (a) the document reveals information that is not publicly available, or available to the Agency's competitors, being other states or countries competing in the market for commercial investments;
 - (b) the document reveals the methods employed by the Agency to attract investment, and the particular methods used in this instance; and
 - (c) In my view, the Agency's functions, as described above, would be unreasonably and detrimentally affected by disclosure of the information;
 - (d) I am satisfied that in this instance the public interest weighs against disclosure as to disclose such details would inhibit the Agency from the function ascribed to it by government.
27. Accordingly, I am satisfied the information identified by the Agency under section 30(1) and 34(4)(a)(ii) is exempt under section 34(4)(a)(ii).

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'¹ 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 25.²
30. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request it is personal affairs information not sought by the Applicant.
31. I have considered the effect of deleting irrelevant an exempt information from the document. In my view, it is practicable for the Agency to delete the irrelevant and exempt 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 34(1)(b) and 34(4)(a)(ii) apply to certain parts of the document.

¹ *Mickelborough 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].

² *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].

33. As it is practicable to edit the document to delete irrelevant and exempt information, I have determined to grant access to the document in part.
34. The document is therefore to be released to the Applicant with the redactions made by the Agency, with the exception that the number of employees in 1 (c) is to be released to the applicant.

Review rights

35. 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.³
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
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.⁶

When this decision takes effect

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

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

⁴ Section 52(5).

⁵ Section 52(9).

⁶ Sections 50(3F) and (3FA).