

Notice of Decision and Reasons for Decision

Applicant:	'FP2'
Agency:	Department of Education
Decision date:	13 February 2024
Sections considered:	Sections 30(1), 33(1), 34(1)(b), 34(4)(a)(ii), 35(1)(b)
Citation:	'FP2' and Department of Education (Freedom of Information) [2024] VICmr 24 (13 February 2024)

FREEDOM OF INFORMATION – Early Childhood Education – Kinder Kits [year] – Supplier Procurement – internal working documents – business, commercial or financial affairs – expose undertaking unreasonably to disadvantage – personal affairs information – information obtained in confidence

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.

While I am satisfied certain information is exempt from release under sections 30(1), 33(1) and 34(1)(b), I am not satisfied information to which the Agency refused access under sections 34(4)(a)(ii) and 35(1)(b) is exempt from release.

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

This decision takes effect when the Agency's 14 day review period expires. After this time, the Agency will provide the marked-up documents in accordance with my decision.

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

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

My reasons for decision follow.

Please refer to the end of this decision for information about further review rights through the Victorian Civil and Administrative Tribunal.

Shantelle Ryan
Acting Public Access Deputy Commissioner

13 February 2024

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant amended the initial request and sought access to:

...materials relevant to the assessment and consideration of a specific application relating to Procurement [number] Kinder Kits [year]. ...Essentially, I would like to see the qualifications of the assessors appointed to assess the tendered products and copies of all of the assessment documents.
2. The Agency identified four documents falling within the terms of the Applicant's request and granted access to the documents in part under sections 30(1), 33(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. I have examined a copy of the documents subject to review.
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 course of the review, the Agency advised that it sought to apply section 35(1)(b) to the information in Documents 1 and 2, in addition to the other exemptions outlined in its decision. The Applicant was advised of the additional reliance on section 35(1)(b) and provided an opportunity to respond.
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 30(1) – Internal working documents

10. 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.

11. The exemption does not apply to purely factual material in a document.¹

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?

- 12. 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.
- 13. 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.²
- 14. I am satisfied the documents contain opinions regarding the suitability of certain products, and advice and recommendations to the Deputy Secretary of Early Childhood Education in relation to the Kinder Kits for the Three-Year-Old Kindergarten program of [year].

Were the documents 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?

- 15. 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.³
- 16. In *Re Waterford and Department of Treasury (No.2)*,⁴ 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.

- 17. I am satisfied the documents were made for the purposes of the deliberative processes of the Agency in considering and consequently making recommendations regarding the suitability of products to be included in the Kinder Kits for that year.

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

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

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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

18. 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. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁵
19. 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:⁶
 - (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 of the decision and 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 similar 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;
 - (f) 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.
20. I accept the documents contain information that relates to a competitive callout to third parties that resulted in contracts between parties, which would have been commercially sensitive at the time the documents were created. However, I also consider such businesses should expect that because government is accountable to the public for its decision making and the expenditure of public funds, greater transparency and public scrutiny will necessarily require disclosure of information about those businesses. Even if disclosure may affect the relationship between the government and those businesses, I consider the public interest still weighs in favour of disclosure.
21. I also note the publicly available information regarding the products included in the Kinder Kits in an agency media release.⁷

⁵ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

⁷ Premier of Victoria, 'Kinder Kits to Help Kids Learn Through Play', 21 December 2022, accessed 8 January 2024 <<https://www.premier.vic.gov.au/kinder-kits-help-kids-learn-through-play>> .

22. Agency officers performing their professional duties in providing advice to a Deputy Secretary are responsible for ensuring their advice is accurate, complete and properly considered on matters central to the Agency's governmental functions. Agency officers, as public sector employees, are required to discharge their duty to provide impartial and fulsome advice to their agency and government. These requirements are a core aspect of their public sector roles and responsibilities and accord with their obligations under the *Public Administration Act 2004* (Vic).
23. I am not persuaded Agency officers would be deterred from discharging their professional and ethical obligations should information in the documents be disclosed under the FOI Act. Accordingly, I am satisfied the disclosure of the following information would not be contrary to public interest:
- a) the details of the successful suppliers in Document 1;
 - b) deliberative comments made by Agency officers in relation to the successful products and the Applicant's product in Document 1;
 - c) the evaluative matrix criteria in Document 2; and
 - d) the outcome of compliance testing in Document 2.
24. While I acknowledge the Applicant's personal interest in obtaining access to the deliberative information in Documents 1 and 2, I have identified two distinct columns where the various public interests can be more clearly balanced, being the products that were successful in the inclusion in the Kits and those that were not successful. I consider the information that concerns third party business outcomes would be reasonably expected to impair the Agency's ability to provide frank advice when determining suitability of products.
25. I am therefore satisfied it would be contrary to the public interest to release deliberative information relating to unsuccessful products in Documents 1 and 2.

