

## Notice of Decision and Reasons for Decision

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Applicant:	'EE9'
Agency:	Sustainability Victoria
Decision date:	3 June 2022
Exemption considered:	Section 34(1)(b)
Citation:	'EE9' and Sustainability Victoria (Freedom of Information) [2022] VICmr 72 (3 June 2022)

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FREEDOM OF INFORMATION – business, commercial or financial information – government grants – unreasonable disadvantage to business undertaking

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.

I am not satisfied information in the documents is exempt under section 34(1)(b).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant information deleted in accordance with section 25, access is granted in part.

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

My reasons for decision follow.

**Sven Bluemmel**  
Information Commissioner

3 June 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - an Environment Protection Authority Permission Pathways form;
  - a preliminary planning application to [website] and supporting attachments;
  - [Named undertaking] documentation;
  - an [tender] document, and
  - the final project report.
2. Following consultation with the Agency, the Applicant advised they do not seek access to personal affairs information.
3. The Agency identified 10 documents falling within the terms of the Applicant's request and decided to refuse access to all documents in full under section 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

### Review application

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 a copy 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 exemption

#### ***Section 34(1)(b) – Documents of a business, commercial or financial nature***

10. The Agency relies on section 34(1)(b) to refuse access to documents containing commercial and financial information provided by a business undertaking during a grant application process. The documents concern the construction of a proposed bioenergy plant.
11. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act:
  - (a) would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking;
  - (b) the information relates to 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.

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

- 12. In *Thwaites v Department of Human Services*,<sup>1</sup> 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. In the course of its application for funding, the business undertaking provided documents to the Agency to provide further information regarding its proposed project. Accordingly, I am satisfied the information was acquired from a business, commercial or financial undertaking.

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

- 14. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.<sup>2</sup>
- 15. The Agency submits that the business undertaking provided technical and commercially valuable reports and documents which the undertaking commissioned from experts and consultants.
- 16. Having reviewed the documents, I am satisfied they contain information that relates to matters of a commercial and financial nature.

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

- 17. In determining whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of section 34(1)(b), an agency or Minister may take account of any of the following considerations under section 34(2):
  - (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.
- 18. I have also had regard to *Dalla Riva v Department of Treasury and Finance*,<sup>3</sup> in which VCAT held documents are exempt from release under section 34(1)(b) if their disclosure would:
  - (a) give a competitor of a business undertaking a financial advantage;
  - (a) enable a competitor of a business undertaking to engage in destructive competition with the business undertaking; and
  - (b) would lead to the drawing of unwarranted conclusions as to a business undertaking's financial affairs and position with detrimental commercial and market consequences.

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<sup>1</sup> (1999) 15 VAR 1.

<sup>2</sup> *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

<sup>3</sup> [2007] VCAT 1301 at [33].

19. I consider the phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b), contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word 'unreasonably' in section 34(1)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed 'unreasonably' to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.
20. 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 an undertaking unreasonably to disadvantage.
21. The Agency submits disclosure of the relevant information would be likely to expose the business undertaking unreasonably to disadvantage as:

Disclosure of this information to the applicant and the wider public would most likely cause substantial harm to the company's competitive position by jeopardising [the undertaking] securing investors and in turn, the construction phase of the [development]. Further negative consequences likely to occur are failure to achieve the project's objectives including [specified objectives]. Given this, SV [Sustainability Victoria] considers that the harm is unreasonable and that any public interest in favour of disclosure with regard to scrutiny of government decisions or transparency regarding expenditure of public money, is outweighed in the circumstances

...

It is apparent that the disadvantage to which [the undertaking] would be exposed is financial in that disclosure would grant its competitors ready access to information that [the undertaking] has compiled at considerable cost to itself and disclosure would imperil the viability as well as the profitability of future stages of [the] project.

If [the undertaking's] final report and associated documents were disclosed under FOI, it would inhibit grant recipients and applicants for SV funding from including comprehensive technical and commercial information in their grant documentation. This information is essential to SV's independent assessment of whether the proposed projects are worthy, value-for-money and technologically advanced responses to the very serious climate change issues Victoria seeks to address and which is SV's particular responsibility to deliver on. The public interest in ensuring that SV achieves its statutory function to further environmental sustainability via a grants program requires that grant recipients and applicants' commercially sensitive information is protected from disclosure.

If the documents were disclosed under FOI, this disclosure would rapidly become known within the relatively small world of bioenergy businesses operating in Victoria. The impact of that disclosure could be catastrophic for future [projects] in Victoria. Any future investment and development opportunities facilitated by the initial [funding] round would therefore be stymied by disclosure.

...

SV's concern is that [businesses] will be inhibited from seeking key government funding support if they have no confidence that their commercially sensitive information will not be released to the world at large including their competitors. SV is also concerned that disclosure of these documents will have a knock-on effect to applicants for the rest of SV's grant programs.

SV has very genuine concerns that disclosure of the documents in question will prejudice the delivery of the Victorian Government's future [programs] and imperil the achievement of its ambitious and necessary [outcomes]. There is no public interest in releasing these documents to this individual. Conversely, there are substantial public interest considerations to be served in upholding SV's decision that these documents are exempt from disclosure.

