

Notice of Decision and Reasons for Decision

Applicant:	'FE2'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	25 May 2023
Exemptions considered:	Sections 28(1)(d), 32(1), 33(1), 34(1)(b), 34(4)(a)(ii)
Citation:	'FE2' and Department of Jobs, Precincts and Regions (Freedom of Information) [2023] VICmr 46 (25 May 2023)

FREEDOM OF INFORMATION – Cabinet documents – ministerial briefs – recommendations made to a Minister – matters of a business, commercial or financial nature – disclosure would not expose undertaking unreasonably to disadvantage – disclosure would not expose agency unreasonably to disadvantage – legal professional privilege – not all privileged information

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 satisfied Document 1 is exempt from release under section 28(1)(d). I am also satisfied certain information is exempt from release under sections 32(1) and 34(1)(b), however I am not satisfied information to which the Agency refused access under sections 33(1) and 34(4)(a)(ii) is exempt from release.

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, I have determined to grant access to the documents in part.

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

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

25 May 2023

Reasons for Decision

Background to review

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

I seek the following documents:

1. BMIN-2-21-10531 Deed of Variation to the Australian Open Framework Agreement, 1/03/2021
 2. BMIN-2-21-10716 Approval of grants for small scale shovel ready tourism projects, 5/03/2021
 3. BMIN-2-21-10694 Inquiry into the impact of the COVID-19 pandemic on the tourism and events sector, 5/03/2021
 4. [Brief reference number, title and date]
 5. BMIN-2-21-10969 AFL Funding and Commitment Deed - Variation #3, 17/03/2021
 6. BMIN-2-21-11091 Global Ballooning Australia - COVID-19 Recovery Grant Funding request, 22/02/2021
 7. BMIN-2-21-11214 Inquiry into the impact of the COVID-19 pandemic on the tourism and events sector, 25/03/2021
 8. BMIN-2-21-11872 210617 - Meeting with Regional Cities Victoria, 20/04/2021
 9. BMIN-2-21-14026 National Business Event Funding - 25 June 2021 - 8 National Business events, 25/06/2021.
2. The Agency identified nine documents falling within the terms of the Applicant's request and granted access to three documents in full, and five documents in part and refused access to one document in full under sections 28(1)(d), 32(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. The Applicant indicated they did not seek access to names or contact information of non-executive departmental staff or the personal contact information of executive departmental staff. Accordingly, this review relates to the documents to which the Agency granted access in part under sections 28(1)(d), 34(1)(b), 34(4)(a)(ii) and refused access to one document in full under section 32(1).
5. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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.

Review of exemptions

Section 28(1) – Cabinet documents

10. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
11. In *Ryan v Department of Infrastructure*,¹ 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.
12. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.
13. Section 28(3) provides the exemption in section 28(1) does not apply to a document to the extent it contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.²

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

14. Section 28(1)(d) provides a document is an exempt document if its disclosure would involve the disclosure of any deliberation or decision of the Cabinet or a sub-committee of the Cabinet,³ other than a document by which a decision of the Cabinet was officially published.
15. 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.⁴
16. 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.⁵
17. Deliberations means the actual debate that took place rather than the subject matter of a debate. In *Department of Infrastructure v Asher (Asher)* at [8], the Victorian Supreme Court of Appeal held:⁶

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.⁷ The former would say nothing as to Cabinet’s deliberations; the latter might say a great deal.

18. 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 processes⁸ - with a

¹ (2004) VCAT 2346 at [33].

² *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

³ Section 28(7).

⁴ *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23]; *Asher v Department of Infrastructure* (2006) 25 VAR 143; [2006] VCAT 1375 at [27].

⁵ *Asher v Department of Sustainability and Environment*(General) [2010] VCAT 601 (6 May 2010) at [42], citing *Re Birrell and Department of Premier and Cabinet [Nos 1 and 2]* (1986) 1 VAR 230 at [239].

⁶ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [8].

⁷ *Re Smith and Department of Environment and Sustainability* [2006] VCAT 1228.

⁸ *Re Waterford and the Department of the Treasury (No 2)* [1984] AATA 67; (1984) 1 AAR 1.

