

Notice of Decision and Reasons for Decision

Applicant:	'EQ3'
Agency:	Hepburn Shire Council
Decision date:	27 June 2022
Provisions and exemptions considered:	Sections 25A(5), 30(1), 34(1)(b), 34(4)(a)(ii), 38, 49KA(2)(a)
Citation:	'EQ3' and Hepburn Shire Council (Freedom of Information) [2022] VICmr 175 (27 June 2022)

FREEDOM OF INFORMATION – council documents – audit and risk committee – meeting minutes – [named location in regional Victoria] Project – development of bicycle trail – refusal to process request on the grounds all documents, should any exist, would be exempt – notice to process a sample of documents – not satisfied all documents would be exempt – disclosure of personal affairs 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 it is apparent from the nature of the documents, as described in the Applicant's request, that all documents to which the request relates would be exempt under sections 30(1), 34(1)(b), 34(4)(a)(ii) and 38. Accordingly, I am not satisfied each of the requirements for section 25A(5) are met.

The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

27 June 2022

Reasons for Decision

Background to review

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

Reports on the [named location in regional Victoria] project that were minuted as being presented to the Hepburn Shire Council Audit and Risk Committee on:

Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]
Public Minutes – Audit and Risk Committee Meeting – [date]...

I request BOTH lots of reports:

 1. those, as minuted, listed above, and
 2. these confidential reports you refer to in your letters, of [date], [date] and [date] ...
2. In consultation with the Applicant, the scope of their request was limited to confidential reports only, with the Agency noting public meeting minutes are available on the Agency's website and were provided outside the FOI Act.
3. The Agency refused to grant access to the documents in accordance with the Applicant's request under section 25A(5). In doing so, it was not required to identify any documents relevant to the request on grounds all documents to which the request relates, should any exist, would be exempt under section 38 in conjunction with section 125(1) of the *Local Government Act 2020* (Vic) (**LG Act 2020**) and section 77 of the former *Local Government Act 1989* (Vic) (**LG Act 1989**), and sections 38A, 30(1), 33(1), 34(1)(b) and 34(4)(a)(ii).
4. The Agency's decision letter sets out the reasons for its decision.
5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

Review application

Preliminary view and notice to produce issued under section 49KA(2)(a)

6. On [date], OVIC provided my preliminary view to the Agency that on the face of the Applicant's request it was unlikely all requested documents would be exempt from release and there would be no obligation on the Agency to provide the Applicant with an edited copy of at least one or more documents in accordance with section 25.
7. Section 49KA(2)(a) provides the Information Commissioner or the Public Access Deputy Commissioner may request an agency process or identify a reasonable sample of documents to which an FOI request relates (**Notice**).
8. In conjunction with my preliminary view and to assist me in conducting my review, I issued a Notice to the Agency requiring it to process the following sample of six documents by [date]:

- (a) two public reports and one confidential report for the Audit and Risk Committee meeting held on [date]; and
 - (b) two public reports and one confidential report for the Audit and Risk Committee meetings held on [date].
9. Once the Agency processed the requested sample of documents, I also requested it provide me with a copy of the six documents and a submission setting out its views in relation to whether each of the documents is exempt from release in full, or whether part of one or more of the documents are not exempt from release and could be released in accordance with section 25.
 10. Finally, in responding to the Notice and processing the requested sample of documents, the Agency was also advised of the option of making a fresh decision on the Applicant's request under section 49M.
 11. On [date], the Agency responded and sought further information as to the application of section 49KA.
 12. Following discussions with OVIC staff, the Agency agreed to process a sample of documents in response to the Notice.
 13. On [date], the Agency advised it maintained its decision to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5) and provided me with the requested sample of documents and a submission in relation to those documents.
 14. The Agency reaffirmed its decision that any documents relevant to the Applicant's request would be exempt under section 38 in conjunction with section 125(1) of the LG Act 2020 and section 77 of the LG Act 1989, sections 38A, 30(1), 33(1), 34(1)(b) and 34(4)(a)(ii). Further, deletion of exempt or irrelevant information would be likely to make the documents unintelligible or meaningless and, therefore, granting access to an edited copy of the documents would not be practicable in accordance with section 25.
 15. On [date], OVIC staff requested a further submission from the Agency in relation to the Agency's application of section 38 in conjunction with section 77 of the LG Act 1989, section 38A of the FOI Act and section 38 of the FOI Act in conjunction with section 125(1) of the LG Act. Following this request, the Agency subsequently advised it no longer relies on sections 38A, or 38 in conjunction with section 77 of the LG Act 1989 and section 38 of the FOI Act in conjunction with section 125(1) of the LG Act in relation to 'confidential meeting information'.
 16. I have examined a copy of the sample of documents provided by the Agency.
 17. I have also considered all communications and submissions received from the parties during the review.
 18. 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.
 19. 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.

