

Notice of Decision and Reasons for Decision

Applicant:	'EZ2'
Agency:	Department of Treasury and Finance
Decision date:	4 January 2023
Exemptions considered:	Sections 30(1), 34(1)(b), 34(4)(a)(ii)
Citation	'EZ2' and Department of Treasury and Finance (Freedom of Information) [2023] VICmr 2 (4 January 2023)

FREEDOM OF INFORMATION – ministerial briefs – ministerial briefings – Treasurer – Assistant Treasurer – Melbourne and Olympic Parks Trust – cash deficit figures – COVID-19 pandemic – Victorian Managed Insurance Authority – Treasurer’s Indemnity – North East Link Project – Whitten Oval Redevelopment

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 is exempt from release under section 30(1) or 34(1)(b). However, I am satisfied certain information in Document 6 is exempt from release under section 34(4)(a)(ii).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, I have determined to grant 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.

Sven Bluemmel
Information Commissioner

4 January 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to specific briefs to the Treasurer.
2. The Agency identified eight documents falling within the terms of the Applicant's request and granted access to four documents in full and four documents in part under sections 28(1)(d), 30(1), 34(1)(b) and 34(4)(a)(ii). 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 only seeks review of information exempted under section 30(1), 34(1)(b) and 34(4)(a)(ii).
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.
10. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Review of exemptions

Section 30(1) – Internal working documents

11. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

12. The exemption does not apply to purely factual material in a document.²
13. The Agency applied section 30(1) to Document 8 only.

Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

14. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
15. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.³
16. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant information deleted, where it is practicable to do so.
17. Document 8 is a briefing to the Treasurer regarding the redirection of cross street realignment funding to the Whitten Oval Redevelopment. Only part of a sentence has been exempted under section 30(1), which I am unable to describe in detail, as to do so would reveal the exempted information.
18. I am satisfied the document and the sentence in which the exempt material appears discloses matter in the nature of advice and recommendation.

Was the document made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?

19. The term ‘deliberative process’ is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.⁴
20. In *Re Waterford and Department of Treasury (No.2)*,⁵ the former Victorian Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

21. I am satisfied the document was made for the purposes of the deliberative processes of the Minister with respect to the approval of funding.

Would disclosure of the document be contrary to the public interest?

22. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

² Section 30(3).

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁵ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

23. In deciding whether the information exempted by the Agency would be contrary to the public interest, the following are relevant factors to consider:⁶
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
 - (f) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
24. The Agency submits the information is exempt as it relates to a deliberative matter that is not publicly known.
25. I am not satisfied disclosure would be contrary to the public interest for the following reasons:
- (a) the fact that information is not publicly known is not sufficient in itself to show that disclosure would be contrary to the public interest;
 - (b) there is no objective information before me to demonstrate disclosure would have a material or detrimental impact on the Whitton Oval project;
 - (c) there is a greater public interest in transparency than maintaining secrecy; and
 - (d) the document concerns decisions made over one year ago and sensitivity has likely declined over time.
26. Accordingly, Document 8 is not exempt from release under section 30(1).
27. My decision on Document 8 is set out in the Schedule of Documents in **Annexure 1**.

Section 34(1)(b) – Business, commercial or financial information of an undertaking

28. 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.

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

29. The Agency applied section 34(1)(b) to Document 6, being a briefing to the Treasurer to approve a Treasurer's Indemnity to limit losses the Victorian Managed Insurance Authority (**VMIA**) may incur with respect to the North East Link Primary Package (**Primary Package**).
30. The VMIA is a statutory body with predominant functions to provide insurance and risk advice to the Victorian Government under the *Victorian Managed Insurance Authority Act 1996* (Vic).⁷
31. As it is a statutory body, I do not accept the information was acquired from a business, commercial or financial undertaking for the purposes of section 34(1)(b). Instead, I will consider the application of section 34(4)(a)(ii) to all information exempted in Document 6.

Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage

32. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, 'in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage'.
33. Therefore, a document is exempt from release under section 34(4)(a)(ii) if:
 - (a) the relevant agency is engaged in trade or commerce;
 - (a) the document contains information of a business, commercial or financial nature; and
 - (b) disclosure of the relevant information would be likely to expose the agency unreasonably to disadvantage.
34. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.⁸
35. The Victorian Civil and Administrative Tribunal (**VCAT**) has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'.⁹ VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.¹⁰ An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency's other functions.¹¹
36. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.¹²
37. While the phrase 'trade and commerce' may be interpreted broadly,¹³ it has been held trade and commerce must 'of their nature, bear a trading or commercial character'.¹⁴
38. The fact an agency's predominant activities may be described as 'governmental' does not preclude it from relying on the exemption under section 34(4)(a)(ii).¹⁵

⁷ *Victorian Managed Insurance Authority Act 1996* (Vic), section 6.

