**Freedom of Information Guidelines**

**Part IV – Exempt documents
Section 34 – Documents relating to trade secrets etc.**

***Freedom of Information Act 1982* (Vic)**

**Section 34 – Documents relating to trade secrets etc.**

All legislative references are to the *Freedom of Information Act 1982* (Vic) unless otherwise stated.

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Section 34 – Documents relating to trade secrets etc.

Extract of legislation

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| **34** | **Documents relating to trade secrets etc.** |
|  | (1) | A document is an exempt document if its disclosure under this Act would disclose information acquired by an agency or a Minister from a business, commercial or financial undertaking and the information relates to— |
|  |  | (a) | trade secrets; or |
|  |  | (b) | other matters of a business, commercial or financial nature and the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage. |
|  | (2) | In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations— |
|  |  | (a) | whether the information is generally available to competitors of the undertaking; |
|  |  | (b) | whether the information would be exempt matter if it were generated by an agency or a Minister; |
|  |  | (c) | whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and |
|  |  | (d) | whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls— |
|  |  | and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant. |
|  | (3) | An agency or Minister, in deciding whether the disclosure of information would expose an undertaking unreasonably to disadvantage, if practicable, must— |
|  |  | (a) | notify the undertaking that the agency or Minister has received a request for access to the document; and  |
|  |  | (b) | seek the undertaking's view as to whether disclosure of the document should occur; and |
|  |  | (c) | state that if the undertaking consents to disclosure of the document, or disclosure subject to deletion of information likely to expose the undertaking to disadvantage, the undertaking is not entitled to apply to the Tribunal for review of a decision to grant access to that document. |
|  | (3A) | If the agency or Minister, after consultation, decides to disclose the document, the agency or Minister must notify the undertaking from which the document was acquired of the— |
|  |  | (a) | decision to grant access to the document; and |
|  |  | (b) | right to make an application for review of the decision provided by section 50(3A). |
|  | (3B) | An agency or Minister is not required to notify an undertaking that has consented to disclosure of a document, or a document with deletions, of the decision to disclose that document or document with deletions (as the case requires). |
|  | (4) | A document is an exempt document if— |
|  |  | (a) | it contains— |
|  |  |  | (i) | a trade secret of an agency; or |
|  |  |  | (ii) | 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; |
|  |  | (b) | it contains the results of scientific or technical research undertaken by an officer of an agency, and— |
|  |  |  | (i) | the research could lead to a patentable invention; |
|  |  |  | (ii) | the disclosure of the results of an incomplete state under this Act would be reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or |
|  |  |  | (iii) | the disclosure of the results before the completion of the research would be reasonably likely to expose the agency or the officer of the agency unreasonably to disadvantage; or |
|  |  | (c) | it is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document and the use or uses for which the document was prepared have not been completed. |

Guidelines

Overview

* 1. Section 34 of the Act contains several exemptions. In summary:
		+ Section 34(1)(a) protects trade secrets of a business, commercial or financial undertaking;
		+ Section 34(1)(b) protects other business, commercial or financial information of an undertaking, where disclosure would likely expose the undertaking to an unreasonable disadvantage;
		+ Section 34(4)(a)(i) protects trade secrets of an agency;
		+ Section 34(4)(a)(ii) protects other business, commercial or financial information of agencies engaged in trade or commerce;
		+ Section 34(4)(b) protects the results of scientific or technical research undertaken by an agency; and
		+ Section 34(4)(c) protects examination papers, examiner’s reports and similar documents, where the document’s use is not yet completed.
	2. Where an agency or Minister is considering whether information in a document is exempt under section 34(1)(b), section 34(3) requires the agency or Minister to consult with the relevant third party, as part of its decision-making process. There is no requirement to consult with third parties when considering the other exemptions in section 34.
	3. Section 34(2) sets out considerations that an agency or Minister may take account of, when deciding if information is exempt under section 34(1)(b).
	4. Section 34 must be read consistently with the objects of the Act in [section 3](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-3/), which is to extend as far as possible the right of the community to access government held information. This right is only limited by exemptions necessary for the protection of essential public interests and private and business affairs.[[1]](#footnote-1) If it is unclear whether section 34 applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[[2]](#footnote-2)

Discretion to disclose exempt documents

* 1. The decision to exempt a document under section 34 is discretionary.[[3]](#footnote-3)
	2. An [agency](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-5/#definitions-agency) or Minister can choose to provide access to information that would otherwise be exempt under section 34, where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

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| For more information on providing access to information outside of the Act, see [section 16 – Access to documents apart from Act](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-16/). |

Section 34(1) exemption – meaning of common terms and phrases

* 1. To be exempt information under section 34(1)(a) or section 34(1)(b), the information must have been acquired by the agency or Minister from a business, commercial or financial undertaking.

Information acquired

* 1. The phrase ‘information acquired’ in section 34(1) involves some positive handing over of information to an agency in a precise form.[[4]](#footnote-4)
	2. The actual document itself does not itself need to be acquired from an undertaking.[[5]](#footnote-5) It need only disclose relevant information acquired from the undertaking.[[6]](#footnote-6) For example, a document may contain information extracted or paraphrased from information acquired from an undertaking.
	3. The information can be acquired from an undertaking through a third party.[[7]](#footnote-7) For example, the undertaking’s real estate agent or accountant, or a barrister submitting an invoice to a law firm, who then submits the invoice to the agency for payment.[[8]](#footnote-8)
	4. However, information generated by an agency about the undertaking, or mutual information arising out of negotiations or collaboration between an agency and an undertaking, is generally not ‘acquired’ by the agency from the undertaking.[[9]](#footnote-9)
	5. The terms of a concluded contractual agreement may or may not contain information acquired from the undertaking.[[10]](#footnote-10) Each case needs to be examined on its own merits to determine whether in fact:
		+ an agency acquired information from the undertaking; and
		+ whether disclosure of the terms of the concluded contract would disclose the acquired information.[[11]](#footnote-11)
	6. Records of transactions entered into by an agency with an undertaking may or may not reveal information acquired by the agency from the undertaking. Each case needs to be determined on its own facts.[[12]](#footnote-12)
	7. Where an agreement records the price payable between an agency and a business undertaking for a good, service, concession or other right, disclosing that information may reveal the price at which the business undertaking is prepared to do business – this is information acquired from the undertaking.[[13]](#footnote-13) Whereas, an amount representing a retrospective compromise, revealing information mutual to the agency and the undertaking may not meet the requirement of the exemption.[[14]](#footnote-14)

Business, commercial, or financial undertaking

* 1. The phrase ‘business, commercial or financial undertaking’ generally refers to an entity, such as a company or organisation, that is engaged in business, trade, or commerce for a financial profit or gain.[[15]](#footnote-15)
	2. An undertaking that is partly government funded or partly controlled by government officers can still be a ‘business, commercial or financial undertaking’ for the purposes of section 34(1).[[16]](#footnote-16)

Case examples

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| **Examples*****Mildenhall v Department of Treasury & Ors* (1994) 7 VAR 342****Background:*** The Applicant requested access to all documents relating to the award of the Grand Prix to Victoria.
* The Agency refused access to some documents on the basis they were exempt in whole or in part under section 34(1). The Agency argued that disclosure of the documents would disclose information acquired from a business, financial or commercial undertaking.

**Business, commercial or financial undertaking:*** In 1991 the Victorian State Government formed a public company limited by guarantee called Melbourne Major Events Co Ltd (**MME**) for the purpose of identifying and attracting major sporting and cultural events to Victoria. Some features of the memorandum and articles establishing MME included that MME was prohibited from carrying on a business for the profit of its members, was not able to acquire property without the approval of the State Treasurer, the Premier of the State of Victoria was able to appoint directors and the directors were required to exercise their powers within financial guidelines, expenditure rules and procedures set by the directors in consultation with the State Treasurer.
* In 1993 MME obtained the right to stage the Grand Prix in Melbourne, and established a wholly owned subsidiary company, Melbourne Grand Prix Promotions Pty Ltd (**MGPP**), to promote the Grand Prix in Melbourne. MGPP was a proprietary company whose shares were all owned by MME and its directors were the same as MME. The memorandum of MGPP contained similar provisions to MME.
* Both MME and MGPP were subject to the now repealed *Corporations Law*.

**Decision – were MME and MGPP a ‘business, commercial or financial undertaking’?**On this question, Judge Fagan, President of the then Administrative Appeals Tribunal of Victoria held:* Both companies had been carrying on activities as a business, commercial or financial undertaking. They were involved in the business of attracting major cultural and sporting events to Victoria and encouraging private sector funding of those events. The events themselves are substantial business, commercial and financial undertakings. MME sought sponsorship for itself and acted as a promoter of some events and supplied certain commercial services for a fee. Judge Fagan considered MGPP’s memorandum and articles, the purpose for which it was set up and the activities thus far undertaken by MGPP and found it clear that it was a business, commercial or financial undertaking.
* The fact the major activities carried on by MME and MGPP related to attracting or managing major events in Melbourne within the parameters of the terms of each company’s memorandum and articles of association did not remove the two companies of the character of a business, commercial or financial undertaking.
* What a company does with profits, gains and assets it acquires from its activities is a matter for it within the limits of its memorandum and articles. The restriction on the disposition of profits, gains and assets, does not of itself prevent it from being a company of a business, commercial or financial undertaking in all cases.
* In this case, MME and MGPP were still permitted to carry on business for profit or gain, for the purposes of the lawful objects of the company. For example, the acquisition of assets could be devoted to the objects of the company rather than the individual members.
* The degree of control of the Premier and Treasurer was considerable, but not absolute. Partial government control of a company by government officers will not of itself deprive a company of the quality of a business, commercial or financial undertaking. Modern governments are often and perhaps necessarily involved in management of enterprises of this character.

