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Notice of Decision and Reasons for Decision

Applicant:	'FB2'
Agency:	Department of Jobs, Skills, Industry and Regions
Decision date:	29 March 2023
Exemption and provision considered:	Sections 25, 34(1)(b)
Citation:	'FB2' and Department of Jobs, Skills, Industry and Regions (Freedom of Information) [2023] VICmr 19 (29 March 2023)

FREEDOM OF INFORMATION – business, commercial or financial information – government grants – information not 'acquired' from an undertaking

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

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant information deleted in accordance with section 25, access is granted 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

29 March 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. Copy of all invoices from [company] (or any other contracted services providers) for the period from [date] to [date] for the [type of] training. Alternatively, general ledger or accounting journal that shows all payments to [company] (or any other contracted services providers) for the period from [date] to [date] for the [type of] training.
 2. Organisational chart (current) for Sport, Recreation and Racing (no names needed, only positions).
 3. Job descriptions for Governance and Integrity positions in the Sport, Recreation and Racing (all levels) (no names needed, only positions name).
 4. Documents showing the amounts, dates (any relevant date) and the description/purpose of funding and/or grants paid by DJPR from [date] to [date] to the following organisations:
 - Ice Hockey Victoria
 - Ice Sports Victoria
 - Any Ice Hockey Clubs of Victoria
 - Any Ice Hockey facilities in Victoria
2. The Agency identified 17 documents falling within the terms of the Applicant's request and granted access to 12 documents in full, four documents in part, and refused access to one document in full under section 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

Complaint concerning adequacy of document searches

3. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches in relation to their FOI request.
4. In accordance with section 61B(3), these concerns were dealt with by this review.
5. OVIC staff made further enquiries with the Agency to address the Applicant's concerns. The outcome of those enquiries was communicated to the Applicant.
6. Based on the Agency's response, I am satisfied the Agency undertook a thorough and diligent search for the requested documents. Accordingly, I consider the Applicant's [concerns] have been fully pursued and there is no need to make further enquiries or take further action under the FOI Act in relation to those particular concerns.

Review application

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
8. I have examined a copy of the documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties.
11. 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.

12. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

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

13. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking and:
 - (a) the information relates to other matters of a business, commercial or financial nature; and
 - (b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.

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

14. In *Thwaites v Department of Human Services*,¹ the Victorian Civil and Administrative Tribunal (VCAT) observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
15. The Agency sought to exempt the following information under section 34(1)(b):
 - (a) approved funding amounts for various projects, contained in letters to the recipients of that funding; and
 - (b) a grant agreement between a business undertaking and the Agency, including its terms, deliverables and funding amounts.
16. Having reviewed the documents, I am not satisfied that the approved funding amounts contained in the funding approval letters were 'acquired' from a business, commercial or financial undertaking. Rather, I consider the exempted information was generated by the Agency about the relevant business, commercial or financial undertakings (even though such generated information may have been informed by information acquired from such undertakings) and has therefore not been 'acquired'.
17. In relation to the grant agreement, I note there is some contention regarding whether concluded contracts contain information 'acquired by' an agency from a commercial undertaking. In *Thwaites v Department of Human Services* the VCAT noted:

To suggest the affirmative view, that is, to say that the formal contracts represent information acquired by the agency, is tantamount to saying that all government contracts relating to matters of a business, commercial or financial nature (and that would cover most commercial contracts) will be exempt. That of course flies in the face of the purpose of the legislation which is underpinned by a predisposition towards disclosure. A different view might of course be taken in the instance of a contract to manufacture some product which, for instance, required the exposition of some chemical formula.²

¹ (1999) 15 VAR 1.

² *Ibid.*

18. In my view the grant agreement does not contain any such proprietary information contemplated by the above. Rather it contains the terms and conditions the agency was prepared to agree to, and the services for which the third party business undertaking agreed to provide.
19. While I am not persuaded that either the approved funding amounts in the letters or any information in the grant agreement were 'acquired by' the agency from a third party in the sense required by *Thwaites*, for completeness, I will consider the remaining limbs of section 34(1)(b).

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

20. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.³
21. Having reviewed the documents, I am satisfied they contain information that broadly relates to matters of a commercial and financial nature.

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

22. Section 34(2) provides that in deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—
- (a) whether the information is generally available to competitors of the undertaking;
 - (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
 - (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
 - (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.
23. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,⁴ 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.
24. 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 'unreasonably' to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.

³ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

⁴ [2007] VCAT 1301 at [33].

25. 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.
26. In determining whether disclosure of commercially sensitive information in a document would expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify an undertaking and seek its views on disclosure.⁵
27. The Agency advised it consulted with two of the three third party undertakings, both of which objected to the disclosure of the exempted information. In relation to Ice Sports Victoria [ISV], the Agency provided the following reasons for their objections:
- ISV were formed at the request of the government as there was a number of small State Sporting Associations and it was easier for these to band together under ISV.
 - ISV receive funding and provide it to SSAs/clubs.
 - Clubs are not generally aware of each other's funding and this is where the disadvantage will come from.
 - If clubs are made aware of funding provided by ISV to other ice sporting clubs, there may be inappropriate contact from clubs, which would impact the ability of ISV to perform its role.
 - ISV are a not for profit. None of the Board are paid and their small amount of resources would be swallowed by answering queries if this information were to be released.