⁸ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

⁹ *Gibson v Latrobe City Council* [2008] VCAT 1340 at [33], citing *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

¹⁰ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [30], citing *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

¹¹ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

¹² *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR 427 at [473].

¹³ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

¹⁴ *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35], citing *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690;

¹⁵ *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

39. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself, or part of its operations, in a manner similar to a commercial entity.
40. 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.¹⁶
41. I consider section 34(4)(a)(ii) contemplates that disclosure of a document under the FOI Act may expose an agency to a certain measure of disadvantage, and that any such exposure must be unreasonable before a document is considered exempt.
42. In the context of section 34(4)(a)(ii), ‘disadvantage’ has been interpreted to be in the nature of an agency engaged in trade and commerce being exposed to commercial or competitive disadvantage. For example, in *Accident Compensation Commission v Croom*,¹⁷ O’Byrne J states:
- In my opinion, the word "disadvantage" in the context of trade or commerce and information of a business, commercial financial nature means injury of a financial kind.¹⁸
43. Whether disadvantage is ‘unreasonable’ depends on the particular facts and circumstances of a matter and involves a balancing exercise. Unlike section 34(1)(b) in conjunction with section 34(2), there is no list of factors to be considered in relation to section 34(4)(a)(ii). However, VCAT has taken the following factors into consideration:¹⁹
- (a) the nature of the information;
 - (b) the circumstances in which the information was obtained;
 - (c) the likelihood that concerned persons would not wish the information to be disclosed without consent; and
 - (d) the current relevance and sensitivity of the information.
44. The term ‘likely’ in the context of this section means ‘probable, such as well might happen or be true’.²⁰

Document 5 – Release of Sports Trusts Solvency Support funding for the Melbourne and Olympic Parks Trust (MOPT)

Is MOPT engaged in trade and commerce?

45. Document 5 concerns the release of funds held in contingency for solvency support for MOPT.
46. MOPT is a statutory authority established under the *Melbourne and Olympic Parks Act 1985* (Vic) and is the custodian of the Melbourne and Olympic Parks precinct. Its purpose is to administer, manage and promote the use of the Melbourne and Olympic Parks precinct for the purposes of development, promotion, operation and use of sports, entertainment, and recreation.²¹
47. I accept MOPT has commercial functions and is in competition with other sports and recreational entities.

¹⁶ *Gibson v Latrobe City Council (General)* [2008] VCAT 1340 at [25].

¹⁷ [1991] 2 VR 322.

¹⁸ *Ibid* at [331].

¹⁹ *Gibson v Latrobe City Council (general)* [2008] VCAT 1340 at [41], citing *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366 at 372-3 and *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 246.

²⁰ *Gibson v Latrobe City Council (General)* [2008] VCAT 1340 at [39] citing *Asher v Department of Innovation, Industry and Regional Development* [2005] VCAT 2702 at [38].

²¹ *Melbourne and Olympic Parks Act 1985* (Vic) section 3.

48. The document specifically concerns MOPT's financial position in the context of its commercial operations.
49. Accordingly, given the functions of MOPT and in the context of the document, I accept MOPT is engaged in trade and commerce for the purposes of the FOI Act.

Does the document contain information of a business, commercial or financial nature?

50. I accept the document contains information of a business, commercial and financial nature.

Would disclosure be likely to expose MOPT unreasonably to disadvantage?

51. The exempted information is forecasted cash deficit figures for MOPT in the context of potential postponement or cancellation of commercial operations, such as the Australian Open, arising from COVID-19 pandemic restrictions.
52. The Agency consulted with MOPT, which expressed concerns that the figures redacted in the brief are speculative and reflect a scenario that did not ultimately eventuate and could be interpreted erroneously and taken out of context and given the high-profile nature of the Australian Open, disclosure in such circumstances would be likely to be commercially damaging to MOPT.
53. The Agency also submits:

The Australian Open is an extremely well-publicised event and MOPT provided their figures around projected cash deficits in confidence to the Department. While... MOPT publishes financial statements in its Annual Report, this financial information around projected cash deficits is not made publicly available, and represent point-of-time estimates, which could be taken out of context or misinterpreted given there is no other explanatory information around the breakdown of these projected deficits. With material in paragraph 8, MOPT's 2021-25 Corporate Plan is not made public and the information redacted reflects information around MOPT's strategic planning priorities.