[**Stewart v Department of Tourism, Sport and the Commonwealth Games [2003] VCAT 45**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html)**Background:*** The Applicant sought access to an agreement between the State of Victoria and the Australian Commonwealth Games Association (**ACGA**), an agreement between the ACGA and Melbourne 2006 Pty Ltd, and any contracts, agreement and memoranda of understanding between those parties in relation to the staging of the Commonwealth Games in 2006.
* Melbourne 2006 Pty Ltd was an entity set up by the State of Victoria to run the 2006 Commonwealth Games, and that would be wound up following completion of the Commonwealth Games.
* Melbourne 2006 was subject to a considerable element of control by government officers and contained unusual features in its constitution and operations.
* The Department refused access to some documents on the basis they were exempt under section 34.

**Decision – was Melbourne 2006 Pty Ltd a business, financial or commercial undertaking?*** Judge Bowman found that Melbourne 2006 Pty Ltd was clearly a business or commercial undertaking.
* Melbourne 2006 Pty Ltd bore “considerable resemblance” to the two companies, MME and MGPP, that were found to be business, commercial or financial undertakings in *Mildenhall v Department of Treasury & Ors* (1994) 7 VAR 342.
* The annual report of Melbourne 2006 supported this finding, referring to “such things as the grant of licences to commercially exploit the Games on a worldwide basis, broadcast rights, and world-wide sponsorship rights”.
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Section 34(1)(a) exemption – trade secrets of a business, commercial or financial undertaking

* 1. A document or information is exempt under section 34(1)(a) if two conditions are satisfied:
1. the document or information was acquired from a business, commercial, or financial undertaking; and
2. the document or information contains trade secrets of the undertaking.
	1. See above for guidance about the first condition. See below for guidance about the second condition.

Steps to applying the exemption

* 1. It is best practice for an agency or Minister seeking to apply the section 34(1)(a) exemption to:
		+ Specifically identify the information considered to be a trade secret.
		+ Determine whether the information was acquired from a business, commercial or financial undertaking, identifying when it was received and from what undertaking;
		+ Consult with the undertaking to seek its views on whether the information constitutes a trade secret, and whether it consents to disclosure.[[17]](#footnote-17) If not, obtain reasons and supporting documentation about why the information constitutes a trade secret.
			- Consider seeking an extension of time under [section 21(2)(b)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-21/) if additional time is required to conduct consultation.
		+ Determine if the information constitutes a trade secret of the undertaking, and should be exempt.
		+ If a decision is made to release the information, and the undertaking did not consent to the disclosure, or did not reply, notify the affected undertaking of the decision and their right to appeal to the Victorian Civil and Administrative Tribunal (**VCAT**), including the 60-day appeal period.
		+ Wait until the review period has ended, and where applicable, the conclusion of any appeal or VCAT proceedings before providing the documents to the applicant.
			- If there are other documents falling within the request that do not contain the affected undertaking’s information, these can be released to the applicant at the same time as the decision notice, without needing to wait for the appeal period to end.

Trade secrets

* 1. To be exempt under section 34(1)(a), the information acquired from the business, commercial or financial undertaking must constitute a trade secret of the undertaking.
	2. The phrase ‘trade secret’ is not defined in the Act. Determining what is a ‘trade secret’ is primarily a question of fact for the administrative decision maker.[[18]](#footnote-18)
	3. A trade secret is generally proprietary knowledge of the undertaking but does not include every piece of commercially sensitive information.[[19]](#footnote-19)

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| **Examples**Secret formulas, processes, or methods used in production of goods or provision of services. |

* 1. There are several factors indicating that information may constitute a trade secret.[[20]](#footnote-20) These include:
* the extent to which the information is known outside of the undertaking’s business;
* measures taken by the undertaking to guard the secrecy of the information;
* the value of the information to the undertaking and competitors;
* the effort and money spent by the undertaking in developing the information; and
* the ease or difficulty with which others might acquire or duplicate the secret.
	1. Information may be a trade secret even if it is not of a technical character.[[21]](#footnote-21)
	2. Information is generally not considered to be a trade secret where the processes, procedures, or methods are well known or widespread (including in that industry), could be assumed, or are publicly available.

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| **Example**[**Tilley v VicRoads [2010] VCAT 483**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/483.html)**Background:*** The Applicant requested access to documents relating to a special registration scheme for heavy vehicles.
* The Agency refused access to some information on the basis it contained information relating to trade secrets acquired from companies who applied to be part of the scheme.

**Decision:*** The documents contained information relating to trade secrets. The evidence satisfied the factors for a trade secret.
* Member Proctor (as he then was), accepted evidence that the documents contained information provided by company A to VicRoads about a vehicle design. “The design is innovative, has significant commercial value, cost significant time and money, is secret and would be valuable to MSD’s competitors. The innovation should increase vehicle stability and thus improve safety and allow for an increased payload. The vehicle has not yet been built.”
* With respect to Company B, Member Proctor accepted evidence that the vehicle design was an innovative improvement to an existing vehicle. The design had significant commercial value and a significant amount of time and money had been spent on developing it. The information had been kept secret and would be valuable to Company B’s competitors. Member Proctor accepted evidence that the appearance of the vehicle has not disclosed the trade secrets. “Numerous components and measurements could not be discovered by seeing or photographing the vehicle. The vehicle is either in operation or parked in a secure depot, to physically measure it would require access and a significant amount of time. Drivers have entered into a confidentiality agreement with Company B with their employer with regard to their knowledge of the vehicle.”
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Consultation with the undertaking

* 1. The Act does not require an agency or Minister to consult under section 34(1)(a). However, it is the undertaking, not the agency or Minister, that is likely to possess the required knowledge to determine whether the information constitutes a trade secret.
	2. Consequently, where is it not clear that information is a trade secret, it is best practice for an agency or Minister to consult with the undertaking, if practicable, to properly understand whether information is a trade secret.
	3. When consulting, an agency should:
		+ notify the undertaking of the request; and
		+ ask the undertaking whether the information is a trade secret and if so, why.

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

* 1. A document or information is exempt under section 34(1)(b) if three conditions are satisfied:
1. the document or information was acquired from a business, commercial, or financial undertaking; and
2. the information relates to matters of a business, commercial or financial nature; and
3. disclosure of the information is likely to expose the undertaking unreasonably to disadvantage (based on matters listed in section 34(2) and any other relevant considerations).

Steps to applying the exemption

* 1. It is best practice for an agency or Minister seeking to apply the section 34(1)(b) exemption to:
		+ Specifically identify the information considered to be business, commercial or financial information.
		+ Determine whether the information was acquired from a business, commercial or financial undertaking, identifying when it was received and from what undertaking.
		+ Determine whether the information relates to matters of a business, commercial or financial nature.
		+ Consult with the undertaking to seek its views on disclosure of the information and how disclosure would expose it unreasonably to disadvantage.
			- Consider whether an extension of time under [section 21(2)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-21/) is permitted due to the need for consultation under section 34.
		+ Critically and objectively consider whether disclosure would be likely to expose the undertaking unreasonably to disadvantage by identifying and establishing three elements:
			- what the disadvantage is;
			- whether the disadvantage is likely to occur; and
			- whether the disadvantage is unreasonable.

If the undertaking consents to disclosure or fails to object to disclosure without explanation, this is a strong indication that the document is not exempt.

* + - If a decision is made to release the information, notify any affected undertakings that did not consent to the disclosure, of the decision and their right to appeal to the Victorian Civil and Administrative Tribunal (VCAT), including the 60-day appeal period.
		- Wait until the conclusion of the review period, and if applicable any appeal or VCAT proceedings before providing the documents to the applicant.
			* If there are other documents falling within the request that do not contain the affected undertaking’s information, these can be released to the applicant at the same time as the decision notice, without needing to wait for the appeal period to end.

Information that relates to matters of a business, commercial or financial nature

* 1. See the heading ‘meaning of common terms and phrases’ above, for guidance about the first condition of the exemption – which is that the information must have been acquired from a business commercial or financial undertaking.
	2. The second condition requires the acquired information to have a business, commercial, or financial nature. ‘Business’, ‘commercial’ and ‘financial’ should each be given their ordinary meaning.[[22]](#footnote-22)

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| **Examples*** business plans and strategies;
* planning applications and background commercial information;
* commercial information in tender documents;
* financial reports or records; or
* invoices that include estimates, rates, fees and personnel applied to each task and the methodology applied to the tasks.[[23]](#footnote-23)
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* 1. Information will ‘relate to’ matters of a business, financial or commercial nature if there is a sufficient or material connection or relationship between the information that would be disclosed by the disclosure of the documents and matters of a business, financial or commercial nature.[[24]](#footnote-24)

Likely to expose the undertaking unreasonably to disadvantage

* 1. When determining if disclosure is likely to expose the undertaking unreasonably to disadvantage, three distinct elements must be identified and considered:
* what the disadvantage is;
* why and when disadvantage is likely to occur; and
* the disadvantage is unreasonable.

