

Notice of Decision and Reasons for Decision

Applicant:	'FF7'
Agency:	Department of Treasury and Finance
Decision date:	14 June 2023
Exemptions considered:	Sections 28(1)(ba), 28(1)(d), 30(1), 33(1), 34(1)(b), 34(4)(a)(ii)
Citation:	'FF7' and Department of Treasury and Finance (Freedom of Information) [2023] VICmr 60 (14 June 2023)

FREEDOM OF INFORMATION – Next Generation Ticketing – Victorian Funds Management Corporation – Proposed bonus Scheme Government Projects – document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet – disclosure of decisions or deliberation of Cabinet - disclosure would not likely lead to confusion or promote ill-informed debate

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied information in the documents subject to review is exempt from release under sections 30(1), 33(1), 34(1)(b) or 34(4)(a)(ii). However, I am satisfied certain information in Document 5 is exempt from release under sections 28(1)(ba) and 28(1)(d).

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

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

14 June 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to specified briefs to the Treasurer.
2. The Agency identified eight documents falling within the terms of the Applicant's request and decided to grant access to three documents in full and refused access to five documents in part under sections 28(1)(ba), 28(1)(d), 29(1)(a), 30(1), 34(1)(b) and 34(4)(a)(ii). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. In their review of the application, the Applicant advised they only seek information exempted by the Agency under the following exemptions in the following documents:
 - (a) section 30(1) in Document 3;
 - (b) section 28(1)(d) in Document 4;
 - (c) sections 28(1)(ba), 28(1)(d), 30(1) and 34(4)(a)(ii) in Document 5; and
 - (d) sections 34(1)(b) and 34(4)(a)(ii) in Document 8.
5. Accordingly, any remaining exempted information is not subject to review.
6. I have examined a copy of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
10. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
11. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

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

Review of exemptions

Section 28(1) – Cabinet documents

12. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of the Cabinet.
13. In *Ryan v Department of Infrastructure*,² the Victorian Civil and Administrative Tribunal (VCAT) observed:

It has been said that a document is not exempt merely because it has some connection with Cabinet, or is perceived by departmental officers or others as being of a character that they believe ought to be regarded as a Cabinet document or because it has some Cabinet “aroma” around it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exemptions [(now five)]” in section 28(1) of the Act.
14. Purely statistical, technical or scientific material in a document is not exempt.³
15. I address the application of sections 28(1)(ba) and 28(1)(d) below.

Section 28(1)(ba) – Document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet

16. Section 28(1)(ba) provides a document is exempt if it has been prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
17. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which the document was prepared was to brief a Minister in relation to an issue to be considered by the Cabinet.⁴ In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to Cabinet.⁵
18. The word ‘briefing’ means a ‘short accurate summary of the details of a plan or operation. The ‘purpose...is to inform’.⁶ Therefore, the document should have the character of briefing material.⁷ A document will be of such character if it contains ‘information or advice...prepared for the purpose of being read by, or explained to, a minister’.⁸ It requires more than having ‘placed a document before a minister’.⁹
19. The Cabinet briefing purpose must be ‘immediately contemplated’ when the document is created. The exemption cannot apply merely because Cabinet ultimately considered the issue.¹⁰ The term ‘issues to be considered by the Cabinet’ within the meaning of section 28(1)(ba), requires that it must be more than just ‘likely’ the Cabinet will consider it. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if not ultimately considered.¹¹

² [2004] VCAT 2346 at [33].

³ Section 28(3).

⁴ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34] citing *Mildenhall v Department of Premier and Cabinet (No 2)* (1995) 8 VAR 478, at 290; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924 at [72]. See also *Department of Treasury and Finance v Dalla Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

⁵ *Secretary to the Department of Treasury and Finance v Dalla Riva* [2007] VSCA 11 at [15]; *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34].

⁶ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [41].

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Thwaites v Department of Health and Community Services* (unreported, AAT of Vic, Macnamara DP, 4 April 1996); *Environment Victoria Inc v Department of Primary Industries (general)* [2013] VCAT 39 at [40]; *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission & Anor* [2013] VCAT 822 at [29].