22. In determining whether disclosure of commercially sensitive information in a document would be likely to expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify the

undertaking and seek its views on disclosure of the undertaking's business, commercial or financial information.<sup>4</sup>

23. The undertaking objected to the release of the documents, advising that the documents were preliminary and subject to change. While I have taken the views of the business undertaking into consideration, its views are one factor for my consideration and are not necessarily determinative.
24. Having carefully reviewed the documents and the information before me, on balance, I am not satisfied disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
25. In reaching this decision, I have taken the following considerations into account:
  - (a) The documents were created as part of a process by which the government allocates public money to meritorious development proposals. I consider there is nothing sensitive about the nature of such documents or the way in which the information was acquired by the Agency. The Agency also [redacted information]; providing information [publicly] about the project and the amount of funding awarded for the pre-construction phase of the [development].
  - (b) A key purpose of access to information under the FOI Act is to ensure grants awarded by government to business undertakings are better able to be scrutinised.
  - (c) 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.
  - (d) I understand there has been considerable interest from the local community in relation to the undertaking's project. I also acknowledge the Applicant's interest in the documents as a concerned local resident who is interested in the proposed [development]. As explained above, I consider there is a public interest in favour of disclosure of the information sought to provide transparency and accountability to affected members of the public around government grants processes and the expenditure of public funds with respect to the proposed [development].
  - (e) Commercial organisations applying for government grants should reasonably expect a greater degree of transparency and accountability given the use of public funds for projects in relation to [sustainability initiatives].
  - (f) The Agency's own terms and conditions in relation to participation in grants programs makes clear that information submitted to the Agency as part of the grant application process may be subject to access under the FOI Act or other lawful means.<sup>5</sup>
  - (g) Much of the information in the documents is very specific to the project site in question and would not appear to be readily transferable to similar projects in other locations.
  - (h) While it is possible the undertaking may be exposed to a certain measure of disadvantage if the documents are disclosed, I am not satisfied any such exposure would be unreasonable in the circumstances of this matter.
  - (i) Whilst I acknowledge the Agency's submission in relation to the impact of disclosure on the government's ability to deliver [programs] , I do not consider this to be a relevant consideration when assessing whether the documents would be exempt under section 34(1)(b).
26. Accordingly, I am not satisfied the documents are exempt under section 34(1)(b).

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<sup>4</sup> Section 34(3).

<sup>5</sup> Sustainability Victoria, 'Terms of participation in grants programs' (Web page, 8 December 2021) <<https://www.sustainability.vic.gov.au/about-us/legal-and-policies/contract-terms-and-conditions/terms-of-participation-in-grants-programs>>.

27. My decision is outlined in the Schedule of Documents in **Annexure 1**.

### **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’<sup>6</sup> 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.<sup>7</sup>

30. As noted above, the Applicant does not seek access to the personal affairs information of third parties. I am satisfied this information, which includes the names, email addresses, phone numbers, signatures, position titles and initials of third parties is irrelevant information and is to be deleted from the documents in accordance with section 25.

31. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

32. On the information before me, I am not satisfied the documents are exempt under section 34(1)(b).

33. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant information deleted in accordance with section 25, access is granted in part.

### **Review rights**

34. 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>8</sup>

35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>

36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>

37. 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.

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.<sup>11</sup>

### **Third party review rights**

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<sup>6</sup> *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].

<sup>7</sup> *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].

<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).

39. As I have determined to release documents that contain information of a business, financial, commercial nature relating to a business undertaking if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>12</sup>
40. In this case, I am satisfied it is practicable to notify the relevant business undertaking of its review rights and confirm it will be notified of my decision on the date of decision.

***When this decision takes effect***

41. My decision does not take effect until the third parties' 60 day review period expires.
42. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>12</sup> Sections 49P(5), 50(3A) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Permission pathway form	10	Refused in full Section 34(1)(b)	Release in part Section 25  The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): I am not satisfied this document is exempt under section 34(1)(b) for the reasons outlined in the Notice of Decision, above.  Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant personal affairs information deleted in accordance with section 25.
2.	[Date]	Planning Permit Application	54	Refused in full Section 34(1)(b)	Release in part Section 25  The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
3.	[Date]	Civil Engineering Plans	18	Refused in full Section 34(1)(b)	Release in part Section 25	Section 34(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	
4.	[Date]	Stormwater Management Report	11	Refused in full Section 34(1)(b)	Release in part Section 25  The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
5.	[Date]	Traffic Impact Assessment Report	36	Refused in full Section 34(1)(b)	Release in part Section 25  The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
6.	[Date]	Preliminary High Level Design Report	23	Refused in full Section 34(1)(b)	Release in part Section 25 The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
7.	[Date]	Letter	3	Refused in full Section 34(1)(b)	Release in part Section 25 The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.
8.	[Date]	[Waste Disposal Report]	3	Refused in full Section 34(1)(b)	Release in part Section 25 The document is to be released except for the irrelevant personal affairs information	Section 34(1)(b): See comments for Document 1.  Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					which is to be deleted in accordance with section 25.	
9.	[Date]	[Named undertaking]: Outline of [Project]	12	<b>Refused in full</b>  Section 34(1)(b)	<b>Release in part</b>  Section 25  The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	<b>Section 34(1)(b):</b> See comments for Document 1.  <b>Section 25:</b> See comments for Document 1.
10.	Undated	Final Project Report	11	<b>Refused in full</b>  Section 34(1)(b)	<b>Release in part</b>  Section 25  The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	<b>Section 34(1)(b):</b> See comments for Document 1.  <b>Section 25:</b> See comments for Document 1.