

## Notice of Decision and Reasons for Decision

---

Applicant:	'FD1'
Agency:	Department of Health
Decision date:	26 April 2023
Exemptions considered:	Sections 34(1)(b), 35(1)(a), 35(1)(b)
Citation:	'FD1' and Department of Health (Freedom of Information) [2023] VICmr 36 (26 April 2023)

---

FREEDOM OF INFORMATION – cemetery trust — *Cemeteries and Crematoria Act 2003* (Vic) – development works – costs plan – abstract of accounts – cemetery trust 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 not satisfied the review document is exempt from release under section 34(1)(b) or 35(1)(b). However, I am satisfied certain information is exempt from release under section 35(1)(a).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access to the review document is granted in part.

A marked-up copy of the documents indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

26 April 2023

## Reasons for Decision

### Background to review

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

[year] Abstract of Accounts for the [named cemetery trust] ...and all supporting documents.
2. In correspondence with the Agency the Applicant further clarified their request, stating:  

I am not seeking the personal affairs information of individuals included in the documents only the positions of trust members who have authorised and are included in the documents.
3. The Agency identified four documents, totalling 47 pages, falling within the terms of the Applicant's request and refused access to one document in part and one document in full under sections 34(1)(b) and 35(1)(b).
4. The Agency's decision also advised that it refused access to one document in full and one document in part under section 25, as it determined information in those documents was not relevant to the terms of the Applicant's request.

### Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. 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.
8. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

### Review document

9. The [named cemetery trust] (the **Trust**) was created in [year], under the *Cemeteries and Crematoria Act 2003* (Vic) (**Cemeteries Act**). A Class B cemetery trust, such as the Trust, is a public entity, governed by the Cemeteries Act and Ministerial directions, which among other things, outline the Trusts financial reporting and expenditure obligations. Expenditure by a cemetery trust is done under the guidance of the Victorian Government Purchasing Board, to ensure a fair and competitive tendering process when considering any public construction.<sup>2</sup>
10. Class B cemetery trusts are required to provide an annual abstract of accounts to the Agency, which includes any supporting material and, should they choose, any costing estimates for future building works concerning the cemetery's maintenance, repairs and development.<sup>3</sup>

---

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

<sup>2</sup> Department of Health, 'Class B cemetery trust financial reporting and financial procedures' at <https://www.health.vic.gov.au/cemeteries-and-crematoria/class-b-cemetery-trust-financial-reporting-and-procedures>.

<sup>3</sup> *Cemeteries and Crematoria Act 2003* (Vic), section 52.

11. In correspondence with OVIC, the Applicant confirmed they seek a review of the Agency's decision to refuse access to Document 3 only (**review document**).
12. The review document is a cost plan relating to proposed building works at the [named cemetery] . The document was submitted to the Agency as an attachment to the Trust's abstract of accounts. The Agency relies on sections 34(1)(b) and 35(1)(b) to refuse access to this document in full.

### **Review of exemptions**

#### ***Section 34(1)(b) – Business, commercial or financial information of a third party business undertaking***

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

The material withheld under this section would disclose business, commercial or financial information for both [named business undertaking] and [the Trust]. The document discloses [named business undertaking] methodology in developing the cost plan for [the Trust], including the breakdown for each stage of the proposed project. It was determined that the release of the information would pose an unreasonable disadvantage to [named business undertaking] business, financial and commercial interests, as it outlines the company's assessment methodologies for creating similar cost plans in the future.

Further, the cost plan breakdown reveals details of [the Trusts] financial information which forms part of a current funding application process. As no contract for works at [the Trusts] has been signed, the disclosure of this information to the public would undermine the tender process and provide an unfair advantage in the quotation of elements of the proposed works.

The department also consulted with [the Trust] and their views were taken into consideration.

*Was the information acquired from a business, commercial or financial undertaking and is the information of a business, financial or commercial nature?*

15. The information acquired by an agency must be of a business, commercial or financial nature. These words are to be given their ordinary meaning.
16. The document was generated by a third party business undertaking (the **business undertaking**) on behalf of the Trust, in the context of exploring possible budget requirements in relation to the development of the [named cemetery].
17. I am satisfied information in the document is of a business, financial and commercial nature and was acquired by the Agency from the business undertaking.
18. While I am satisfied the cost management agency that prepared the document is a third party business undertaking, I do not consider the Trust, which is a publicly entity with public funding is a business undertaking for the purpose of section 34(1)(b).

