

## Notice of Decision and Reasons for Decision

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Applicant: 'CT9'  
Agency: Department of Environment, Land, Water and Planning

Decision date: 16 March 2021  
Exemptions considered: Sections 34(1)(b), 34(4)(a)(ii)

Citation: 'CT9' and Department of Environment, Land, Water and Planning  
(Freedom of Information) [2021] VICmr 73 (16 March 2021)

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FREEDOM OF INFORMATION – [Named] Wind Farm – Victorian Renewable Energy Targets (**VRET**) – Support Agreement – not satisfied disclosure would expose business undertaking unreasonably to disadvantage

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.

I am satisfied the parts of the document subject to review are not exempt under sections 34(1)(b) and 34(4)(a)(ii).

Accordingly, access to the relevant parts of the document is granted in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

16 March 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:  
  
...complete list of all renewable energy companies with whom the Victorian Government currently has VRET Support Agreements...
2. Following consultation with the Agency, the Applicant amended their initial request to 'The [named] Wind Farm Support Agreement'.
3. The Victorian Renewable Energy Target (**VRET**) refers to the legislated objective for renewable energy generation set by the Victorian Government. The VRET Reverse Auction is a government scheme that called for bids from the private sector in relation to investment in new renewable energy projects to support the Government's legislated targets.
4. In 2017, six new renewable energy generation facilities (three wind farms and three solar farms) were successful in the auction and awarded a 15 year Support Agreement with the State of Victoria (the **State**). The [named] Wind Farm project, by [third party], was one of the successful proponents in the VRET Reverse Auction.
5. According to the Victorian Government's Renewable Energy website, successful proponents must achieve a number of milestones set out in the VRET Support Agreement prior to the commencement of a project's construction. The Agency is responsible for the administration of the Support Agreement.<sup>1</sup>
6. The Agency identified one document falling within the terms of the Applicant's request to which it refused access in full under sections 34(1)(b) and 34(4)(a)(ii).

### Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

### Document subject to review

8. In consultation with OVIC staff, the Applicant agreed to narrow the scope of the review to the body to the Support Agreement only, and excluding the attached schedules.
9. OVIC sought a submission from the Agency regarding the narrowed scope.
10. Without making a fresh decision, the Agency agreed to release additional information in the document. However, it continued to rely on sections 34(1)(b) and 34(4)(a)(ii) to refuse access to certain information in the document.
11. I have examined a copy of the document subject to review.
12. I have considered all submissions and communications received from the parties.
13. 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

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<sup>1</sup> Victorian Renewable Energy Auction Scheme  
[https://www.energy.vic.gov.au/\\_\\_data/assets/pdf\\_file/0023/391172/VRET\\_FAQ.pdf](https://www.energy.vic.gov.au/__data/assets/pdf_file/0023/391172/VRET_FAQ.pdf) (accessed on 29 January 2021).

only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

14. I also 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, 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)**

15. 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 matters of a business, commercial or financial nature; and
  - (b) the disclosure of the information would be likely to expose the business undertaking unreasonably to disadvantage.
16. The review document concerns the Supported Agreement entered into by [third party] (the **business undertaking**) and the Victorian Government.
17. In accordance with section 34(3), the Agency consulted with the business undertaking to obtain its views on disclosure of the document. A copy of the business undertaking's response was provided for my consideration.

*Does the document contain information acquired by the Agency from a business undertaking that relates to matters of a business, commercial or financial nature?*

18. The phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.<sup>2</sup>
19. The words 'business, commercial or financial nature' are to be given their ordinary meaning.<sup>3</sup>
20. Whether a contractual agreement constitutes 'information acquired' by an agency for the purposes of section 34(1) is not settled.
21. In *Thwaites v Metropolitan Ambulance Service*,<sup>4</sup> the former Administrative Appeals Tribunal (**Tribunal**) held:

[The contracts between Metropolitan Ambulance and the successful tenderers] do not so much consist of information acquired by the agency from a business, commercial or financial undertaking but rather constitute the record of the transaction between the parties. Such documents, recording the agreement as to the arrangements between the parties, are, in effect, the contractual outcome of negotiations...
22. In contrast, the Tribunal has also concluded a contract of itself, does not disqualify it from exemption under section 34(1) as a term of a concluded contract may include information of a business nature.

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<sup>2</sup> *Thwaites v Department of Human Services* (1999) 15 VAR 1.

<sup>3</sup> *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

<sup>4</sup> (1996) 9 VAR 427 at 473.

To determine otherwise would 'read down the subsection considerably'.<sup>5</sup> I agree with this view and consider each case needs to be examined on its merits.

23. While I acknowledge the document represents the outcome of concluded negotiations between the State and the business undertaking, for the purposes of this review, I accept the document contains information acquired from the business undertaking within the terms of the agreement.