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.⁹

19. 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.¹⁰
20. 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.¹¹
21. Document 1 is a brief to the Minister for Tourism, Sport and Major Events providing advice to the Minister about changes to the agreement between the department, Tennis Australia (**TA**) and Melbourne Olympic Parks Trust (**MOPT**) for the Australian Open Framework Agreement (**AOFA**) and seeking the Minister's agreement to execute the Deed of Variation to the AOFA.
22. The Agency determined the funding breakdown approved by the Executive Review Committee (**ERC**) is exempt from release under section 28(1)(d).
23. I have considered the Agency's submission and I am limited in the amount of information I can provide about these documents.
24. However, based on the information before me, I am satisfied certain information in Document 1 is exempt from release under section 28(1)(d).
25. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents in **Annexure 1**.

Section 32(1) – Documents affecting legal proceedings

26. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.

Legal Professional Privilege

27. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹²
 - (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation; or
 - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

⁹ *Re Birrell and Department of the Premier and Cabinet* (1986) 1 VAR 230.

¹⁰ *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.

¹¹ *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].

¹² *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

Client Legal Privilege

28. A document will be subject to client legal privilege where it contains a ‘confidential communication’¹³ between:
- (a) the client (or the client’s agent) and the client’s professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice;¹⁴ or
 - (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.¹⁵
29. For convenience, I refer to ‘legal professional privilege’ and ‘client legal privilege’ as ‘legal privilege’ in this decision.
30. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client’s express or implied consent.¹⁶
31. The High Court of Australia has observed the importance of legal privilege:
- The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.¹⁷
32. Legal privilege extends to communications between a government agency and its inhouse lawyers, so long as the Agency’s lawyers are sufficiently independent.¹⁸
33. The dominant purpose for which a confidential communication was made will determine whether the exemption applies.¹⁹
34. Legal privilege will apply to a document prepared by the recipient of legal advice or an employee of the recipient, if it contains a written record of confidential legal advice provided by the recipient’s legal advisor. The dominant purpose test is to be applied to the original communication and extends to notes without having to apply the dominant purpose test to the separate document recording the advice.²⁰ This means, if an agency creates an internal document that records or discloses legal advice received by the Agency, legal privilege also will extend to that document.

¹³ Defined in section 117 of the *Evidence Act 2008* (Vic) to mean communications made in circumstances where the Agency and its professional legal advisers were under an obligation not to disclose their contents.

¹⁴ Section 118 of the *Evidence Act 2008* (Vic).

¹⁵ Section 119 of the *Evidence Act 2008* (Vic).

¹⁶ Sections 122(2) and 122(3) of the *Evidence Act 2008* (Vic) (for client legal privilege); *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

¹⁷ *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 at [19].

¹⁸ *Waterford v The Commonwealth* [1987] HCA 25 at [4] (per Mason and Wilson JJ) and at [5] to [6] (per Brennan J).

¹⁹ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

²⁰ *Standard Chartered Bank of Australia Ltd v Antico* (1995) 36 NSWLR 87 at [91]-[93].

35. Document 4 is a briefing to the Minister for Tourism, Sport and Major Events regarding [redacted]. The Agency advised the exempt information reflects advice provided by the Agency's inhouse Legal team and its external legal advisor.
36. On the information before me, I am satisfied the requisite lawyer-client relationship exists between the minister and the Agency's inhouse lawyers and also its external legal advisor.
37. I am satisfied Document 4 contains a confidential communication between an Agency officer and the Minister which relied on legal advice provided by the Agency's in-house legal team and its external legal advisor.
38. However, I am not satisfied the entirety of the briefing is exempt under section 32(1). While the Agency may have obtained legal advice in relation to the brief, on the information before me, the remainder of the brief does not contain details of what advice was received in relation to the development of the brief. In my view, most of the information in the briefing does not contain or reveal a confidential communication between the client and its professional legal advisers that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation.

Has legal professional privilege been waived?

39. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client's express or implied consent.²¹
40. There is no information before me to indicate legal professional privilege has been waived.
41. Accordingly, I am satisfied that paragraphs 3, 5(a) and 6 of Document 4 are exempt under section 32(1).
42. My decision in relation to section 32(1) is set out in the Schedule of Documents in **Annexure 1**.

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

43. As I am satisfied certain information is to be released in Document 4, I will consider the personal affairs of third parties whose information is in those parts of Document 4 that I consider are not otherwise exempt.
44. 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**);²² and
 - (b) such disclosure would be 'unreasonable'.

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

45. 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.²³
46. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and

²¹ Sections 122(2) and (3) of the *Evidence Act 2008* (Vic).

²² Sections 33(1) and 33(2).

²³ Section 33(9).

unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.²⁴

47. I consider that the parts of Document 4 that I consider not otherwise exempt contain personal affairs information of individuals other than the applicant.

Would disclosure of the personal affairs information be unreasonable?

48. 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.
49. In *Victoria Police v Marke*,²⁵ 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'.²⁶ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.²⁷
50. 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;
 - (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of disclosure of information, if released;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.²⁸

Personal affairs information of agency officers and minister

51. Generally speaking, I consider there is nothing particularly sensitive about disclosing the identity of Victorian public sector employees where their personal affairs information concerns or arises in the context of them performing their ordinary duties, where it may be already known to an applicant or is publicly available. However, in matters of a sensitive or confidential nature, whether disclosure would be unreasonable needs to be carefully considered in all of the circumstances.
52. Document 4 is an official document of the Agency and provides a record of Agency officers carrying out their usual employment duties and responsibilities within a professional context, which in this instance is a briefing to the Minister for Tourism, Sport and Major Events. The personal affairs

²⁴ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

²⁵ [2008] VSCA 218 at [76].

²⁶ *Ibid.*

²⁷ *Ibid* at [79].

²⁸ Section 33(2A).

information does not concern those persons in their private or personal capacity. In my view, the personal affairs information of the Agency officers is not particularly sensitive in the circumstances of the matter.

53. I am satisfied disclosure in such circumstances would not be unreasonable and therefore, the information is not exempt from release under section 33(1).

Personal affairs information of the third party

54. The third party is the subject of the briefing to the minister and their personal affairs information is their name and former position title.
55. In my view, there is a public interest in disclosure of the personal affairs information in transparency and government accountability where the third party held multiple executive positions within government. I consider a large amount of information has been publicly released that discusses the third party's alleged actions whilst in public office which led to the creation of this briefing to the minister.
56. I am satisfied disclosure of the personal affairs information of this third party in the present circumstances would not be unreasonable and therefore, such information is not exempt from release under section 33(1).
57. The Schedule of Documents in **Annexure 1** sets out my decision on section 33(1).

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

58. 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.
59. Document 6 is a brief to the Minister for Tourism, Sport and Major Events regarding the provision of funding to a private entity being Global Ballooning Australia (**GBA**). The brief seeks the Minister's approval and signature for offers of support to be provided to GBA.

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

60. In *Thwaites v Department of Human Services*,²⁹ VCAT observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
61. I am satisfied Document 6 reveals information that was acquired from a third party business undertaking.

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

62. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.³⁰
63. I am satisfied the exempted information relates to matters of a business, commercial or financial nature.

²⁹ (1999) 15 VAR 1.

³⁰ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

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

64. 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.

65. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,³¹ 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.

66. 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.

67. 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.

68. 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.³²

69. The Agency consulted with the business undertaking, which advised the documents are sensitive and "commercial in confidence". I have considered the business undertaking's view the documents contain commercially sensitive and proprietary information.

³¹ [2007] VCAT 1301 at [33].

³² Section 34(3).

70. The Agency submits in support of its application of section 34(1)(b):

In applying section 34(1)(b), the department contends that the information in the documents meets the three conditions of this section of the Act as follows:

1. The document or information was acquired from a business, commercial or financial undertaking

The brief contains information specifically sought from and provided by GBA to assist in the decision-making process for the granting of any financial assistance. GBA and PricewaterhouseCoopers (PwC) worked together to provide the information to the department.

