

Notice of Decision and Reasons for Decision

Applicant:	'EK2'
Agency:	Department of Health
Decision date:	29 April 2022
Exemption considered:	Section 34(1)(b)
Citation:	'EK2' and Department of Health (Freedom of Information) [2022] VICmr 120 (29 April 2022)

FREEDOM OF INFORMATION – matters of a business, commercial or financial nature – would not expose undertaking unreasonably to disadvantage – public hospitals – business case

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 in that I have decided to grant access to the document in full as I am not satisfied it is exempt under section 34(1)(b).

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

29 April 2022

Reasons for Decision

Background to review

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

...a copy of the business case, recently submitted to the Department of Health secretary for review, for the voluntary amalgamation of [named hospital 1], [named hospital 2], [named hospital 3] and [named hospital 4]...
2. The Agency identified one document comprising 161 pages falling within the terms of the Applicant's request and decided to refuse access to the document in full under sections 34(1)(b) and 35(1)(a). The Agency's decision letter sets out the reasons for its decision.

Review application

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. On [date], the Agency advised it intended to make a fresh decision under section 49M(1). OVIC staff informed the Applicant about the Agency's fresh decision and the requirement under section 49M(2) that it be made by [date], being 28 days from the date the Agency notified OVIC and the Applicant of its intention to make a fresh decision.
6. On [date], the Agency requested an extension of time to make its fresh decision. OVIC requested a submission from the Agency outlining the reasons why an extension of time was required.
7. On [date], the Agency confirmed its fresh decision would not be made within the required timeframe under section 49M(2). In doing so, the Agency provided a supplementary written submission advising it no longer relied on section 35(1)(a) to refuse access to the document as the project is now public and the business case finalised. It also provided a reconsidered marked-up version of the document, indicating where it considered the exemption under section 34(1)(b) applies. I note that in comparison with the original document, the Agency determined a significant amount of additional information can be released.
8. As the Agency did not make a fresh decision, I am required to resume my review based on the Agency's original decision in accordance with section 49MA(3). However, I have taken the Agency's submission into account, and as such, I have not considered the application of section 35(1)(a) and have reviewed the reconsidered version of the document provided to OVIC on [date].
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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) – Information acquired by an agency from a business undertaking

12. The Agency applied section 34(1)(b) to refuse access to certain information in the document.
13. 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 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.
14. The phrase ‘information acquired’ in section 34(1) signifies the need for the positive handing over of information in some precise form.¹
15. The phrase, ‘business, commercial or financial nature’ should be given its ordinary meaning.²
16. 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.

17. Section 34(1)(b) contemplates disclosure of a document under the FOI Act may expose an undertaking to a certain measure of disadvantage. However, something more than commercial disadvantage is required to satisfy the requirements of this exemption; namely, whether the undertaking is likely to be exposed unreasonably to disadvantage, for example, of a financial nature that causes harm to the competitive position of the undertaking.

Does the document contain information acquired from a business undertaking related to matters of a business, commercial or financial nature?

18. The document subject to review is the business case for the voluntary amalgamation of [named hospital 1], [named hospital 2], [named hospital 3] and [named hospital 4] (the **Hospitals**).
19. I am satisfied the document contains information of a commercial and financial nature. However, I am not satisfied that the Hospitals are business, commercial or financial undertakings for the purposes of section 35(1)(b). Instead, they are public health bodies whose predominant function is the delivery of health care services to the public.

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

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

20. However, for completeness, I will consider whether disclosure of the information would be likely to expose the Hospitals unreasonably to disadvantage.

