

Notice of Decision and Reasons for Decision

Applicant:	'CO8'
Agency:	Department of Jobs, Precincts and Regions
Agency reference:	21-1136
Our reference:	C/21/01163
Decision date:	31 December 2021
Exemptions considered:	Sections 28(1)(ba), 30(1), 34(1)(b), 34(4)(a)(ii)
Citation:	'CO8' and Department of Jobs, Precincts and Regions (Freedom of Information) [2021] VICmr 26 (31 December 2021)

FREEDOM OF INFORMATION – ministerial briefing – arts funding – use of public land – whole of government investment committee – not engaged in trade or commerce

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 satisfied the exemptions in section 28(1)(ba) apply to Documents 6 and 7 in full.

I consider certain content in Document 2 is exempt under section 34(1)(b) but am not satisfied sections 30(1) or 34(4)(a)(ii) apply to this document.

I am not satisfied sections 30(1), 34(1)(b) or 34(4)(a)(ii) applies to the remainder of the documents.

As it is practicable to edit some of the documents to delete irrelevant and exempt information, I have determined to grant access to the documents in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

31 December 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. Brief to the Minister for Regional Development, BMIN-2-20-5734, Support for Queenscliffe Historical Museum.
 2. Brief to the Minister for Regional Development, BMIN-2-20-3749, SCT Logistics Wodonga Logic Site Expansion.
 3. Brief to the Minister for Regional Development, BMIN-2-20-3647, Use of public land for community activity and economic development.
 4. Brief to the Minister for Regional Development, BMIN-2-20-3958, Minister to meet with local MPs re: Geelong City Deal.
 5. Brief to the Minister for Business Precincts, BMIN-2-20-6500, WoMEDA Grant Funding.
 6. Brief to the Minister for Business Precincts, BMIN [reference] [subject]
 7. Brief to the Minister for Business Precincts, BMIN [reference] [subject]
2. The Agency identified seven documents falling within the terms of the Applicant's request. It decided to grant access to some of those documents in part. The Agency relied on sections 28(1)(ba), 30(1) and 34(4)(a)(ii) to refuse access to some of the documents in full and some in part. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant indicated they are not seeking review of the Agency's decision to exempt certain information under section 33(1).
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
9. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Preliminary view

10. OVIC staff provided my preliminary view to the Agency on the application of section 34(4)(a)(ii) on 2 July 2021. The Agency did not agree with my preliminary view and its response is described below.

Review of exemptions

Section 28(1) – Cabinet documents

11. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
12. In *Ryan v Department of Infrastructure*,¹ the Victorian Civil and Administrative Tribunal (**VCAT**) observed:

It has been said that a document is not exempt merely because it has some connection with Cabinet, or is perceived by departmental officers or others as being of a character that they believe ought to be regarded as a Cabinet document or because it has some Cabinet “aroma” around it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exemptions [(now five)]” in section 28(1) of the Act.

13. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.

Section 28(1)(ba)

14. Section 28(1)(ba) provides a document is an exempt document if it is a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
15. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which the document was prepared was to brief a Minister in relation to issues to be considered by Cabinet.² In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to Cabinet.³
16. The Cabinet briefing purpose must be ‘immediately contemplated’ when the document is created. The exemption cannot apply merely because Cabinet ultimately considered the issue.⁴
17. The word ‘briefing’ means a ‘short accurate summary of the details of a plan or operation. The purpose...is to inform’. The document should have the character of a briefing material. A document will be of such character if it contains ‘information or advice...prepared for the purpose of being read by, or explained to, a [m]inister’. It requires more than having ‘placed a document before a Minister’.⁵
18. The term ‘issues to be considered by Cabinet’ within the meaning of section 28(1)(ba), requires that it must be more than just ‘likely’ that Cabinet will consider it. There must be an intention or expectation the issues will be considered by Cabinet (even if not ultimately considered). Evidence that a matter was included in the Cabinet Agenda will meet this test.⁶

¹ (2004) VCAT 2346 at [33].