Audit and Risk Committee

20. Section 53(1) of the LG Act 2020 requires a council to establish an Audit and Risk Committee, which is not a delegated committee of the council.¹
21. Sections 53(3) and 53(4) of the LG Act 2020 set out requirements for the membership of an Audit and Risk Committee.
22. Section 53(5) of the LG Act 2020 provides a non-council member of an Audit and Risk Committee is subject to the confidentiality provisions under section 125 of that Act. This provision is discussed in more detail below.
23. The Agency's website provides the following information about its Audit and Risk Committee:²

The Audit and Risk Committee is a Committee of Council under Section 53 of the *Local Government Act 2020*. It is not a delegated Committee of Council and does not have any decision-making powers of Council.

What does it do?

The Audit and Risk Committee oversees risk, governance, financial management, and compliance.

It works to an adopted work plan.

It is governed by Council's Audit and Risk Committee Charter. This charter sets out the Committee's objectives, authority, composition, responsibilities and reporting requirements.

As part of Council's governance obligations to its community, the Committee oversees responsibilities in relation to the following:

- Risk management
- Financial statements
- Internal controls and compliance
- External audit
- Internal audit

What doesn't it do?

The Committee does not have executive powers or authority to implement actions in areas over which Council management has responsibility. The Committee does not have any management functions and is therefore independent of management, and makes recommendations to Council.

Current members

There are six members – two Councillors and four external independent members:

- [name] (Independent) – Chairperson
- [name] (Independent)
- [name] (Independent)
- [name] (Independent)
- [name], Mayor (Councillor representative)
- [name] (Councillor representative)

...

When does it meet?

The Committee meets quarterly, with the following dates set for 2022.

¹ Section 53(2) of the LG Act 2020.

² Hepburn Shire Council, *Audit and risk committee* (Web Page), <<https://www.hepburn.vic.gov.au/Council/About-Council/Audit-risk-committee>>.

...

Audit and Risk Committee meetings are not open to the public.

Local Government Act 2020

24. On 24 October 2020, the LG Act 2020 commenced. The objectives of the LG Act 2020 are set out in section 4 of that Act and include ensuring, '[c]ouncils are constituted as representative bodies that are accountable, transparent, collaborative, efficient and engaged with their communities'.³
25. Section 8 of the LG Act 2020 provides in relation to the 'Role of a Council':
- (1) The role of a Council is to provide good governance in its municipal district for the benefit and wellbeing of the municipal community.
 - (2) A Council provides good governance if—
 - (a) it performs its role in accordance with section 9;
 - (b) the Councillors of the Council perform their roles in accordance with section 28.
 - (3) In performing its role, a Council may—
 - (a) perform any duties or functions or exercise any powers conferred on a Council by or under this Act or any other Act; and
 - (b) perform any other functions that the Council determines are necessary to enable the Council to perform its role.
- ...
26. Section 9 of the LG Act 2020 sets out overarching governance principles and supporting principles for that Act:
- (1) A Council must in the performance of its role give effect to the overarching governance principles.
 - (2) The following are the overarching governance principles—
 - (a) Council decisions are to be made and actions taken in accordance with the relevant law;
 - (b) priority is to be given to achieving the best outcomes for the municipal community, including future generations;
 - (c) the economic, social and environmental sustainability of the municipal district, including mitigation and planning for climate change risks, is to be promoted;
 - (d) the municipal community is to be engaged in strategic planning and strategic decision making;
 - (e) innovation and continuous improvement is to be pursued;
 - (f) collaboration with other Councils and Governments and statutory bodies is to be sought;
 - (g) the ongoing financial viability of the Council is to be ensured;
 - (h) regional, state and national plans and policies are to be taken into account in strategic planning and decision making;
 - (i) the transparency of Council decisions, actions and information is to be ensured.
 - (3) In giving effect to the overarching governance principles, a Council must take into account the following supporting principles—
 - (a) the community engagement principles;

³ Section 4(b) of the LG Act 2020.

- (b) the public transparency principles;
- (c) the strategic planning principles;
- (d) the financial management principles;
- (e) the service performance principles.

27. As can be seen by the above objectives and principles of the LG Act 2020 (and other provisions in that Act),⁴ public transparency in council decision making and the exercise of statutory and administrative functions and powers is a key focus of the LG Act.