Identifying the disadvantage

* 1. In considering whether disclosure will expose an undertaking to unreasonable disadvantage, an agency should, along with any other relevant consideration, have regard to the factors set out in section 34(2). These are:
* whether the information is generally available to competitors of the undertaking;
* whether the information would be exempt if it were generated by an agency or a Minister;
* whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
* 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.
	1. Other relevant considerations that have been highlighted in case law[[25]](#footnote-25) include whether disclosure would:
* give a competitor of the undertaking a competitive financial advantage;
* enable that competitor to engage in destructive competition with the undertaking; or
* lead to unwarranted conclusions about the undertaking's financial affairs and position that result in commercial and market consequences.
	1. Under section 34(2)(d), examples of public interest factors in favour of disclosure include:
* transparency and accountability, particularly in the expenditure of public money;
* scrutiny of government decisions, especially involving allegations of wrong-doing;
* allowing the public to be better informed about decisions like the privatisation of government services; and
* contributing to informed public debate.
	1. Government transparency and accountability requires private organisations contracting with government to expect more public scrutiny over their dealings. This includes the possibility that their business, financial or commercial information may be disclosed to the public under the Act.[[26]](#footnote-26) The exemption in section 34(1)(b) balances government transparency and public accountability against protecting legitimate commercial interests.

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| **Example**[**Asher v Victorian WorkCover Authority [2002] VCAT 369**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2002/369.html)* In this case, VCAT observed that “practices that are completely acceptable, and indeed expected between private sector organisations take on a different hue when the contract is between public and private entities and public money is involved”.
* VCAT found that disclosure of information in an advertising contract between the respondent and a private company (namely, some dollar amounts and some narrative detailing what service was to be provided and for how much) would not be likely to expose the private company unreasonably to disadvantage.
* VCAT concluded that there was greater weight to be placed on the need for transparency and accountability than on the tenuous evidence that the company would be disadvantaged in relation to its competitors.
* VCAT noted that although the information was not generally available to the company's competitors, that was only one of the factors for consideration and that factor, by itself, did not mean the information should not be disclosed.

VCAT also found that: * disclosure of material that formed part of the private company's tender proposal (namely, a costing of a particular advertising campaign strategy) would not be likely to expose that company unreasonably to disadvantage.
* disclosure of the hourly rate of a firm engaged to supervise probity aspects of the tender process would not expose that firm unreasonably to disadvantage.
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The meaning of ‘likely’

* 1. Disclosure of the information must be *likely* to cause unreasonable disadvantage. ‘Likely’ is given its plain English meaning – seeming like truth, fact, or certainty, or reasonably to be believed or expected.[[27]](#footnote-27) His Honour Judge Bowman, sitting as VCAT Vice President, said that the test is one of likelihood rather than certainty, and referred with approval to the dictionary definition of “likely” as “probable, such as well might happen or be true”.[[28]](#footnote-28)
	2. An agency should carefully consider if disclosure is ‘likely’ to cause unreasonable disadvantage, as opposed to it being a mere possibility – then articulate that consideration in their written reasons.

Unreasonable

* 1. An agency must establish that disclosure would likely cause ‘unreasonable’ disadvantage – not just any level of disadvantage. Whether disclosure is likely to expose an undertaking unreasonably to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that are likely to follow from disclosure of the information. An agency must be able to articulate in their reasons why the disadvantage is unreasonable, as opposed to mere disadvantage.
	2. Where the business, commercial or financial information is so small and inconsiderable or so incidental to an undertaking’s central operations, its disclosure is unlikely to meet the threshold of unreasonable disadvantage.[[29]](#footnote-29)
	3. The timing of the access decision is a relevant factor that may affect the level of disadvantage likely to be suffered by an undertaking.[[30]](#footnote-30)

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| **Example**[**Stewart v Department of Tourism, Sport and the Commonwealth Games [2003] VCAT 45**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html)**Background:*** The Applicant requested access to two contracts relating to the staging of the 2006 Commonwealth Games.
* At the time of the Tribunal’s decision a number of important marketing and financial arrangements for the Commonwealth Games were about to be negotiated, including the sale of items related to the Commonwealth Games and various television and broadcasting rights.
* The Agency argued that the breach of the contracts’ confidentiality clause, through disclosure of the contracts under the Act, would expose the undertaking, Melbourne 2006, unreasonably to disadvantage as it would demonstrate an inability of the undertaking to keep confidential, the information in the documents.

**Decision:*** The Tribunal held that disclosure of the two contracts would be likely to expose the undertakings unreasonably to disadvantage.
* The Tribunal observed at [32]:

“Obviously a confidentiality clause cannot simply be inserted in every contract involving an agency so as to defeat the purposes of the Act. The circumstances of each case and document must be considered. However, the timing of events does seem to me to be a legitimate argument. In the context of such timing, it seems to me to be at least arguable that the disclosure of relevant information in breach of a confidentiality clause and impacting upon the anticipation of confidential dealings may of itself be sufficient to satisfy the requirement that it "would be likely to expose the undertaking unreasonably to disadvantage."* Further, the Tribunal found that, given the timing, it made sense that disclosure of the contracts could discourage rightsholders and event promoters from engaging in business in Victoria. Sponsors and rightsholders are unwilling to have the details of their commercial arrangements made public. The ability to keep this information confidential increases the number of companies who would be prepared to negotiate such commercial agreements with Melbourne 2006 and therefore increase the potential revenues from the Commonwealth Games. The Tribunal commented at [48]:

“I might say that the timing of the application had some bearing upon my thinking. Without in any way prejudging the matter, it might be that an application such as this would have greater prospects of success if the financial arrangements referred to … were concluded matters. The fact that such matters are not concluded seems to me to have bearing upon the disadvantage likely to be suffered unreasonably by the undertakings … In applications such as this, there are many factors to be considered. Doubtless in some applications the degree of alleged disadvantage remains a constant. In others, the degree of disadvantage may increase, decrease or disappear altogether with the effluxion of time.” |

Case examples

* 1. Case law examples where unreasonable disadvantage was not established, include:
		+ Disclosure of a purchase order which revealed the total costs charged by an independent assessor for conducting an investigation for the agency.[[31]](#footnote-31) The document did not reveal the assessors approach to the investigation, which is information that would have given competitors a bidding advantage.[[32]](#footnote-32)
		+ Disclosure of the indemnity limits of a building surveyor's professional indemnity insurance, contained in the building surveyor’s certificate of currency for the insurance.[[33]](#footnote-33) In this case, the evidence demonstrated the certificates were designed to be shown to third parties[[34]](#footnote-34) and the building surveyor was not concerned about his competitors receiving the certificate.
		+ Disclosure of emails from the staff of the agency to a cleaning contractor, relating to work the contractor had done, was doing, or ought to have been doing under various contracts to clean high-rise public housing in Victoria.[[35]](#footnote-35) In this case, VCAT noted the absence of direct evidence from the cleaning contractor, and the fact that deficiencies in the performance of the contract were legitimate matters of wider public interest.[[36]](#footnote-36)
		+ A document disclosing the background and scope of work an auditing firm had been asked to perform, and nothing more, did not disclose the firm's methodology (and was therefore not harmful to the firm’s competitive position).[[37]](#footnote-37) Whereas, an audit report that detailed how transactions were sampled or explained the actual analysis of the job at hand “might properly be regarded as unique to a firm and thus worthy of protection from commercial competitors and capable of being described as methodology”.[[38]](#footnote-38)
	2. Case law examples where unreasonable disadvantage was established, include:
		+ Information in contractual documents between a government health services provider and a private pathology and diagnostic services provider which revealed turnaround times for pathology tests performed by the contractor. VCAT accepted evidence that information about turnaround times was not known to the contractor’s competitors and that disclosure of the information would give the undertaking’s competitors an unfair advantage in future public hospital tender processes.[[39]](#footnote-39)
		+ Law firm invoices containing hours worked and hourly rates (as opposed to gross totals), and documents containing fee estimates.[[40]](#footnote-40) In both cases, the evidence demonstrated that the hourly rates for an individual law firm are not generally available and are confidential and commercially sensitive information for each firm. Disclosure would enable a competitor to engage in destructive competition with the business.
		+ Project models provided to an agency in relation to negotiation of a contract price for an upgrade to CityLink.[[41]](#footnote-41)
		+ A State purchase contract for the provision of print management and associated services.[[42]](#footnote-42)
		+ Disclosure of a consultant’s methodology, as revealed in the requested reports, in circumstances where its competitors had not developed and did not use the same methodology. The methodology was described by the consultant as a systematic way of structuring and putting information together which had been developed over time, with substantial time and effort, that set the consultant apart from its competitors. VCAT accepted the consultant’s evidence and found that disclosure would cause the consultant unreasonable disadvantage because it would enable competitors to take its methodology and have a ready-made starting point.[[43]](#footnote-43)

Requirement to consult with an undertaking – section 34(3)