² *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

³ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

⁴ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

⁵ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁶ *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996). See also *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998); *Hulls v Department of Treasury*

19. My decision in relation to section 28(1)(ba) is set out in the Schedule of Documents at **Annexure 1**.

Section 30(1) – Internal working documents

20. Section 30(1) has three requirements:

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

21. The exemption does not apply to purely factual material in a document.⁷

22. I must also be satisfied releasing this information is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁸

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

24. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁹

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the agency would not otherwise be able to explain upon disclosure of the documents;
- (f) the 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

and Finance (No 2) (1994) 14 VAR 295 at [320–321]; reversed on other grounds by the Court of Appeal: *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331; 15 VAR 360; [1999] VSCA 117.

⁷ Section 30(3).

⁸ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁹ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

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.

25. In relation to section 30(1), the Agency submits:

Document 3 - Brief to the Minister for Regional Development, BMIN-2-20-3647 - Use of public land for community activity and economic development.

It is not in the public interest to release this information as:

- Prior to any final decisions being made, government officials should be allowed to freely discuss opinions and advice without fear of that information being promoted prior to any final decision being made; and
- The information is not fact based and is speculative opinion.

Friends of Mollacoota Inc. v Department of Planning and Community Development held that:

“Decision-makers should be judged on the final decision and their reasons for it, not on what might have been considered or recommended by others in preliminary or draft internal working documents.”¹⁰

This decision additionally utilised the support of *McIntosh v Victoria Police*.¹¹

Document 4 - Brief to the Minister for Regional Development, BMIN-2-20-3958 - Minister to meet with local MPs re: Geelong City Deal

It is not in the public interest to release this information as:

- Prior to any final decisions being made, government officials should be allowed to freely discuss opinions and advice without fear of that information being promoted prior to any final decision being made;
- The information is not fact based and is speculative opinion;
- The progress report contains internal discussions and memoranda for follow up, risks and risk mitigation strategies to be noted and addressed;
- A document is publicly produced by GCD which is available on their website and provides a simplified version of the status relating to each individual element of the program; and
- The drafting of documents is currently ongoing and no information has yet to be released in this regard, therefore, the release of information prematurely would cause speculation, prior to any final decisions being made.

The department relies on the same information provided in Document 3 as to the information satisfying both limbs of section 30(1).

26. My decision regarding section 30(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 34(1)(b) – Document relating to matters of a business, commercial or financial nature

27. Section 34(1)(b) provides that a document is an exempt document if its disclosure under the FOI Act would disclose information acquired by the Agency from a business, commercial or financial undertaking and the information relates to other matters of a business, commercial or financial nature and the disclosure of which would be likely to expose the undertaking unreasonable to disadvantage.

28. My decision regarding section 34(1)(b) is set out in the Schedule of Documents at **Annexure 1**.

¹⁰ *Friends of Mollacoota Inc. v Department of Planning and Community Development* (General) [2011] VCAT 1889 at [51]

¹¹ *McIntosh v Victoria Police* (General) [2009] VCAT 1868 at [12]

Section 34(4)(a)(ii) – Document relating to trade secrets etc

29. 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’.
30. The Victorian Civil and Administrative Tribunal (**VCAT**) has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.¹² VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.¹³
31. The provision contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage, and that any such exposure must be unreasonable.
32. In relation to section 34(4)(a)(ii) the Agency submits:

Document 1 - Brief to the Minister for Regional Development, BMIN-2-20-5734 - Support for Queenscliffe Historical Museum.

The Queenscliffe Historical Museum (QHM) is an incorporated association, run by a committee of Management, and staffed by volunteers.

...

The department is engaged in trade or commerce with this association in that:

- The department is not delivering statutory services to QHM;
- Any decision relating to funding granted to the QHM will effect their financial outcomes; and
- The department has the ability to grant or decline funding grants to the association and there is no obligation to provide assistance.

When discussing government departments being engaged in the provision of grants, Judge Wood in *Bracks v Department of State Development*¹⁴ noted that:

“the purpose of the scheme is not only the immediate one of benefiting the recipient company itself, but it extends to companies individuals and organisations which enter into contracts with the recipient consequent upon the grant itself, for example, employment contracts and contracts for the supply of goods and services in the nature of capital works for the recipient company, thus the overall objective and purpose of the grant is to promote widespread commercial activity.”