¹¹ *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39 at [38]-[41].

20. Document 5 is a briefing to the Treasurer concerning the Agency's assessment of a 'Next Generation Ticketing Strategic Plan' and strategic considerations regarding the Next Generation Ticketing Project.
21. I am satisfied on the face of the document that it is a briefing to a Minister.
22. While the Agency has provided extrinsic material in support of its decision that section 28(1)(ba) applies, in my view, the extrinsic material demonstrates that a Cabinet committee had already considered the matter and does not support the contention that the issues were intended to be considered in future.
23. However, I am satisfied on the face of paragraphs 32 and 33 that it concerns matters to be considered by a Cabinet committee in future.
24. Given this finding on section 28(1)(ba), I have also considered whether information the Agency exempted from release under section 28(1)(ba) is instead exempt from release under section 28(1)(d).
25. My decision on section 28(1)(ba) is set out in the Schedule of Document in **Annexure 1**.

Section 28(1)(d) – Disclosure of any deliberation or decision of the Cabinet

26. Section 28(1)(d) provides a document is exempt from release if it would involve the disclosure of any deliberation or decision of the Cabinet other than a document by which a decision of the Cabinet was officially published.
27. A document will be exempt under section 28(1)(d) if there is evidence the Cabinet discussed and determined options or issues set out in a document.¹²
28. Where a document, on its face, does not disclose a decision or deliberation of the Cabinet, or the extent of the Cabinet's interaction with a document is unclear, section 28(1)(d) will not apply.¹³
29. Deliberations means the actual debate that takes place, not just the subject matter of the debate. In *Department of Infrastructure v Asher (Asher)* at [8], the Victorian Supreme Court of Appeal held:

It all depends upon the terms of the document. At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or feasible or may advance an argument for a particular point of view.¹⁴ The former would say nothing as to Cabinet's deliberations; the latter might say a great deal.
30. Also held in *Asher* at [58]:

The deliberative process involves the weighing up or evaluating of the competing arguments or considerations that may have a bearing upon Cabinet's course of action – its thinking processes¹⁵ - with a view to the making of a decision. It encompasses more than mere receipt of information in the Cabinet room for digestion by Cabinet ministers then or later.¹⁶
31. A 'decision' means any conclusion as to the course of action the Cabinet adopts whether it is a conclusion as to final strategy on a matter or conclusions about how a matter should proceed.¹⁷

¹² *Smith v Department of Sustainability and Environment* [2006] VCAT 1228 at [23]; *Asher v Department of Infrastructure* (2006) 25 VAR 143; [2006] VCAT 1375 at [27].

¹³ *Asher v Department of Sustainability and Environment* (General) [2010] VCAT 601 at [42], citing *Re Birrell and Department of Premier and Cabinet [Nos 1 and 2]* (1986) 1 VAR 230 at 239.

¹⁴ *Smith v Department of Environment and Sustainability* [2006] VCAT 1228.

¹⁵ *Re Waterford and the Department of the Treasury (No 2)* [1984] AATA 67; (1984) 1 AAR 1.

¹⁶ *Re Birrell and Department of the Premier and Cabinet* (1986) 1 VAR 230.

¹⁷ *Dalla Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30], citing *Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301.

32. Where a decision made by the Cabinet is public, an announcement in relation to the issue decided will not disclose the Cabinet's decision or deliberation.¹⁸
33. Document 4 records information that was 'noted' by Cabinet Committee. I do not accept that the action of 'noting' represents a decision of Cabinet, nor in the context of this document does it reveal the actual deliberation of the Cabinet. As such, I am not satisfied it is exempt from release under section 28(1)(d).
34. As noted above, Document 5 is a briefing to the Treasurer concerning Next Generation Ticketing. It asks the Minister to note 'DTF's High Value High Risk Deliverability Assessment of the Next Generation Ticketing Strategic Procurement Plan' and the 'update on related strategic considerations regarding the Next Generation Ticketing Project'.
35. The Agency has applied section 28(1)(d) to parts of the document where it considers it would disclose information that was subject to Cabinet deliberations and that the Cabinet decisions made as a result of the deliberations have not been made public.
36. I am satisfied on the face of the documents that certain information would reveal decisions made by a Cabinet committee.
37. The Agency has provided OVIC with copies of Cabinet submissions in support of its submission. Having considered that extrinsic material, I am satisfied information in Document 5 would reveal decisions or deliberations of a Cabinet committee, and is therefore, exempt from release under section 28(1)(d).
38. The Schedule of Documents in **Annexure 1** sets out my decision on section 28(1)(d).