* 1. In deciding whether disclosure would expose an undertaking unreasonably to disadvantage, section 34(3) requires an agency or Minister to, if practicable:
* notify the undertaking of the request;
* ask the undertaking how and why disclosure would expose it unreasonably to disadvantage, if at all;
* ask whether the undertaking consents to the disclosure of the information, or disclosure subject to deletion; and
* advise that if the undertaking consents to disclosure, or disclosure subject to deletions, it cannot apply to VCAT for review of the decision.
	1. When seeking the views of the business undertaking, it is important that an agency highlights that all of the elements of section 34(1)(b) must be made out before the document can be considered exempt.
	2. Informing the undertaking of the elements of the exemption will enable the undertaking to provide an informed response and ensure their reasons are relevant, if they object to the document being released.
	3. An agency should request and obtain detailed information from an undertaking about:
* what the disadvantage is;
* whether the disadvantage is likely to occur; and
* why the disadvantage is unreasonable.
	1. The opinion of the undertaking is not determinative and is only one factor to be weighed by an agency when deciding if disclosure of the information is likely to expose the undertaking unreasonably to disadvantage. An undertaking may strongly object to release, but that is not enough to satisfy the exemption. If an agency or Minister is not satisfied that all elements of the exemption are made out, an agency or Minister must release the document.
	2. Conversely, if the undertaking consents to disclosure or fails to object to disclosure without explanation, this is a powerful reason in favour of finding that the document is not exempt.[[44]](#footnote-44) The object of section 34(1) is to protect the undertaking’s information. An agency or Minister will have difficulty establishing that release of a document would disadvantage the undertaking in circumstances where the undertaking is asked to provide their views, and does not express concerns about release.
	3. When consulting, the 30-day timeframe to decide a request may be extended by up to 15 days under section 21(2)(a).

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| For more information, see [section 21 – Time within which formal requests to be decided](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-21/).  |

* 1. An agency or Minister is only required to consult with an undertaking where it is practicable to do so.

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| For more information on whether consultation is practicable, see [section 33](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/) of the FOI Guidelines.  |

* 1. Consultation may occur in any manner or form. For example, by telephone, email, post, or a meeting.
	2. [Professional Standard 7.3](https://ovic.vic.gov.au/book/professional-standards/#7._Practicability_of_consulting_third_parties_) requires a record of the consultation to be kept. This includes who was consulted, whether they consented or objected, and any reasons provided.

More information

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| See [section 33](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/) of the FOI Guidelines for more information about:* determining whether consultation is not practicable
* how to conduct consultation
* privacy considerations
* keeping records of consultation under the Professional Standards
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Notifying an undertaking of a decision to disclose information – section 34(3A) and (3B)

* 1. If an undertaking objected to release of the information or document, or did not respond to the consultation, and a decision is made to release the document or information, section 34(3A) requires the agency to notify the undertaking of:
* the decision to grant access to the document; and
* the undertaking’s right to apply to VCAT for a review of the decision.
	1. There is no requirement to notify an undertaking that consented to the release of the information or document, provided the decision reflects release of the information or document, as agreed by the undertaking (section 34(3B)).
	2. The applicant should be advised the document will only be released at the end of the undertaking’s 60 day review period, which begins on the day the undertaking is notified of the decision.

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| Read more about notifying applicants of third party review rights in [section 27](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-27/). |

* 1. If an undertaking who objected to disclosure exercises their right to seek review by VCAT, an agency or Minister must not disclose the documents until the VCAT proceedings are finalised and directions made.

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| For more information, see [section 50 – Applications for review by the Tribunal](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-50/).For information about reviews before OVIC, see sections [49P(5)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-49p/) and [50(3A)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-50/) of the Guidelines. |

Practicability of notifying an undertaking of the agency’s decision

* 1. If the undertaking was not consulted under section 34(3) because it was not practicable to do so, then there is no requirement under section 34(3A) for the agency to notify the undertaking of the agency’s decision to grant access to the document. The agency can release the information to the applicant without waiting 60 days.
	2. If the undertaking was consulted under section 34(3), but cannot be located at the time of the agency’s decision, the agency should send the notification required by section 34(3A) to the last known address of the undertaking and wait 60 days before releasing the information to the applicant.
	3. If the agency is reasonably satisfied that the undertaking no longer exists at the time of the agency’s decision, then there is no requirement to notify the undertaking of the agency’s decision under section 34(3A). To be reasonably satisfied, the agency should search the company database on the Australian Securities and Investment Commission (ASIC) website or the business name register on the Consumer Affairs Victoria (CAV) website to confirm the status of the business. A google search is not sufficient.

Section 34(4)(a)(i) exemption – trade secret of an agency

* 1. A document or information is exempt under section 34(4)(a)(i) if two conditions are satisfied:
1. the document or information contains a trade secret of an agency; and
2. disclosure would be likely to expose the agency unreasonably to disadvantage.
	1. For guidance about the first condition, see the sub-heading below titled ‘what is a trade secret?’.
	2. For guidance about the second condition, see the heading below ‘section 34(4)(a)(i) and (ii) – common element’.

Steps to applying the exemption

* 1. It is best practice for an agency or Minister seeking to apply the section 34(4)(a)(i) exemption to:
		+ Specifically identify the information considered to be a trade secret.
		+ Determine if the information is in fact a trade secret of the agency.
		+ Critically and objectively consider whether disclosure would be likely to expose the agency unreasonably to disadvantage by identifying and establishing three elements:
			- what the disadvantage is;
			- whether the disadvantage is likely to occur; and
			- the disadvantage is unreasonable.
		+ If the exemption is made out, consider whether to exercise the discretion in [section 16(2)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-16/) to provide access to the information or document despite the exemption applying.

What is a trade secret?

* 1. A ‘trade secret’ is not defined in the Act, however it is generally considered to be proprietary knowledge of the agency.

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| **Examples**Secret formulas, processes, or methods used in production of goods or provision of services. |

* 1. There are a number of indicators to information constituting a trade secret.[[45]](#footnote-45) These include:
* whether the information is of a technical character;
* the extent to which the information is known outside of the agency;
* measures taken by the agency to guard the secrecy of the information;
* the value of the information to the agency and any competitors;
* the effort and money spent by the agency in developing the information; and
* the ease or difficulty with which others might acquire or duplicate the secret.
	1. Information is generally not considered to be a trade secret where the processes, procedures, or methods are well known or widespread (including in that industry), could be assumed, or are publicly available.
	2. Timing is also a relevant consideration, as something which was originally secret may lose its secret character over time.

Section 34(4)(a)(ii) exemption – business, commercial or financial information of an agency engaged in trade or commerce

* 1. A document or information is exempt under section 34(4)(a)(ii) if three conditions are satisfied:
1. the agency is engaged in trade or commerce;and
2. the document contains information of a business, commercial or financial nature; and
3. disclosure of the information would be likely to expose the agency unreasonably to disadvantage.
	1. 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.
	2. Guidance about the first and second conditions is in this section of the Guidelines.
	3. For guidance about the third condition, see the heading below ‘section 34(4)(a)(i) and (ii) – common element’.

Steps to applying the exemption

* 1. It is best practice for an agency or Minister seeking to apply the section 34(4)(a)(ii) exemption to:
		+ Specifically identify the information considered to be business, commercial or financial information.
		+ Establish that the agency is engaged in trade or commerce in relation to the information. Note that ‘governmental’ activities (delivering statutory services or functions) are often not trade or commerce.
		+ Determine whether the information relates to matters of a business, commercial, or financial nature.
		+ Critically and objectively consider whether disclosure would be likely to expose the agency unreasonably to disadvantage by identifying and establishing three elements:
			- what the disadvantage is;
			- that the disadvantage is likely to occur; and
			- that the disadvantage is unreasonable.
		+ If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

An agency engaged in ‘trade or commerce’

* 1. The words trade or commerce are expressions of fact and terms of common knowledge.[[46]](#footnote-46)
	2. Whether an agency is engaged in trade or commerce always depends on the specific facts and circumstances, but requires clear evidence that the agency is doing more than delivering government services or functions. Trade or commerce activities must ‘of their nature, bear a trading or commercial character’.[[47]](#footnote-47)
	3. The issue of whether an agency is engaged in trade or commerce is to be determined as at the date of the request.[[48]](#footnote-48)
	4. An agency can be engaged in trade or commerce even if the agency’s activities are predominantly governmental.[[49]](#footnote-49)
	5. The information of a business, commercial or financial nature that is in the requested documents must be connected to the trade or commerce activity the agency is engaged in, and not government services or functions.
	6. Just because an agency is engaging in commercial or financial transactions, does not necessarily mean it is engaging in trade or commerce. In [*Pallas v Road Corporation* [2013] VCAT 1967](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/1967.html), the VCAT found that an agency that enters into contracts to deliver statutory services or functions, is not doing so for the purposes of trade or commerce, they are doing so to fulfil their statutory functions and deliver governmental services.