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

26. 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**),⁸ and
 - (b) such disclosure would be 'unreasonable'.

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

27. 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.⁹

⁸ Sections 33(1) and 33(2).

⁹ Section 33(9).

28. 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 unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.¹⁰
29. The documents contain the personal affairs information of persons other than the Applicant, including names and position titles.

Would disclosure of the personal affairs information be unreasonable?

30. 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.
31. In *Victoria Police v Marke*,¹¹ 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'.¹² 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'.¹³
32. 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;
 - (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;
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person;¹⁴
33. Generally speaking, I consider there is nothing particularly sensitive about disclosing the identity of Victorian public sector employees where their personal affairs information concerns

¹⁰ *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].

¹¹ [2008] VSCA 218 at [76].

¹² *Ibid.*

¹³ *Ibid* at [79].

¹⁴ Section 33(2A).

or arises in the context of them performing their ordinary professional duties, and is already known to an applicant or is publicly available.

34. The documents subject to review are official documents of the Agency and provide a record of Agency officers carrying out their usual employment duties and responsibilities within a professional context, which in this instance is assessments made as part of an evaluation panel. The personal affairs information does not concern those persons in their private or personal capacity. In my view, the names and position titles of the Agency officers who are a part of the evaluation team, as well as the position titles of the non-scoring advisors are not particularly sensitive in the circumstances of the matter. In addition, there is no information before me to suggest that the Applicant intends to disseminate the personal affairs information.
35. While I do not have information before me concerning the views of the relevant third parties, I recognise that they may object to disclosure of their personal affairs information. However, having carefully considered the circumstances of this matter, I am not satisfied it would be unreasonable to disclose certain personal affairs information of the Evaluation Team, Advisors and the panel's chair in Documents 3 and 4. This information is therefore not exempt under section 33(1).
36. I have however considered the names of the non-scoring members of the panel and the advisors to the panel, and I consider it to be unreasonable to release to this information, given their peripheral engagement with the Agency. This information is therefore exempt under section 33(1).

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

37. 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?

38. In *Thwaites v Department of Human Services*,¹⁵ 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.

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

39. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.¹⁶

¹⁵ (1999) 15 VAR 1.

¹⁶ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

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

40. 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.
41. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,¹⁷ 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.
42. I consider the phrase 'expose the undertaking unreasonably to disadvantage' in 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.
43. Promoting good governance, transparency and accountability in government decision making and the oversight of the allocation of public funds is in the public interest is better served by transparency than secrecy.
44. Private companies, which tender and enter into government contracts should reasonably expect a great degree of transparency and accountability given the use of public funds to pay for an agency's procurement of external goods and services.
45. 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

¹⁷ [2007] VCAT 1301 at [33].

undertaking and seek its views on disclosure.¹⁸ The Agency deemed it not to be practicable to consult with relevant undertakings given the number of businesses contained in the documents.

46. I recognise the business undertakings are in competition with each other and that information relating to each business undertaking is unlikely to be available to their competitors. However, I have placed weight on the nature of the information and the availability of information in the public domain regarding the successful businesses.¹⁹
47. As noted above in my consideration of section 30(1), I consider the information relating to the businesses that were successful in bids to the Agency would not be likely to expose those business undertakings unreasonably to disadvantage.
48. I consider certain information in the document that concerns the considerations of offers of the undertakings that were unsuccessful could be used by its competitors to gain a commercial advantage in future callouts for products. Therefore, this information is likely to expose these business undertakings unreasonably to disadvantage, noting the Applicant's position as a competitor, and this information is therefore exempt under section 34(1)(b).
49. As such, I consider only a small amount of information in the document is exempt from release under section 34(1)(b) on grounds it would be likely to expose a business undertaking unreasonably to disadvantage.

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

50. 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.

Is the Agency engaged in trade and commerce?

51. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.²⁰
52. The VCAT has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'.²¹ VCAT has adopted the view of the

¹⁸ Section 34(3).

¹⁹ Premier of Victoria, 'Kinder Kits to Help Kids Learn Through Play', 21 December 2022, accessed 8 January 2024 <<https://www.premier.vic.gov.au/kinder-kits-help-kids-learn-through-play>>.

²⁰ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

²¹ *Gibson v La Trobe Cirt Council (General)* [2008] VCAT 1340 at [33], citing *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134 per Deane J, with whom Brennan J agreed.

