

Notice of Decision and Reasons for Decision

Applicant:	'FH5'
Agency:	Victorian Multicultural Commission
Decision date:	24 July 2023
Exemptions considered:	Sections 34(1)(b) and 35(1)(b)
Citation:	'FH5' and Victorian Multicultural Commission (Freedom of Information) [2023] VICmr 76 (24 June 2023)

FREEDOM OF INFORMATION – multicultural grant program – community support fund – section 19 document – information provided in confidence – information acquired from a business undertaking – disclosure would not unreasonably expose business undertaking to unreasonable disadvantage – successful and unsuccessful grant applicants

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 information in a document it created in response to a request 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 document under review is exempt under section 34(1)(b).

I am satisfied certain information in the document is exempt under section 35(1)(b); however, I am not satisfied all information to which the Agency applied this exemption to is exempt.

As it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted access to the document is granted in part.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

24 July 2023

Reasons for Decision

Background to review

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

I seek a list of all applications for grants to the [Agency] including the name of the organisation applying, the name of the applicant who is applying on behalf of the organisation, the amount sought, the purpose of the grant or request, whether the grant or request was successful or unsuccessful and the reason(s) for the success or rejection of the grant or application in the [date range] financial year and the period from [date range].

2. The Agency's decision letter advised that no documents matching the terms of the Applicant's request existed in discrete form. Therefore, in accordance with section 19 of the FOI Act, the Agency produced a four-page document containing the requested information. The Agency determined to release the document in part refusing access under sections 34(1)(b) and 35(1)(b).
3. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. During the review, staff of OVIC made enquiries with the Agency regarding its application of the exemptions under sections 34(1)(b) and 35(1)(b) and provided the Agency an opportunity to respond.
7. On [date], the Agency provided a further submission, maintaining its view that the information identified in the document is exempt.
8. I have examined a copy of the document subject to review and 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.

Review of exemptions

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

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

13. In *Thwaites v Department of Human Services*,² the Victorian Civil and Administrative Tribunal (VCAT) observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
14. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.³
15. The Agency exempted the following information in relation to unsuccessful grant applicants:
 - (a) the program name, project description and name of the applying organisation;
 - (b) the requested funding amount; and
 - (c) reason the grant application was refused.
16. The threshold requirement for the exemption is whether a document contains 'information acquired' from a business undertaking.
17. Regarding whether the information in the document had been acquired from a business undertaking, the Agency submits:

An 'undertaking' refers to 'an entity other than the agency itself' and can include entities which are government funded or partly controlled by government (for example, St John Ambulance

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

² (1999) 15 VAR 1.

³ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

Victoria was found by the Victorian Civil and Administrative Tribunal [VCAT] to be an ‘undertaking’ for the purposes of section 34(1)(b))[1].⁴

18. I note the Agency’s submissions refer to the matter of *Australian Institute of First Aid & Emergency Care Providers Pty Ltd v Victorian WorkCover Authority*,⁵ where VCAT made its findings on the basis that St John Ambulance is a charitable body that relies on charitable donations to maintain its business function.
19. Regarding this review, I broadly accept the organisations contained in the document may be reliant on the acquisition of funding to support their community business proposals therefore, I am inclined to accept these organisations are business undertakings for the purpose of section 34(1)(b).
20. However, I do not accept the Agency’s broad application of section 34(1)(b) to information acquired from a government organisation, noting the particular government organisation is not reliant on charitable donations to maintain its business function.
21. In any case, with respect, I do not believe the approach adopted in *Australian Institute of First Aid & Emergency Care Providers Pty Ltd v Victorian WorkCover Authority* accurately reflects Parliament’s intention, noting the exemptions under section 34 were narrowed by the passing of the *Freedom of Information (Miscellaneous Amendments) Act 1999* (Vic). In the second reading speech for the Act, it was stated:

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

22. Therefore, I am not satisfied section 34(1)(b) applies to information the Agency acquired from a government organisation, as I am not satisfied this organisation is a business undertaking as contemplated by section 34(1)(b).

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

23. 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;

⁴ The Agency’s submissions referencing *Re Australian Institute of First Aid and Emergency Care Providers Pty Ltd and Victorian Workcover Authority* (2000) 16 VAR 222; see also *Re Mildenhall and Department of Treasury* (1994) 7 VAR 342, *Re Stewart and Department of Tourism, Sport and Commonwealth Games* (2003) 19 VAR 363.