Section 30(1) – Internal working documents

39. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
40. The exemption does not apply to purely factual material in a document.¹⁹

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

41. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
42. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.²⁰

¹⁸ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26]; *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [46].

¹⁹ Section 30(3).

²⁰ *Mildenhall v Department of Education* (1998) 14 VAR 87.

43. In Document 3, the Agency has exempted a date from release under section 30(1). While the document itself, being a briefing to a Minister, is matter in the nature of recommendation, I am not satisfied the date is. Rather, it is purely factual material in the document. As such, section 30(3) applies. Accordingly, I will not consider the remaining limbs of the exemption with respect Document 3.
44. I accept Document 5 contains the opinion in relation to fare reforms at paragraph 20 and an opinion on opportunities to leverage the new public transport ticketing system to generate additional State revenue at paragraph 35.

Was Document 5 made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?

45. The term ‘deliberative process’ is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.²¹
46. In *Re Waterford and Department of Treasury (No.2)*,²² the former Victorian Administrative Appeals Tribunal held:
- ... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
47. I am satisfied Document 5 was prepared for the deliberative processes involved in informing the Minister of matters falling within his portfolio.

Would disclosure be contrary to the public interest?

48. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
49. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:²³
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency’s functions and other statutory obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;

²¹ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

²² (1984) 1 AAR 1 at [58].

²³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483 at 488.

- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
 - (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
50. The Agency submits the exempted information has the potential to mislead and create confusion and ill-informed public debate.
51. I am not persuaded by the Agency's submission that disclosure would likely lead to confusion or promote ill-informed debate. In my view, such arguments underestimate the capacity of the public to be informed about advice received and decisions made by agencies and government. It also minimises the importance of public engagement and participation in government policy making and decision making. In any event, I consider that the question of whether debate is necessary or not should be left to the public rather than to government. Nevertheless, if this remains of concern to the Agency, it is open for it to release the document to the Applicant with any necessary additional information to eliminate or minimise any confusion or misunderstanding concerning the document.
52. Accordingly, in the absence of any information before me weighing against the public interest, I am not satisfied information in Document 5 is exempt from release under section 30(1).
53. My decision on section 30(1) is set out in in the Schedule of Documents in **Annexure 1**.

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

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

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

55. In *Thwaites v Department of Human Services*,²⁴ VCAT observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
56. I am satisfied the Document 8 refers to information that was obtained from a business undertaking.

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

57. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.²⁵
58. I am satisfied the information in Document 8 relates to matters of commercial and financial nature, as it concerns remuneration. However, the exempted information is only the name of the undertaking. In my view, this is not information of a business, commercial or financial nature for the purposes of the exemption under section 34(1)(b). However, for completeness, I will consider the remaining limb of the exemption.

²⁴ (1999) 15 VAR 1 at 13.

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

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

59. Section 34(2) provides that in deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—
- (a) whether the information is generally available to competitors of the undertaking;
 - (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
 - (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
 - (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—
- and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.
60. I consider the phrase ‘expose the undertaking unreasonably to disadvantage’ in section 34(1)(b), contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word ‘unreasonably’ in section 34(1)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed ‘unreasonably’ to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.
61. Accordingly, section 34(1)(b) contemplates a business undertaking may be exposed to a certain level of disadvantage. The question is whether any such disclosure would expose the undertaking unreasonably to disadvantage.
62. In determining whether disclosure of commercially sensitive information in a document would expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify an undertaking and seek its views on disclosure.²⁶ However, there is no information before me concerning the views of the business undertaking.
63. As noted above, the Agency only exempted the name of the business undertaking under section 34(1)(b). Other exempted information in the document reveals advice provided by the business undertaking, however, that information was not exempted under section 34(1)(b).
64. I am not satisfied revealing the identity of the business undertaking would be reasonably likely to expose it unreasonably to disadvantage, irrespective of whether the advice is released, for the following reasons:
- (a) it will not give competitors of a business undertaking a financial advantage;
 - (b) it will not enable competitors to engage in destructive competition with a business undertaking; and
 - (c) it will not lead to the drawing of unwarranted conclusions as to a business undertaking’s financial affairs and position with detrimental commercial and market consequences.²⁷

²⁶ Section 34(3).