*Would disclosure of the document be likely to expose the business undertaking unreasonably to disadvantage?*

19. Section 34(2) provides that in deciding whether disclosure of information would expose a business 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.
20. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,<sup>4</sup> in which the Victorian Civil and Administrative Tribunal (VCAT) held documents are exempt from release under section 34(1)(b) if their disclosure would:
- (a) give competitors of the business undertaking a financial advantage;
  - (b) enable competitors of the business undertaking to engage in destructive competition with the business undertaking; or
  - (c) would lead to the drawing of unwarranted conclusions as to the business undertaking's financial affairs and position with detrimental commercial and market consequences.
21. By amending section 34(1)(b) to include the word 'unreasonably', it is my view, Parliament determined this exemption will apply where a business undertaking would be exposed 'unreasonably' to disadvantage only. As such, I consider section 34(1)(b) contemplates disclosure under the FOI Act may expose a business undertaking to a certain measure of disadvantage.
22. On the information before me, I am not satisfied disclosure of the business, financial and commercial information in the document would expose the business undertaking unreasonably to disadvantage for the following reasons:
- (a) While the information may not be known to the business undertaking's competitors, it is general in nature and would be reasonably common to such development projects.
  - (b) While I acknowledge the Agency's view, as set out in its submissions above, that disclosure of the review document would expose it unreasonably to disadvantage as it 'outlines the company's assessment methodologies for creating similar cost plans in the future', the Agency elected not to consult with the business undertaking to obtain its views on disclosure of the relevant information, as required under section 34(3). Therefore, there is nothing before me to sufficiently satisfy me that the methodologies utilised in this case hold significant commercial value.
  - (c) Rather, the methodology and practices in the document reflect what I consider would likely be the standard industry process for undertaking a cost evaluation in these circumstances.

---

<sup>4</sup> [2007] VCAT 1301 at [33].

23. Accordingly, I am not satisfied disclosure of the document would expose the business undertaking unreasonably to disadvantage and the document is not exempt from release under section 34(1)(b).

***Section 35(1) – Documents containing material obtained in confidence***

24. Section 35(1) applies to documents that, if disclosed, would divulge any information or matter communicated in confidence by or on behalf of a person or a government to an agency. This provision contains two exemptions: sections 35(1)(a) and 35(1)(b).

***Section 35(1)(b) – Disclosure of confidential information would be contrary to the public interest***

25. A document is exempt from release under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
26. Confidentiality can be expressed or implied from the circumstances of the matter.<sup>5</sup>
27. In relation to the application of section 35(1)(b) that Agency submit:
- This information was obtained only to support the Trust in applying for grant funding and to be utilised throughout the quoting and tender process. Releasing this information to a member of the public could compromise this process as it is unknown what the member of the public's intentions are.
  - it was not a requirement of [the Trust] to provide to the department the [business undertaking] estimates as part of the Abstract of Accounts; it was only done so, in confidence, to highlight the possible extent of work and funds required in future projects by [the Trust]. This information is solely for the commercial interests of the trust operations and the price structures quoted are confidential;
  - no consent has been provided by [the Trust] to disclosure of the information in the documents;
  - disclosure is likely to undermine trust between the department and [the Trust], as well as other Cemetery Trusts;
  - the information in document one was provided by [the Trust] voluntarily as indicated by the document as an 'Optional Section'. Again, this section, as well as the [business undertaking] document, were not required to be provided and was only done so on a confidential basis to the department;
  - the Trust is going through the funding application process, and no contracts for works at the cemetery have been signed, therefore the disclosure of the information contained in the documents to the public would undermine that tender process, and provide an unfair advantage in quotation of elements included in the documents;
  - [the Trust] may not provide similar information in future to the Department;
  - [the Trust] may not provide information of a similar quality or quantity in future.
28. As mentioned, the review document was provided to the Agency as an attachment to the Trust's abstract of accounts, submitted in accordance with section 52 of the Cemeteries Act. While I note the statutory framework which requires the Trust financial reporting to the Agency, in this case I accept the Agency's submission that the document was provided in confidence, on a voluntary basis.

