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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'CW6'
Agency:	Essential Services Commission
Decision date:	16 April 2021
Exemption considered:	Section 34(1)(b)
Citation:	'CW6' and Essential Services Commission (<i>Freedom of Information</i>) [2021] VICmr 97 (16 April 2021)

FREEDOM OF INFORMATION – solar farms – licensing – electricity generation licences – lease agreements

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 is the same as the Agency's decision.

I am satisfied the documents are exempt under section 34(1)(b). I have decided to refuse access to the documents in full.

As it is not practicable to edit the documents to delete exempt information, I have determined to refuse access to the documents in full.

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

16 April 2021

Reasons for Decision

Background to review

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

Could I please make a freedom of information request for a copy of the following complete Application for Electricity Generation Licenses:

- [Location] Solar Farm
- [Location] Solar farm
- [Location] Solar Farm
- [Location] Solar Farm
- [Location] Solar Farm
- [Location] Solar Farm
- [Location] Solar Farm
- [Location] Solar Farm
- [Location] Solar Farm
- [Location] Solar Farm
- [[Location] Solar Farm
- [Location] Solar Farm
- [Location] Solar Farm

2. The Agency contacted the Applicant to advise that a public version of the applications is available on its website. The Applicant advised they are seeking the lease agreements to 'understand what are the reasonable and market accepted terms and values'. The Applicant also advised they do not seek access to the personal affairs information of persons in the documents.
3. The Agency identified eight lease agreements falling within the terms of the Applicant's request and refused access to the documents in full under section 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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.
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 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.

Review of exemptions

Section 34(1)(b) – Commercial information of a private sector organisation

10. 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.
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. VCAT has recognised the words ‘business, commercial or financial nature’ should be given their ordinary meaning.²
13. The Agency advised it consulted with third party undertakings, that is, the private organisations who are parties to each lease agreement (the **business undertakings**). The Agency provided copies of the responses it received from the business undertaking, which I have taken into consideration in my decision.
14. 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.

Applicant’s submission

15. The Applicant submits:

[Redacted background information about the Applicant] ...access to these documents would enable us to determine the fair and equitable market terms for the renewable energy equipment required to be installed [at specified location].

...

¹ (1999) 15 VAR 1.

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

We understand that the objective of the FOI Act is to create a general right of access to information in the possession of the Government or other public bodies and we believe the Commission's decision to refuse access to the requested documents in full is inconsistent with the FOI Act due to the following:

- (a) A counterparty in a lease negotiation with a respective licensee or landowner may employ a solicitor to act on their behalf who already has the knowledge of the commercial terms previously agreed by the respective licensee or landowner therefore the disclosure of the requested documents provides no greater likely advantage to the counterparty and therefore no greater likely disadvantage to the licensee or landowner;
- (b) If one of the respective licensees or landowners is exposed to a disadvantage during future lease negotiations (which we propose is unlikely and immaterial), the disadvantage will be of a "tactical kind" only and it cannot be deemed that the respective party would have suffered an 'injury' even if they elect to accept commercial terms consistent with commercial terms that they had freely and willingly previously accepted;
- (c) It is not reasonably likely that the Commissions' ability to obtain similar information in the future would be impaired under the provisions provided to it within the *Electricity Industry Act 2000*
- (d) We consent to any information relating to the personal affairs of any person as defined by the FOI Act being deleted; and
- (e) Disclosure of renewable energy information such as we have requested is consistent with public interests and the strategies and policies of the Victorian Government, outweighing any disadvantage (which we propose is unlikely and immaterial) that the respective parties may be exposed to.

While we do not believe the respective parties will likely be exposed to 'disadvantage' (with the meaning 'injury of a financial kind') for the above reasons, we acknowledge that they would likely be exposed to 'discomfort' from the disclosure of the requested documents and wish to continue to reassure them of the following:

- (a) We are not commercial competitors or employed by commercial competitors;
- (b) We do not seek to cause them harm or loss; and
- (c) We do not intend to publish or broadly distribute the documents.

Agency's submission

16. The Agency submits:

The documents falling within the scope of [the Applicant's] FOI request were copies of eight lease agreements associated with eight solar farms that the commission has licensed to generate electricity. The lease agreements were provided to the commission as part of electricity generators applications for licences under section 17 of the *Electricity Industry Act 2000*.

...

Any perception by current or future regulated industry participants that commercially sensitive information is at risk of onward disclosure to the public, will potentially jeopardise the fulsomeness of engagement with the commission.

...

The commission can identify no countervailing public interest in disclosure of the lease agreements to [the Applicant] that would outweigh the above concern as well as competitive disadvantage to the undertakings. [The Applicant's] FOI request is not focused on transparency and accountability, particularly in the expenditure of public money, or scrutinizing government decisions, especially where allegations of wrong-doing are alleged. Nor does the request seek to enhance the public's knowledge about government decisions, such as privatisation of government services for example, or contribute to a better-informed public. Instead, the request appears to be linked to market research into going rentals and terms for solar farm leases. This is more a matter of private interest than of public interest.

...