²⁷ These three factors were considered in *Dalla Riva v Department of Treasury and Finance* [2007] VCAT 1301 at [33].

65. Accordingly, I am not satisfied information in the document is exempt from release under section 34(1)(b).
66. My decision on section 34(1)(b) is set out in the Schedule of Documents in **Annexure 1**.

Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage

67. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, ‘in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage’.
68. Accordingly, a document is exempt under section 34(4)(a)(ii) if:
- (a) the agency is engaged in trade or commerce;
 - (a) the document contains information of a business, commercial or financial nature; and
 - (b) disclosure of which would be likely to expose the agency unreasonably to disadvantage.

Is the Agency engaged in trade and commerce?

69. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.²⁸
70. VCAT has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.²⁹ VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.³⁰ An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency’s other functions.³¹
71. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.³²
72. While the phrase ‘trade and commerce’ may be interpreted broadly, it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.³³
73. The fact an agency’s predominant activities may be described as ‘governmental’ does not preclude it from relying on the exemption under section 34(4)(a)(ii).³⁴
74. In my view, whether information is governmental or relates to agency trade and commerce depends on the specific document and the purpose of that engagement.
75. The information exempted in Document 5 is a contingency rate and key risks associated with a project, in the context of the Agency’s High Value High Risk Deliverability Assessment of the Next Generation Ticketing Strategic Procurement Plan.

²⁸ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

²⁹ *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [33] citing *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) ALR 621 at [44].

³⁰ *Ibid* at [34] citing *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) ALR 621 at [44].

³¹ *Ibid* at [36] citing *Marple v Department of Agriculture* (1995) 9 VAR 29 at 76.

³² *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at 473.

³³ *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35] citing *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR at 604.

³⁴ *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

76. I am not satisfied the essential character or core activity undertaken by the State Government in the Next Generation Ticketing project is that of trade and commerce. Rather, it concerns the delivery of a publicly funded project on behalf of the community and the government's core functions.
77. Document 8 concerns a proposed bonus scheme for senior investment professionals at the Victorian Funds Management Corporation (**VFMC**). In summary, the Agency submits the VFMC is engaged in trade and commerce as the positions to which the proposed bonus scheme relates are fundamental to the commercial operations of VFMC and the scheme was designed having regard to numerous commercial factors. Such factors include:
- (a) the VFMC is seeking to recruit investment specialists that have suitably varied experience in the private financial sector and the recruitment market for experienced executive leaders with relevant investment skills is highly competitive;
 - (b) the VFMC is in competition with the private sector for candidates;
 - (c) the scheme will inform confidential contract negotiations, which regard to the market conditions; and
 - (d) the scheme will require certain levels of investment performance to be achieved before any bonuses are paid, given that the engagement of the executive leaders is with a view to obtaining profit and value outcomes, beyond merely providing services for the benefit of the public.
78. The Agency submits this scenario can be distinguished from other employment scenarios, such as the recruitment of temporary contract staff, and that the bespoke nature of this particular scenario of engaging and retaining executive leader strongly indicates the VFMC is engaged in trade and commerce.
79. I acknowledge the Agency's submission that the VFMC is in competition with the private sector to engage persons with particular skills. However, I do not accept this amounts to the VFMC being engaged in trade and commerce. In my view, the recruitment and remuneration, irrespective of whether an Agency is seeking to attract staff of an executive level or with specialist skills, is not an activity that is inherently commercial in nature as it relates to the Agency's ordinary staffing and resourcing functions. However, for completeness, I will consider the remaining limbs of the exemption.