---

<sup>5</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

29. However, the relevant consideration under section 35(1)(b) is whether disclosure would be reasonably likely to impair the Agency's ability to obtain similar information in the future and in this case, I am not satisfied it would.
30. In *Medical Practitioners Board of Victoria v Sifredi*,<sup>6</sup> the Court held that a response given by a practitioner to the Board in the course of its enquiry was not exempt from release because the evidence did not establish that a practitioner would not respond to a request for information from the Board. Merely that they may respond with less frankness and candour. Put another way, evidence of the ability of an agency to obtain similar information in the future will not arise if the impairment goes no further than mere lack of candour or greater circumspection.<sup>7</sup>
31. While I note the Trust volunteered this information on a confidential basis, I also note the Agency's submission that the information was acquired for the purpose of obtaining a government grant from the Agency. Therefore, I consider the information, while voluntarily provided by the Trust in these circumstances, would still be required to be produced to the Agency for the purpose of obtaining funding for the proposed development at a later time.
32. While I accept the consequence that as a result of disclosure the Trust, or those in the position of the Trust, may be less inclined to include such information with their abstract of accounts in the future nevertheless, the exemption is not made out if the impairment goes no further than showing potential suppliers may be somewhat less candid than they may have otherwise been.
33. Therefore, taking into account the nature and the context in which the review document was generated, and the legislative framework involving expenditure and procurement by a Class B cemetery trust, I am not satisfied the Agency's ability to receive similar information in the future would be impaired by disclosure in this case.
34. Accordingly, I am not satisfied section 35(1)(b) applies to the review document.

*Section 35(1)(a) – Confidential information would be exempt from release if generated by an agency*

35. While I accept the document is not exempt under section 35(1)(b) on the basis that I am not satisfied the second condition of the exemption is met however, after careful review of the information I agree there exists a number of public interest matters relevant to the disclosure of the document. Therefore, I have considered it necessary to also look at the application of section 35(1)(a), which relevantly provides:
  - (1) A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister, and—
    - (a) the information would be exempt matter if it were generated by an agency or a Minister;
36. The expression 'exempt matter' is defined in section 5(1) to mean 'matter the inclusion of which in a document causes the document to be an exempt document'.
37. Section 30(1) concerns 'internal working documents' of an agency. However, section 35(1)(a) has the effect that so long as the requirements of section 30(1) are met, those communicating information in confidence are 'deemed' to be officers of the agency and the material will be assessed as if it were generated by the agency. Therefore, if the information communicated to the Agency in confidence is capable of being exempt under section 30(1), the exemption under section 35(1)(a) will be made out.<sup>8</sup>

<sup>6</sup> (2000) 16 VAR 347 at [19].

<sup>7</sup> *Corry v Police (Vic)* [2010] 282 [28]; *Ryder v Booth* [1985] VR 869.

<sup>8</sup> *Casey City Council v Environment Protection Authority* [2010] VCAT 453 at [28]-[30].

38. 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.
39. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.<sup>9</sup>
40. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or the government.<sup>10</sup>
41. In *Re Waterford and Department of Treasury (No.2)*,<sup>11</sup> the former Victorian Administrative Appeals Tribunal held:
- ... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
42. I am satisfied the document is an expression of opinion or advice provided in the course of, and for the purposes of, the Trust’s deliberative process in planning and managing the development of a cemetery.
- Would disclosure of the document be contrary to the public interest?*
43. In determining if disclosure of a document 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. This involves a ‘process of the weighing against each other conflicting merits and demerits’.<sup>12</sup>
44. In doing so, I have given weight to the following relevant factors in the context of this matter:<sup>13</sup>
- (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 document;
  - (c) the stage of a decision or a process being undertaken at the time the communications were made;
  - (d) whether disclosure of the document would be likely to inhibit communications between members of the Trust, essential for the Trust to make an informed and well-considered decision or participate fully and properly in a process in accordance with the ‘Trust’s functions and other statutory obligations;

<sup>9</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>10</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>11</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>12</sup> *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].