24. I am also satisfied the information relates to matters of a business and commercial nature.

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

25. I note the narrowing by Parliament of the exemptions under section 34 with the passing of the *Freedom of Information (Miscellaneous Amendments) Act 1999* (Vic). In the second reading speech for that Act, it was stated:

The Freedom of Information Act provides an exemption for a range of information relating to business, commercial and financial matters that is obtained by government agencies from business organisations. This exemption has been employed in the past, under the guise of commercial confidentiality, to prevent disclosure of documents that should be open to public scrutiny.

The bill narrows the ambit of this exemption. Under the proposed amendments documents will be exempt only if disclosure of information relating to business, commercial or financial matters would be likely to expose a business organisation unreasonably to a disadvantage. This narrower exemption will operate in conjunction with the government's policy commitment to post all contracts for the delivery of services to the community on behalf of the government on the Internet. This will ensure that Victorians are aware of and better able to scrutinise business undertakings entered into by the government.<sup>6</sup>

26. Section 34(2) provides that, in deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage for the purposes of section 34(1)(b), an agency 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 any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

27. In determining whether disclosure would expose the business undertaking unreasonably to disadvantage in this case, I have also considered whether disclosure under the FOI Act would:<sup>7</sup>

- (a) give a competitor of the undertaking a competitive financial advantage;
- (b) enable that competitor to engage in destructive competition with the undertaking;

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<sup>5</sup> See *Holbrook v Department of Natural Resource and Environment* (1997) 13 VA 1 at [8]; *Hull v Department of Treasury and Finance* (1998) 13 VAR 381.

<sup>6</sup> *Victorian Parliamentary Debates*, Legislative Assembly, 11 November 1999, 350.

<sup>7</sup> *Dalla-Riva v Department of Treasury and Finance* [2007] VCAT 1301 at [33].

- (c) would lead to the drawing of unwarranted conclusions as to the undertaking's financial affairs and position with commercial market consequences.

28. Having carefully considered the document and context in which it was acquired by the Agency, I am not persuaded its disclosure would expose the business undertaking unreasonably to disadvantage, for example, by causing substantial harm to their competitive position.

29. I have formed this view based on the following considerations:

(a) Whether the information is generally available to competitors of the business undertaking

The document arose out of a contractual arrangement between the Agency (on behalf of the State) and the business undertaking. It forms part of the Agency's management and oversight of the undertaking's performance under the agreement.

For the most part, I consider the document contains standard industry and contract clauses reasonably expected to be included in such an agreement. Neither the Agency nor the business undertaking provided evidence to demonstrate how disclosure of the concluded agreement terms would cause unreasonable disadvantage to the business undertaking's operations. Rather, I consider the nature of the document largely concerns each party's contractual responsibilities under the agreement.

Where a clause contains more specific information, I consider it lacks substantive detail such that its disclosure would divulge highly sensitive commercial information that could reasonably expose the business undertaking commercial, business, or financial detriment.

While I note certain information concerns dates and financial information not generally known to competitors of the business undertaking, this is one factor for consideration only and is not determinative.

(b) Whether the information could be disclosed without causing substantial harm to the competitive position of the business undertaking

I accept the document contains commercially sensitive information. However, I am not satisfied its disclosure would harm the ability of the business undertaking to negotiate agreements with the State or other contracts of a similar nature or harm its competitive position. Nor am I satisfied there is sufficient information to satisfy me disclosure of this information would expose the business undertaking unreasonably to disadvantage. I have formed this view based on the following considerations:

- The document relates to a large project that affects a significant proportion of the Victorian community. It is not unreasonable for such projects to be subject to public scrutiny in the interests of transparency and accountability.
- Each project will likely turn on its own facts and circumstances (eg. based on its size, site specific factors, design and level of commercial risk). In this instance, I do not accept disclosure would allow competitors of the business undertaking to draw unwarranted inferences on its current and future infrastructure projects given the information does not provide any reliable or current insight into the undertaking's current or future business and financial affairs.
- [Contextual information on the Applicant's interest in the document] Further, it is relevant the Applicant is not a commercial competitor of the business undertaking and is not seeking access to its commercial information to obtain a commercial or competitive advantage.

- Transactions between private entities and the State take on a different hue and the same level of 'commercial in confidence' cannot be afforded to such transactions and related documents. Where commercial entities engage with government, and where public funds are utilised to fund such projects, it is not unreasonable to expect greater transparency than a commercial entity would experience when dealing with other similar entities and that information provided by a company to a government agency may be released under the FOI Act or other means.<sup>8</sup> In this regard, I also note Clause 29.5 in the document, which specifically states the State continues to have obligations under the FOI Act.
- I accept the release of commercial documents within a commercially competitive environment, such as in the renewable energy industry, may cause a certain measure of disadvantage. However, the test in regard to section 34(1)(b) is whether disclosure would be likely to expose a business undertaking unreasonably to disadvantage. This provision contemplates some disadvantage may be experienced by an entity that enters into a commercial agreement with government on behalf of the State. In this instance, the business undertaking has not provided sufficient information to satisfy me any such disadvantage to which it may be exposed would be unreasonable.

(c) Whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the business undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls

The document was produced in relation to the Victorian Government's commitment to its renewable energy targets, which I consider is a matter of public interest.