28. Local Government Victoria summarises the LG Act 2020 as follows:⁵

The new *Local Government Act 2020* is the most ambitious reform to the local government sector in over 30 years. The Act drives improved service delivery, innovation, collaboration, and sustainable futures for all Victorians through:

- better financial management and community engagement
- clearer standards of behaviour for elected representatives
- increased council and councillor accountability
- changes to election processes and candidate requirements
- increased transparency of council decisions.

29. Accordingly, the various provisions under Part 6 of the LG Act 2020 are directed at ensuring the integrity of local government, councils, councillors and council employees in the discharge of their statutory functions and official duties and responsibilities.

Review of section 25A(5)

30. The power under section 25A(5) is carefully circumscribed.⁶ A decision maker must be satisfied of the following three requirements that operate to limit its application:

- (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
- (b) Second, it must be apparent all requested documents are exempt.
- (c) Third, it must be apparent from:
 - (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
 - (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.⁷

31. An agency is not required to identify any or all documents to which an FOI request relates, or to specify in respect of each document, the relevant exemption under which a document is claimed to be exempt.

⁴ See for example, sections 57 and 58 of the LG Act 2020.

⁵ *Local Government Victoria, Local Government Act 2020* (Web Page), <<https://www.localgovernment.vic.gov.au/council-governance/local-government-act-2020>>.

⁶ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

⁷ *Knight v Corrections Victoria* [2010] VSC 338.

What is the essential character of the requested documents?

32. Having considered the terms of the Applicant's request, I am satisfied, the essential character of the documents requested is that of progress reports prepared by Agency officers in relation to an Agency project which were provided to the Council's Audit and Risk Committee on nine specific dates.
33. Accordingly, I am satisfied the essential character of the documents requested is objectively apparent from the face of the request and the first requirement of section 25A(5) is met.

Would each of the documents, as described in the FOI request, be exempt?

34. The Agency submits each of the requested documents would be exempt from release under section 38 in conjunction with section 125(1) of the LG Act 2020, and sections 30(1), 33(1), 34(1)(b) and 34(4)(a)(ii). I consider the application of each of these exemptions to the requested documents based on the nature of the requested documents and the sample of documents discussed above.

Section 30(1) – Internal working documents

35. 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;
 - (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.
36. The exemption does not apply to purely factual material in a document.⁸
37. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of the agency's staff, and any person employed by or engaged on behalf of an agency, whether or not they are subject to the *Public Administration Act 2004* (Vic).

Would the documents 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, in the course of, or for the purpose of, the deliberative process involved in the functions of an Agency?

38. 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.
39. 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.⁹
40. A document may fall within section 30(1) even if it does not contain matter in the nature of opinion, advice or recommendation if it discloses matter in the nature of consultation or deliberation.
41. The requested documents are reports made to the Council's Audit and Risk Committee in relation to the development of a bicycle trail.

⁸ Section 30(3).

⁹ *Mildenhall v Department of Education* (1998) 14 VAR 87.

42. I am satisfied on the face of the Applicant's request, the requested documents would likely contain information in the nature of opinion, advice, consultation or deliberation prepared and exchanged between Agency officers.
43. However, the requested documents would also be likely to contain factual information in relation to the project, including a description of actual known events that have occurred or actions taken by the Agency or other persons. Accordingly, I am not satisfied such factual or background information would be exempt from release under section 30(1) by virtue of section 30(3). Accordingly, I am not satisfied the first limb of section 30(1) would be met in relation of each of the requested documents.
44. I am also satisfied any such documents would have been created in the course of the Agency's deliberative processes in connection with its statutory functions under planning and building laws and regulations.

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

45. In determining if disclosure of the documents would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have given weight to the following factors:¹⁰
 - (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 of 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 impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
 - (g) 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.
46. In their submission, the Applicant states:

I am seeking the report(s), as the public minutes are inadequate. They note the receipt of the report, not even acknowledging that any information was passed to the Audit and Risk Advisory Committee (ARAC), apart from the statement that the 'purpose of the report is to provide an update on the [named location in regional Victoria] Project Stage One' and the ARAC accepts and notes the report.

¹⁰ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

It is noted that there isn't an attachment. Even if it is a verbal report: what is being reported, received, addressed, and noted? Are they addressing any issues?

Issues that need to be addressed by ARAC, to properly brief HSC, range from public liability insurance matters, signage, the relevant construction standards for the trails, the development of bike-only trails that exclude all other forest users from these bike-only paths, etc... Is such a land use permitted under the legislation governing forests and public land? Is it included in the lease agreement allowing use of the land? What other lease provisions are there? Is the lease duly executed and legal?