17. I agree the documents were acquired by the Agency from the business undertakings and contain information of a commercial, business and financial nature. Therefore, I must consider whether disclosure of the lease agreements would be likely to expose the business undertakings unreasonably to disadvantage, including in accordance with any relevant factors under section 34(2).
18. At least one party to each of the lease agreements objects to disclosure. The reasons provided included that disclosure would:
- (a) provide the Applicant with commercially sensitive information;
 - (b) place the business undertaking at a competitive disadvantage when leasing land in the future for both agriculture and solar;
 - (c) harm negotiations with other landowners;
 - (d) give future lessors an advantage, that is 'have the advantage of knowing past pricing and the current income of [name of company] and be able to structure their bids accordingly';
 - (e) disadvantage a lessor in relation to negotiations relating to its other property;
 - (f) be detrimental to its business; and
 - (g) identify the lessors from the lease agreement, given the location of the solar farms in rural community.
19. In addition, I note the Agency's submission that applications for such projects are increasing and disclosure of the lease agreements would likely affect negotiations for similar agreements by these and other parties.
20. My assessment of the factors in section 34(2) is as follows:
- (a) Whether the information is generally available to competitors of the business undertakings

I note the Applicant's view information about terms and conditions and rental incomes from such projects may be discussed via legal representatives. However, while it is open for such parties to discuss the terms of a lease agreement, they generally do so on a voluntary and confidential basis.

As stated above, at least one party to each of the lease agreements objects to disclosure.

I also note the Agency's advice that these agreements do not form part of the publicly available information about applications for electricity generation.

These factors weigh against disclosure.

I note three of the lease agreements contain a covering page that is a form provided by Land Use Victoria, not the Agency. It appears to be a form used to submit each lease to Land Use Victoria. The form contains the following statement:

Privacy Collection Statement

The information in this form is collected under statutory authority and used for the purpose of maintaining publicly searchable registers and indexes.

While I note the parcels of land do appear on a search on the Land Use Victoria website (www.landata.vic.gov.au), the documents themselves do not appear to be publicly available.

Rather, if they are publicly available, they may be available for purchase for a fee from Land Use Victoria. In those circumstances, they would not be subject to the FOI Act under section 14(1)(a). Section 14(1)(a) provides a person is not entitled to obtain access to a document under the FOI Act if the document contains 'information that is open to public access, as part of a public register or otherwise, in accordance with another enactment, where that access is subject to a fee or other charge'.

Therefore, their inclusion of the statement does not affect my decision, which relates to the application of the FOI Act to documents held by the Agency.

(b) Whether the information would be exempt matter if it were generated by an agency or a Minister

Given this matter relates to commercial lease agreements between private sector commercial parties, I do not consider this is a relevant factor.

(c) Whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking

While there are similarities between the lease agreements, the terms, including the rental amounts, and various other provisions vary. While these are long term agreements and disclosure is unlikely to affect them, I accept the parties to the agreements may negotiate with other parties for similar agreements in the future, and that disclosure would be likely to unfairly impact those negotiations. On that basis, I accept the detriment described above by the business undertakings is reasonably likely to occur.

The Applicant states they are not seeking the lease agreement information to cause financial harm and that they do not wish to publish the agreements. However, I must consider disclosure of the documents in the context of release under the FOI Act, which is unrestricted and unconditional. That is, once a document is disclosed to an applicant under the FOI Act, the applicant (or any other third party with whom the applicant may share the document) is free to use or disseminate the document as they please. In this case, the parties to the lease agreements would not have any ability to restrain the use of the documents.

(d) Whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking

I do not consider the public interest weighs in favour of disclosure in this matter for the following reasons:

- (i) As described above, the documents subject to review are commercial agreements between two private parties. The Agency is not party to the agreements and maintains copies only as part of its application process.
- (ii) The documents do not directly relate to the expenditure of public funds.
- (iii) The Agency published parts of the applications, not including the leases, submitted by the named solar farms which assists it to promote transparency and accountability of its decision making.
- (iv) I note the Applicant's view that disclosure is consistent with the Victorian government's promotion of renewable energy, however I am not persuaded disclosure of the information subject to this review would have any such effect on renewable energy.

21. Having considered the above factors, on balance, I am satisfied disclosure of the documents would expose the business undertakings unreasonably to disadvantage.
22. Accordingly, I am satisfied the documents are 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 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'³ 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 25.⁴
25. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25. I am satisfied it is not practicable to do so as it would render the documents meaningless, particularly given the specific details of lease values sought by the Applicant in their FOI request, which I have determined exempt under section 34(1)(b).

Conclusion

26. On the information before me, I am satisfied the documents are exempt under section 34(1)(b).
27. As I am satisfied it is not practicable to provide the Applicant with an edited copy the documents with exempt and irrelevant information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

Review rights

28. 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.⁵
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
31. 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.
32. 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.⁸

³ *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].

⁴ *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].

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision
1.	[date]	[Location] solar farm – lease agreement	60	Refused in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
2.	[date]	[Location] solar farm – lease agreement extract with certain details redacted	4	Refused in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
3.	[date]	[Location] solar farm – lease agreement	57	Refused in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
4.	[date]	[Location] solar farm – lease agreement (1)	63	Refused in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
5.	[date]	[Location] solar farm – lease agreement (2)	64	Refused in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
6.	[date]	[Location] solar farm – lease agreement	56	Refused in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
7.	[date]	[Location] solar farm – lease agreement	47	Refused in full Section 34(1)(b)	Refuse in full Section 34(1)(b)

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision
8.	[date]	[Location] solar farm – lease agreement	57	Refused in full Section 34(1)(b)	Refused in full Section 34(1)(b)