

## Notice of Decision and Reasons for Decision

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Applicant:	'FQ9'
Agency:	Ambulance Victoria
Decision date:	3 June 2024
Exemptions considered:	Sections 30(1), 33(1), 34(1)(b)
Citation:	'FQ9' and Ambulance Victoria (Freedom of Information) [2024] VICmr 40 (3 June 2024)

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FREEDOM OF INFORMATION – procurement – business case – tender evaluation – documents from [year] – third party business undertakings – not satisfied disclosure would expose business undertaking unreasonably to disadvantage – additional documents located during review

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

### Notice of Decision

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

My decision on the Applicant's request differs from the Agency's decision. I am not satisfied information to which the Agency refused access under sections 30(1), 33(1) and 34(1)(b) in **Documents 1 and 2** is exempt from release. As such, these documents are to be released to the Applicant with irrelevant personal affairs information deleted in accordance with section 25.

During my review, additional documents were located and provided to OVIC by the Agency. I consider nine of these documents (**Documents 3 to 11**) to be relevant to the terms of the Applicant's request. The Agency did not claim any information in these additional documents as exempt. These documents are also to be released to the Applicant with any irrelevant personal affairs information deleted in accordance with section 25.

My reasons for decision follow. The Schedule of Documents at **Annexure 1** details my decision for each document.

For information about further review rights through the Victorian Civil and Administrative Tribunal, please refer to the end of this decision.

Penny Eastman  
Acting Public Access Deputy Commissioner

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  1. Any report proposal or plan produced by Ambulance Victoria consequent tender RFT [number] for the provision of an Operations improvement Plan which will provide advice on how emergency response time targets can be achieved: [website address]
  2. Any business case, plan or report created by or for Ambulance Victorias in relation to the revised Ambulance dispatch project. It is likely that any such document would have been created around [year] or [year].
  3. Any report produced by [named business undertaking] for Ambulance Victorias between [year] and [year].
2. The Agency identified two documents falling within the terms of the Applicant's request, being a tender evaluation report (**Document 1**), and a business case (**Document 2**), both relating to the development of an Operations Improvement Plan for the Agency. The Agency refused access to both documents in full under sections 30(1), 33(1) and 34(1)(b). 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 confirmed in their application for a review of the Agency's decision that they do not require personal affairs information. Accordingly, this information is irrelevant to this review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. In one of its submissions, the Agency provided OVIC with 11 additional documents located in searches following its decision.
7. I have examined a copy of all documents submitted as part of the review.

### Initial view

8. Where possible, OVIC seeks to informally resolve matters consistent with the requirement of performing my functions under the FOI Act with as little formality or technicality as is appropriate in the circumstances.
9. During the review, the Agency was provided with an initial view by OVIC staff advising:
  - the Applicant has confirmed they do not require personal affairs information and so any such information originally exempted under section 33(1) in Documents 1 and 2 was now irrelevant information under section 25;

- a formal decision by an OVIC Commissioner would be unlikely to uphold the exemptions relied upon by the Agency under sections 30(1) and 34(1)(b) to refuse access to these documents;
  - that nine of the eleven additional documents provided to OVIC as part of the Agency's submission would likely be considered relevant to the terms of the Applicant's FOI request; and
  - further details of the Agency's search for documents were required, particularly in relation to points 2 and 3 of the FOI request.
10. In the Agency's response to OVIC's initial review, it confirmed:
- the Agency has no issue if a determination is made by the relevant Commissioner that sections 30(1), 33(1) and 34(1)(b) do not apply to Documents 1 and 2;
  - the Agency has no issue if the relevant Commissioner considers additional documents to be within the scope of the FOI request; and
  - a request was sent to [Agency officers] asking them to conduct a search for documents within the scope of the FOI request. Only one response was received, which provided the additional eleven documents relating to the tender referred to in point 1 of the FOI request.
11. I am satisfied that nine of the additional documents located following the Agency's enquiries during the review are relevant to the terms of the Applicant's request. These documents, details of which are included at **Documents 3 to 11** in the Schedule of Documents at Annexure 1, are broadly described as documents relating to the tendering process for the development of an Operations Improvement Plan for the Agency.
12. The Agency has confirmed it does not intend to apply any exemptions to these nine documents and it is content for the documents to be released to the Applicant. As such, with the exemption of identifying personal affairs information which the Applicant does not seek, I have not further considered these documents in my review of exemptions below.
13. 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.
14. 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*