Judge Wood’s conclusion was that this was a Government department engaging in trade or commerce. This exempt information is of a business and financial nature, in that:

- It discloses individual figures that have not yet been announced or made public;
- The reasoning behind the request for additional funding from the perspective of the QHM;
- What the funding, were it to be granted, would specifically be used for; and
- Conditions to be included in the Grant Agreement.

The release of this information would be likely to expose the agency unreasonably to disadvantage as:

- It would provide other agencies and organisations insight into decision making processes which may alter the approach that is taken when requesting funding, grants or financial decisions from the department; and
- Funding available to organisations is limited and of a competitive nature and decisions must be made on the merits of the organisation lodging requests and providing appropriate details without bias.

¹² *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

¹³ *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].

¹⁴ *Bracks v Dept State Dev* [1998] VCAT 579 (15 January 1999) at [28(c)]

In determining that grant amounts should be exempt from release due to the exposure of the agency to unreasonable disadvantage, Judge Wood (*Bracks v Department of State Development*) noted that:

“I am satisfied that there is a likelihood which is not fanciful nor remote that the release of the documents in question may expose the respondent to disadvantage. It is quite significant, in my view, that those States which are regarded by Victoria as its competitors do not divulge the amounts of individual grants which carries the inference that those Departments too appreciate the potential for disadvantage should such amounts be disclosed.”¹⁵

Document 2 - Brief to the Minister for Regional Development, BMIN-2-20-3749 - SCT Logistics Wodonga Logic Site Expansion

SCT has sought government funding through the *Regional Jobs Fund* to invest in infrastructure and expand their site in Wodonga. The briefing is to provide the minister with the background and reasoning regarding the funds being sought.

DJPR is engaged in trade or commerce with this private business in that:

- The department is not delivering statutory services to SCT;
- Any decision relating to funding granted to SCT will effect their financial outcomes; and
- The department has the ability to grant or decline funding grants to the business and there is no obligation to provide assistance.

...In addition to those mentioned, *Fyfe v Department of Primary Industries* also determined that the involvement of a Government in providing grants or funding is sufficient demonstration of the engagement in trade or commerce.¹⁶

This exempt information is of a business and financial nature, in that:

- It discloses individual figures that have not yet been announced or made public;
- The reasoning behind the request for additional funding from the perspective of the SCT;
- What the funding, were it to be granted, would specifically be used for; and
- The risk assessment results undertaken by the government in considering the payment of funds to the business and the reasoning behind those assessments.

Again, the department relies on arguments previously expressed in in our response to Document 1, that the information is of a business or financial nature.

The release of this information would be likely to expose the agency unreasonably to disadvantage as:

- For private businesses to understand the risk assessment processes undertaken by the government, as well as the outcome of those risk assessments would provide unfair advantage to other businesses and allow them to alter applications for funds to adapt to governments decision making processes.

The department relies upon the same arguments as previously mentioned in Document 1.

Document 4 - Brief to the Minister for Regional Development, BMIN-2-20-3958 - Minister Symes to meet with local MPs re: Geelong City Deal

DJPR is engaged in trade or commerce with a multitude of private businesses discussed in this document business in that:

- The department is not delivering statutory services to these businesses;
- Any decision relating to funding granted to these businesses will effect their financial outcomes;
- Feasibility studies are ongoing in relation to the provision of funding to a private business; and

The department has the ability to grant or decline funding grants to the business and there is no obligation to provide assistance.

¹⁵ *Bracks v Dept State Dev* [1998] VCAT 579 (15 January 1999) at [30(b)]

¹⁶ *Fyfe v Department of Primary Industries* (General) [2010] VCAT 240 at [24 and 25]

This exempt information is of a business and financial nature, in that:

It discloses individual funding figures that have not yet been announced or made public; and

- Feasibility studies are continuing and any results will determine financial outcomes to the effected business.

The release of this information would be likely to expose the agency unreasonably to disadvantage as:

- Unnecessary speculation would be increased prior to any final decisions being made.

Document 5 - Brief to the Minister for Business Precincts, BMIN-2-20-6500 - WoMEDA Grant Funding

The West of Melbourne Economic Development Alliance (WoMEDA) is independent board (created with the support of Victoria University) with the objective of influencing economic development opportunities and investments in the West of Melbourne, covering 6 council areas.

