

Notice of Decision and Reasons for Decision

Applicant:	'DB4'
Agency:	Suburban Rail Loop Authority
Decision date:	25 May 2021
Exemption considered:	Section 34(1)(b)
Citation:	'DB4' and Suburban Rail Loop Authority (<i>Freedom of Information</i>) [2021] VICmr 140 (25 May 2021)

FREEDOM OF INFORMATION – invoice – provision of goods and services to government – advertising, marketing or communications expenditure – financial information – disclosure would not expose undertaking 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 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 information in the document subject to review is exempt from release under section 34(1)(b). Accordingly, I have granted access to the document in part with irrelevant information deleted in accordance with section 25.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
25 May 2021

Reasons for Decision

Background to review

1. [Redacted – Background to the request.]
2. The terms of the [Applicant's] request processed by the Agency are:

All invoices for advertising, marketing or communications expenditure related to the Suburban Rail Loop (SRL) Project and the total FTE communications, marketing, or public relations workforce at its highest point to date for the SRL Project.
3. The Agency located two invoices issued by two companies. One invoice was released to the Applicant in part (Document 1) and one invoice was released in full (Document 2). The Agency relied on the exemption under section 34(1)(b) to refuse access to information in Document 1 and irrelevant information in the document was deleted in accordance with section 25.
4. The Agency created one document in accordance with section 19 to indicate the total full-time equivalent communications, marketing, or public relations workforce of the Agency at its highest point to date for the Suburban Rail Loop Project (Document 3). The Agency released this document in full to the Applicant.
5. The Agency's decision letter sets out the reasons for its decision in relation to Document 1. While the Schedule of Documents attached to the Agency's decision letter refers to Document 1 being exempt from release under sections 33(1) and 34(4)(a)(ii), the Agency confirmed it relies on section 34(1)(b) only.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. Specifically, the Applicant sought review of the information the Agency determined is exempt under section 34(1)(b). As such, only Document 1 falls within the scope of my review.
8. I have examined a copy of Document 1.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties.
11. 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.
12. 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 exemption

Section 34(1)(b) – Documents containing business, commercial or financial information of a business undertaking

13. A document will be an exempt document under section 34(1)(b), if the document contains information:
- (a) acquired from a business, financial or commercial undertaking;
 - (b) that relates to matters of a business, commercial or financial nature; and
 - (c) the disclosure of which, having regard to the matters listed in section 34(2), would be likely to expose the undertaking unreasonably to disadvantage.

Was the information acquired from a business, commercial or financial undertaking?

14. The phrase ‘information acquired’ in section 34(1) signifies the need for some positive handing over of information in some precise form.¹
15. The phrase ‘business, commercial or financial undertaking’ generally refers to an entity, such as a company or organisation, that is engaged in business, trade, or commerce for a financial profit or gain.
16. I am satisfied the information to which the Agency refused access was obtained by the Agency from a commercial or business undertaking for the purposes of section 34(1)(b) (the **Undertaking**).

Does the information relate to matters of a business, commercial or financial matter?

17. 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.²
18. The information exempted by the Agency reveals the ‘rates and loadings’ and total fees incurred for a service provided by the Undertaking.
19. I am satisfied this information is of a business, commercial and financial matter.

Would disclosure of the information be likely to expose the Undertaking unreasonably to disadvantage?

20. In determining whether a document is exempt under section 34(1), 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

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

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

or are relevant.