The trails are contentious in nature for a number of reasons, including, but not limited to, the possible proposed use of illegally built bike trails and a number of trails' impact on listed and unlisted heritage sites. Despite HSC being signatory to the combined goldfields UNESCO registration bid, there seems to be little HSC cognizance of the impact and ramifications of the proposed CTP on registered and as yet unregistered heritage sites. There are still some heritage sites that are unlocated/mapped. There are penalties under Heritage Victoria legislation for knowing about, but not proposing, these sites for listing.

HSC seems set to disallow these issues to be publicly addressed and scrutinised. A number of publicly released HSC reports about the trails have been criticised for not being sufficiently robust. The public liability implications of many of the pending decisions and plans makes it crucial for the public to access the information they need to make a reasonable judgement on the issues at hand, let alone their decision on personal future use - walking or biking, etc. - of the trails.

47. The Agency's website refers to its Public Transparency Policy under the LG Act 2020:¹¹

6.1.1 Public Transparency Principles

Council commits to the following principles for public transparency as detailed within the *Local Government Act 2020*:

- (a) Council decision making processes must be transparent except when the Council is dealing with information that is confidential by virtue of this Act or any other Act;
- (b) Council information must be publicly available unless—
 - (i) the information is confidential by virtue of this Act or any other Act; or
 - (ii) public availability of the information would be contrary to the public interest;
- (c) Council information must be understandable and accessible to members of the municipal community;
- (d) Public awareness of the availability of Council information must be facilitated.

6.2.1 Decision making at Council

Decision making at Council meetings will be:

- (a) undertaken in accordance with the Act and the Governance Rules
- (b) conducted in an open and transparent forum, unless in accordance with the provisions in the Act and Council's Governance Rules
- (c) informed through community engagement, in accordance with the Community Engagement Principles and Council's Community Engagement Policy
- (d) made fairly and on the merits, and where any person whose rights will be directly affected by a decision of the Council, that person will be entitled to communicate their views and have their interests considered

48. The Agency submits:

¹¹ Hepburn Shire Council 'Public Transparency Policy' (Date approved 25 August 2020)
<https://www.hepburn.vic.gov.au/files/assets/public/council/documents/policy-83-c-public-transparency.pdf>.

It would be contrary to the public interest to disclose documents that would reveal either the Council or the ARC's thinking on various strategic options available to the Council at different stages of negotiation in relation to the Project that is still ongoing.

49. Noting the object of the Public Transparency Policy as well as the object of the FOI Act described in paragraph 18, I am not persuaded by the Agency's submissions in relation to public interest considerations. In summary, I consider the following factors weigh in favour of disclosure of the documents:
- (a) As reports, the documents would be prepared as part of the Agency's record keeping obligations with an expectation they would become official records of discussions held and decisions made by a council committee responsible for auditing project risks.
 - (b) While the information recorded in the reports may not reflect the final outcome reached or resolution of the matter, they reflect the important work of the Agency in assessing risk and making decisions over a period of two years.
 - (c) In [date], the Agency obtained a planning permit and commenced construction on the project, which reflects the information in the documents occurred at a specific point in time that has since progressed considerably.
 - (d) The issue to which the documents relate is one that has significantly engaged the local community and, therefore, raises public interest considerations. I consider the local community engaged with this issue and are capable of understanding information in the requested reports reflect a point in time over the course of an ongoing project and the public interest is served when disclosure of government information informs the public and allows for public participation in government decision making.
 - (e) I accept there is a public interest in Agency officers being able to freely communicate their professional opinions and rationale so as to ensure that decisions made regarding the directions of recommendations are subject to proper and thorough deliberation. However, based on the terms of the request, my consideration of a sample of the documents and the public interest factors considered above, I am of the view disclosure of the documents would be unlikely to impair the ability of Agency officers to prepare documents with proposals or provide frank and candid advice to the Agency to inform its decision making function.
 - (f) In the event the Agency is concerned the documents were not intended for public release and requires 'more material for context and clarity', it is open to the Agency to provide further clarity and context when disclosing the documents.
 - (g) The LG Act 2020 provides Councils are 'to be accountable to their local communities in the performance of functions and the exercise of powers and the use of resources'.¹² Further, the object of the LG Act 2020 is 'to ensure transparency and accountability in Council decision making'. As such, I am of the view disclosure of the requested reports made to the Audit and Risk Committee is consistent with the objects of the LG Act and overarching governance principles of that Act.
50. Accordingly, I am not satisfied all of the requested documents would be exempt from release under section 30(1).

