

Notice of Decision and Reasons for Decision

Applicant:	'CJ2'
Agency:	Major Transport Infrastructure Authority
Decision date:	8 December 2020
Date of reissue:	14 December 2020
Exemption considered:	Section 34(1)(b)
Citation:	'CJ2' and Major Transport Infrastructure Authority (Freedom of Information) [2020] VICmr 331 (12 November 2020)

FREEDOM OF INFORMATION – surveys – Level Crossing Removal Project – business, commercial or financial information

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 certain information in the documents is exempt under section 34(1)(b).

I am also satisfied certain information in the documents falls outside the scope of the Applicant's request and is irrelevant.

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 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.

Joanne Kummrow

Public Access Deputy Commissioner

8 December 2020

Reasons for Decision

Background to review

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

The request is in regard to the survey, conducted by [company] on behalf of LXRP (then LXRA), about the Bell Street to Moreland Road level crossing removal project. I have attached a jpeg of the survey invitation letter to clarify which survey data I am requesting access to. I hereby request access to:

- 1) All survey questions, full format, and
- 2) All anonymised data collected in the survey

I do not need or wish to see any personal information from any survey respondent. Please provide the data in cvs or xls format.

2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request and refused access to the documents in full under section 34(1)(b).
3. The Agency's decision letter sets out the reasons for its decision.

Review

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 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 that 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.

Section 25 – Irrelevant information

10. During the review, the Agency advised that certain information in the documents was outside of the scope of the Applicant's request. This included the percentage of the responses chosen for each question in the survey.
11. The Agency was provided with the Commissioner's preliminary view that the Applicant's request for 'all anonymised data' included the responses to the survey questions in the two documents.
12. In response, the Agency advised the following in relation to the scope of the Applicant's request:

The decision was made on our interpretation of the Applicant's request. This took into account the context in which the request was made, in particular the phrase 'all anonymised data' in conjunction with [the Applicant's] desire to receive the data 'in cvs or xls format'. This anticipates a spreadsheet showing each individual response and would allow manipulation of the data to show further trends, eg

percentage of people who speak a language other than English at home who were unaware of the project. No such document is in our possession or could be created under section 19 of the FOI Act. In this case, the documents subject to the request were discovered on the basis that they contained the 'full format questions' sought. This reference to 'full format' in our view includes not only the initial question (eg How aware are you of the project) but also the offered responses from which a participant must choose (eg very, not very, not at all). In our view, the percentage of total responses to each question shown in those documents is a manipulation of the data and not the data itself as requested by the applicant, and should fall outside the scope of the request.

13. I have carefully considered the Agency's view. I note the Applicant requested 'all anonymised data collected from the survey'. I am satisfied the percentage of responses to each question falls within the scope of the Applicant's request. However, I am not satisfied certain information in the documents, which relates to benchmarking, is within the scope of the Applicant's request as this information relates to the undertaking's internal business processes and, therefore, is irrelevant.

Review of exemptions

Section 34(1)(b) – Disclosure of business, commercial or financial information would be likely to expose an undertaking unreasonably to disadvantage

14. Section 34(1)(b) provides a document is an exempt document if:

- (a) its disclosure under the FOI Act would disclose information acquired by an agency from a business, commercial or financial undertaking;
- (b) the information relates to matters of a business, commercial or financial nature; and
- (c) disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.

15. The Applicant is a research fellow at a university and provided the following background information in relation to the matter:

We are conducting an independent health impact assessment (HIA) of the Upfield LXR project, one that examines the extensive, yet subtle changes that major infrastructure projects can have on the determinants of health and wellbeing (Dahlgren and Whitehead, 1991).

We plan to demonstrate the capacity of a *liveability framework* for scoping and evaluating the determinants of health and wellbeing using an HIA methodology (Harris et. al., 2007; Browne & Lowe, under review). Within this framework, 'social cohesion and local democracy' is understood to be one of several important determinants of health (Lowe et al 2013, 2015), and so community opinions of the project, particularly when participants are randomly selected, will constitute an essential part of the evidence base. The data will be synthesised, alongside data from other sources, to make an assessment of Upfield LXR's overall positive and negative impacts on public health and wellbeing. The limitations of the data for this purpose will be made explicit in the research findings.

The research outputs will be valuable for both advancing the discipline of HIA and for helping the government to improve the way it designs and delivers major infrastructure. Both of these purposes serve the public interest.

Do the documents contain information relating to matters of a business, commercial or financial nature that has been acquired by the Agency from a business undertaking?

16. 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 some positive handing over of information in some precise form.
17. The words, 'business, commercial or financial nature' are to be given their ordinary meaning.²
18. In its submission, the Agency advised the documents contain 'deliberate decisions about the design of the survey' such as question ordering, question phrasing and proposed answers to questions.
19. I acknowledge there exists a deliberative process in the development of research surveys. Having considered the content of the documents, I am satisfied they contain information acquired from a business undertaking that relates to matters of a business, commercial or financial nature.

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

20. 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—
 - (e) and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.
21. Following consultation, in accordance with section 34(3), the business undertaking advised the Agency it objected to disclosure of information in the documents on the grounds disclosure would allow for its competitors to access information relating to the undertaking's specific processes and industry expertise (in relation to the creation of surveys) that will enable them to have a competitive advantage over the business undertaking.
22. Specifically, the Agency submitted:

While these matters are not apparent on the face of the document, to a competitor with knowledge in general about the choices made in order to build a survey each step of the way, comparison could be made to their own work. The above are all important matters for consideration when building a survey and release of the documents would likely give competitors insight into them. The correct choices in those matters leads to better participant engagement and more meaningful response data. Surveys are closely guarded and [company] is not aware of how its competitors make choices in the above categories to build their own surveys of this nature. They informed us that knowledge in how to deal with the above points are matters which are constantly refined over the course of many surveys for

¹ (1999) 15 VAR 1.