54. In determining whether disclosure will be likely to expose MOPT unreasonably to disadvantage, I have considered the following:
- (a) The situations to which the estimated cash deficits relate did not eventuate, such as the cancellation of the Australian Open. While I accept the document does not disclose contextual information about how the forecasted figures were calculated, I do not consider disclosure of the information without contextual information would be likely to expose MOPT unreasonably to commercial disadvantage. In any case, should the Agency or MOPT consider disclosure of the documents would lead to any misunderstanding, it is open to the Agency to release the document to the Applicant with any necessary additional information to eliminate or minimise any confusion or misunderstanding concerning the document or to place the document into a fuller context.
- (b) In the context of the economic implications of the COVID-19 pandemic during 2020-2021, it is not unexpected or controversial that entities would anticipate the COVID-19 pandemic restrictions may impact the income from revenue generating events. In this respect, I have considered MOPT's 2020-2021 Annual Report,²² which states the following:

BENEFITING FROM A STRONG BALANCE SHEET

The impact of COVID-19 on the precinct's events program and M&OP's revenue was significant, but with a strong foundation of responsible financial management the organisation continues to occupy a strong position despite the challenges of the past 12 months.

Over time, M&OP has built sufficient cash reserves to ensure its business remains sustainable despite fluctuations in demand for venue hire. This approach has held the organisation in good stead

²² Melbourne and Olympic Parks, Annual Report 2020-21, p. 5.

and enabled it to provide \$8.4 million in financial relief to tenants and hirers, and \$2.5 million to support casual staff since the beginning of the pandemic while focusing on prudent financial management. This includes \$5.1 million in financial relief and \$1.6 million to support staff this year. Additionally, \$42.0 million was contributed to the Melbourne Park Redevelopment.

Total income for the year was \$43.3 million, down \$55.7 million from the previous year. This decline was largely due to the cancellation of revenue generating events.

Total operating expenditure of \$57.0 million was \$13.8 million lower than last year. This excludes depreciation charges of \$39.4 million in the current year and \$39.1 million in the previous year.

The net operating balance for the year, excluding the depreciation charge and other economic flows, was a loss of \$13.7 million. This is down from the \$28.2 million profit in the previous year.

- (c) There is no information before me from either the Agency or MOPT to suggest that disclosure of the information will impact MOPT's future commercial negotiations.
- (d) I also consider the public interest weighs in favour of disclosure to ensure public scrutiny with respect to the finances of public sector agencies. While the Annual Report fulfils this function, disclosure of the information in this document nevertheless supports the public interest of transparency. In undertaking my review, I have had regard to the object of the FOI Act in section 3(1), in particular that non-disclosure of a document should be limited only by exceptions and exemptions necessary to protect an 'essential' business interest.
- (e) The Agency also exempted a small amount of information outlining, in general terms, MOPT'S 'commercialisation strategy'. The Agency submits this information 'is not made public and the information redacted reflects information around MOPT's strategic planning priorities'. In my view, the exempted information is so general in nature that it is unlikely such information could be used by competitors at the expense of the commercial interest of MOPT. Accordingly, I am not satisfied this information is exempt under section 34(4)(a)(ii).

55. Accordingly, I am not satisfied the document contains information that will be likely to expose MOPT unreasonably to disadvantage and therefore, the document is not exempt from release under section 34(4)(a)(ii).

56. My decision on Document 5 is set out in the Schedule of Documents in **Annexure 1**.

Document 6 – Victorian Managed Insurance Authority (VMIA) request for a Treasurer's Indemnity in relation to the North East Link

- 57. The North East Link is an infrastructure project to connect Eastern Freeway to the Metropolitan Ring Road (M80).²³
- 58. The Victorian Government and the North East Link State Tolling Corporation entered into a Public Private Partnership with Spark North East Link Pty Ltd (**Spark**) to deliver the Primary Package, being the construction of the North East Link Tunnels.²⁴
- 59. It has been disclosed in the unredacted parts of the document subject to review that the North East Link Project (**NELP**) agreed to provide insurance cover to Spark, and that VMIA can manage some gaps in the insurance arrangements for the Primary Package within its risk appetite. The briefing requests the Treasurer to sign a Deed of Indemnity to protect the VMIA against potential losses regarding the Primary Package that are outside of its risk appetite.