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| **Example**In Pallas, VCAT found that building public roads, including appointing contractors in competitive tenders, is not engaging in ‘trade or commerce’ - it is delivering a government service.[[50]](#footnote-50) |

* 1. Following *Pallas*, tendering out projects, entering commercial contracts, managing budgets, or buying goods and services does not necessarily constitute engaging in trade or commerce for the purpose of this exemption.[[51]](#footnote-51)
	2. The approach in *Pallas* has not been universally adopted by VCAT. Other decisions consider that when carrying out governmental functions for which the agency in question was created for, the agency can still be engaging in trade or commerce when engaging contracted service providers.[[52]](#footnote-52)

Case examples

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| **Examples**In [*Davis v Department of Transport* [2022] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/721.html), the Applicant requested access to a master plan and business case for future government consideration of a long-term upgrade to a train station owned by the State Government, including precinct development and commercial opportunities. The VCAT accepted that the Department was engaged in trade or commerce with respect to the project on behalf of the State, and it would be officers of the Department who would be engaged in any future negotiations with the private sector about development options for the site.[[53]](#footnote-53) In this situation, the agency is engaged in trade or commerce as the landlord or potential vendor of real estate.[[54]](#footnote-54)In [*Save Albert Park Inc v Australian Grand Prix Corporation* [2008] VCAT 168](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/168.html), Vice President Judge Harbison held that the Australian Grand Prix Corporation was engaged in trade or commerce within the meaning of section 34(4)(a).[[55]](#footnote-55) Her Honour rejected the applicant's argument that because the respondent was the sole body established to conduct the Grand Prix in Melbourne each year, it did not have competitors and did not operate in a competitive commercial environment. Her Honour stated at [32]:In my view it is apparent from the powers given to the Respondent, and from all of the documents in evidence, that the role of the Respondent is not simply to stage the Grand Prix – it is responsible also to try to achieve its financial and commercial success, through its efforts in promoting the event, and through the overall financial and commercial management of the event. In doing so, it must compete with alternative entertainment. This activity is properly to be characterised as being engaged in trade or commerce. I do not need to be positively satisfied that the Respondent competes with interstate events, or even with all other types of available entertainment. There is in my view ample evidence in the material to show that the Respondent is engaged in trade and commerce. |

Information of a business, commercial or financial nature

* 1. The information must have a business, commercial, or financial nature. ‘Business’, ‘commercial’ and ‘financial’ should each be given their ordinary meaning.[[56]](#footnote-56)

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| **Examples*** business plans and strategies;
* background planning and commercial information;
* financial reports and records;
* development options for property owned by the State Government.[[57]](#footnote-57)
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* 1. In *Stewart*, VCAT found the documents did contain information of a business, financial or commercial nature, being matters relating to broadcasting and sponsorship rights and licences, marketing and fundraising.[[58]](#footnote-58)

Section 34(4)(a)(i) and (ii) exemptions – common element - Likely to expose the agency unreasonably to disadvantage

* 1. To be an exempt document under section 34(4)(a)(i) or section 34(4)(a)(ii), the disclosure of the document must be likely to expose the agency unreasonably to disadvantage.
	2. When determining if disclosure is likely to expose the agency unreasonably to disadvantage, three distinct elements must be identified and considered:
* what the disadvantage is;
* why and when disadvantage is likely to occur; and
* the disadvantage is unreasonable.

Unreasonable disadvantage

* 1. An agency must be able to articulate or describe how disclosing the information would unreasonably expose the agency to disadvantage.
	2. Tribunals and courts describe ‘disadvantage’ in terms of the business, commercial or financial implications of disclosure. In particular, whether disclosure is likely to:
		+ reduce an agency’s capacity to compete in a competitive market for buying and selling goods or services;[[59]](#footnote-59)
		+ reduce an agency’s capacity to negotiate future commercial contracts;[[60]](#footnote-60)
		+ strengthen the bargaining position of entities the agency negotiates with, at the expense of the agency competing for marketplace share;[[61]](#footnote-61) or
		+ expose the rates that an agency is prepared to accept for various services – and if so, the likely impact on the agency’s operations.

The meaning of ‘likely’

* 1. Disclosure of the information must be **likely** to cause unreasonable disadvantage. ‘Likely’ should be given its plain English meaning – seeming like truth, fact, or certainty, or reasonably to be believed or expected. His Honour Judge Bowman, sitting as VCAT Vice President, said that the test is one of likelihood rather than certainty, and referred with approval to the dictionary definition of “likely” as “probable, such as well might happen or be true”.[[62]](#footnote-62)
	2. An agency should carefully consider if disclosure is ‘likely’ to cause unreasonable disadvantage, as opposed to it being a mere possibility – then articulate that consideration in their written reasons.

Unreasonable

* 1. An agency must establish that disclosure would likely cause ‘unreasonable’ disadvantage – not just any level of disadvantage. Whether disclosure is likely to expose the agency unreasonably to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that are likely to follow from disclosure of the information. An agency must be able to articulate in their reasons why the disadvantage is unreasonable, as opposed to mere disadvantage.
	2. Whether disadvantage would be **unreasonable**for the purposes of section 34(4)(a) involves the consideration of all circumstances, including factors both in favour of, and against disclosure, such as:[[63]](#footnote-63)
		+ the nature of the information;
		+ whether there is any public interest in disclosure or nondisclosure;
		+ the circumstances in which the information was obtained or created;
		+ whether the information has any current relevance; and
		+ the identity of the applicant and the likely motives of the applicant.
	3. The word ‘unreasonably’ should be seen in the context of the balancing process between competing factors of the perceived need for confidentiality and the need for public accountability and transparency on the part of the government, its departments and agencies.[[64]](#footnote-64)

Case examples

* 1. Case law examples where unreasonable disadvantage to the agency was not established, include:
		+ In *Byrne v Swan Hill Rural City Council*, VCAT accepted there is a measure of disadvantage to government agencies in not being able to offer confidentiality to the business undertakings with whom they do business. However, in the context of the policy evident in freedom of information legislation, the **disadvantage is not unreasonable**.[[65]](#footnote-65) In this case, VCAT found that disclosure of the tender of the successful tenderer for the contract to manage swimming pools owned by the Council would not expose the Council unreasonably to disadvantage. The VCAT found it unlikely that the companies tendering for the contract could simply refuse to deal with bodies subject to the FOI Act.
		+ In [*Dalla-Riva v Department of Treasury & Finance*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2083.html), VCAT was not satisfied that the disclosure of a consultant’s Public Sector Comparator (**PSC**) final report, which compared private sector bids for the Mitcham-Frankston Freeway Project with the cost to government of delivering that project, would be likely to expose the agency unreasonably to disadvantage.[[66]](#footnote-66) Relevant to this decision was:
			- its timing, in that the contract for the project had already been awarded and contractual negotiations had been concluded for some time. Therefore, disclosure would not impact the state of mind of bidders for the project and would not impact on the contractual relationship between the government and the successful bidder;
			- the significant public interest in transparency of the PSC process, to assess whether the process is of value for unique one-off projects, given how expensive PSC reports are to prepare, and the fact the government had chosen private delivery of the project, rather than a public/private partnership, before the PSC report was finalised; and
			- the importance of ensuring that public debate on an issue is informed by the facts. VCAT considered release of the facts in the PSC report would inform, rather than mislead the public.
		+ In [*Honeywood v Department of Innovation, Industry and Regional Development*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2004/1657.html), a draft document prepared two years before the date of request, that did not go forward to the Minister, was superseded by events and not developed any further, and accurate at the time of its preparation, was not likely to expose the Department unreasonably to disadvantage if disclosed.[[67]](#footnote-67)
	2. Case law examples where unreasonable disadvantage to the agency was established, include:
		+ In [*Stewart v Department of Tourism, Sport and the Commonwealth Games*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), VCAT found that disclosure of two contracts would be likely to expose the agency unreasonably to disadvantage. Relevant to the decision was its timing, in that the agency was about to begin marketing the Commonwealth Games and dealing with sponsors, suppliers and licencees, rather than these events having already happened at the time of the request. The VCAT found that “[a]t this particular time, the safeguarding of confidentiality is important”.[[68]](#footnote-68)
		+ In [*CityLink Melbourne Limited v Department of Transport* [2020] VCAT 1078](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2020/1078.html), VCAT found disclosure of internal emails concerning financial modelling for contract negotiations between VicRoads and CityLink, documents containing the scope of work for advice on negotiations and internal commercial assessments, would be likely to expose the Department unreasonably to disadvantage. Relevant to the decision was the fact:[[69]](#footnote-69)
			- the discussions were confidential, reflected ongoing concerns and contained current information as to how the State values and assesses commercial proposals, including the State’s assessment of CityLink’s proposal;
			- the information was relevant and sensitive, and its disclosure was likely to expose the State to unreasonable disadvantage in future negotiations with CityLink;
			- there was no current evidence of a public interest in accountability and transparency that outweighed the strong interest in the information remaining confidential.
		+ In [*Fitzherbert v Department of Health and Human Services*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/201.html), VCAT found that disclosure of the maintenance log of a cleaning contractor, containing job prices, unit prices and total prices charged, would expose the Department unreasonably to disadvantage in future maintenance tenders. The tender process includes a schedule of rates for specific work items. By releasing the maintenance log and comparing it to the tender schedule of rates, competitors of the contractor would be able to determine the charges the Department had previously accepted, over and above the tender schedule of rates, leading to the Department paying higher prices for maintenance services.[[70]](#footnote-70)

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| **Example – Invoices for legal services**[***Commissioner of State Revenue v Tucker* [2021] VCAT 238**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html)**and** [***Chopra v Department of Education and Training* [2019] VCAT 1860**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/1860.html)**.****Background:*** In both cases, the applicants requested access to invoices for legal services, expenditure claims, purchase orders and estimate of legal fees.
* In both cases, the agencies refused access to these documents under section 34(4)(a)(ii) and other exemptions.