Federal Court of Australia that these terms are 'of the widest import'.²² 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.²³

53. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.²⁴
54. While the phrase 'trade and commerce' may be interpreted broadly,²⁵ it has been held trade and commerce must 'of their nature, bear a trading or commercial character'.²⁶
55. 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).²⁷
56. In my view, for this exemption to have meaning within the context of the FOI Act, 'trade or commerce' must be distinct from ordinary governmental activities conducted by all government agencies and arising from legislative functions and responsibilities.
57. An agency cannot be said to be engaged in trade or commerce merely because it engages in transactions that have some commercial nature such as purchasing goods or services. Most, if not all, government agencies would be involved in the procurement of services from third party contracted service providers.
58. Where the Government enters a contract on behalf of the State of Victoria with a private entity in exchange for the provision of goods and services for the benefit of the public, it does not do so as an activity in the capacity of engaging in trade or commerce, but rather to fulfil its role to deliver governmental services and functions.
59. In the circumstances of this matter, I consider the Agency is not negotiating with businesses for trade or commerce. Rather, the Agency has a need to procure goods for schools and is evaluating which businesses are appropriate to provide that service.
60. As such, this limb of the exemption is not met. For completeness, I will briefly consider the remaining limbs of the exemption.

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

61. 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.²⁸
62. I am satisfied the document contains information of a business, commercial or financial nature.

²² Ibid at [34].

²³ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [46].

²⁴ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

²⁵ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

²⁶ *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35], citing *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 604.

²⁷ *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].

²⁸ *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

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

63. 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.
64. As discussed above, I accept the documents contain information that would have been sensitive at the time at which it was created. However, I consider that much of the information in the documents is no longer relevant to the present circumstances.
65. In my view, I am not satisfied that detrimental outcomes of disclosure are reasonably likely to occur if the information is disclosed.
66. As such, I consider disclosure would not be reasonably likely to expose the Agency unreasonably to disadvantage.
67. Accordingly, as the first and third limbs of the exemption are not met, the documents are not exempt from release under section 34(4)(a)(ii).

Section 35(1)(b) – Information obtained in confidence

68. 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.
69. Section 35(2) 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.
70. Because the information was acquired from a business, commercial or financial undertaking, I cannot be satisfied information acquired by the third party businesses as part of the procurement process is exempt from release under section 35(1)(b).

Was the information obtained in confidence?

71. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.²⁹

²⁹ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

72. 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.³⁰
73. The Agency advised the information was provided as a result of an Invitation to Supply (ITS) in line with the Victorian Government Purchasing Board (VGPB) policies.
74. In line with the VGPB policies, responses to the ITS will be treated as confidential with the intention all potential suppliers are treated fairly and that standards of probity, confidentiality and security are applied.³¹
75. I note that while I have considered the above, I also draw attention to the ITS document provided by the Agency, contains the following:

Point 7.1

...responses will be treated as confidential by the Buyer. The State will not disclose Response contents and information except:
as required by law (including, for the avoidance of doubt, as required under the *Freedom of Information Act 1982* (Vic)).

76. Having considered the above, I consider the stakeholders may have had an expectation that the information they provided to the Agency would be treated as confidential, such that their information would only be communicated within the Agency, subject to release as required under the FOI Act.

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

77. 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. This involves 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 in the future should the information be disclosed.
78. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. 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.³²
79. With respect to information provided by the businesses, I am not satisfied that disclosure in this instance would inhibit the Agency from obtaining information of this nature in future for the following reasons:
- (a) the information exempted by the Agency is the business and product names, descriptions and summaries submitted to the Agency for the consideration of being

³⁰ *XYZ v Victoria Police* [2010] VCAT 255 at [265], referring to *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

³¹ VGPB, 'Market approach – goods and services policy', 5 July 2023, accessed 14 December 2023 <<https://www.buyingfor.vic.gov.au/market-approach-goods-and-services-policy>> .

³² *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

included in the Kinder Kits of the stakeholders with respect to the proposed products;
and

- (b) there is nothing controversial about the submission of products by stakeholders set out in the document, considering their purpose and objectives in being included in the kits and receiving public funding.

80. Given the information was provided to the Agency for the purpose of receiving public funding, I am not satisfied, on the information before me, that applicants would be deterred from providing similar information to the Agency as part of future applications and stakeholders will continue to supply the government in response to callouts for inclusion of products in future kits irrespective of disclosure in this instance.
81. Accordingly, I am not satisfied the information in the documents is exempt from release under section 35(1)(b).
82. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

83. 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.
84. Section 25 allows for information to be deleted from a document where it ‘would reasonably be regarded as irrelevant to the request’.³³
85. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’³⁴ 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 25.³⁵
86. I have considered the information the Agency deleted from the documents as irrelevant.
87. 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

88. On the information before me, I am not satisfied the information in the documents is exempt from release under sections 34(4)(a)(ii) and 35(1)(b).