DJPR is engaged in trade or commerce with this independent board in that:

- WoMEDA is independent of the government and acts as a lobby group to obtain funding and entice development to the region;
- The department is not delivering statutory services to WoMEDA;
- Any decision relating to funding granted to WoMEDA or any organisation lobbied for by them will effect their financial outcomes; and
- The department has the ability to grant or decline funding grants to the organisation or private businesses and there is no obligation to provide assistance.

This exempt information is of a business and financial nature, in that:

- It discloses individual figures that have not yet been announced or made public;
- Similar agreements in place with other partners;
- What the funding, were it to be granted, would specifically be used for; and
- The risk assessment results undertaken by the government in considering the payment of funds to the business and the reasoning behind those assessments.

The release of this information would be likely to expose the agency unreasonably to disadvantage as:

- Until decisions are final and publicised, outcomes may change, and the release of that information prior to this may cause unnecessary queries, confusion and create unnecessary speculation.

Is the Agency engaged in trade or commerce?

33. In response to my preliminary view, the Agency submits:

...the department is also aware of numerous instances in recent years where VCAT have provided decisive commentary with respect to the question of whether an agency is engaged in trade and commerce. For example, the recent case of *Commissioner of State Revenue v Tucker* (Review and Regulation) [2021] VCAT 238 (19 March 2021)...

...

In recent times, agencies have been held to be engaged in trade and commerce in a broad range of circumstances, including when:

- Engaging external lawyers (*Chopra v Department of Education and Training* (Review and Regulation) [2019] VCAT 1860)
- Providing educational services (*Department of Education and Training v Australian Education Union* (Review and Regulation) [2019] VCAT 1667)
- Engaging external contractors, such as for maintenance work (*Fitzherbert v Department of Health and Human Services* (Review and Regulation) [2019] VCAT 201)
- Engaging in contracts with third parties (*CityLink Melbourne Limited v Department of Transport* (Review and Regulation) [2020] VCAT 1078 – which again specifically overturned OVIC’s findings in respect of s 34(4)(a)(ii)).

The above is reflective of the well-established principle in respect of s 34(4)(a)(ii) that the terms “trade and commerce” are “expressions of fact and terms of common knowledge. ... [T]he terms are clearly of the widest import” (*Re Ku-ring-gai Co-op Building Society Ltd (No 12)* (1978) 36 FLR 134 (at 167)).

In addition to the above examples, the department’s submissions set out specifically where the provision of grants has been accepted as that agency being engaged in trade and commerce. We reiterate that in *Fyfe v Department of Primary Industries* [2010] VCAT 240, the proposition that an agency involved in the management of grants designed to attract private sector businesses is properly engaged in trade or commerce was accepted. Specifically, it was noted that, as in this case, the scheme “entail(s) not merely a handing out of money but entry into contractual arrangements...In the circumstances I believe...the respondent Department could be regarded as having entered into or negotiating entry into a joint venture arrangement with the other party or parties.”

...

Documents 1, 4 and 5

34. The Agency determined certain parts of documents 1, 4 and 5 exempt under section 34(4)(a)(ii). This information is described as follows:
- (a) in relation to Document 1, the value of a grant made from the ‘Living Regions Living Suburbs Fund’ to the Queenscliffe Historical Museum and certain information regarding how that grant will be spent;
 - (b) in relation to Document 4, information regarding projects involved in the ‘Geelong City Deal’ and ‘Revitalising Central Geelong’ (this relates to a plan with a defined value of investment in the region in relation to certain projects¹⁷);
 - (c) in relation to Document 5, the value of funding relating to the West of Melbourne Economic Development Alliance (WoMEDA) and the names of some of the recipients of other similar funding arrangements. The funding is drawn from the Agency’s budget.
35. I note the case law cited by the Agency in support of its view that it is engaged in trade or commerce.
36. I note that in relation to *Commissioner of State Revenue v Tucker*¹⁸, *Department of Education and Training v Australian Education Union*¹⁹ and *CityLink Melbourne Limited v Department of Transport*²⁰, the OVIC decisions to which they relate did not have to consider the exemption in section 34(4)(a)(ii) – rather, this exemption in section 34(4)(a)(ii) was added by the respective respondents when listed with VCAT.
37. I have reviewed the cases cited by the Agency and consider this matter is distinguishable from those cited, for the following reasons:
- (a) With the exception of *Department of Education and Training v Australian Education Union*,²¹ each of the matters listed above relate to an Agency engaging with commercial entities. Documents 1, 4 and 5 do not relate to the Agency’s engagement with a commercial entity.
 - (b) I do not agree with the Agency’s contention that *Fyfe v Department of Primary Industries* supports its view that the provision of grants amount to an Agency being engaged in trade or commerce.