**Agency evidence:**The agencies argued that release of the documents:* would set a floor for the price of legal services, and the breach of confidentiality may drive law firms out of the market, narrowing the field, and further driving up prices for legal services; and
* would give a misleading impression of typical legal expenditure by the agencies in the types of matters brought by the applicants, who were frequent litigants against the agencies. This may unreasonably undermine the agencies’ ability to properly defend proceedings brought against them by these frequent litigants.

**Decision:*** In each case, VCAT accepted the agencies’ evidence, and found that disclosure of the invoices and other expenditure documents would expose the agencies unreasonably to disadvantage.
* Highly relevant to the finding that the disadvantage to the agencies was ‘unreasonable’, was the fact that in each case, the applicants had a long history of dispute with the respective agencies and would be able to link information in the documents with existing knowledge or draw inferences from the information in the documents because of existing knowledge.
* VCAT found there was considerable risk the applicants would use the information in the documents mischievously to further their campaigns against the agencies, including by taking the information out of context, commencing further litigation, and exposing officers of the agencies and employees of the law firm, to unwarranted and misplaced criticism.[[71]](#footnote-71)
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| **Example – Master plan and business case*****[Davis v Department of Transport](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/721.html)* [[2022] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/721.html)****Background**:* The Applicant requested access to a master plan and business case for future government consideration of a long-term upgrade to a train station owned by the State Government, including precinct development and commercial opportunities.
* The Department refused access in part to the document under section 34(4)(a)(ii) and other exemptions.

**Department’s evidence:*** The Department argued that it is obliged to maximise any commercial benefits to the taxpayer when engaging in property dealings and transactions.
* Disclosure of financial estimates, and other business and commercial information in the document, would be likely to prejudice current or future commercial negotiations carried out by the State, or undermine the State’s commercial position.[[72]](#footnote-72)
* In its evidence, the Department pointed to an undisclosed item in the document, explaining that it placed a value on a potential future transaction. The Department argued that disclosure of that information to potential future purchasers would be commercially disadvantageous to the State, and the very indication that the State may be considering options of this kind, had the potential to disadvantage the State commercially.
* Disclosure would allow potential purchasers to access information from which they could strengthen their bargaining position at the expense of the Department and ultimately the taxpayer.

**Decision:*** VCAT accepted that the Department was engaged in trade or commerce with respect to the project on behalf of the State, and it would be officers of the Department who would be engaged in any future negotiations with the private sector about development options for the site.[[73]](#footnote-73)
* VCAT accepted the Department’s evidence that it would be likely to be exposed unreasonably to disadvantage if the document was disclosed.
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Consultation with another agency – section 34(4)(a)(i) and (ii) exemptions

* 1. The Act does not require an agency to consult with any other agency to which the information relates prior to making a decision under section 34(4)(a)(i) or (ii).
	2. There is also no right to seek review by the other agency. However, the other agency may have a right to apply to be joined as a party under section 60 of the [Victorian Civil and Administrative Tribunal Act 1998](https://www.legislation.vic.gov.au/in-force/acts/victorian-civil-and-administrative-tribunal-act-1998/135) (Vic).

Section 34(4)(b) exemption – results of scientific or technical research

* 1. A document or information is exempt under section 34(4)(b)) if:
		+ it contains the results of scientific or technical research (**research**); and
		+ the research is undertaken by an officer of an agency; and
			- the research could lead to a patentable invention (section 34(4)(b)(i)); or
			- the research is not yet completed, and disclosure of the incomplete results would be reasonably likely to:
				* expose a business, commercial or financial undertaking unreasonably to disadvantage (section 34(4)(b)(ii)); or
				* expose the agency or the officer of the agency unreasonably to disadvantage (section 34(4)(b)(iii)).

Scientific or technical research

* 1. The words ‘scientific’ and ‘technical’ should be given their ordinary meaning.[[74]](#footnote-74)
	2. The word scientific includes physics, chemistry and the social sciences.[[75]](#footnote-75)
	3. The word technical includes things which belong to, relate to, are appropriate to, peculiar to or characteristic of a particular art, science, profession or occupation including the technical arts and applied sciences.[[76]](#footnote-76)

Officer of an agency

* 1. The term ‘officer’ is defined in section 5(1). It includes independent contractors and consultants engaged by an agency to carry out work or provide services.[[77]](#footnote-77)

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| For more information read [section 5](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-5/) of the Guidelines. |

Patentable invention

* 1. A patent protects any device, substance, method or process that is new, inventive or useful.

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| For more information visit [IP Australia](https://www.ipaustralia.gov.au/patents/what-are-patents). |

Disclosure of incomplete results would be reasonably likely to expose undertaking or agency to disadvantage

* 1. The exemption will not apply to the results of research if the research has been finalised.[[78]](#footnote-78)
	2. A research project may extend over months or years, with many stages, and with interim or preliminary results being achieved at those various stages. The exemption is intended to apply to results achieved at these earlier stages of a research project.[[79]](#footnote-79)
	3. Examples of where there may be an unreasonable disadvantage include where premature disclosure would be reasonably likely to:
		+ lead to a misleading conclusion as to the likely results and outcome of the research project; or
		+ affect the undertaking’s competitiveness in overseas markets.[[80]](#footnote-80)

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| For information about this condition of the exemption, see the sections above titled:* + Section 34(1)(b) exemption – likely to expose the undertaking unreasonably to disadvantage; and
	+ Section 34(4)(a)(i) and (ii) exemptions – common element – likely to expose the agency unreasonably to disadvantage.

See also [section 35(1)(b)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-35/) – the meaning of ‘reasonably likely’. |

Case example

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| **[Johnson v Cancer Council of Victoria [2016] VCAT 1596](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2016/1596.html)****Background:*** + The applicant requested access to survey questions and response data from surveys conducted by the Cancer Council of Victoria (**Council**), regarding cigarette plain packaging.
	+ The Council is a research institute recognised by the National Health and Medical Research Council. It conducts behavioural research studies using a science-based approach, which aim to assist in the prevention and early detection of cancer.
	+ The Council refused access to some working datasets under section 34(4)(b)(iii) – disclosure of incomplete search results would be reasonably likely to expose the agency or an officer of an agency unreasonably to disadvantage.
	+ The Council argued that the working datasets were not final datasets. They contained cleaned and coded data that underlie published papers, but also contain data intended to form the basis of future planned published papers.

**Decision:**VCAT found:* + The datasets did contain the results of scientific research undertaken by the Council.
	+ On the basis of witness evidence, 5 of the 6 datasets did contain results of research that was not yet completed, because the results were to be the subject of additional research papers, to be published in the future.
	+ One dataset related to completed research, and therefore could not be exempt under section 34(4)(b)(iii).

VCAT found disclosure of the incomplete research results would be reasonably likely to expose the Council and the researchers acting on behalf of the Council, unreasonably to disadvantage. In making this finding, VCAT accepted the evidence of the Council’s researchers (at [268]-[272]) that:* + deliberation is an integral part of the scientific method. Researchers expect that privacy will be maintained to promote open and frank exchange of ideas within the research teams and mentoring from supervisors;
	+ premature release of data will disadvantage the Council’s researchers who are conducting the project, by permitting others who have nothing to do with the study to analyse and make use of the data before the Council’s researchers have the opportunity to complete their analyses of the data and prepare papers;
	+ the research process is undertaken on the understanding that the work is in draft form, so that there is opportunity to detect and correct errors, and identify alternative interpretations of findings prior to the research being scrutinised by independent scientific reviewers when the paper is submitted for publication;
	+ the research process involves researchers challenging each other and their work, analysing data from different perspectives, expressing sceptical views, identifying weaknesses, reaching dead-ends, re-examining hypotheses, and methods and revising data upon receiving new information. Premature publication of data would cause disadvantage;
	+ in empirical studies, researchers are judged on their final manuscript and published description and summary of the results of analysis – not on draft or non-final datasets;
	+ draft documents are unlikely to contain the full justifications or the complete methodology which would be set out in full manuscripts;
	+ draft documents do not present data in a format suitable for public dissemination and may contain data errors or unclear responses;
	+ draft documents contain non-final datasets that are later revised, and conclusions that are later refined, honed or omitted as a result of scientific peer review;
	+ release of internal or draft research documents may result in confusion or misrepresentation of the research in public particularly if draft documents differ from published data;
	+ there may be unfair or unreasonable criticism of the research or researcher if preliminary or uncorrected research material is subjected to public scrutiny before it is subject to correction and peer review processes;
	+ opponents of research may take advantage of the release of draft or incomplete documents to make allegations of scientific dishonesty or bias which may adversely affect the reputation of a researcher, even if ultimately unfounded or unsubstantiated;
	+ inappropriate scrutiny of draft documents may damage the effectiveness of the final published reports.

