



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: 'CX5'
Agency: Environment Protection Authority
Decision date: 19 April 2021
Exemption considered: Section 34(1)(b)
Citation: 'CX5' and Environment Protection Authority (Freedom of Information) [2021] VICmr 105 (19 April 2021)

FREEDOM OF INFORMATION – regulatory documents – environmental regulation – pollution abatement (PAN) notices – *Environment Protection Act 1970* (Vic) – third party invoices for works

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 the documents are 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, I have granted access to the documents in part.

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

19 April 2021

Reasons for Decision

Background to review

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

All inspection records and reports in respect of the land at [location] and/or the [named business] between [dates];

A copy of all Pollution Abatement Notices or similar issued by the EPA in respect of the land at [location] and/or the [named business] between [dates];

Requests to the EPA by any person or entity made for or on behalf of the owners, operators and/or duty holders of the land at [location] and/or the [named business] between [dates] for the review and/or revocation of any Pollution Abatement Notice issued in respect of the land at [location] and/or the [named business] between [dates] including, but not limited to all documents submitted by the legal or other representatives of the duty holder for the Land;

Internal review documents of any Pollution Abatement Notices issued in respect of the land at [location] and/or the [named business] between [dates];

The reasons and/or grounds for the revocation of any Pollution Abatement Notice issued in respect of the land at [location] and/or the [named business] between [dates];

A copy of any revocation notice of any Pollution Abatement Notice issued in respect of the land at [location] and/or the [named business] between [dates] to any party;

All written correspondence between the EPA and [name of] Council in relation to any Pollution Abatement Notice and any subsequent revocation of any Pollution Abatement Notice issued by the EPA in respect of the land at [location] and/or the [named business] between [dates];

All emails between the EPA and the legal or other representatives of the owner, operator and/or duty holder in respect of the land at [location] and/or the [named business] between [dates] in relation to any Pollution Abatement Notice issued by the EPA in respect of the Land and any subsequent revocation of a PAN.

2. The Agency identified 91 documents falling within the terms of the Applicant's request and granted access to three documents in part and 88 documents in full. The Agency relied on section 34(1)(b) to refuse access to parts of the documents. 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 to three documents in part.
4. The Applicant advised they do not seek access to the personal affairs information of third party individuals in the documents. Accordingly, this information is to be deleted from the documents in accordance with section 25.
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.

Preliminary view

10. The Agency was provided with a preliminary view that the three invoices subject to review are not exempt under section 34(1)(b).
11. The Agency was also invited to consult with the two service providers (**business undertakings**) that created and issued the invoices subject to review.
12. The Agency did not respond to the preliminary view.

Review of exemptions

Section 34(1)(b)

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 (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.
14. 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 the positive handing over of information in some precise form.
15. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.²
16. The Agency advised it consulted with one of the business undertakings involved in this matter (being the business that hired the two service providers that created the invoices) regarding its views on release of documents containing its business, commercial or financial information. It responded by objecting to the release of its information. The Agency did not consult with the two service providers that created and issued the invoices referred to in my preliminary view.
17. Section 34(2) provides in deciding whether disclosure of information would expose a business undertaking unreasonably to disadvantage, 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

¹ (1999) 15 VAR 1.

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

- (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—
- (e) and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

18. In its submission, the Agency provided the following information:

The three invoices relate to the purchase of works to install equipment at [named business] to respond to [description of issue]. The three invoices were provided to the EPA as part of the evidence to demonstrate satisfaction of the requirements in Pollution Abatement Notices (PANs) issued under the *Environment Protection Act 1970* to [named business].

For the assessment of the invoices, the EPA undertook consultations with [name of business] (a property group that owns [name of business, the proprietor of the [named business]], in accordance with Section 34(3)(b) of the FOI Act. [Name of business] objected to disclosure of documents.

The decision to exempt the sums of money was made after giving the following considerations:

- The material discloses pricing information of a third party provider, [name of service provider 1], of the equipment that [named business] purchased to satisfy the regulatory requirements under the PANs, which information would not ordinarily be available to the competitors of [name of service provider 1] (specifically, rates for individual items, and GST amounts and sub-totals in instances where only a single unit of the item was purchased).
- The material discloses pricing information of a third party provider, [name of service provider 2], for services to install the equipment that [named business] purchased from [name of service provider 2] to satisfy the regulatory requirements under the PANs, which information would not ordinarily be available to the competitors of [name of service provider 2] (specifically, rates for individual items, and GST amounts and sub-totals in instances where only a single unit of the item was purchased).
- Disclosure of the information of [name of service provider 1] and [name of service provider 2] would be likely to allow competitors to use such information in conjunction with public information about the respective products and services each provides to undermine their competitive position, which would be likely to cause substantial harm to their competitive position, as it would enable competitors to engage in destructive competition with [name of service provider 1] and [name of service provider 2].
- The totals for which [named business] was invoiced by [name of service provider 1] and [name of service provider 2] is information that discloses aspects of the financial position of [named business] and that would not ordinarily be available to competitors of [named business]. It would be likely to be used by a competitor to engage in destructive competition with [named business].
- The financial position of [named business] is irrelevant to evaluate the effectiveness of the regulation of its practices in respect of the matter for which this information was acquired by EPA and for the stated purpose that concerns [the Applicant].
- There is a public interest in knowing that instances of pollution caused by [named business] have been addressed to the extent required by the relevant laws, but that does not require confidential details of financial matters that would be likely to be used to the detriment of [named business], or one or more of its consultants.