<sup>13</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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;
  - (f) the impact disclosure would have on the efficient and economical conduct of government;<sup>14</sup> and
  - (g) the public interest in the community being better informed about the way in which the Trust carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
45. Having considered the content of the document, I am satisfied disclosure of the financial information would be contrary to the public interest, for the following reasons:
- (a) I acknowledge the Applicant's interest in the information as outlined in their review application and also accept that there is considerable community interest in the subject matter of the document. In particular, interest in the details, planning and decisions relating to development works at the cemetery. I note similar information will be required to be submitted for public scrutiny through the planning process conducted by the local council, which will likely involve community consultation on the proposed development works.
  - (b) While I accept that information in the document may ultimately become available for public inspection, I am equally mindful of the early stage in the planning process in which the document was produced. I consider the cost plan is the subject of potential current and future financial relevance. If the development proceeds to a tender process, the information in the review document would allow prospective tenderers, with which the Trust would have to deal, access to information from which they can strengthen their bargaining position at the expense of the Trust and ultimately, the public as a publicly funded development.
  - (c) I consider the public interest, at this particular stage in the proposed development, is in maintaining confidentiality of the Trust's financial and commercial information to maximise the Trust bargaining position, to the benefit of the taxpayer.
  - (d) In relation to the outstanding information, I accept this information holds some sensitivities as it relates to the early planning stages of the project and may not accurately reflect a final outcome. However, unlike the cost estimates and budget allowances I am not satisfied disclosure of the terms of engagement and descriptions of works would be capable of disrupting the efficient and economical conduct of the Trust to effectively engage in a future tender process.
  - (e) Rather, I am satisfied disclosure would serve the public interest in allowing the community to better understand the nature of the proposed development works and address questions that have acquired particular importance in the mind of those in the community.
46. Accordingly, I am satisfied certain information communicated to the Agency in confidence would be exempt material under section 30(1) and as a consequence, is exempt under section 35(1)(a). However, I am not satisfied the outstanding information is exempt material under section 30(1) and therefore, not exempt under section 35(1)(a).

**Section 25 – Deletion of exempt or irrelevant information**

47. 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.

---

<sup>14</sup> *Secretary, Department of Justice v Osland* [2007] VSCA 96.



48. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>15</sup> 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.<sup>16</sup>
49. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as it concerns personal affairs information not sought by the Applicant in their request, being names and a signature of a third party.
50. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete 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 before me, I am not satisfied the review document is exempt from release under section 34(1)(b) or 35(1)(b). However, I am satisfied certain information is exempt from release under section 35(1)(a).
52. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the review document is granted in part.
53. A marked-up copy of the documents indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

### **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.<sup>17</sup>
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
56. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
57. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto: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.<sup>20</sup>

---

<sup>15</sup> *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].

<sup>16</sup> *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].

<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</sup> Sections 50(3F) and 50(3FA).

***Third party review rights***

59. As I have determined to release documents to which the Agency refused access under sections 34(1) and 35(1)(b), if practicable, I am required to notify the relevant third parties of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>21</sup>
60. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights and confirm the business undertaking and the Trust will each be notified of my decision.

***When this decision takes effect***

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

---

<sup>21</sup> Sections 49P(5), 50(3A), 50(3AB) 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.	[year range]	Abstract of Accounts	8	Released in part Sections 35(1)(b), 25	Not subject to review	The Applicant advised they do not seek a review of this document.
2.	Various	Tax invoices	15	Determined irrelevant Section 25	Not subject to review	See comments for Document 1.
3.	[date]	Cost Plan	16	Refused in full Sections 34(1)(b), 35(1)(b), 25	<b>Release in part</b> Sections 35(1)(a), 25 A marked copy of the document has been provided to the Agency, which sets out my decision in relation to the document.	<b>Section 34(1)(b):</b> For the reasons set out in the Notice of Decision above, I am not satisfied the business undertaking would be exposed unreasonably to disadvantage by disclosure of the document. <b>Section 35(1)(b):</b> While I am satisfied the information was communicated in confidence to the Agency, I am not satisfied its disclosure would be contrary to the public interest in that the Agency would not be impaired from obtaining similar information in the future. <b>Section 35(1)(a):</b> For the reasons set out in the Notice of Decision, I am satisfied the cost estimates in the document would be exempt from release if generated by the Agency and therefore, are exempt from release under section 35(1)(a). However, I am not satisfied other information in the document is exempt from release as I am not satisfied its disclosure would be contrary to the public interest. Accordingly, this information is to be released to the Applicant.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<p><b>Section 25:</b> I am satisfied information deleted in the document under section 25 is irrelevant information as it concerns personal affairs information that is not sought by the Applicant.</p> <p>I am also satisfied it is practicable for the Agency to provide an edited copy of the document with irrelevant and exempt information deleted.</p>
4.	Various	Bank statements		Released in part Irrelevant information removed under section 25	Not subject to review	See comments for Document 1.