In relation to [sporting venue], the Agency advised:

- The document would give competing ice sports venues in Australia and overseas an unfair advantage in potentially winning business.
 - Would impact the ability of the facility to attract and host significant national and international ice sports.
 - The document includes sensitive details outlining the allocation of ice time and support to be provided to various sporting associations and organisations which may create discontent and impair the organisations relationships with these stakeholders
 - May create conflict within the sporting sector as a whole and embarrass [sporting venue].
 - Release of the information would provide competitors with details of the specific events that they are targeting and attempting to attract during the term of the agreement (6 years).
 - Release of the information would provide competitors with detail of the financial support being provided to secure the events.
28. While I have taken the views of the business undertakings into consideration, those views are one factor for my consideration and are not necessarily determinative.
29. Having carefully reviewed the documents and the information before me, on balance, I am not satisfied disclosure of the information would be likely to expose the undertakings unreasonably to disadvantage.
30. In reaching this decision, I have taken the following considerations into account:
- (a) For the most part, the funding amounts do not relate to individual clubs, rather they relate to overall funding to ISV.
 - (b) In any case, I do not accept that disclosure of the amount of government grants provided to individual clubs would disadvantage those clubs to an extent that overrides the significant public interest in the oversight and transparency in the allocation of public funds.
 - (c) Having reviewed the terms of the grant agreement, I am not satisfied that the content is sensitive in any respect that may give rise to a disadvantage. For the most part, the agreement contains standard terms of such contracts, the disclosure of which will have no impact on the third party.

⁵ Section 34(3).

- (d) The documents were created as part of a process by which the government allocates public money for community services. I consider there is nothing inherently sensitive about the nature of such documents.
- (e) A key purpose of access to the type of information in the documents subject to review is to ensure grants awarded by government to business undertakings are better able to be scrutinised.
- (f) Promoting good governance, transparency and accountability in government decision making and the oversight of the spending of public funds is strongly in the public interest.
- (g) Commercial organisations applying for government grants should reasonably expect a greater degree of transparency and accountability given the use of public funds.
- (h) While it is possible the undertaking may be exposed to a certain measure of disadvantage if the documents are disclosed, I am not satisfied any such exposure would be unreasonable in the circumstances of this matter.

31. Accordingly, I am not satisfied information in the documents is exempt under section 34(1)(b).

32. My decision is outlined in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

33. 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.

34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁷

35. As noted in the terms of the request, the Applicant does not seek access to the personal affairs information of third parties. I am satisfied this information, which includes the names, email addresses, phone numbers, signatures, position titles and initials of third parties is irrelevant information and is to be deleted from the documents in accordance with section 25.

36. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

37. On the information before me, I am not satisfied the documents are exempt under section 34(1)(b).

38. 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, access is granted in part.

⁶ *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].

⁷ *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].

Review rights

39. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
42. 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.
43. 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.¹¹

Third party review rights

44. As I have determined to release documents that contain information of a business, financial, commercial nature relating to a business undertaking if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹²
45. In this case, I am satisfied it is practicable to notify the relevant business undertakings of their review rights and confirm they will be notified of my decision on the date of decision.

When this decision takes effect

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

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

¹² 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
1.1	1/12/20	Tax Invoice [reference]	1	Release in full	Not subject to review	
1.2	13/04/21	Tax Invoice [reference]	1	Release in full	Not subject to review	
1.3	06/10/21	Tax Invoice [reference]	1	Release in full	Not subject to review	
1.4	03/05/22	Tax Invoice [reference]	1	Release in full	Not subject to review	
1.5	24/08/22	Tax Invoice reference]	1	Release in full	Not subject to review	
2.1	Undated	Sport Recreation and Racing Organisational Chart	26	Release in full	Not subject to review	
2.2	Undated	Governance and Integrity Organisational Chart	1	Release in full	Not subject to review	
3.1	Undated	Position description – Manager, Governance and Integrity – VPS5	4	Release in full	Not subject to review	
3.2	Undated	Position description – Senior Project Officer – Integrity – VPS 5	4	Release in full	Not subject to review	
3.3	Undated	Position description – Project Officer – Governance and Integrity – VPS4	4	Release in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
3.4	Undated	Position description – Project Officer – Governance and Integrity – VPS 4	4	Release in full	Not subject to review	
4.1	Undated	Global Engagement Management System (GEMS) Ice Hockey Grants Summary	2	Release in full	Not subject to review	
4.2	13/11/19	Ice Sports Victoria – Grant Letter Together More Active (TMA) Program	1	Refuse in part Section 34(1)(b)	Release in part Section 25 The document is to be released, except for irrelevant information, which is to remain deleted in accordance with section 25.	Section 34(1)(b): I am not satisfied section 34(1)(b) applies to the exempted material in the document for the reasons outlined above. Section 25: I am satisfied the document contains information that is irrelevant to the request, being personal affairs information not sought by the Applicant. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.3	15/11/19	Ice Sports Victoria – TMA Funding Agreement Variation	4	Refuse in part Section 34(1)(b)	Release in part Section 25 The document is to be released, except for irrelevant information, which is to remain deleted in accordance with section 25.	Section 34(1)(b) and 25: See comments for Document 13.
4.4	Undated	Ice Sports Victoria – Grant Letter TMA Program	1	Refuse in part Section 34(1)(b)	Release in part Section 25 The document is to be released, except for irrelevant information, which is to remain deleted in accordance with section 25.	Section 34(1)(b) and 25: See comments for Document 13.
4.5	17/06/21	Grant Agreement – [sporting venue]	27	Refuse in full Section 34(1)(b)	Release in part Section 25 The document is to be released, except for irrelevant information, which is to remain deleted in accordance with section 25.	Section 34(1)(b) and 25: See comments for Document 13.
4.6	Undated	[Ice Hockey Club] – Grant Letter	2	Refuse in part Section 34(1)(b)	Release in part Section 25	Section 34(1)(b) and 25: See comments for Document 13.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					The document is to be released, except for irrelevant information, which is to remain deleted in accordance with section 25.	