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

different clients, which builds expertise in a particular area. [Company] are of the view that they are experts in the stakeholder engagement survey field.

.... Release of these documents, particularly in an area where [company] has such expertise, would enable less-experienced competitors to shortcut that refinement process by comparing their own surveys with those of [company] and therefore gain an advantage.

Not only would release enable improvement in competitors' processes by repeating what [company] has learned, it has the potential for them to develop positive points of difference in their own product

23. Having carefully considered the purpose and content of the documents, I am not satisfied disclosure would be likely to expose the business undertaking unreasonably to disadvantage for the following reasons:
- (a) The phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b) contemplates a business undertaking may be exposed to a certain measure of disadvantage should a document containing its business, commercial or financial information be disclosed under the FOI Act. By the introduction of the word 'unreasonably' in section 34(1)(b), Parliament determined this exemption will apply where an undertaking will be exposed 'unreasonably' to disadvantage only.
 - (b) I acknowledge there is specialised knowledge and skill involved in the creation of surveys of this nature, and the business undertaking makes a number of decisions in formulating the survey design.
 - (c) Having reviewed the documents and on the information before me, I am not persuaded they are of a nature or format, such that their content evidences unique reasoning or methodology used by the undertaking in developing the survey, such that disclosure of the documents would expose the business undertaking unreasonably to disadvantage. Namely, I am not satisfied disclosure would reasonably give a competitor of the business undertaking a competitive advantage or allow them to engage in destructive competition with the business undertaking.
 - (d) While not determinative and acknowledging the nature of disclosure under the FOI Act is unrestricted and unconditional, I note the Applicant is a university researcher, not a commercial competitor of the business undertaking seeking to access the documents for a commercial or competitive process. I accept the Applicant's submission they seek access to the documents for research purposes to better understand the impacts of the level crossing removal project.
 - (e) I acknowledge the business undertaking objects to disclosure of the documents. However, this is not a determinative factor in the application of section 34(1)(b). The business undertaking is a commercial entity that, when providing services to Government for a fee paid for by the public, should be cognisant of the requirement for transparency in the provision of documents to the public through the FOI Act.
 - (f) I am not satisfied the documents would be exempt documents if they were generated by an agency or a Minister.
 - (g) I accept the Applicant's research has a public purpose and consider disclosure of the documents is in the public interest. Disclosure will support transparency and accountability in government decision making where it relates to the use of significant public funds for major infrastructure projects. Disclosure will assist the Applicant in researching the impacts of a

project that affects members of the public and provide them with the views of the public, collated by Agency, regarding the project.

24. Accordingly, I am not satisfied the documents are exempt under section 34(1)(b).

Deletion of irrelevant information

25. 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.
26. 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 deletions. Where deletions would render a document meaningless, they are not 'practicable', and the release of the document is not required under section 25.⁴
27. As detailed above, I consider certain information in the documents is irrelevant as it falls outside the scope of the Applicant's request, which seeks access to the full format survey questions and all data collected from the survey. In my view, it is practicable for the Agency to delete the irrelevant information in accordance with section 25, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

28. I am not satisfied certain information in the documents is exempt under section 34(1)(b).
29. I am also satisfied certain information in the documents falls outside the scope of the Applicant's request and is irrelevant.
30. 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 determined to grant access to the documents in part.
31. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

32. If the Agency is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal for it to be reviewed.⁵
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
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.⁷

³ *Mickelburgh 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].

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).

Third party review rights

36. As I have decided to disclose a document the Agency determined to be exempt under section 34(1), if practicable, I must notify any relevant business undertaking of their right to apply to VCAT for a review of my decision.⁸
37. As I am satisfied it practicable to do so, the relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice of my decision.⁹

When my decision takes effect

38. Accordingly, my decision does not take effect until the business undertaking's 60 day third party review expires, or until any proceeding in relation to my decision is concluded.

⁸ Sections 49P(5) and 50(3A).

⁹ Section 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Community results summary	16	Refused in full Section 34(1)(b)	Release in part Section 25 The following information relate to survey benchmarking and is irrelevant as it falls outside the scope of the Applicant's request and is to be deleted in accordance with section 25: <ul style="list-style-type: none"> On pages 5 to 15, the sentences in relation to benchmarking that follow each survey question. On pages 5 to 15, the graphs in relation to benchmarking that follow each survey question. 	Section 34(1)(b): For the reasons in my decision above, I am not satisfied the release of the commercial information in the documents would expose the undertaking to disadvantage. Section 25: I am satisfied it would be practicable to delete irrelevant information in the document in accordance with section 25, as it would not require substantial time and effort and the edited document would retain its meaning.
2.	[date]	Stakeholder results summary	6	Refused in full Section 34(1)(b)	Release in part Section 25 The following information relates to survey benchmarking is irrelevant as it falls outside the scope of the Applicant's request and it	Section 34(1)(b): See comments for document 1 Section 25: See comments for Document 1

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> On pages 2-3 and 5-9, the sentences in relation to benchmarking that follow each survey question. On pages 2-3 and 5-9, the graphs in relation to benchmarking that follow each survey question. 	