¹² Section 1(5) of the LG Act 2020.

Section 34(1)(b) – Business affairs information

51. 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.

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

52. In *Thwaites v Department of Human Services*,¹³ 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.
53. I am satisfied information in the documents would relate to matters of a business, commercial and financial nature as it relates to project planning progress reports to the Audit and Risk Committee involving several business, commercial and financial undertakings.

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

54. Section 34(2) provides that in determining whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of section 34(1)(b), an agency or Minister may take account of any of the following considerations:
- (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.
55. I have also had regard to *Dalla Riva v Department of Treasury and Finance*,¹⁴ in which VCAT held documents are exempt under section 34(1)(b) if their disclosure would:
- (a) give competitors of a business undertaking a financial advantage;
 - (b) enable competitors to engage in destructive competition with a business undertaking; and
 - (c) would lead to the drawing of unwarranted conclusions as to a business undertaking’s financial affairs and position with detrimental commercial and market consequences.
56. I consider the phrase ‘expose the undertaking unreasonably to disadvantage’ in section 34(1)(b), contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word ‘unreasonably’ in section 34(1)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed

¹³ (1999) 15 VAR 1.

¹⁴ [2007] VCAT 1301 at [33].

‘unreasonably’ to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.

57. Accordingly, section 34(1)(b) contemplates a business undertaking may be exposed to a certain level of disadvantage. The question is whether any such disclosure would expose the undertaking unreasonably to disadvantage.
58. I am not satisfied disclosure of the documents would be reasonably likely to expose the undertaking unreasonably to disadvantage:
- (a) While the information in the documents may or may not be known to competitors of the business undertakings, I consider it unlikely the non-detailed information would give a competitor a financial advantage or allow a competitor to engage in destructive competition with an undertaking if released.
 - (b) The Agency’s submission did not provide any detailed information about how disclosure of the documents would cause unreasonable disadvantage.
 - (c) The Agency did not seek the views of the business undertakings in accordance with section 34(2) and therefore did not provide supporting submissions for the supposition that this would unreasonably disadvantage any concerned business undertakings.
 - (d) Commercial organisations who engage with government in development projects should reasonably expect a greater degree of transparency and accountability given the use of public funds.
 - (e) I have had regard to the object of the FOI Act in section 3(1), which is to create a general right of access to information in the possession of government or other public bodies, limited only by exceptions and exemptions necessary to protect ‘essential’ public interests, privacy and business affairs. This broad right provides any person may request access to any document held by an agency without cause or connection to a document or its subject matter. Further, section 3(2) of the FOI Act provides it is Parliament’s intention the provisions of the FOI Act must be interpreted to further the object of the Act.
59. In light of the above factors, I am not satisfied the requested documents would be exempt from release in full under 34(1)(b).

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

60. 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’.
61. A document is exempt under section 34(4)(a)(ii) if:
- (a) the agency is engaged in trade or commerce;
 - (b) the document contains information of a business, commercial or financial nature; and
 - (c) disclosure of which would be likely to expose the agency unreasonably to disadvantage.

Is the Agency engaged in trade or commerce?

62. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.¹⁵
63. VCAT has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'.¹⁶ VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.¹⁷ 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.¹⁸
64. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.¹⁹
65. While the phrase 'trade and commerce' may be interpreted broadly,²⁰ it has been held trade and commerce must 'of their nature, bear a trading or commercial character'.²¹
66. 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).²²
67. 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.
68. The Agency relies on section 34(4)(a)(ii) to exempt information '... which involves commercial negotiations with various agencies and contractors'.
69. In my view, there is nothing before me to substantiate that the Agency is 'engaged in trade or commerce' for the purposes of section 34(4)(a)(ii).
70. Rather, I consider reports considering expenditure are 'part of the processes of trade and commerce' in which the Agency purchases services as part of carrying out its governmental functions.
71. Accordingly, I am satisfied the Agency is not engaged in trade and commerce in the context of section 34(4)(a)(ii) for the purposes of this matter and the first requirement under section 34(4)(a)(ii) is not met.
72. While I am not satisfied the Agency is engaged in trade or commerce, for completeness, I have considered the second and third requirements under section 34(4)(a)(ii).

Do the documents contain information of a business, commercial or financial nature?

73. 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.²³

¹⁵ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

¹⁶ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

¹⁷ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

¹⁸ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

¹⁹ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

²⁰ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

²¹ *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

²² *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].