¹⁷ <https://www.infrastructure.gov.au/cities/city-deals/geelong/>

¹⁸ [2021] VCAT 238 (19 March 2021)

¹⁹ [2019] VCAT 1667

²⁰ [2020] VCAT 1078

²¹ General [2010] VCAT 240.

Rather, I consider the member, at [25], is distinguishing the documents subject to that review from 'simply a matter of handing out grants'. Rather, the member considered:

It may be open to question for instance whether a Government agency that was distributing bushfire relief funds would for that reason be regarded as engaged in trade or commerce. Nevertheless the arrangements here entail not merely a handing out of money but entry into contractual arrangements which would entail the erection of a pilot electricity generation plant. In the circumstances I believe in light of the State of Victoria through the agency of the respondent Department could be regarded as having entered into or negotiating entry into a joint venture arrangement with the other party or parties. The first requirement for the exemption is therefore made out.

In my view the documents subject to the present case relate more closely to government grants rather than the documents described in that decision, that in the circumstances of that matter are distinctly more commercial in nature than in this instance.

- (c) I also note the Agency cites *Bracks v Department of State Development*²². While I note the similarities to this matter, in that the matter dealt with grants, in my view the documents subject to this request differ in important aspects. At [28], Judge Wood describes his reasons for concluding the respondent was engaged in trade or commerce. In particular, at [28(b)] he notes:

(b) the scheme of the grant's system is such that the respondent was in competition with its counterpart Departments in other States of the country and overseas;

There is no information before me that demonstrates the grants subject of this request are subject to such interstate competition as described in that matter.

38. In my view, whether information is governmental or relates to an agency engaged in trade or commerce depends on the specific document and the purpose of that engagement. This is supported by *Pallas v Roads Corporation*²³ that made the distinction between government and commercial activities at [56]:

VicRoads no more engages in trade or commerce when it undertakes a major arterial road construction or revision project than does a Government analyst in giving a certificate as to what a particular substance is or Law professor in providing an opinion under a statutory process as to Aboriginal heritage issues. The exemptions claimed under Section 34(4) of the Freedom of Information Act therefore, are not made out. Whatever property transactions are in prospect here are carried out for Governmental purposes, not for commercial purposes. The property purchases that might be involved here would be compulsory acquisition, an exercise of sovereign power, not a commercial process.

39. In this matter, the documents relate to the Agency providing public funding for governmental functions, including:
- (a) in relation to Document 1, the creation of a 'community hub';
 - (b) in relation to Document 4, the provision of certain public projects and infrastructure;
 - (c) in relation to Document 5, '...suburban jobs growth; improved community health and wellbeing; and smarter transport connectivity'.
40. As I consider the Agency is engaged in governmental activities, I am not satisfied it is engaged in trade or commerce in the present context.

²² [1998] VCAT 579 (15 January 1999)

²³ (Review and Regulation) [2013] VCAT 1967 (22 November 2013)

41. While I do not consider the Agency is engaged in trade or commerce for the purposes of the documents in dispute in this matter, I have considered the Agency's arguments that disclosure would be likely to expose it unreasonably to disadvantage as follows.

Would disclosure expose the Agency unreasonably to disadvantage?