²³ North East Link Program – Primary Package Project Summary (December 2021), <https://www.dtf.vic.gov.au/sites/default/files/document/North%20East%20Link%20Primary%20Package%20%E2%80%93%20Project%20Summary.PDF>.

²⁴ Ibid; Victoria's Big Build, Publications and FAQs, <https://bigbuild.vic.gov.au/projects/north-east-link-program/about/faqs>.

60. The exempted information sets out contextual information setting out why a Treasurer's Indemnity is being sought, including details of reinsurance gaps outside of the VMIA's risk appetite, the probability of a Treasurer's Indemnity being triggered, and potential payouts.

Is an agency engaged in trade or commerce?

61. The Agency submits multiple Government agencies will likely be exposed unreasonably to disadvantage if the exempted information is released, including the Agency itself, as the department which funds and advises on infrastructure projects, and the Major Transport Infrastructure Authority (**MTIA**), as the authority responsible for procuring and delivering major infrastructure projects, which includes NELP, a division of the MTIA.
62. The Agency submits MTIA/NELP is engaged in trade and commerce when it negotiates and procures insurance policies on commercial terms for infrastructure projects and construction contracts.
63. The Agency submits the present circumstances can be distinguished from the circumstances considered in *Pallas v Roads Corporation*²⁵ (**Pallas**). In *Pallas*, Judge McNamara held:²⁶

In carrying out its road building functions the Corporation engages in Governmental activities rather than in trade or commerce...

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is. A consumer who purchases a consumer item from a department store is not, for that reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.

64. The Agency submits:

In the present circumstances, in which the State has purchased an insurance policy from VMIA on commercial terms, the State is equivalent to the construction companies, as it is the entity which is purchasing insurance policies from VMIA on commercial terms, after extensive negotiations with VMIA and the other parties which will be covered by the insurance policies (the construction contractor).

To the extent that *Pallas* appears to apply in relation to the act of MTIA/NELP negotiating insurance terms in its construction contracts, it is clear that the type of document being considered in *Pallas* is distinguishable from these circumstances and the question of whether an agency is engaged in trade or commerce is dependent on the circumstances and facts of the case.²⁷ That is, in *Pallas* the information related to consultants reports about proposed upcoming road projects, whereas the current information subject to review relates to complex negotiations regarding insurance terms in a competitive tender process with the private sector.

We note VCAT's finding in *Pallas* has not been endorsed in any other VCAT decision or superior Court since, and submit that it is an unduly narrow interpretation of the intent of the FOI Act, which if applied would arguably result in no government Agency ever being considered to be 'engaged in trade or commerce' for the purposes of s 34(4)(a)(ii), therefore defeating the intention of Parliament when enacting the provision.

For these reasons, we prefer the view adopted in other cases on the matter, including:

- The recent decision of the Victorian Civil and Administrative Tribunal of *Davis v Major Transport Infrastructure Authority (Review and Regulation)* [2022] VCAT 894 in which it was noted at [72] that it was not in dispute that the MTIA's activities were in trade or commerce.

²⁵ (Review and Regulation) [2013] VCAT 1967.

²⁶ Ibid at [57]-[58].

²⁷ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45.

- The decision of the Tribunal in *CityLink Melbourne Limited v Department of Transport*²⁸. In that case, the Tribunal was satisfied that the Department of Transport, when carrying out its road functions in relation to the road tolls concerning the CityLink road project, was in fact engaged in trade or commerce.

65. The document concerns NELP contracting with Spark for the delivery of the Primary Package for the North East Link and insurance with respect to the Primary Package.
66. In the present circumstances, NELP is the responsible authority for the planning, implementation and execution of the North East Link. I acknowledge public infrastructure projects of this nature include government contracting with commercial undertakings, such as Spark, to carry out specific construction works on behalf of government. However, although part of this process may bear a business or commercial nature, I do not accept this means an agency is 'engaged in trade or commerce' for the purposes of section 34(4). Where the State Government enters into a contract on behalf of the State of Victoria with a commercial provider in exchange for the provision of goods or services for the benefit of the public, it does not do so as an activity in trade or commerce, but rather to fulfil its role to deliver governmental services, functions and publicly funded projects on behalf of the community.
67. For the same reason, I do not consider the Agency purchasing an insurance policy from VMIA, albeit on commercial terms, amounts to the Agency engaging in trade and commerce.
68. On the information before me, I am not satisfied the essential character or core activity undertaken by the State Government in this instance, and to which the information relates, meets the requirement of 'trade or commerce' for the purposes of section 34(4)(a)(ii).
69. Given this, I have not considered whether disclosure will be likely to expose MTIA/NELP unreasonably to disadvantage.
70. I will consider the remaining limbs of section 34(4)(a)(ii) with respect to information concerning the VMIA only.