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

21. The Agency consulted with each of the Hospitals that are included in the business case in accordance with its obligation under section 34(3).
22. The Hospitals object to disclosure of the exempt material in the document. I have considered the submission of the Hospitals' representative and the Agency that disclosure of the document would expose the Hospitals unreasonably to disadvantage.
23. Prior to its reconsideration of the document, the Agency submitted the following:

In making its decision to exempt the document under section 34(1)(b), the department consulted with the four health services under section 34(3) of the Act. The health services advised that the document contains financial information of the Health Services and assessments of the benefits and costs of the amalgamation. Disclosure of this information would expose the Health Services to disadvantage, especially as this information is not available to the general public. In so far as the Business Case identifies cost savings which may be realised through the amalgamation of the Health Services, this could lead employees and contracted service providers to cease providing services if they became concerned about their continued engagement following the amalgamation. As the decision to amalgamate has not been finalised, this will have a negative impact on the operation of the Health Services.

In so far as the Business Case indicates the financial difficulties faced by some aspects of the Health Services' operations, this information may lead employees and contracted service providers to withdraw services for fear of the long-term viability of the service. Disclosure of the Business Case could lead to industrial difficulties and potentially disputes in that employees may apprehend for their future employment following the amalgamation.

Further, the financial reports of the Health Services in the document are not the final audited accounts of the Health Services.

24. On [date], the Agency made a further submission:

[The Hospitals] provided the view that although the amalgamation has already been effected, it is now working on its implementation of the amalgamation which requires the integration of the 4 participating Health Services.

The document sets out the commercial drivers for the amalgamation, including the prospects of greater efficiency through the consolidation of services. Disclosure of this information from the document would expose [health entity] to disadvantage in that its program of consultation with affected employees and service providers would be undermined. Further, [health entity] would be disadvantaged if its contracted service providers withdrew or limited their services in apprehension of [health entity's] altered requirements.

25. Having carefully reviewed the document and the information before me, on balance, I am not satisfied disclosure of the exempted information would be reasonably likely to expose the Hospitals unreasonably to disadvantage. In reaching this decision, I have taken into account the following considerations:
- (a) The document was created as part of a process by which the Hospitals voluntarily proposed to amalgamate to more efficiently provide healthcare services to the public in areas of regional Victoria. I consider there is nothing sensitive about the nature of document or the way in which the information was acquired by the Agency such that release would give a competitor of the Hospitals a financial advantage or would allow destructive competition.

- (b) The Minister for Health's approval of the amalgamation was announced on [date]³ and the new health service called [health entity], that this document concerns, was established on [date].⁴ I note the Agency has since taken this factor into account when it considered making a fresh decision and provided OVIC with a reconsidered version of the document.
- (c) I accept there are circumstances where disclosure of a document provided in confidence to an agency may impact upon the expectation of confidential commercial dealings. However, I am not persuaded in this case where the potential financial harm to the Hospitals is a foreseeable and expected outcome of the amalgamation process.
- (d) While I accept that release of this information may expose the Hospitals to disadvantage in future negotiations with employees and service providers affected by the amalgamation, I am not satisfied that disadvantage would be unreasonable on the basis that commercial and industrial disputes are a foreseeable and likely consequence of the amalgamation.
- (e) Disclosure of business, financial or commercial information is not unreasonable where its disclosure is in the public interest. I consider disclosure of the document to the Applicant is in the public interest and supports open and accountable government. This notion is reflected in the objects of the FOI Act, which is to create a general right of access to information, limited by exceptions necessary to protect essential public interests only.
- (f) I do not consider the documents are being sought by a commercial competitor of the business undertaking. Rather, the Applicant is exercising their right to access information about a government decision that impacts persons within the regional Victorian community.

26. Accordingly, I am satisfied the document is not exempt under section 34(1)(b).

Conclusion

27. On the information available, I am not satisfied the exemption in section 34(1)(b) applies to the document. I have decided to grant access to the document 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 [footnote redacted]

⁴ [footnote redacted]

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).

Third party review rights

33. As I have determined to release documents that contain information claimed exempt under section 34(1)(b), 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.⁹
34. I am satisfied it would be practicable to notify each Undertaking of their right to seek review of my decision by VCAT.
35. Accordingly, OVIC will provide the Agency with a notice to issue to each Undertaking setting out their review rights.

When this decision takes effect

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

⁹ Sections 49P(5), 50(3A) and 52(3).