19. The Applicant submits:

- (1) The extent of works undertaken and the *pricing and total amounts paid for services that are related to installation of components* to address the pollution the subject of the PAN is the fundamental basis for the revocation of the PAN and the primary purpose of the request for information;

- (2) The information is not financial and commercial information such that it could on any reasonable assessment be considered to expose the [named business] or the contractor to “unreasonable disadvantage” as:
- a. The information is the specific cost of the installation of equipment in a particular [type of equipment], in a particular context, to rectify a particular defect, to address a particular pollution complaint and/or PAN. These costs are not of a general nature that can be readily transferable to other clients, [type of equipment] or factual circumstances;
 - b. The information is not financial and commercial information of an ongoing operational nature for the [named business]; and
 - c. The [type of equipment] equipment is a component part of an overall significant [type of business] operation that includes multiple [redacted] areas.

(3) It is the alleged cost of the works to the [named business] that is relevant and not the contractor or application of that cost to other factual scenarios. If there is any concern about the contractor the subject of documents in question, names can be redacted.

(4) The cost of the equipment is likely to be readily available through a quote from the particular contractor or supplier.

(5) The financial information in question has been generally disclosed in a letter dated [date] to our client from [name of lawyer] acting for [name of local council] (**[name] Letter**) where it states (emphasis added):

Council has been advised that the EPA provided the following reasons why the internal review determines that the PAN be revoked:

- *The primary reason for this decision was that the works required in the Notice were considered disproportionate to the risk to human health and the environment. In order to comply with the Notice, extensive works with costs exceeding [value] were required above what was already spend [sic] by the [named business]. The EPA did not have sufficient evidence to justify the amount of remedial work required.*

(6) The [name] Letter provides the following further reason provided by the EPA for the revocation of the PAN:

- *Consideration was also put into what was ‘reasonably practicable’ for the duty holder in their industry. For the [named] industry, it is not industry standard for these types of controls to be implemented across the board, it is very likely that [named business] now has the most extensive [description of issue] controls in place for a [type of business] compared to other within the state of Victoria.*

Based on this reason, the *pricing and total amounts paid for services* related to the installation of components in the [type of business] as that are unique and cannot or would not be transferrable to any other [type of business] operation because they exceed standard practice by some measure. There is simply no prospect that the *pricing and total amounts paid* for such extraordinary works and controls that go over and above the norm would provide any advantage to a third party (be it another [type of business] or contractor).

(7) Releasing the information in these circumstances would not be releasing information to a competitor of the [named business] or the contractor. In any event there is no competitor to the [type of business] which is a highly unique and substantial entertainment complex.

...

The information is needed because it is the fundamental basis for the EPA decision to revoke the PAN without abatement of the alleged pollution and the reason why the alleged pollution has not been required by the EPA to be abated.

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

20. The documents subject to review are three invoices. A substantial amount of information, including the description of services provided were released to the Applicant. The information the Agency determined to be exempt under section 34(1)(b) is the costs paid for the services.

21. I accept the documents relate to matters of a business, commercial or financial nature in the context of the purchaser of the services and the two named service providers.

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

22. I have determined disclosure of the information relating to the costs paid for the services would not expose the business undertakings unreasonably to disadvantage for the following reasons:
- (a) As described by the Agency, the three invoices were provided to the EPA as part of evidence to demonstrate responses to Pollution Abatement Notices issued under the *Environment Protection Act 1970* (Vic). In these circumstances, I consider disclosure will assist the Applicant to form a view as to whether the Agency met its regulatory obligations under that Act in ensuring compliance with environment protection laws.
 - (b) In my view, there is a public interest in disclosure of the information as it demonstrates the Agency has met its regulatory obligations and statutory functions.
 - (c) I do not consider disclosure of the information would reveal sufficient information regarding the financial position of the purchaser of the services, such that disclosure would cause it substantial harm in a commercial context. Rather, they relate to a small part of its financial expenditure two years ago.
 - (d) While I accept the information is not publicly available, as the invoices refer to specific services provided at a specific point in time, which are likely to vary according to the particular circumstances underpinning the services provided, I am satisfied the information can be released without causing substantial harm to any of the business undertakings concerned.
23. Accordingly, I am satisfied the information is not exempt under section 34(1)(b).

Deletion of exempt or irrelevant information

24. 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.
25. 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
26. 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 as it relates to personal affairs information, which is not sought by the Applicant.
27. I have considered whether it is practicable to provide the Applicant an edited copy of the documents with irrelevant information deleted in accordance with section 25. I am satisfied it is practicable do so as it would not involve substantial time and effort, and the edited documents would retain meaning.

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].

Conclusion

28. On the information before me, I am not satisfied the documents are exempt under section 34(1)(b).
29. 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, I have granted access to the documents in part.
30. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

31. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁵
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
34. 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.
35. 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

Third party review rights

36. I have decided to release documents that contain matters of a commercial nature relating to third party business undertakings.
37. Accordingly, the relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.⁹

When this decision takes effect

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

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).

⁹ 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
Note: Documents 1 to 11, 13, 14, 17 to 88 were released in full to the Applicant.						
12.	[date]	[name of service provider 1]	2	Release in part Section 34(1)(b)	Release in full	Section 34(1)(b): I am not satisfied the document is exempt for the reasons set out in the Notice of Decision above.
15.	[date]	[name of service provider 2]	1	Release in part Section 34(1)(b)	Release in full The document is to be released with irrelevant information deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1. Section 25: The contact name and email address are irrelevant to the terms of the Applicant’s request and are to be deleted in accordance with section 25.
16.	[date]	[name of service provider 2]	1	Release in part Section 34(1)(b)	Release in full The document is to be released with irrelevant information deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1. Section 25: The contact name and email address are irrelevant to the terms of the Applicant’s request and are to be deleted in accordance with section 25.