Is the VMIA engaged in trade and commerce?

71. As noted above, the Agency applied section 34(1)(b) to information specifically concerning the VMIA. However, as VMIA is a statutory authority, I have considered the application of section 34(4)(a)(ii).
72. The Agency submits:

In the context of the document, VMIA is engaged in the issuing and brokering of insurance on a commercial basis. VMIA issues insurance to State departments, agencies and other entities as required under the *Victorian Managed Insurance Act 1996 (Vic)* (VMIA Act), in this instance for the North East Link Project, and charges commercial premiums to the project for such insurance. Under the VMIA Act, VMIA also provides insurance to entities that are not government entities such as construction companies and domestic builders (for Domestic Building Insurance). VMIA makes a commercial assessment of how much of this cover should be 're-insured' (where VMIA in turn pays commercial premiums to insurers across the global market) and at what cost.

73. I accept the VMIA is engaged in trade and commerce in the context of providing insurance to Government agencies and non-governmental entities. While it is a government agency undertaking statutory functions with respect to insurance, I accept it operates subject to competition with other commercial insurers.

²⁸ [2020] VCAT 1078.

Does the document contain information of a business, commercial or financial nature?

74. I accept the document contains information of a business, commercial and financial nature.

Would disclosure be likely to expose VMIA unreasonably to disadvantage?

75. The Agency submits VMIA would be generally disadvantaged by disclosure of information in Document 6 in the following ways:

- in commercial negotiations to place re-insurance in the global market, if commercial re-insurers were aware of VMIA's appetite and the commercial basis on which VMIA is able to retain risk, in particular the terms of the Treasurer's indemnity;
- in commercial negotiations with future contracts for projects where VMIA is placing insurance, as private sector parties would have insight into positions that VMIA be accept. This information is not usually available to those parties in the context of such commercial negotiations.

76. The Agency also submits disclosure could prejudice the VMIA in the negotiation and settlement of potential claims and variations under the insurance contracts with reinsurers and Spark, which could include:

- [Spark] gaining strategic advantage in knowing the thresholds for risk assumed between VMIA, reinsurers and the State, including the probabilities of loss occurring and associated payouts;
- [Spark] inflating claim demands and holding out for higher claim settlements;
- undermining VMIA's ability to negotiate claims and premiums, when knowledge of the context and particulars of the State's involvement in underwriting the risk is revealed;
- prejudicing VMIA's ability to charge [Spark] additional premium for risk variations;
- impacting the re/insurance and risk position of future projects insured through VMIA on major projects.
- Public disclosure of the information may also impact VMIA's position as a risk adviser and this would impact the delivery of risk management training by VMIA.

77. The Agency submits any such disadvantage would be unreasonable because:

- the information would not be generally available to reinsurers and insurance policy holders (potential claimants);
- this information would normally be regarded as commercially sensitive as it reveals availability and appetite of VMIA and reinsurers to underwrite risk;
- the information would disclose the retention thresholds of VMIA, reinsurers and the State which is information received and provided in confidence;
- the information would disclose the associated premium behind underwritten risk (or State agreement not to charge premium), which may be the subject of future risk variations by [Spark] or on future projects.
- The nature of the commercial information is such that entities VMIA is dealing with on a commercial basis (re-insurers and private sector contractors) may be advantaged, leading to higher cost or risk positions for VMIA.

78. It is submitted the disadvantage is likely to occur in negotiations on upcoming projects, as it is very likely that consortia involved in future infrastructure projects would seek similar terms in their contracts, negatively impacting the insurance or reinsurance and risk position of future projects.

79. Having carefully reviewed the document, I accept disclosure of certain information will be likely to expose the VMIA unreasonably to disadvantage, particularly information specifying events that would trigger claims under a Treasurer's Indemnity, the probability of loss and the quantum of possible payouts. I agree certain information could be used to inflate claims and gain strategic advantages to the commercial detriment of the VMIA.
80. Accordingly, I am satisfied certain information in the document is exempt from release under section 34(4)(a)(ii).
81. My decision on Document 6 is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

82. 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.
83. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²⁹ 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 25.³⁰
84. Noting the Applicant only seeks review of information exempted from release under sections 30(1), 34(1)(b) and 34(4)(a)(ii), I have not considered the remaining information the Agency exempted from release or deleted from the documents as irrelevant information.
85. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete that information, because it will not take substantial time or resources and the edited documents will retain meaning.