2. The information relates to matters of a business, commercial or financial nature

The information provided to the department by GBA and PwC refers to staffing, wages, the financial position of the business, issues that impact the cash flow of the business, funding options recommended by PwC, business forecasts, outgoing costs and operational needs.

3. Disclosure of the information is likely to expose the undertaking unreasonably to disadvantage

71. The Agency provided a copy of the third-party undertaking's response to consultation regarding the release of its documents which I have considered.

72. I am satisfied disclosure of certain information in Document 6 will be reasonably likely to expose the undertaking unreasonably to disadvantage, as it concerns internal management matters, future business planning and internal risk management issues. As such, I am satisfied it is exempt from release under section 34(1)(b).

73. However, I am not satisfied disclosure of certain other information would be likely to expose the business undertaking unreasonably to disadvantage for the following reasons:

- (a) While I note certain information concerns financial information not generally known to competitors of the business undertaking, this is one factor for consideration only and is not determinative.
- (b) I accept disclosure of certain information may allow competitors to draw unwarranted inferences on the business undertaking's affairs at a particular point in time during the acute phase of the COVID-19 pandemic, given the information provides insight into the undertaking's business and financial affairs at that time.
- (c) A key purpose of access to information under the FOI Act is to ensure dealings between government agencies and business undertakings are better able to be scrutinised. There is a public interest in favour of disclosure of the information sought to provide transparency and accountability around government provision of financial assistance, as well as the expenditure of public funds generally.
- (d) Where commercial entities engage with government, and where public funds are utilised to fund such projects, it is not unreasonable to expect greater transparency than a commercial entity would experience when dealing with other commercial entities and that information provided by a company to a government agency may be released under the FOI Act or other means.³³
- (e) I accept the release of commercial documents within a commercially competitive environment, may cause a certain measure of disadvantage. However, the test in regard to section 34(1)(b) is whether disclosure would be likely to expose a business undertaking *unreasonably* to disadvantage. This provision contemplates some disadvantage may be experienced by an entity that discloses its business and financial affairs to obtain government support during the COVID-19 pandemic. In this case, I consider that much of the information in question relates to a particular point in time. Given that point in time was during a highly unusual period of pandemic response, I do not consider that any insights from disclosure of the information would be reasonably seen as

³³ This was noted by Deputy President Galvin in *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR 427 at [477].

being representative of the business undertaking's general approach or business planning outside of the acute pandemic context. In light of this, I am not persuaded that any disadvantage to which the business undertaking may be exposed from disclosure would be unreasonable.

- (f) The FOI Act requires access be provided to information in the possession of government 'limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs' and that any discretion conferred by the FOI Act be exercised, as far as possible, to facilitate and promote the disclosure of information. In my view, there is a strong public interest in transparency about the way in which the Government financially supported businesses during the most acute phases of the COVID-19 pandemic.
- (g) Therefore, I consider any disadvantage to which the business undertaking would likely be exposed due to disclosure of the document is outweighed by the public interest in favour of government transparency and accountability on the use of public funds during the COVID-19 pandemic.
- (h) I am satisfied the Applicant is not a competitor of the undertaking. Rather, the Applicant is a member of parliament who seeks access to the documents for the public interest of transparency in the use of public funds.

74. Accordingly, I am not satisfied certain information in the document is exempt under section 34(1)(b).

75. My decision on section 34(1)(b) is further set out in the Schedule of Documents in **Annexure 1**.

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

76. 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'. A document is exempt under section 34(4)(a)(ii) if:

- (a) the agency is engaged in trade or commerce;
- (b) the document contains information of a business, commercial or financial nature; and
- (c) disclosure of which would be likely to expose the agency unreasonably to disadvantage.

77. Document 5 is a brief to the Minister for Tourism, Sport and Major Events seeking both an approval and signature from the Minister to execute a Deed of Variation to the Funding and Commitment Deed between the State and the Australian Football League (**AFL**).

78. Document 9 is a brief to the Minister for Tourism, Sport and Major Events requesting approval for funding to the Melbourne Convention Bureau (**MCB**) to attract events, and for the Minister to note the risk management strategies put in place.

Is the Agency engaged in trade and commerce?

79. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.³⁴

80. VCAT has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'.³⁵ VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.³⁶ An agency may be regarded as being engaged in trade or

³⁴ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

³⁵ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

³⁶ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency's other functions.³⁷

81. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.³⁸
82. While the phrase 'trade and commerce' may be interpreted broadly,³⁹ it has been held trade and commerce must 'of their nature, bear a trading or commercial character'.⁴⁰
83. 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).⁴¹
84. With respect to Document 5, the Agency's decision provides:

... the department considers that it is engaged in trade or commerce in that the funding and commitments provided by the government are in consideration of the commercial nature of the AFL and Marvel Stadium to both maintain and attract events and business to the State.
85. With respect to Document 9, the Agency submits:

The MCB is part of Visit Victoria and is dedicated to attracting national and global business events to the State (both Melbourne and Regional Victoria). MCB's aim is to assist in the attraction of business to the Convention and Exhibition spaces that Melbourne (and more broadly the State) has to offer. This includes providing incentives and assistance to prospective event holders in the hopes of attracting them away from holding their events in other states. The incentives on offer are in the form of grants provided by the Minister through a regular briefing process. In this way, the department is in direct competition with other states and countries for such business and is considered to be involved in trade or commerce.
86. I take the view described in *Pallas v Roads Corporation*,⁴² that a government agency engaged in meeting its public functions is not engaged in trade or commerce, for example in relation to VicRoads:

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

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is. A consumer who purchases a consumer item from a department store is not, for that reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.⁴³
87. 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.
88. With respect to Document 5, I accept the Agency has commercial functions and is in competition with other states in attracting sport and entertainment content. Accordingly, given the functions of the Agency, I am satisfied the Agency is engaged in trade or commerce.

³⁷ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

³⁸ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

³⁹ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

⁴⁰ *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

⁴¹ *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].

⁴² *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967.

⁴³ *Ibid* at [57]-[58].

89. With respect to Document 9, I accept the Agency has commercial functions and is in competition with other states in attracting business events. Accordingly, given the functions of the Agency, I am satisfied the Agency is engaged in trade or commerce.

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

90. 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.⁴⁴

91. With respect to Document 5, the Agency submits:

... the department considers that it is engaged in trade or commerce in that the funding and commitments provided by the government are in consideration of the commercial nature of the AFL and Marvel Stadium to both maintain and attract events and business to the State.

92. With respect to Document 9, the Agency's decision provides:

In assessing this document, the department has considered that the funding amounts (individual and overall in conjunction with the number of events funded) and the acquisition strategies are consistent with being commercial or financial information of the department

93. On the information before me, I am satisfied Documents 5 and 9 contain information of a business, commercial and financial nature.

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

94. 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.

95. 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 before information will be exempt under this provision.

96. Specifically in relation to Document 5, the Agency submits:

The release of the details in the deed agreement and any funding amounts would disadvantage the state in that competitors in interstate jurisdictions would be able to seek out similar deals and funding to attract such business or events to their state.

...

The state is in competition with other states to maintain the presence of the central business of the AFL in Victoria, through funding assistance provided to the AFL and in particular, the AFLW. This includes the expansion of matches to regional areas and a partnership in developing a world class stadium development to maintain matches within the state.

With interstate venues (notably OPTUS Stadium in Perth) being funded by their State Government for development as a premiere world class venue, the State maintains that such funding arrangements between the department and the AFL/Marvel Stadium, go towards the development of the venue as an attractive option for not only sport, but other events, to choose Marvel Stadium as a destination.

...

Other States and Territories will have visibility of our negotiating strategy and will use that to attract events away from Victoria. This may not only impact future negotiations with the AFL on their content but also other sport and major event content, both of national and international significance.

⁴⁴ *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

... The department wishes to reiterate that the release of any information referencing dollar amounts and the obligations of the AFL under the agreement would be considered a risk to the department under section 34(4)(a)(ii). That risk is considered unreasonable for the business of the department as the disclosure of the commercial details of the agreement with the AFL, and the AFL's obligations under the agreement is likely to result in a loss of competitive advantage for the State in acquiring sport and entertainment content.