Other disadvantages to the Council or its researchers include:* + loss of access to schools for research and cancer prevention education;
	+ reduced willingness of the public, including cancer patients, to participate in other research projects;
	+ loss of competitive edge for attracting high calibre staff and securing funding;
	+ loss of trust among donors and volunteers;
	+ loss of privacy of the data;
	+ risk of unethical use of the data in breach of ethics approvals; and
	+ risks to the scientific process.
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Section 34(4)(c) – examination papers and examiner reports

* 1. A document or information is exempt under section 34(4)(c)) if two conditions are satisfied:
		+ Firstly, it is:
			- an examination paper; or
			- a paper submitted by a student during an examination; or
			- an examiner’s report; or
			- similar document; and
		+ Secondly, the use or uses for which the document was prepared have not been completed.
	2. The purpose of the exemption is to protect the efficacy of the testing and the integrity of the examination process.[[81]](#footnote-81)
	3. The term ‘examination’ has a broad definition and can include non-academic related examinations.[[82]](#footnote-82) For example, selection reports containing questions prepared for recruitment processes.
	4. A ‘marking guide’ has been found to be a ‘similar document’ for the purposes of this exemption.[[83]](#footnote-83)
	5. If the use or uses of a document have been completed, the exemption cannot apply.[[84]](#footnote-84)
	6. The exemption does not involve any public interest considerations. Any potential prejudice or disadvantage to the agency in a document’s disclosure, or public interest in a document not being disclosed, is irrelevant.[[85]](#footnote-85)
	7. The words ‘prepared’ and ‘completed’ should be given their ordinary meaning.[[86]](#footnote-86)
	8. The ‘use’ or ‘uses’ of a document, must be a use ‘for which the document was prepared’, not a use of the information contained in the document or secondary use, created or realised after the document’s preparation.[[87]](#footnote-87)

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| **Examples*** An examination paper prepared solely for use in a particular examination, in a particular subject, in a particular semester, cannot be exempt under section 34(4)(c) if a decision is made to use examination questions and other material contained in the document in the following year’s examination.
* Whereas a marking guide prepared for ongoing use in assessments in future examinations, that will, in fact, be used by the agency again, can be exempt under section 34(4)(c), as the marking guide’s future use was a use for which the document was prepared, and there is evidence to support that the use is not yet complete.[[88]](#footnote-88)
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* 1. The issue is whether the use or uses for which a **document** has been prepared have been completed, **not** whether the uses for which **the information in a document**, as it appears in other documents held by the agency, has been completed.[[89]](#footnote-89)

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| **Example**The fact an agency may store examination questions drawn from examination papers on a database for future use, does not change the fact that the examination papers themselves were prepared for particular examinations, in particular subjects, in particular semesters. |