The FOI Act requires access be provided to information in the possession of government 'limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs' and that any discretion conferred by the FOI Act be exercised, as far as possible, to facilitate and promote the disclosure of information.

In my view, there is a legitimate public interest in the way in which the Government meets its renewable energy targets and the financial and operational arrangements in place to monitor whether the targets are achieved. Therefore, I consider any disadvantage to which the business undertaking would likely be exposed due to disclosure of the document is outweighed by the public interest in favour of government transparency and accountability and the use of public funds.

30. Accordingly, on the information before me, I am not satisfied disclosure of the document under review would expose the business undertaking unreasonably to disadvantage.

**Section 34(4)(a)(ii)**

31. 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'.
32. As with section 34(1)(b), this provision contemplates disclosure of a document under the FOI Act may expose an agency to a certain measure of disadvantage. However, for this exemption to apply, any such exposure to disadvantage must be unreasonable.

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<sup>8</sup> This was noted by Deputy President Galvin in *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR 427 at [477].

*Is the Agency engaged in trade or commerce?*

33. The Agency has not provided information as to how it considers it is engaged in trade or commerce for the purposes of section 34(4) in the circumstances of this case.
34. An agency may be regarded as being engaged in trade or commerce even if the amount of trade or commerce engaged in is insignificant and incidental to the agency's other functions.<sup>9</sup> The fact an agency's predominant activities may be described as 'governmental' does not preclude it from relying on the exemption under section 34(4)(a)(ii).<sup>10</sup>
35. The High Court of Australia has determined 'trade and commerce' means 'dealings in the course of those activities or transactions which of their nature bear a trading or commercial character'.<sup>11</sup>
36. In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*, the Federal Court of Australia held, '[t]he terms "trade" and "commerce" are not terms of art. They are expressions of fact and terms of common knowledge'<sup>12</sup> and are terms 'of the widest import'.<sup>13</sup>
37. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself, or part of its operations, in a manner similar to a commercial entity.
38. In considering this issue, I take the view described in *Pallas v Roads Corporation* that a government agency engaged in meeting its public functions is not engaged in trade or commerce, for example in relation to VicRoads, where it was held:

In carrying out its road building functions the Corporation engages in Governmental activities rather than in trade or commerce...

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is. A consumer who purchases a consumer item from a department store is not, for that reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.<sup>14</sup>

39. In my view, the business and financial information referred to by the Agency does not demonstrate it is engaged in trade or commerce, but rather carrying out its governmental functions in providing oversight into the delivery of a large project.
40. However, even if I were to accept the Agency is engaged in trade or commerce, I do not consider it has demonstrated disclosure of the document would expose it unreasonably to disadvantage. The document represents its concluded negotiations with the business undertaking and does not reveal the iterative process of negotiations between the State and the proponent. Further, as the primary body responsible for managing and engaging with proponents in relation to such projects, the Agency is not subject to the same market forces or competition, as would a commercial entity. As such, I consider it would be reasonably likely to overcome any exposure to disadvantage arising from disclosure of the document.

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<sup>9</sup> *Marple v Department of Agriculture* [1995] 9 VAR 29 at [47].

<sup>10</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

<sup>11</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 690, *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

<sup>12</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 [1978] FCA 50; [1978] 22 ALR 621 at 44.

<sup>13</sup> *Ibid* at 45.

<sup>14</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [57]-[58].

41. I also consider, in general terms, any contract depends on a number of factors including the subject of the contract, the bargaining power of the contracting parties and the existence of competitive pressures to obtain the benefit of the contract. I consider government agencies have considerable bargaining strength in the provision of services. In this case, I am not satisfied there is sufficient evidence before me to support the view that disclosure would impact the ability of the State government to attract future business from private sector companies, or from continuing to enter into future negotiations in good faith, because the terms in which it did business would become publicly known. Ultimately, businesses will more likely than not be prepared to do business with government agencies where they consider it is in their commercial interests to do so.
42. Accordingly, I am satisfied the document is not exempt under section 34(4)(a)(ii).

### **Conclusion**

43. On the information before me, I am satisfied the parts of the document subject to review are not exempt under sections 34(1)(b) and 34(4)(a)(ii).
44. Accordingly, access to the relevant parts of document is granted in full.

### **Review rights**

45. 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>15</sup>
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>16</sup>
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>17</sup>
48. 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.
49. 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>18</sup>

### **Third party review rights**

50. As I have decided to release information of a commercial nature relating to the third party business undertaking, it will be notified of my decision and right to apply to VCAT for a review of my decision within 60 days from the date it is given notice.<sup>19</sup>

### **When this decision takes effect**

51. Accordingly, my decision does not take effect until the third party's 60 day review period expires.
52. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>15</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>16</sup> Section 52(5).

<sup>17</sup> Section 52(9).

<sup>18</sup> Sections 50(3F) and (3FA).

<sup>19</sup> Sections 49P(5), 50(3A) and 52(3).