Do the documents contain information of a business, commercial or financial nature?

80. The phrase 'information of a business, commercial or financial nature' is not defined in the FOI Act. Therefore, the words 'business, commercial or financial nature' should be given their ordinary meaning.³⁵
81. I am satisfied the documents concern matters of a business, commercial and financial nature.

Would disclosure be likely to expose the Agency unreasonably to disadvantage?

82. Whether disclosure is likely to expose an Agency unreasonably to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that likely to follow from disclosure of the information.
83. The provision contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage, and that any such exposure must be unreasonable.
84. In the context of section 34(4)(a)(ii), 'disadvantage' has been interpreted to be in the nature of an agency engaged in trade and commerce being exposed to commercial or competitive disadvantage. For example, in *Accident Compensation Commission v Croom* [1991] 2 VR 322, O'Bryan J states:

³⁵ *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

In my opinion, the word "disadvantage" in the context of trade or commerce and information of a business, commercial financial nature means injury of a financial kind.³⁶

85. Whether disadvantage is 'unreasonable' depends on the particular facts and circumstances of a matter and involves a balancing exercise. Unlike section 34(1)(b) in conjunction with section 34(2), there is no list of factors to be considered in relation to section 34(4)(a)(ii). However, VCAT has taken the following factors into consideration:³⁷
- (a) the nature of the information;
 - (b) the circumstances in which the information was obtained;
 - (c) the likelihood that concerned persons would not wish the information to be disclosed without consent; and
 - (d) the current relevance and sensitivity of the information.
86. With respect to Document 5, the Agency submits the exempted information, if disclosed, and could compromise any potential tendering process and effective implementation of the Public Transport Ticketing project.
87. In my view, the Agency has not established in sufficient detail that these disadvantages are likely to occur due to disclosure of the exempted information or that any such disadvantage would be unreasonable.
88. Contracts for public transport ticketing systems are unique and do not come up often, noting the previous contract for the State's public transport ticketing system was awarded in July 2016 with an expiry date on 30 November 2023.³⁸
89. The Government public announced on 15 May 2023 that a 15-year contract had been awarded to a ticketing supplier to be the next operator of the State's public transport ticketing system, taking over from the current myki operator.³⁹ It is now up to the State and the new ticketing supplier to manage the contract.
90. In this case, I am not satisfied there is sufficient evidence before me to support the view that disclosure would impact the ability of the State government to attract future offers from private sector companies with contracts relating to public transport ticketing, or that disclosure would impede the effective implementation of the project.
91. Accordingly, I am not satisfied the document contains information that is exempt from release under section 34(4)(a)(ii). However, I have considered whether the contingency rate is instead exempt from release under section 28(1)(d). My decision on Document 5 is set out in the Schedule of Documents in **Annexure 1**.
92. With respect to Document 8, the Agency provided a detailed submission outlining why it considers disclosure will be likely to expose VFMC unreasonably to disadvantage with respect to hiring and retaining executive roles.

³⁶ at [331].

³⁷ *Gibson v Latrobe City Council (General)* [2008] VCAT 1340 at [41], citing *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366 at 372-3 and *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 246.

³⁸ Buying for Victoria, Contract eo1601284, available at <https://www.tenders.vic.gov.au/contract/view?id=62790>.

³⁹ Premier of Victoria, 'New Public Transport Ticketing Contract' (Media release, 15 May 2023) available at <https://www.premier.vic.gov.au/new-public-transport-ticketing-contract>; Patrick Hatch, Sumeyya Ilanbey and Ashleigh McMillan, 'Myki operator loses contract, new fare system on the way for commuters', *The Age* (online, 15 May 2023) available at <https://www.theage.com.au/national/victoria/myki-operator-loses-contract-us-specialist-to-overhaul-ticket-system-20230515-p5d8h0.html>).