Other States and Territories will have visibility of our negotiating strategy and will use that to attract events away from Victoria. This may not only impact future negotiations with the AFL on their content but also other sport and major event content, both of national and international significance.

97. In relation to Document 9, the Agency submits:
1. Event owners would become aware of funding amounts provided by MCB to other events and can use that knowledge during negotiations with MCB about bringing their event to Melbourne, ultimately resulting in higher amounts of government funding being paid to events than would be necessary if this information was not public. This is not in the interests of the State.
 2. Other convention bureaux across Australia also seek to attract business events to be held in their state, and if they become aware of the funding amounts that MCB provides they will be able to tailor their funding offers to out-bid Melbourne, ultimately resulting in a higher number of events not choosing Melbourne as their host city than would be likely if this information was not public.
 3. Clients enter negotiations based on trust. MCB has operated for over 50 years and has an established global reputation. Clients enter negotiations with MCB on the understanding that commercially sensitive information is kept that way. Should clients believe their commercial information is at risk of being made public, they will choose to negotiate with other destinations to relocate their events.
98. With respect to Document 5, I do not consider the agency has demonstrated disclosure of the document would expose it unreasonably to disadvantage. Document 5 represents a variation to an agreement between the Agency and the business undertaking where the business undertaking is to invest into Victorian Australian Rules football and in return, the Agency provides funding to the business undertaking's event stadium. I consider that the variation outlined in Document 5 relates to a negotiation at a particular point in time and is not likely to expose the Agency to some disadvantage in future negotiations between the Agency and the undertaking or other similar sports-related undertakings.
99. With respect to Document 9, the document represents the Agency's concluded negotiations with the undertaking and does not reveal the process of negotiations between the State and the business undertaking. Rather, it would reveal funding amounts for events from 2021. I am not persuaded the release of information relating to past events would likely expose the Agency unreasonably to disadvantage.
100. In this case, I am not satisfied that disclosure would impact the ability of the State government to attract future business events, or from continuing to enter into future negotiations in good faith, merely because one aspect of the terms on which it did business on this particular occasion would become publicly known.
101. Accordingly, I am not satisfied information in Documents 5 and 9 is exempt under section 34(4)(a)(ii).
102. My decision on section 34(4)(a)(ii) is further set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

103. 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.

104. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴⁵ 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 25.⁴⁶
105. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as the Applicant agreed to remove the names and contact information of non-executive Agency staff and the personal contact information of executive Agency staff from the scope of the request.
106. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

107. On the information before me, while I am satisfied certain information is exempt from release under sections 28(1)(d), 32(1) and 34(1)(b), I am not satisfied information to which the Agency refused access under sections 33(1) and 34(4)(a)(ii) is exempt from release.
108. 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.

Review rights

109. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.⁴⁷
110. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴⁸
111. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁴⁹
112. 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.
113. 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.⁵⁰

Third party review rights

114. As I have determined to release documents that contain information of a business, financial, or commercial nature relating to a business undertaking, if practicable, I am required to notify the relevant business undertaking of its right to seek review by VCAT of my decision within 60 days from the date they are given notice.⁵¹ I am satisfied it is practicable to notify the business undertaking of its review rights.

⁴⁵ *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].

⁴⁶ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

⁴⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁴⁸ Section 52(5).

⁴⁹ Section 52(9).

⁵⁰ Sections 50(3F) and (3FA).

⁵¹ Sections 49P(5), 50(3A) and 52(3).

115. I have also decided to release a document that contains the personal affairs information of certain persons named in the documents, being the names, position titles and signature. I am satisfied it is not practicable to notify certain third parties of my decision having regard to the type of information to be released, noting similar information has been released to the Applicant elsewhere in the documents, given the senior and public facing roles the individuals hold and the personal affairs information where it merely demonstrates these individuals performing their ordinary professional duties as public sector officials.