21. I have also had regard to the decision in *Dalla-Riva v Department of Treasury and Finance*,³ in which VCAT held documents are exempt under section 34(1)(b) if their disclosure would:
 - (a) give competitors of a business undertaking a financial advantage;
 - (b) enable competitors to engage in destructive competition with a business undertaking; and
 - (c) would lead to the drawing of unwarranted conclusions as to a business undertaking's financial affairs and position with detrimental commercial and market consequences.
22. Accordingly, section 34(1)(b) contemplates a business undertaking may be exposed to a certain level of disadvantage. The question is whether any such disclosure would expose the undertaking unreasonably to disadvantage.
23. In determining whether disclosure of commercially sensitive information in a document would expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify an undertaking and seek its views on disclosure.⁴
24. I note the Agency consulted with the Undertaking to obtain its view on disclosure, and the Undertaking considers disclosure of the information would 'compromise both [the Undertaking] in terms of the fees [it] offer[s] government as well as the media in terms of the rate position negotiated for government'.
25. The Agency's decision letter states disclosure of the information would be likely to expose the Undertaking unreasonably to disadvantage as:
 - (a) the information is not generally known to competitors;
 - (b) the charges are specifically negotiated for government and [the Undertaking]; and
 - (c) disclosure would provide information on these charges which may be exploited by actual or potential competitors of [the Undertaking].
26. Having reviewed the document and decision of the Agency and views of the Undertaking, based on the information before me, I am not satisfied disclosure of the information to which the Agency refused access would expose the Undertaking unreasonably to disadvantage, for the following reasons:
 - (a) there is no evidence to demonstrate, other than in the general terms expressed by the Undertaking, how its competitors would gain a financial advantage from the disclosure of Document 1 to the Applicant under the FOI Act;
 - (b) there is no evidence to demonstrate, other than in general terms expressed by the Undertaking, how disclosure of Document 1 would enable its competitors to engage in destructive competition with the Undertaking from the disclosure of this information to the Applicant under the FOI Act;
 - (c) there is no evidence to demonstrate how disclosure of Document 1 would lead to the drawing of unwarranted conclusions as to the Undertaking's financial affairs and position with detrimental commercial and market consequences;
 - (d) promoting good governance, transparency and accountability in government decision making and the oversight of the spending of public funds is strongly in the public interest;

³ [2007] VCAT 1301 at [33].

⁴ Section 34(3).

- (e) a key purpose of access to information under the FOI Act is to ensure the expenditure of the public funds are better able to be subject to public scrutiny;
- (f) private companies contracting with government agencies for the provision of goods and services should reasonably expect a greater degree of transparency and accountability given the use of public funds for the procurement of those goods and services; and
- (g) while it is possible the Undertaking may be exposed to a certain measure of disadvantage if Document 1 is disclosed, I am not satisfied any such exposure would be unreasonable given the circumstances of this matter.

27. Accordingly, I have determined the exempt information the Agency deleted in the Document 1 is not exempt under section 34(1)(b).

Section 25 – Deletion of exempt or irrelevant information

- 28. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable 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’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
- 30. The Agency’s decision letter states the Applicant confirmed, [redacted contextual information], that they do not seek access to bank account details, such as BSB numbers, account numbers, and SWIFT codes, or the personal affairs information of non-executive staff. The Agency deleted this information from Document 1 in accordance with section 25 on grounds it is irrelevant information.
- 31. Given the Agency provided the Applicant with an edited copy of Document 1, I am satisfied it remains practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25.

Conclusion

- 32. On the information before me, I am not satisfied information in the document subject to review is exempt from release under section 34(1)(b). Accordingly, I have granted access to the document in part with irrelevant information deleted in accordance with section 25.
- 33. The Schedule of Documents in **Annexure 1** sets out my decision in relation to Document 1.

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].

Review rights

34. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.⁷
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
37. 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.
38. 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

39. I have decided to release information in Document 1 that contains matters of a commercial nature relating to third party business undertaking.
40. 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.

When this decision takes effect

41. For that reason, my decision does not take effect until the Undertaking's 60 day review period expires.
42. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Invoice	1	Released in part Sections 34(1)(b), 25	Release in part Section 25 The document is to be released with the following irrelevant information deleted in accordance with section 25: (a) the name in the second column; and (b) the BSB and account number.	Section 34(1)(b): I am not satisfied information in this document is exempt under section 34(1)(b) for the reasons outlined in the Notice of Decision above. Section 25: The Applicant seeks review of the information exempted by the Agency under section 34(1)(b) only. I am satisfied it remains practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25.
2.	4/09/2020	Invoice	1	Released in part Section 25	Not subject to review	
3.	Undated	Document created by the Agency in accordance with section 19	1	Released in full	Not subject to review	