42. Even if I were persuaded that the Agency is engaged in trade or commerce in the present context, I do not consider disclosure of the documents would expose it unreasonably to disadvantage for the following reasons:
- (a) I do not consider the documents contain enough detail that would reveal information from which entities seeking funding could gain advantage that would affect the Agency's ability to determine appropriate grant recipients. In any case, I consider the allocation of such funding should be an open and transparent process.
 - (b) While certain matters covered in the documents may be ongoing and therefore subject to change, I do not consider that disclosure of the documents would cause confusion. Rather, members of the community can understand that such decisions are subject to change as part of a potentially iterative process.
 - (c) I do not consider disclosure to be unreasonable where there is a significant public interest in disclosure of information about the recipients of grants. In my view disclosure gives the community the ability to examine the cost effectiveness and integrity of grants processes.
 - (d) There is no information before me to support the view that disclosure would have any negative impact on the process of administering grant funding for other projects where the Agency is effectively the sole provider of the grant funding service in this context; I also do not consider disclosure would deter any funding recipient where they benefit from such funding arrangements.

Document 2

43. The information the Agency considered exempt under section 34(4)(a)(ii) in this document relates to providing funding through the 'Regional Jobs Fund'. I note Document 2 differs to an extent from the other documents subject to review in that it relates to a commercial entity engaged in a competitive business, being the processing of 'bushfire affected softwood from NSW' in Victoria.
44. However, I also note the purpose of the funding is to create direct and indirect jobs and to 'facilitate other businesses to grow rail freight and exports from the region'. Therefore, in my view, the Agency is providing the funding for the purpose of boosting economic activity, that in the context of its core functions, is a governmental activity.
45. Having carefully considered the contents of Document 2, I have determined, for reasons similar to those in relation to Documents 1, 4 and 5 that even if I were persuaded that the Agency is engaged in trade or commerce in the present context, I do not consider disclosure would expose it unreasonably to disadvantage.
46. In making this decision I acknowledge the Agency may experience some inconvenience from disclosure. However, as described above, in my view any disadvantage represented by such inconvenience is not unreasonable where the public interest weighs in favour of disclosure. In this instance the government is recommending investment of public funds in a business in the form of a grant and I consider the process of awarding such grants, wherever possible, should be transparent so that the community can assess the effectiveness of public expenditure and can be satisfied with the integrity of the processes that determine which businesses receive such funds.

47. The documents are therefore not exempt under section 34(4)(a)(ii).

Section 25 – Deletion of exempt or irrelevant information

48. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

49. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’²⁴ 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 25.²⁵

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

Conclusion

51. On the information available, I am satisfied the exemptions in section 28(1)(ba) apply to Documents 6 and 7 in full. I consider certain content in Document 2 is exempt under section 34(1)(b) but am not satisfied sections 30(1) or 34(4)(a)(ii) apply to this document.

52. I am not satisfied sections 30(1), 34(1)(b) or 34(4)(a)(ii) apply to the remaining documents.

53. As it is practicable to edit some of the documents to delete irrelevant and exempt information, I have determined to grant access to certain documents in part.

Review rights

54. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁶

55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁷

56. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁸

57. 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.

58. 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.²⁹

²⁴ *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].

²⁵ *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].

²⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁷ Section 52(5).

²⁸ Section 52(9).

²⁹ Sections 50(3F) and (3FA).

When this decision takes effect

59. I have decided to release documents that contain matters of a commercial nature relating to third party business undertaking.
60. 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.
61. My decision does not take effect until the relevant third party review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	BMIN-2-20-5734 Support for Queenscliffe Historical Museum	3	Released in part Sections 33(1), 34(4)(a)(ii)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 34(4)(a)(ii): I am not satisfied the Agency is engaged in trade or commerce for the reasons set out above in my Notice of Decision. Section 25: The Applicant is not seeking information exempted by the Agency under section 33(1). This information is therefore irrelevant to the request.
2.	[date]	BMIN-2-20-3749 SCT Logistics Wodonga Logic Site Expansion	8	Released in part Sections 33(1), 34(4)(a)(ii)	Release in part Sections 34(1)(b), 25 The document is to be released with irrelevant information and information exempt under section 34(1)(b) as described below deleted in accordance with section 25. The following information is exempt under section 34(1)(b):	I note the Agency no longer seeks to exempt information at points 1 (a), (b) or (c) under section 34(4)(a)(ii). Section 34(4)(a)(ii): See comments for Document 1. I note the document refers to a ‘cabinet in confidence’ decision; however, the Agency has not applied an exemption under section 28 to that information. As the information is publicly available, I have not further considered any exemptions