²³ *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

74. Noting the Audit and Risk Committee is formed in part to consider the appropriate administration of public funds in relation to projects before it, I am satisfied that the reports would likely contain some commercial and financial information.

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

75. Section 34(4) contemplates disclosure of a document containing information of a business, commercial or financial nature under the FOI Act may expose an agency to a certain measure of disadvantage.

76. In the context of section 34(4)(a)(ii), 'disadvantage' has been interpreted to be in the nature of an agency engaged in trade or commerce being exposed to commercial or competitive disadvantage. For example, in the decision of *Accident Compensation Commission v Croom*,²⁴ 'disadvantage' contemplated by this section is interpreted as 'disadvantage in a business, commercial or financial sense'.²⁵

77. 'Disadvantage' in the context of 'trade or commerce' and 'information of a business, commercial financial in nature' means injury to an agency or the State of Victoria of a financial kind.²⁶

78. 'Likely' in the context of section 34(4) means 'probable, such as well might happen or be true'.²⁷

79. Whether any disadvantage would be 'unreasonable' depends on the particular facts and circumstances of the matter and involves a balancing exercise.²⁸

80. Further, it is not enough to establish there is a likelihood of disadvantage as any such exposure to disadvantage must be 'unreasonable' in the circumstances.²⁹

81. VCAT has taken the following factors into consideration when determining whether section 34(4)(a)(ii) applies:³⁰

- (a) the nature of the information to be disclosed;
- (b) the circumstances in which the information was obtained by the agency;
- (c) the likelihood that concerned persons would not wish the information to be disclosed without their consent; and
- (d) the current relevance and sensitivity of the information.

82. Having considered the relevant information and the parties' submissions, I do not consider disclosure would expose the Agency unreasonably to disadvantage for the following reasons:

- (a) The Agency is a local government organisation with over 200 staff which would be reasonably likely to procure tenders and services associated with its statutory and governmental functions. The total cost of the services would have been negotiated based on the specific services rendered for those projects.

²⁴ [1991] 2 VR 322.

²⁵ Ibid 325.

²⁶ Ibid 331.

²⁷ *Asher v Department of Innovation, Industry and Regional Development* [2005] VCAT 2702 at [38]; *Gibson v Latrobe City Council (General)* [2008] VCAT 1340 at [39].

²⁸ *Asher MP v Department of Innovation, Industry and Regional Development (General)* [2005] VCAT 2702 at [28] and [38].

²⁹ *Re Byrne and Swan Hill Rural City Council* (2000) 16 VAR 366 as cited in *Dalla-Riva v Department of Treasury and Finance* [2005] VCAT 2083 at [30].

³⁰ *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366 at 372-3; *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 246; *Dalla Riva v Department of Treasury and Finance* [2005] VCAT 2083 at [30]; as cited in *Gibson v Latrobe City Council (General)* [2008] VCAT 1340 at [41].

- (b) Reports for regular Audit and Risk Committee meetings would not likely contain detailed financial expenditure information, rather are likely to include total figures which accurately reflect the expenditure involved in the relevant project. I do not consider disclosure of the information will cause any uncertainty from the market in the procurement by the Agency of future services, as such pricing is determined by a range of contributing factors.
- (c) The government has considerable market power such that I do not consider disclosure would have any impact on it or cause it financial disadvantage in procuring such services in the future.
- (d) Given the lack of detail in the information subject to review, I do not consider entities bidding for project tenders from the Agency could obtain an advantage from such information or gain bargaining power. Similarly, I do not consider its disclosure would have any impact on the Agency's relationships with commercial entities.
- (e) While disclosure could expose the Agency to some disadvantage, I do not consider any such expose would be unreasonable where the public interest lies in favour of disclosure. In this instance, I consider disclosure would promote accountability for government's use of public funds for project development expenditure.

83. Accordingly, I am not satisfied all of the requested documents would be exempt from release in full under section 34(4)(a)(ii) and it is likely one or more of the documents could be released in part.

Section 38 in conjunction with section 125 of the LG Act

84. A document is exempt under section 38 if the following three requirements are met:

- (a) there is an enactment in force;
- (b) that applies specifically to the kind of information contained in the documents; and
- (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

85. For section 38 to apply to a document, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Is there an enactment in force?

86. Section 125 of the LG Act provides:

125 Confidential information

(1) Unless subsection (2) or (3) applies, a person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, must not intentionally or recklessly disclose information that the person knows, or should reasonably know, is confidential information.

Penalty: 120 penalty units.