Conclusion

86. On the information before me, I am not satisfied information is exempt from release under section 30(1) or 34(1)(b). However, I am satisfied certain information in Document 6 is exempt from release under section 34(4)(a)(ii).
87. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, I have determined to grant access to the documents in part.
88. My decision on each document is set out in the Schedule of Documents in **Annexure 1**.

Review rights

89. 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.³¹
90. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.³²

²⁹ *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].

³⁰ *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].

³¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

³² Section 52(5).

91. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.³³
92. 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.
93. 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.³⁴

Third party review rights

94. As I have determined to release documents that contain information the Agency exempted from release under section 34(1)(b), I have considered the requirement for third party notification. I do not accept MOPT or the VMIA are 'business, commercial or financial' undertakings within the meaning of section 34(1)(b), and therefore, I am not required to notify the relevant third parties of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.³⁵
95. Nevertheless, the Agency may wish to notify those parties of my decision, noting the Agency has 14 days to seek review of my decision by VCAT.

When this decision takes effect

96. My decision does not take effect until the Agency's 14 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

³³ Section 52(9).

³⁴ Sections 50(3F) and 50(3FA).

³⁵ 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.	06/10/2021	Ministerial Brief Melton City Council – Draft Investment Policy Statement – September 2021	3	Released in full	Not subject to review	
2.	01/12/2021	Ministerial Brief Central Pier Western Tip Demolition	2	Released in full	Not subject to review	
3.	13/10/2021	Ministerial Brief Summary of interstate budgets 2021-22	2	Released in full	Not subject to review	
4.	14/10/2021	Ministerial Brief Building Financial Capacity of Housing Agencies Initiative Phase 3 and Amendments to the Treasurer’s Guarantee	2	Released in part Section 28(1)(d)	Not subject to review	
5.	15/10/2021	Ministerial Brief Release of Sports Trusts Solvency Support funding for the Melbourne and Olympic Parks Trust	3	Released in part Sections 28(1)(d), 34(4)(a)(ii)	Released in part Section 25 The information that the Agency exempted under section 34(4)(a)(ii) is to be released. The remaining	Section 34(4)(a)(ii): I am not satisfied information in this document is exempt from release under section 34(4)(a)(ii) for the reasons

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					information to which the Agency refused access it to remain deleted in accordance with section 25.	provided in the Notice of Decision, above. Section 25: As the Applicant does not seek review of the information that the Agency exempted under section 28(1)(d), it is to remain deleted in accordance with section 25. I am satisfied it is practicable to provide the Applicant with an edited copy of this document with such information deleted in accordance with section 25.
6.	19/10/2021	Ministerial Brief Victorian Managed Insurance Authority (VMIA) request for a Treasurer's Indemnity in relation to the North East Link	4	Released in part Sections 34(1)(b), 34(4)(a)(ii)	Release in part Sections 34(4)(a)(ii), 25 The document is to be released, except for the following information which is to be deleted in accordance with section 25: (a) the personal affairs information deleted by the Agency as irrelevant information (b) the information exempted in paragraph 4 on page 1,	Section 34(1)(b): I am not satisfied the document is exempt from release under section 34(4)(a)(ii) for the reasons provided in the Notice of Decision, above. Section 34(4)(a)(ii): I am satisfied some of the information exempted by the Agency is exempt under section 34(4)(a)(ii) for the reasons provided in the Notice of Decision, above. Section 25: The document contains personal affair

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>which is exempt from release under section 34(4)(a)(ii); and</p> <p>(c) the information exempted by the Agency in paragraphs 4 (from point (a)) to 10 from page 3 onwards, which is exempt from release under section 34(4)(a)(ii).</p>	information of non-executive staff, which I am satisfied is irrelevant information. I am satisfied it is practicable to provide the Applicant with an edited copy of this document with such information deleted in accordance with section 25.
7.	20/10/2021	Ministerial Brief 2020-21 Public Non-Financial Corporation Dividend Determination	3	Released in full	Not subject to review	
8.	25/10/2021	Ministerial Brief Redirection of Cross Street Realignment funding to the Whitten Oval Redevelopment	3	Released in part Sections 28(1)(d), 30(1)	Release in part Section 25 The information exempted under section 30(1) is to be released.	<p>Section 30(1): I am not satisfied section 30(1) applies to this document for the reasons stated in the Notice of Decision, above.</p> <p>Section 25: See comments for Document 1.</p>