93. With respect to the specific disadvantage to which the VFMC will be likely to be exposed to if the information were to be disclosed, the Agency submits:
- other private sector entities would be able to identify the particular remuneration packages currently being offered to VFMC's executive leaders, who are highly talented investment specialists, and other potential employers would be able to offer them more competitive remuneration packages;
 - notably, VFMC has a market reputation for building and developing high calibre investment professionals that manage direct and indirect portfolios, which results in VFMC executives being viewed as attractive candidates for other non-banking financial institutions located in Melbourne who are in a position to offer pay positions in excess of VFMC;
 - the competitive nature of this industry was also acknowledged by the Victorian Independent Remuneration Tribunal, as their report in June 2022 stated:

"The Tribunal has found that VFMC and TCV are likely to need to offer base remuneration – expressed as a total remuneration package – above the maximum of the relevant remuneration band...

This is largely because other finance sector organisations typically remunerate above the maximum of the relevant band for an in-scope role. VFMC and TCV compete with these organisations in attracting and retaining talent."
 - it would then become more difficult to retain VFMC's executive leadership roles, given that VFMC is more constrained in its ability to 'bid' against other private sector firms, and can only offer its executive leaders the current approved variable pay plan scheme; and
 - the State's ability to achieve investment objectives for VFMC clients and the State would be compromised and unfairly disadvantaged as a result.
94. In summary, the Agency submits the disadvantage, outlined above, would be unreasonable for the following reasons:
- (a) VFMC invests a considerable amount of funds for 31 clients across the insurance, superannuation, health, arts, education and services agencies of Victoria;
 - (b) there are a limited number of appropriate candidates to sufficiently carry out these roles;
 - (c) disclosure of the information would lead to other potential employers being able to easily offer higher remuneration packages to attract VFMC's existing executive leaders, which is likely to occur given the very small pool of suitable candidates; and
 - (d) an unreasonable imbalance would be created in the relevant employment market as VFMC would not have equivalent insight into the other competitive pay packages being offered by other employers; and
 - (e) VFMC would need to devote considerable time and resources to focus on recruiting and filling any vacancies from the small pool of suitable candidates, which would negatively impact on VFMC's operations and the outcomes for the 31 Victorian agencies VFMC services.
95. In my view, any employment contract negotiations will be influenced by a number of factors including the subject of the contract, the bargaining power of the contracting parties and the existence of competitive pressures to obtain the benefit of the contract. I consider government agencies have considerable bargaining strength. However, in the circumstances of this matter, I accept certain information is commercially sensitive and could expose the VFMC to disadvantage for the reasons provided by the Agency in its submission, summarised above.
96. In any case, I am not satisfied the VFMC is engaged in trade and commerce. Therefore, I am not satisfied the information is exempt from release under section 34(4)(a)(ii).

97. My decision on section 34(4)(a)(ii) for Documents 5 and 8 is set out in the Schedule of Documents in **Annexure 1**.

Section 33(1) – Documents affecting personal privacy of third parties

98. As I am not satisfied Document 8 is exempt under section 34(1)(b) and 34(4)(a)(ii), I have considered the application of section 33(1), which I consider is a relevant exemption to consider with respect to remuneration related information.

99. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI Act would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person other than the Applicant (a **third party**);⁴⁰ and
- (b) such disclosure would be ‘unreasonable’.

Do the documents contain personal affairs information of individuals other than the Applicant?

100. Information relating to a person’s ‘personal affairs’ includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.⁴¹

101. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person.

102. The exempted information in Document 8 sets out a range of proposed bonuses expressed as percentages of fixed remuneration for particular position titles.

103. In *Asher v Department of State & Regional Development*,⁴² VCAT states ‘it seems to be generally accepted that the quantum of remuneration received by an officer for his or her discharge of government duties is information relating to that officer’s personal affairs’.

104. While the document itself only refers to proposed bonuses, such information concerns specified positions including executive level staff, and noting that the proposed scheme was approved by the Treasurer, the exempted information can reveal potential bonuses available to particular persons.

105. As such, I am satisfied the document contains personal affairs information of third parties.

Would disclosure of the personal affairs information be unreasonable?

106. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

107. In *Victoria Police v Marke*,⁴³ the Victorian Court of Appeal held there is ‘no absolute bar to providing access to documents which relate to the personal affairs of others’. Further, the exemption under section 33(1) ‘arises only in cases of unreasonable disclosure’ and ‘[w]hat amounts to an unreasonable disclosure of someone’s personal affairs will necessarily vary from case to case’.⁴⁴ The Court further held, ‘[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the

⁴⁰ Sections 33(1) and 33(2).