(2) Subsection (1) does not apply if the information that is disclosed is information that the Council has determined should be publicly available.

(3) A person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, may disclose information that the person knows, or should reasonably know, is confidential information in the following circumstances—

- (a) for the purposes of any legal proceedings arising out of this Act;
- (b) to a court or tribunal in the course of legal proceedings;

- (c) pursuant to an order of a court or tribunal;
- (d) in the course of an internal arbitration and for the purposes of the internal arbitration process;
- (e) in the course of a Councillor Conduct Panel hearing and for the purposes of the hearing;
- (f) to a Municipal Monitor to the extent reasonably required by the Municipal Monitor;
- (g) to the Chief Municipal Inspector to the extent reasonably required by the Chief Municipal Inspector;
- (h) to a Commission of Inquiry to the extent reasonably required by the Commission of Inquiry;
- (i) to the extent reasonably required by a law enforcement agency.

87. I am satisfied the LG Act 2020 is an enactment in force for the purpose of section 38. Accordingly, the first requirement of section 38 is met.

Does the enactment apply specifically to the kind of information in the documents?

88. For section 38 to apply to a document, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

89. 'Confidential Information' in section 125(1) of the LG Act 2020 is defined in section 3(1) of that Act and includes at section 3(1)(f) (personal information) and section 3(1)(g) (private commercial information):

- (f) personal information, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs;
- (g) private commercial information, being information provided by a business, commercial or financial undertaking that—
 - (i) relates to trade secrets; or
 - (ii) if released, would unreasonably expose the business, commercial or financial undertaking to disadvantage;

90. The definitions of 'confidential information', as set out above, overlap with the exemptions under section 33(1) (personal affairs exemption) and section 34(1)(b) (business affairs exemption) of the FOI Act, which I consider below.

Would the documents contain 'personal information' for the purpose of section 125(1) of the LG Act 2020?

91. In determining whether the documents contain a third party's 'personal information', and whether its disclosure would be unreasonable for the purpose of section 125(1) of the LG Act, I have had regard to the similar considerations that arise under section 33(1) of the FOI Act.

92. Section 33(1) concerns 'personal affairs information' and provides a document is exempt from release if:

- (a) its disclosure would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (or personal affairs information) (a **third party**);³¹ and
- (b) disclosure of the personal affairs information would be 'unreasonable' in the circumstances.

³¹ Sections 33(1) and 33(2).

93. Information relating to the 'personal affairs' of a third party includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.³²
94. I accept 'personal information' encompasses a broad range of information concerning an individual. For example, their name, address, correspondence, contact information or other personal details.
95. I am satisfied the documents would be likely to contain limited personal affairs information of third parties, which I am satisfied is 'personal information' for the purpose of section 125(1) of the LG Act.

Would disclosure of the 'personal information' be unreasonable in the circumstances?

96. In determining whether the exemption applies, it is necessary to determine whether disclosure of the personal affairs information would be unreasonable in the circumstances. This involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the particular circumstances.
97. Even where an applicant claims to know the identity of a third party, disclosure of the third party's personal affairs information may still be unreasonable in the circumstances.³³
98. As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³⁴
99. I also note the decision of *Coulson v Department of Premier and Cabinet*³⁵ (**Coulson decision**), in which VCAT held, whether or not an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.
100. Therefore, the proper application of section 33(1) involves the consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.³⁶
101. I have considered the following factors³⁷ in determining whether disclosure of the personal information in the documents would be unreasonable in the circumstances:
 - (a) the nature of the personal information and the circumstances in which it was obtained by the Agency;
 - (b) the Applicant's interest in the information;
 - (c) the likelihood of further disclosure of the information, if released under the FOI Act;
 - (d) whether any public interest would be promoted by release of the information;
 - (e) whether any third party to whom the personal information relates objects or would be likely to object to the release of the information; and

³² Section 33(9).

³³ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

³⁴ *Victoria Police v Marke* [2008] VSCA 218 at [68].

³⁵ (Review and Regulation) [2018] VCAT 229.

³⁶ [2008] VSCA 218 at [104].

³⁷ A number of these factors were identified in *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

- (f) whether the disclosure of the personal information would or would be reasonably likely to endanger the life or physical safety of any person.³⁸

102. The Agency advised in relation to the application of section 33(1) to the documents:

Personal affairs information includes many different types of information including names, positions, e-mail addresses, street addresses, telephone numbers (landlines and mobiles), statements of opinions by a person about another person, voice recordings and visual images. This is not an exhaustive list. It should be interpreted by reference to the capacity of any member of the public to identify a person.³⁹

The documents would contain personal affairs information about a number of people including Council officers, members of the ARC and third parties.