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> • paragraph 5(b) on page 4 of the document from word 12 to the end of the second sentence in the paragraph; and • in Attachment 2, the content of paragraph 6 on page 7 from word 31 until the end of content on this page. 	<p>under section 28 in relation to this information.</p> <p>Section 34(1)(b): For completeness, while the Agency did not apply section 34(1)(b) to the document, I note it contains the financial affairs of a business undertaking. I therefore consider it appropriate to contemplate whether disclosure would expose the business undertaking unreasonably to disadvantage. From the information before me, with the exception of certain content as detailed in the OVIC Decision column, I am not satisfied disclosure of this document would have any effect on the business undertaking. I also consider that disclosure of the majority of the document is not unreasonable where the recipients of such grants should expect greater public scrutiny. In relation to certain content as detailed in the OVIC Decision column, in my</p>

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						<p>view disclosure of this information, which I consider would generally not be available to competitors of the business undertaking, could expose it to a measure of disadvantage or cause harm to its competitive position which I consider is unreasonable in the circumstances. As such, on balance, I find this content only is exempt under section 34(1)(b), while the remaining information is not exempt from release.</p> <p>Section 25: See comments for Document 1 in relation to irrelevant information. I consider it is practicable for the Agency to delete both irrelevant and exempt information in this document, because it would not require substantial time and effort, and the edited document would retain meaning.</p>
3.	Undated	BMIN-2-20-3647 Use of public land for community activity and	44	Released in part Sections 30(1), 33(1)	Release in part Section 25	Section 30(1): I consider the document contains the opinion, advice and

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
		economic development			<p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p>recommendation prepared by Agency officers for the deliberative purposes of the agency – that of providing advice regarding the use of certain land.</p> <p>I note the Agency’s submission and the preliminary nature of the views expressed in the document. However, I have determined it would not be contrary to the public interest for the following reasons:</p> <ul style="list-style-type: none"> • the preliminary nature of the information is not determinative. In my view members of the public are capable of understanding such views can be subject to change; • disclosure of such information assists members of the public to understand Agencies’ decision making processes – which in my view is a key aim of the FOI Act;

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						<ul style="list-style-type: none"> the document relates to land use that affects the community. I consider such decisions should be subject to public scrutiny and transparency. <p>The document is therefore not exempt under section 30(1).</p> <p>Section 25: See comments for Document 1.</p>
4.	Undated	BMIN-2-20-3958 Minister to meet with local MPs re: Geelong City Deal	19	Released in part Sections 30(1), 33(1), 34(4)(a)(ii)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	<p>Section 30(1): I consider the document contains the opinion, advice and recommendation prepared by Agency officers for the deliberative purposes of the agency – that of providing advice regarding various projects.</p> <p>I note pages 10-19, titled 'project status report' contains significant detail regarding certain projects.</p> <p>I have determined it would not be contrary to the public</p>

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						<p>interest to release this information for similar reasons to Document 3. I would also add that I consider disclosure would not have any negative effect on similar advice being provided in the future where agency officers are obligated to provide such advice as part of their professional duties.</p> <p>Section 34(4)(a)(ii): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>
5.	Undated	BMIN-2-20-6500 WoMEDA Grant Funding	33	<p>Released in part</p> <p>Sections 34(4)(a)(ii), 33(1)</p>	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p>Section 34(4)(a)(ii): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>
6.	[date]	BMIN [reference] [subject]	53	<p>Refused in full</p> <p>Section 28(1)(ba)</p>	<p>Refuse in full</p> <p>Section 28(1)(ba)</p>	<p>Section 28(1)(ba): I am satisfied, based on the contents of the document, that it was prepared for the purpose of briefing a Minister</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>in relation to issues to be considered by a subcommittee of cabinet. It is therefore exempt under section 28(1)(ba).</p> <p>Section 25: The document is exempt in full and cannot be edited to remove exempt information.</p>
7.	[date]	BMIN [reference] [subject]	35	<p>Refused in full</p> <p>Section 28(1)(ba)</p>	<p>Refuse in full</p> <p>Section 28(1)(ba)</p>	<p>Section 28(1)(ba): See comments for Document 6.</p> <p>Section 25: The document is exempt in full and cannot be edited to remove exempt information.</p>