⁵ (2000) 16 VAR 222.

⁶ Victorian Parliamentary Debates, Legislative Assembly, 11 November 1999, 350.

- (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.

24. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,⁷ in which VCAT held documents are exempt under section 34(1)(b) if their disclosure would:

- (a) give competitors of a business undertaking a financial advantage;
- (b) enable competitors to engage in destructive competition with a business undertaking; and
- (c) would lead to the drawing of unwarranted conclusions as to a business undertaking's financial affairs and position with detrimental commercial and market consequences.

25. I consider section 34(1)(b) contemplates disclosure under the FOI Act may expose a business undertaking to a certain measure of disadvantage; however, the exemption turns upon whether the disadvantage would be unreasonable.

26. In relation to the application of section 34(1)(b), the Agency submits:

Information relating to successful applications for funding made to the [Agency] is made publicly available in the [Agency] 2021-22 Annual Report.

The [Agency] notes that the grant amount applied for by organisations is not shared publicly and is considered exempt from release as organisations provide this information as part of the application process with the expectation of confidentiality. Therefore, information relating to unsuccessful applications has been redacted in accordance with section 34(1)(b) of the Act.

27. On the information before me, I am not satisfied disclosure of the business and financial information in the document would expose the business undertakings unreasonably to disadvantage, for the following reasons:

- (a) The information was obtained by the Agency as part of a process by which the government allocated money to what it considers to be meritorious programs. I consider there is nothing inherently sensitive about the information in the document or how the Agency obtained the information.

⁷ [2007] VCAT 1301 at [33].

- (b) A key purpose of access to information under the FOI Act is to ensure grants awarded by the government to business undertakings are subject to public scrutiny.
 - (c) I acknowledge the approach adopted by the Agency in this matter is similar to the approach taken in *Byrne v Swan Hill rural City Council*,⁸ which considered disclosure of documents relating to unsuccessful tenders would unreasonably expose the tenderers to disadvantage. However, I consider the current case can be distinguished from that of *Byrne* as it is not considering section 34(1)(b) to the actual grant documents.
 - (d) Rather, the review document concerns a very brief description of the proposal, which does not contain a level of detail to provide possible competitors with a 'ready made starting point'⁹, or to engage in destructive competition with a business undertaking named in the document.
 - (e) While it is possible the undertakings may be exposed to a certain measure of disadvantage, I am not satisfied the level of exposure would amount to an unreasonable level of disadvantage in the circumstances of this matter.
28. In any event, I consider that there is a strong public interest in the disclosure of information relating to the award of grants that are ultimately funded by taxpayers.
29. Accordingly, I am not satisfied section 34(1)(b) applies to the document.

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

30. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
31. I note the Agency has applied section 35(1)(b) to information acquired from organisations claimed to be business undertakings for the purpose of section 34(1)(b). However, the operation of section 35(1) is subject to the limitations in section 35(2), which provides that this section does not apply to information—
- (a) acquired by an agency or a Minister from a business, commercial or financial undertaking; and
 - (b) that relates to trade secrets or other matters of a business, commercial or financial nature.
32. In this case, given I have found section 34(1)(b) does not apply to the document, I consider it appropriate to examine the Agency's application of section 35(1)(b) to the information.

⁸ (2000) 16 VAR 366.

⁹ *Green v Department of Human Services* [2014] VCAT 1233 at [25].

Was the information obtained in confidence?

33. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹⁰
34. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.¹¹
35. Information in the document discloses material provided to the Agency as part of each organisations grant application to the Agency to fund a proposed community project.
36. In considering the nature of the information, I accept the Agency's broad application that the document discloses information communicated by grant applicants to the Agency voluntarily and in confidence.

Would disclosure of the information be contrary to the public interest?

37. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. The public interest test in section 35(1)(b) is narrow and limited to considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency should the information be disclosed.
38. I note the exemption will not be made out of an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.¹²
39. In relation to the application of section 35(1)(b), the Agency submits:

The [Agency] relies on the candid and frank communication of information from organisations making requests for funding, including the provision of sensitive financial information and details about future planning to support multicultural communities in Victoria. It is reasonably likely that disclosure of this information would deter these sources of information from supplying a similar level of candid and informative advice to the [Agency] in the future. This would impede the [Agency] from carrying out their functions, which would be contrary to the public interest and disadvantage the organisations applying for funding and the communities with which they engage.

40. The Agency's further submissions provide:

Individuals and organisations apply for grants or funding with an expectation that the application process is confidential. While it is understood that final information around successful grant applications will be made publicly available as part of the acquittal of the spending of public money, the grant amount initially applied for is not shared publicly and is provided by applicants with an expectation of confidentiality.

¹⁰ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹¹ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹² *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

In addition, applicants expect that, if unsuccessful, the fact of their unsuccessful application will not be publicly released to the world at large. Knowing that their confidential grant application information could be publicly released would be likely to discourage some applicants from applying, whether due to privacy concerns, impact on public reputation, fear of perceived lack of support by the [Agency], embarrassment or shame, or other considerations, and would be contrary to the intentions of the program in encouraging maximum participation from culturally diverse communities.

Successful grant applicants

41. Regarding successful grant applicants, the Agency applied section 35(1)(b) to the amount applied by these organisations.
42. I accept there are certain sensitivities surrounding business and financial information being provided to the Agency. Nonetheless, given the information in this case has been provided to the Agency for the purpose of receiving public funding, I am not satisfied potential grant applicants would be deterred from continuing to provide relevant information, as required, to support a successful grant application as a result of disclosure in this case. In coming to this conclusion, I note the Agency has released the majority of information regarding these proposals to the Applicant. I also note the Agency's advice that successful grant details regarding successful applicant proposals, including the final funded amount, are published in the Agency's annual report.
43. While I acknowledge from my review of the Agency's annual report that in some cases the final grant amount differs from the amount initially sought, the discrepancies are very minor that I do not consider it would cause such an impact to the successful grant applicants, if disclosed.
44. Accordingly, I am not satisfied section 35(1)(b) applies to the amount applied by the successful grant applicants. This information is to be released.

Unsuccessful grant applicants

45. Regarding unsuccessful grant applicants, the Agency applied section 35(1)(b) to the amount applied as well as the program name, description, organisation name and the Agency's outcome regarding funding eligibility.
46. The Agency's further submissions advise, in accordance with section 35(1A), they consulted with the unsuccessful grant applicants in relation to disclosure of their information. In response, two of the organisations advised the Agency they object to disclosure on the basis that the information was provided in confidence, and they would be deterred from applying for similar grants in the future.
47. I accept the Agency's submissions concerning the sensitivity in disclosing the unsuccessful applicants information, particularly noting in such circumstances unsuccessful applicant's information is not published. I also note the particular views of the unsuccessful applicant's in relation to the disclosure of their information under the FOI Act.
48. Accordingly, I am satisfied that due to the higher sensitivities surrounding the disclosure of information provided by unsuccessful grant applicants to the Agency, release would be contrary to the public interest on the basis that it would reasonably deter future applications,

which would be contrary to the Agency's objective to promote diversity and strengthen community ties with multicultural communities.

49. Accordingly, in relation to information concerning unsuccessful grant applicants in the document I am satisfied the information is exempt under section 35(1)(b).

Conclusion

50. On the information before me, I am not satisfied information in the document is exempt from release under section 34(1)(b).
51. I am however satisfied information in the document is exempt under section 35(1)(b), although I have determined that section 35(1)(b) does not apply to all information exempted by the Agency in the document. Accordingly, further information, being the monetary amount recorded in the 'Amount Applied' column for successful grant applicants, is to be released.
52. As I am satisfied it is practicable for the Agency to provide an edited copy of the document with exempt information deleted, access to the document is granted in part.

Review rights

53. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³
54. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
55. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
56. 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.
57. 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.¹⁶

Third party review rights

58. As I have determined to release information claimed exempt under section 35(1)(b), if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁷
59. Where practicable, third parties will be provided with notice of my decision and information regarding their right to seek review by VCAT.

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and 50(3FA).

¹⁷ Sections 49P(5), 50(3A), 50(3AB) and 52(3).

When this decision takes effect

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