⁴¹ Section 33(9).

⁴² [2002] VCAT 609 at [9], referring to *Re Ricketson v Royal Children’s Hospital* (1989) VAR 10 at 12 per Judge Hanlon and *Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105 at 110.

⁴³ [2008] VSCA 218 at [76].

⁴⁴ *Ibid.*

FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁴⁵

108. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
- (a) The nature of the personal affairs information: The information is figures of proposed bonuses, expressed as percentages of fixed remuneration. This is not sensitive information and relates to persons in their professional capacity.
 - (b) The circumstances in which the information was obtained: The information was obtained from the VFMC in the context of seeking the Treasurer's consent to endorse the proposed bonus scheme.
 - (c) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved: The Applicant seeks access to the document as part of their role as a Member of Parliament.
 - (d) Whether any public interest would be promoted by release of the personal affairs information: There is public interest in the disclosure of information related to wages of public sector employees where it relates to bonuses for the purposes of transparency.
 - (e) The likelihood of disclosure of information, if release: It is reasonably like the information could be disseminated.
 - (f) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information: There is no information before me about the views of third parties, however, I consider it would be reasonably likely that third parties would object to disclosure of information relating to bonuses available to them.
 - (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person:⁴⁶ This is not a relevant factor in the circumstances of this matter.
109. On balance of the above factors, I am satisfied it would not be unreasonable to disclose the figures in Document 8.
110. Accordingly, information in Document 8 is not exempt from release under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

111. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
112. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴⁷ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.⁴⁸

⁴⁵ Ibid at [79].

⁴⁶ Section 33(2A).

⁴⁷ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁴⁸ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

113. The personal affairs information redacted by the Agency is irrelevant information for the purposes of this review and is to remain deleted.
114. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.
115. My decision on section 25 is set in in the Schedule of Documents in **Annexure 1**.

Conclusion

116. I am not satisfied information in the documents subject to review is exempt from release under sections 30(1), 33(1), 34(1)(b) or 34(4)(a)(ii). However, I am satisfied certain information in Document 5 is exempt from release under sections 28(1)(ba) and 28(1)(d).
117. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.
118. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

119. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁴⁹
120. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵⁰
121. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵¹
122. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
123. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.⁵²

Third party review rights

124. As I have determined to release documents that contain personal affairs information and information of a business, financial, commercial nature relating to a business undertaking, if practicable, I am required to notify the third parties and the business undertaking of its right to seek review by VCAT of my decision within 60 days from the date they are given notice.⁵³
125. In the circumstances, I have decided notifying the relevant business undertaking of its review rights is not practicable as it would be an unnecessary intrusion for the following reasons:
- (a) the exempt information is merely the name of the undertaking;
 - (b) the information does not reveal any proprietary information; and

⁴⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵⁰ Section 52(5).

⁵¹ Section 52(9).

⁵² Sections 50(3F) and (3FA).

⁵³ Sections 49P(5), 50(3), 50(3A) and 52(3).

- (c) there is no information before me to indicate revealing the name of the business undertaking would expose it to any sort of commercial detriment.

126. Regarding my decision to release personal affairs information, I have also decided notifying the third parties of their review rights is not practicable. The information refers to some particular positions but also to groups of individuals in broad categories. In any event, I consider that consultation would be an unnecessary intrusion due to the nature of the information, being figures of proposed bonuses expressed as percentages of fixed remuneration, which I consider is not sensitive information and relates to persons in their professional capacity.