³³ Section 25(a).

³⁴ *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].

³⁵ *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].

89. I am however satisfied that certain information in the documents is exempt from release under sections 30(1), 33(1) and 34(1)(b).
90. 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.
91. A marked-up copy of the documents indicating exempt and irrelevant information in accordance with my decision has been provided to the Agency.

Timeframe to seek a review of my decision

92. 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.³⁶
93. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.³⁷
94. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.³⁸
95. 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.
96. 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.³⁹

Third party review rights

97. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, information of a business, financial, commercial nature relating to a business undertaking and documents 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.⁴⁰
98. In the circumstances, I have decided notifying the relevant third parties of their review rights is not practicable as I am of the view the notifying the relevant third parties would be an unnecessary intrusion for the following reasons:
 - (a) the nature of the information;
 - (b) the context in which the information was provided, being predominantly communicated for the purpose of consideration for a Kinder Kit that has since been completed;

³⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

³⁷ Section 52(5).

³⁸ Section 52(9).

³⁹ Sections 50(3F) and 50(3FA).

⁴⁰ Sections 49P(5), 50(3), 50(3A), 50(3AB) and 52(3).

- (c) the number of third party businesses to be contacted; and
- (d) the fact that the matter is now public knowledge and is therefore not sensitive.

99. I have however determined to notify a number of third parties of their right to review for the following reasons:

- (a) The nature of the information released, being their full name; and
- (b) The nature of their involvement with the project.

When this decision takes effect

100. 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.	Undated	Product Details Table	36	<p>Released in part</p> <p>Sections 30(1), 34(1)(b), 34(4)(a)(ii), 35(1)(b)</p>	<p>Release in part</p> <p>Sections 30(1), 34(1)(b), 25</p> <p>The document is to be released in accordance with the marked-up copy provided to the Agency.</p>	<p>Sections 30(1): I am satisfied the panel comments in this document are matter in the nature of opinion, advice and recommendation of Agency officers recorded during a deliberative process of the Agency. I am satisfied the comments would be contrary to the public interest to release for the reasons outlined in my Notice of Decision above.</p> <p>Section 34(1)(b): I am not satisfied the information in the document is exempt under section 34(1)(b) for the reasons provided above.</p> <p>Section 34(4)(a)(ii): I am not satisfied information in this document is exempt from release under section 34(4)(a)(ii) for the reasons provided above.</p> <p>Section 35(1)(b): I am not satisfied the information in this document is exempt from release under section 35(1)(b) for the reasons provided above.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and</p>

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						irrelevant information deleted in accordance with section 25.
2.	Undated	Evaluation Matrix	3	<p>Released in part</p> <p>Sections 30(1), 33(1), 34(1)(b), 34(4)(a)(ii), 35(1)(b)</p>	<p>Release in part</p> <p>Sections 30(1), 34(1)(b), 25</p> <p>The document is to be released in accordance with the marked-up copy provided to the Agency.</p>	<p>Sections 30(1): I am satisfied the panel comments in this document are matter in the nature of opinion, advice and recommendation of Agency officers recorded during a deliberative process of the Agency. I am satisfied the comments would be contrary to the public interest to release for the reasons outlined in my Notice of Decision above. I am however not satisfied the evaluation parameters that were used to evaluate all the invitees would be contrary to public interest to release and are therefore not exempt under section 30(1).</p> <p>Section 33(1): I am satisfied the document contains the personal affairs information of persons other than the Applicant. I am not satisfied it would be unreasonable to disclose the personal affairs information, being the names and positions of the Evaluation Team, in this document for the reasons outlined 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(1)(b): I am satisfied certain information in this document is exempt from release under section 34(1)(b) for the reasons provided above.</p> <p>Section 34(4)(a)(ii): See comments for Document 1.</p> <p>Section 35(1)(b): See comments for Document 1.</p>
3.	Undated	Recommended Supplier Decision Document	17	<p>Released in part</p> <p>Section 33(1), 25</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released in accordance with the marked-up copy provided to the Agency.</p>	<p>Section 33(1): I am satisfied the document contains the personal affairs information of persons other than the Applicant. I am not satisfied it would be unreasonable to disclose the personal affairs information, being the names and positions of the Evaluation Team and the positions of the non-scoring advisors, in this document for the reasons outlined in the Notice of Decision, above. I am however satisfied the names of the non-scoring advisors and the advisory panel would be unreasonable to release and are to remain exempt.</p> <p>Section 25: I am satisfied the remaining information in the document is not relevant to the Applicant's request.</p>

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	Undated	Expert Advisory Panel – Terms of Reference	3	Released in part Section 33(1)	Release in full Sections 33(1) The document is to be released in full.	Section 33(1): See comments for Document 2.