103. The personal information would have been acquired by the Agency in the course of Agency officers carrying out their usual work duties and responsibilities in fulfilling the Agency's functions and obligations, including in relation to carrying out the functions of the Agency's Audit and Risk Committee, as required under the LG Act 2020. As such, I consider the personal affairs information concerns these individuals in a professional or official capacity rather than in relation to their personal or private lives.
104. In relation to Agency officers, I can see no special circumstances in this matter that supports a view disclosure of their names would be unreasonable regardless of their seniority.
105. There is no information before me to suggest there is any sensitivity about the release of the names of further third parties or that they had any expectation of privacy when agreeing to participate in the Audit and Risk Committee meetings. Rather, their views were voiced in a meeting for which notes were being taken and minutes recorded.
106. There is nothing before me to suggest the disclosure of personal affairs information in this context would or would be reasonably likely to endanger the life or physical safety of any person.
107. Nor is there anything before me to support the supposition that Agency officers, committee members or further third parties object to the release of their personal affairs information in the context of their work on this project.
108. The Applicant seeks access to the documents to further understand decision making in relation to an ongoing council project underway with the Agency.
109. Noting personal affairs information is already in the public domain in the public minutes of the Agency, I do not consider the personal affairs information to be sufficiently sensitive to outweigh the public interest in transparency and accountability under the circumstances.
110. In weighing up the above factors, on balance, I am not satisfied disclosure of all personal information in the requested documents would be unreasonable. As such, I am not satisfied all such information would be exempt in full under section 33(1).
111. Given the overlap with the exemption under section 33(1) and the definition of 'confidential information' under section 3(1)(f) in the LG Act 2020 ('personal information'), I am not satisfied all documents requested by the Applicant would be exempt from release under section 38.

Do the documents contain 'private commercial information' for the purpose of section 125(1) of the LG Act?

112. A document will contain 'private commercial information' if it contains information provided by a business commercial or financial undertaking that:

³⁸ Section 33(2A).

³⁹ *Hutchinson v Department of Human Services* (1997) 12 VAR 422.

- (a) relates to trade secrets; or
- (b) if released, would unreasonably expose the business, commercial or financial undertaking to disadvantage.

113. The definition of 'private commercial information' is similarly worded to the exemption in section 34(1)(b). However, 'private commercial information' has a higher threshold than section 34(1)(b) in that it requires release of such information that 'would unreasonably expose' a business undertaking to disadvantage, whereas section 34(1)(b) requires that a business would be 'likely to be exposed unreasonably to disadvantage'.
114. Given I am not satisfied the lower threshold has been met with respect to section 34(1)(b), as discussed above, I am not satisfied all information in the requested documents would expose the undertaking unreasonably to disadvantage and it is likely one or more of the documents could be released in part.
115. Given the overlap with the exemption under section 34(1)(b) and the definition of 'confidential information' under section 3(1)(g) in the LG Act 2020 ('private commercial information'), I am not satisfied all documents requested by the Applicant would be exempt from release under section 38.

Summary on second limb

116. I am not satisfied each of the requested documents would be exempt under sections 33(1), 34(1)(b), 34(4)(a)(ii), and 38 of the FOI Act in conjunction with section 125(1) of the LG Act 2020. Accordingly, the second requirement of section 25A(5) is not met.

Section 25 – Deletion of exempt or irrelevant information

117. 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.
118. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴⁰ 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 25.⁴¹
119. I am satisfied there would likely be scope to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am also satisfied it would be practicable to do so as it would likely not require substantial time and effort and the edited copy of the documents would likely retain sufficient meaning.
120. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.
121. Accordingly, I am not satisfied the third requirement of section 25A(5) is met.

Conclusion

122. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.

⁴⁰ *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].

⁴¹ *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].

123. Having considered the application of section 25A(5) and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant's request that all documents relevant to the request would be exempt in full under sections 30(1), 33(1), 34(1)(b), 34(4)(a)(ii), and 38 in conjunction with section 125(1) of the LG Act 2020.
124. Accordingly, I am not satisfied each of the requirements of section 25A(5) are met such that the Applicant's request for access to the documents can be categorically refused.
125. The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

Review rights

126. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁴²
127. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴³
128. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁴⁴
129. 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.
130. 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.⁴⁵
131. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

When this decision takes effect

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

⁴² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁴³ Section 52(5).

⁴⁴ Section 52(9).

⁴⁵ Sections 50(3F) and 50(3FA).