* 1. The VCAT has held that an examination paper’s use is completed at the end of the examination assessment period, when the results are published.[[90]](#footnote-90)
1. [*Ryan v Department of Infrastructure*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2004/2346.html) [2004] VCAT 2346, [32]. [↑](#footnote-ref-1)
2. [*Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/822.html) [2013] VCAT 822, [21] and [*Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/39.html#fnB4), [29], both referring to *Ryder v Booth* (1989) VR 869, 877. While these decisions do not deal with section 34, they refer to the principle set out in *Ryder v Booth* that because the FOI Act is remedial legislation, where ambiguity is encountered the rights given by the Act should be construed liberally and exceptions narrowly.  [↑](#footnote-ref-2)
3. [*Victorian Public Service Board v Wright* [1986] HCA 16](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1986/16.html), [3]. [↑](#footnote-ref-3)
4. *Thwaites v Department of Human Services* (1999) 15 VAR 1, 14. [↑](#footnote-ref-4)
5. *Gill v Department of Industry, Technology and Resources* (1985) 1 VAR 97, 106. [↑](#footnote-ref-5)
6. *Gill v Department of Industry, Technology and Resources* (1985) 1 VAR 97, 106; *Holbrook v Department of Natural Resources* (1997) 13 VAR 1, 8. [↑](#footnote-ref-6)
7. *Re City Parking Pty Ltd* (1996) 10 VAR 170, [198]. [↑](#footnote-ref-7)
8. See example, [*Commissioner of State Revenue v Tucker* [2021] VCAT 238](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html), [157]. [↑](#footnote-ref-8)
9. *Holbrook v Department of Natural Resources* (1997) 13 VAR 1, 8. [↑](#footnote-ref-9)
10. [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [19]-[20]. [↑](#footnote-ref-10)
11. [*Specialist Diagnostic Services Pty Ltd v Western Health* [2016] VCAT 17](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2016/17.html), [50]-[51]. [↑](#footnote-ref-11)
12. *Holbrook v Department of Natural Resources & Environment* (1997) 13 VAR 1, 8. [↑](#footnote-ref-12)
13. *Holbrook v Department of Natural Resources & Environment* (1997) 13 VAR 1, 8. [↑](#footnote-ref-13)
14. *Holbrook v Department of Natural Resources & Environment* (1997) 13 VAR 1, 8. [↑](#footnote-ref-14)
15. See [*Commissioner of State Revenue v Tucker* [2021] VCAT 238](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html), [156], citing *Marple v Department of Agriculture* (1995) 9 VAR 29. [↑](#footnote-ref-15)
16. [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [21]. [↑](#footnote-ref-16)
17. The Act does not require an agency or Minister to consult under section 34(1)(a). However, consultation is strongly encouraged. [↑](#footnote-ref-17)
18. [*Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1992/241.html), [30]-[32] in relation to the equivalent provision in the Commonwealth FOI Act, followed in [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [27]. [↑](#footnote-ref-18)
19. *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366, [27]; [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [26]. [↑](#footnote-ref-19)
20. *Re Bankers Trust Australia Ltd v Ministry of Transport* (1989) 2 VAR 33, 38-9 in relation to the equivalent provision in the Commonwealth FOI Act*; Re Organon (Aust) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588, [24] in relation to the equivalent provision in the Commonwealth FOI Act . These factors are “merely guides”: [*Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1992/241.html), [37]. [↑](#footnote-ref-20)
21. [*Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1992/241.html), 33; [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [26]. [↑](#footnote-ref-21)
22. [*Gibson v Latrobe CC* [2008] VCAT 1340](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/1340.html), [25]. [↑](#footnote-ref-22)
23. [*Commissioner of State Revenue v Tucker* [2021] VCAT 238](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html), [158]. [↑](#footnote-ref-23)
24. [*Commissioner of State Revenue v Tucker* [2021] VCAT 238](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html), [158], citing [*J & G Knowles & Associates Pty Ltd v Commissioner of Taxation* [2000] FCA 196](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2000/196.html). [↑](#footnote-ref-24)
25. *Dalla-Riva v Department of Treasury and Finance* [2007] VCAT 1301, [33]. [↑](#footnote-ref-25)
26. *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427, [477]. [↑](#footnote-ref-26)
27. See Macquarie Dictionary. [↑](#footnote-ref-27)
28. [*Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2702.html), [38]. [↑](#footnote-ref-28)
29. *Holbrook v Department of Natural Resources* (1997) 13 VAR 1, 8. [↑](#footnote-ref-29)
30. [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [32]-[38], [48]. [↑](#footnote-ref-30)
31. [*AOZ v JLV*[2019] VCAT 31](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/31.html), [182]-[183]. [↑](#footnote-ref-31)
32. [*AOZ v JLV* [2019] VCAT 31](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/31.html), [182]. [↑](#footnote-ref-32)
33. [*Faine v Victorian Building Authority* [2019] VCAT 111](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/111.html), [59]-[60]. [↑](#footnote-ref-33)
34. [*Faine v Victorian Building Authority* [2019] VCAT 111](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/111.html), [31]. [↑](#footnote-ref-34)
35. [*Fitzherbert v Department of Health and Human Services* [2019] VCAT 201](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/201.html). [↑](#footnote-ref-35)
36. [*Fitzherbert v Department of Health and Human Services*[2019] VCAT 201](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/201.html), [56]-[57]; see also [*Department of Education and Training v Australian Education Union* [2019] VCAT 1667](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/1667.html), [68]-[73] and ‘[*FD1’ and Department of Health* [2023] VICmr 36](https://ovic.vic.gov.au/decision/fd1-and-department-of-health-freedom-of-information-2023-vicmr-36-26-april-2023/), [22]; ‘[*FD2’ and Department of Justice and Community Safety* [2023] VICmr 37](https://ovic.vic.gov.au/decision/fd2-and-department-of-justice-and-community-safety-freedom-of-information-2023-vicmr-37-3-may-2023/), [69]-[70], where the agencies’ exemption claims failed due to lack of direct evidence from the undertaking. [↑](#footnote-ref-36)
37. [*Kotsiras v Department of Premier & Cabinet* [2003] VCAT 472](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/472.html), [36]. [↑](#footnote-ref-37)
38. [*Kotsiras v Department of Premier & Cabinet* [2003] VCAT 472](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/472.html), [37]. [↑](#footnote-ref-38)
39. [*Specialist Diagnostic Services Pty Ltd v Western Health* [2016] VCAT 17](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2016/17.html), [82]-[84]. [↑](#footnote-ref-39)
40. [*Chopra v Department of Education and Training* [2019] VCAT 1860](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/1860.html), [59]-[66]; [*Commissioner of State Revenue v Tucker* [2021] VCAT 238](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html), [166]-[167], [170]. [↑](#footnote-ref-40)
41. [*CityLink Melbourne Limited v Department of Transport* [2020] VCAT 1078](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2020/1078.html). [↑](#footnote-ref-41)
42. [*Tucker v Commissioner of State Revenue* [2019] VCAT 2018](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/2018.html). [↑](#footnote-ref-42)
43. [*Green v Department of Human Services* [2014] VCAT 1233](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2014/1233.html). [↑](#footnote-ref-43)
44. *Hulls v Victorian Casino & Gaming Authority* (1998) 12 VAR 483, 495. [↑](#footnote-ref-44)
45. *Re Bankers Trust Australia Ltd v Ministry of Transport* (1989) 2 VAR 33, 38-9*; Re Organon (Aust) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588, [24]. [↑](#footnote-ref-45)
46. [*Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd*[1978] FCA 50](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1978/50.html), per Deane J, Brennan J agreeing, [44]. [↑](#footnote-ref-46)
47. [*Gibson v Latrobe City Council* [2008] VCAT 1340](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/1340.html); [*Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1990/17.html); (1990) 169 CLR 594, 604. [↑](#footnote-ref-47)
48. *Marple v Department of Agriculture* (1995) 9 VAR 29, 47. [↑](#footnote-ref-48)
49. [*Commissioner of State Revenue v Tucker* [2021] VCAT 238](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html)*,* [175] citing [*Gibson v Latrobe City Council* [2008] VCAT 1340](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/1340.html); *Marple v Department of Agriculture* (1995) 9 VAR 29; [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html) and *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427. [↑](#footnote-ref-49)
50. [*Pallas v Road Corporation* [2013] VCAT 1967](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/1967.html). [↑](#footnote-ref-50)
51. See examples where the agency was found not be engaged in ‘trade or commerce’: [‘*CT9’ and Department of Environment, Land, Water and Planning* [2021] VICmr 73](https://ovic.vic.gov.au/decision/ct9-and-department-of-environment-land-water-and-planning-freedom-of-information-2021-vicmr-73-16-march-2021/), [38]-[39]; ‘[*EZ4’ and Department of Treasury and Finance* [2023] VICmr 4](https://ovic.vic.gov.au/decision/ez4-and-department-of-treasury-and-finance-freedom-of-information-2023-vicmr-4-7-february-2023/), [61]-[63]. [↑](#footnote-ref-51)
52. [*Chopra v Department of Education and Training* [2019] VCAT 1860](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/1860.html); [*Commissioner of State Revenue v Tucker* [2021] VCAT 238](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html), [174]. [↑](#footnote-ref-52)
53. [*Davis v Department of Transport* [2022] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/721.html), [58], following *City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR 170, 185. In *City Parking*, the respondent was held to be an agency engaged in trade or commerce as landlord, tenant or potential vendor of real estate. [↑](#footnote-ref-53)
54. *City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR 170, 185. [↑](#footnote-ref-54)
55. See also [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [41]. [↑](#footnote-ref-55)
56. [*Gibson v Latrobe CC* [2008] VCAT 1340](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/1340.html), [25]. [↑](#footnote-ref-56)
57. [*Davis v Department of Transport* [2022] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/721.html), [58]. [↑](#footnote-ref-57)
58. [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [42]. [↑](#footnote-ref-58)
59. *Binnie v Department of Industry, Technology & Resources*(1986) 1 VAR 345, 348. [↑](#footnote-ref-59)
60. *Binnie v Department of Industry, Technology & Resources*(1986) 1 VAR 345, 348; [*Davis v Department of Transport* [2022] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/721.html), [58]. [↑](#footnote-ref-60)
61. [*Save Albert Park Inc v Australian Grand Prix Corporation* [2008] VCAT 168](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/168.html), [77]. [↑](#footnote-ref-61)
62. [*Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2702.html), [38]. [↑](#footnote-ref-62)
63. [*Asher v Department of Innovation, Industry & Regional Development* [2005] VCAT 2702](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2702.html), [42]-[43]; [*Fitzherbert v Department of Health and Human Services* [2019] VCAT 201](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/201.html), [61]. [↑](#footnote-ref-63)
64. [*Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2702.html), [38]. [↑](#footnote-ref-64)
65. *Byrne* *v Swan Hill Rural City Council* (2000) 16 VAR 366, [43]. [↑](#footnote-ref-65)
66. [*Dalla-Riva v Department of Treasury & Finance* [2005] VCAT 2083](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2083.html), [90]-[97], [100]-[103]. [↑](#footnote-ref-66)
67. [*Honeywood v Department of Innovation, Industry and Regional Development* [2004] VCAT 1657](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2004/1657.html), [29]. [↑](#footnote-ref-67)
68. [*Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/45.html), [43]. [↑](#footnote-ref-68)
69. [*CityLink Melbourne Limited v Department of Transport* [2020] VCAT 1078](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2020/1078.html), [147], [150]-[155]. [↑](#footnote-ref-69)
70. [*Fitzherbert v Department of Health and Human Services* [2019] VCAT 201](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/201.html), [62]-[72]. [↑](#footnote-ref-70)
71. [*Commissioner of State Revenue v Tucker* [2021] VCAT 238](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/238.html), [88]-[90]; and [*Chopra v Department of Education and Training* [2019] VCAT 1860](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/1860.html) [49], [51]. [↑](#footnote-ref-71)
72. See also [*Gibson v Latrobe City Council* [2008] VCAT 1340](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/1340.html), [64]-[65]. [↑](#footnote-ref-72)
73. [*Davis v Department of Transport* [2022] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/721.html), [58]. VCAT relied on *City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR 170, 185. In that case the respondent was held to be an agency engaged in trade or commerce as landlord, tenant or potential vendor of real estate. [↑](#footnote-ref-73)
74. See *Mildenhall* *v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, in the context of the words ‘scientific’ and ‘technical’ in the section 28(3) exemption. [↑](#footnote-ref-74)
75. *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, 294 in relation to section 28(3), approved in [*Johnson v Cancer Council of Victoria* [2016] VCAT 1596](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2016/1596.html), [254] in relation to 34(4)(b)(iii). [↑](#footnote-ref-75)
76. *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, 294-5 in relation to section 38(3), approved in [*Johnson v Cancer Council of Victoria* [2016] VCAT 1596](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2016/1596.html), [254] in relation to 34(4)(b)(iii). [↑](#footnote-ref-76)
77. See example, [*Mees v University of Melbourne (General)* [2009] VCAT 782](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/782.html), [31]. [↑](#footnote-ref-77)
78. *Re Coultbart and Princess Alexandra Hospital and District Health Service* (2001) 6 QAR 94, referred to with apparent approval in [*Johnson v Cancer Council of Victoria* [2016] VCAT 1596](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2016/1596.html), [255]. [↑](#footnote-ref-78)
79. *Re Coultbart and Princess Alexandra Hospital and District Health Service* (2001) 6 QAR 94, referred to with apparent approval in [*Johnson v Cancer Council of Victoria* [2016] VCAT 1596](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2016/1596.html), [255]. [↑](#footnote-ref-79)
80. *Hopper v Department of Agriculture and Rural Affairs* (unreported, AAT of Vic, Harding PM, 20 December 1990). [↑](#footnote-ref-80)
81. ‘[*AP8’ and Victorian Curriculum Assessment Authority* [2019] VICmr 143](https://ovic.vic.gov.au/decision/ap8-and-victorian-curriculum-and-assessment-authority-freedom-of-information-2019-vicmr-143-16-october-2019/), [18]. [↑](#footnote-ref-81)
82. ‘[*AU3’ and Victoria Police* [2019] VICmr 184](https://ovic.vic.gov.au/decision/au3-and-victoria-police-freedom-of-information-2019-vicmr-184-3-december-2019/), [49]. [↑](#footnote-ref-82)
83. [*McKean v University of Melbourne* [2007] VCAT 1310](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1310.html), [22]; ‘[*AP8’ and Victorian Curriculum Assessment Authority* [2019] VICmr 143](https://ovic.vic.gov.au/decision/ap8-and-victorian-curriculum-and-assessment-authority-freedom-of-information-2019-vicmr-143-16-october-2019/), [18]. [↑](#footnote-ref-83)
84. [*McKean v University of Melbourne* [2007] VCAT 1310](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1310.html), [25]. [↑](#footnote-ref-84)
85. [*McKean v University of Melbourne* [2007] VCAT 1310](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1310.html), [25]-[26];[*Melbourne University v McKean* [2008] VSC 325](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2008/325.html), [30]. [↑](#footnote-ref-85)
86. [*McKean v University of Melbourne* [2007] VCAT 1310](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1310.html), [29]. [↑](#footnote-ref-86)
87. [*McKean v University of Melbourne* [2007] VCAT 1310](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1310.html)*,* [28]. [↑](#footnote-ref-87)
88. See example, ‘[*AP8’ and Victorian Curriculum Assessment Authority* [2019] VICmr 143](https://ovic.vic.gov.au/decision/ap8-and-victorian-curriculum-and-assessment-authority-freedom-of-information-2019-vicmr-143-16-october-2019/), [20]-[22]. [↑](#footnote-ref-88)
89. [*Melbourne University v McKean* [2008] VSC 325](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2008/325.html), [27]; followed in ‘[*AU3’ and Victoria Police* [2019] VICmr 184](https://ovic.vic.gov.au/decision/au3-and-victoria-police-freedom-of-information-2019-vicmr-184-3-december-2019/), [51]. [↑](#footnote-ref-89)
90. [*McKean v University of Melbourne [2007] VCAT 1310*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1310.html), [29]; see also ‘[*AU3’ and Victoria Police* [2019] VICmr 184](https://ovic.vic.gov.au/decision/au3-and-victoria-police-freedom-of-information-2019-vicmr-184-3-december-2019/), [52]. [↑](#footnote-ref-90)