When this decision takes effect

116. My decision does not take effect until the third parties' 60 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.	17/03/2021	BMIN-2-21-10531: Deed of Variation to the Australian Open Framework Agreement (pages 1 – 4)	4	Released in part Section 28(1)(d)	Release in part Section 28(1)(d), 25 The document is to be released except for the information the Agency determined is exempt from release under section 28(1)(d) and the irrelevant information.	Section 28(1)(d): I am satisfied information in the document is exempt under section 28(1)(d) for the reasons provided in the Notice of Decision, above. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25.
2.	N/A	BMIN-2-21-10716: Approval of grants for small scale shovel ready tourism projects	5	Released in full	Not subject to review	
3.	N/A	BMIN-2-21-10694: Inquiry into the impact of the COVID-19 pandemic on the tourism and events sector	3	Released in full	Not subject to review	
4.	[date]	BMIN-[reference]: [name] (pages 5 – 8)	4	Refused in full Section 32	Release in part Sections 32(1), 33(1), 25	Section 32(1): I am satisfied certain information in the document is exempt from release under section 32(1) for

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>The document is to be released, except for the following information which is to remain deleted in accordance with section 25:</p> <p>(a) paragraphs 3, 5(a) and 6, which are exempt from release under section 32(1); and</p> <p>(b) the information the Applicant out-scoped as irrelevant.</p> <p>A marked-up copy of the document has been provided to the Agency.</p>	<p>the reasons provided in the Notice of Decision, above.</p> <p>Section 33(1): I am satisfied certain information is exempt under section 33(1) for the reasons provided in the decision above.</p> <p>Section 25: I am satisfied the name of the junior Agency officer on pages 1, 2 and 4 and phone numbers of the Executive Officers on page 1 fall outside of the scope of the Applicant's request.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.</p>
5.	28/05/2021	<p>BMIN-2-21-10969: AFL Funding and Commitment Deed - Variation #3 (pages 9 – 14)</p>	6	<p>Released in part Sections 34(4)(a)(ii), 25</p>	<p>Release in part Section 25</p> <p>The document is to be released except for the information the Applicant out-scoped as irrelevant and</p>	<p>Section 34(4)(a)(ii): I am not satisfied information in the document is exempt under section 34(4)(a)(ii) for the reasons provided in the Notice of Decision above.</p> <p>Section 25: See comments for Document 1.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					that is to remain deleted in accordance with section 25. A marked-up copy of the document has been provided to the Agency.	
6.	14/05/2021	BMIN-2-21-11091: Global Ballooning Australia - COVID-19 Recovery Grant Funding request (pages 15 – 22)	8	Released in part Section 34(1)(b)	<p>Release in part Sections 34(1)(b), 25</p> <p>The document is to be released, except for the following information which is to remain deleted in accordance with section 25:</p> <p>(a) paragraph 3(a) on page 3 and paragraph 4(c) on page 5 of the document, which are exempt from release under section 34(1)(b);</p> <p>(b) the third sentence in paragraph 4(f) on page 5 of the document, which is exempt from release under section 34(1)(b);</p>	<p>Section 34(1)(b): I am satisfied certain information in this document is exempt from release under section 34(1)(b) for the reasons provided in the Notice of Decision, above.</p> <p>Section 25: See comments for Document 1.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>(c) paragraph 5(a) on page 5 of the document, which is exempt from release under section 34(1)(b); and</p> <p>(d) irrelevant personal affairs information that was redacted in the Agency's decision.</p> <p>A marked-up copy of the document has been provided to the Agency.</p>	
7.	N/A	BMIN-2-21-11214: Inquiry into the impact of the COVID-19 pandemic on the tourism and events sector	4	Released in full	Not subject to review	
8.	N/A	BMIN-2-21-11872: 210617 - Meeting with Regional Cities Victoria	7	Released in full	Not subject to review	
9.	17/08/2021	BMIN-2-21-14026: National Business Event Funding - 25 June 2021 -	4	Released in part Section 34(4)(a)(ii)	Release in part Section 25	Section 34(4)(a)(ii): See comments for Document 5.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		8 National Business events (pages 24 – 26)			<p>The document is to be released except for the information the Applicant out-scoped as irrelevant and that is to remain deleted in accordance with section 25.</p> <p>A marked-up copy of the document has been provided to the Agency.</p>	Section 25: See comments for Document 1.