When this decision takes effect

127. My decision does not take effect until the Agency's 14 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	9/11/2021	Ministerial Briefing B21/1860	4	Released in full	Not subject to review	
2.	12/11/2021	Ministerial Briefing B21/1612	3	Released in full	Not subject to review	
3.	12/11/2021	Ministerial Briefing B21/1878	5	Released in part Section 30(1)	Release in part Section 25 The information that the Agency exempted under section 30(1) is to be released. The irrelevant personal affairs information that was deleted in the Agency's decision is to remain deleted in accordance with section 25.	Section 30(1): I am not satisfied the date is exempt from release under section 30(1) as it is purely factual material. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant personal affairs information deleted in accordance with section 25.
4.	12/11/2021	Ministerial Briefing B21/1715	2	Released in part Section 28(1)(d)	Release in part Section 25 The information that the Agency exempted under section 28(1)(d) is to be released. The irrelevant personal affairs information that was deleted in the Agency's decision is to remain	Section 28(1)(d): I am not satisfied the document is exempt from release under section 28(1)(d) for the reasons provided in the Notice of Decision, above. Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					deleted in accordance with section 25.	
5.	16/11/2021	Ministerial Briefing B21/1880	5	Released in part Sections 28(1)(ba), 28(1)(d), 30(1), 34(4)(a)(ii)	<p>Release in part Sections 28(1)(ba), 28(1)(d), 25</p> <p>The document is to be released, except for the following information which is exempt from release and is to remain deleted in accordance with section 25:</p> <ul style="list-style-type: none"> (a) point 1 under the heading titled 'Key points', which is exempt under section 28(1)(d); (b) points 1, 2 and 3 under the heading titled 'Background' on page 2, which are exempt under section 28(1)(d); (c) point 8(a) on page 2, which is exempt from release under section 28(1)(d); and (d) point 8(c) on page 2, which is exempt from 	<p>Section 28(1)(ba): For the reasons provided in the Notice of Decision, above, I am satisfied, on the face of the document, that certain information in this document is exempt from release under section 28(1)(ba).</p> <p>Section 28(1)(d): For the reasons provided in the Notice of Decision, above, I am satisfied only some of the exempted information is exempt from release under section 28(1)(d).</p> <p>Section 30(1): I am not satisfied information in the document is exempt from release under section 30(1) for the reasons provided in the Notice of Decision, above.</p> <p>Section 34(4)(a)(ii): I am not satisfied information in the document is exempt from release under section 34(4)(a)(ii) for the reasons</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>release under section 28(1)(d);</p> <p>(e) the information the Agency exempted from release in paragraph 9 on page 2, which is exempt from release under section 28(1)(d);</p> <p>(f) paragraph 11 on page 2, which is exempt from release under section 28(1)(d);</p> <p>(g) paragraph 17 on page 3, which is exempt from release under section 28(1)(d);</p> <p>(h) paragraphs 32 and 33 on page 4, which is exempt from release under section 28(1)(ba);</p> <p>(i) the first sentence in paragraph 35 on page 4, which is exempt from release under section 28(1)(d);</p>	<p>provided in the Notice of Decision, above.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information and irrelevant personal affairs information deleted in accordance with section 25.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>(j) the title of attachment B on page 5, which is exempt from release under section 28(1)(d); and</p> <p>(k) the irrelevant personal affairs information, that was deleted in the Agency's decision.</p>	
6.	22/02/2021	Ministerial Briefing B21/1679	3	Released in part Section 29(1)(a)	Not subject to review	
7.	22/11/2021	Ministerial Briefing B21/1824	4	Released in full	Not subject to review	
8.	22/11/2021	Ministerial Briefing B21/1837	5	Released in part Sections 34(1)(b), 34(4)(a)(ii)	<p>Release in part Section 25</p> <p>The information that the Agency exempted under sections 34(1)(b) and 34(4)(a)(ii) is to be released.</p> <p>The irrelevant personal affairs information, that was deleted in the Agency's decision, is to remain deleted in accordance with section 25.</p>	<p>Section 33(1): I am not satisfied the document is exempt from release under section 33(1) for the reasons provided in the Notice of Decision, above.</p> <p>Section 34(1)(b): I am not satisfied the document is exempt from release under section 34(1)(b) for the reasons provided in the Notice of Decision, above.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>Section 34(4)(a)(ii): I am not satisfied the Agency is engaged in trade and commerce in the context of this document, for the reasons provided in the Notice of Decision, above. Accordingly, information in the document is not exempt under section 34(4)(a)(ii).</p> <p>Section 25: See comments for Document 1.</p>