15. 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.
16. The exemption does not apply to purely factual material in a document.<sup>1</sup>
17. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of the agency, a member of the agency’s staff, and any person employed by or for the agency, regardless of whether they are subject to the *Public Administration Act 2004* (Vic) apply or not.
18. I must also be satisfied releasing this information is not contrary to the public interest. This requires a ‘process of the weighing against each other conflicting merits and demerits’.<sup>2</sup>

*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?*

19. 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.
20. 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.<sup>3</sup>
21. As referenced above, the Agency applied section 30(1) to Documents 1 and 2.
22. The business case in Document 2 sets out the purpose and background for developing an Operations Improvement Plan and provides details of the tender evaluation process and recommended outcome.
23. The tender evaluation report in Document 1 provides details of the tender process, the Agency’s evaluation of each tenderer, and the recommended outcome.

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<sup>1</sup> Section 30(3).

<sup>2</sup> *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].

<sup>3</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

24. I am satisfied that both documents contain the opinions, advice and recommendations of Agency officers.

*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?*

25. 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.<sup>4</sup>

26. In *Re Waterford and Department of Treasury (No.2)*,<sup>5</sup> 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.

27. I am satisfied the documents subject to review were prepared in the course of, and for the purpose of, the Agency’s deliberative processes in awarding a contract to an external provider.

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

28. 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.

29. 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:<sup>6</sup>

- (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 a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency’s functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;

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<sup>4</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

<sup>5</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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

- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
  - (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
30. The Agency's decision letter details its views that the release of the documents would inhibit the ability of staff members to provide frank and candid advice as part of their roles.
31. Having reviewed the documents and considered their content and context, I am satisfied the disclosure of information would not be contrary to the public interest for the following reasons:
- (a) The purpose of producing a business case and tender evaluation report is to provide a clear and transparent record of the tendering process and subsequent appointment of the preferred supplier. The documents form an integral part of the probity requirements involved in the governance of procurement processes.
  - (b) The opinions, advice and recommendation provided by Agency staff in the documents are based on consensus scoring by the Evaluation Panel against set evaluation criteria. As the information is not directly attributable to individual Agency staff, I do not consider the release of the documents would inhibit the ability of staff to provide frank and candid advice as part of their roles.
  - (c) The documents date back [several years] and so the information is no longer considered to be commercially sensitive. Further, the substance of the tender is not one that is commonly advertised. Therefore, I do not consider disclosure of the documents would unduly impact the willingness of suppliers to submit a tender for any future contracts.
32. Accordingly, I am satisfied that disclosure of Documents 1 and 2 would not be contrary to the public interest, and the relevant information is not exempt from release under section 30(1).

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

33. 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?*

34. In *Thwaites v Department of Human Services*,<sup>7</sup> 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.
35. Documents 1 and 2 include details of the tender evaluation scores, contract costs, and a summary of the evaluations of the tender proposals, based on information provided by the tenderers. However, the documents also include some information that was produced by the Agency rather than being solely acquired from the business undertakings.

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

36. VCAT has recognised the words 'business, commercial or financial nature' have their ordinary meaning.<sup>8</sup>
37. I am satisfied the documents concern matters of a business, commercial or financial nature.

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

38. 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.

39. 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.

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<sup>7</sup> (1999) 15 VAR 1.

<sup>8</sup> *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

40. I am not satisfied disclosure of Documents 1 and 2 would expose the business undertakings unreasonably to disadvantage for the following reasons:
- (a) One of the additional documents provided by the Agency to OVIC during the review is titled 'Part A Achieving Response Time Targets' (**Document 3**). This document sets out the 'Conditions of Tendering' on page 19, which includes a provision for the disclosure of contract information in accordance with the FOI Act. A copy of this document would have been provided to each of the third party business undertakings that submitted a tender for the provision of an Operations Improvement Plan to the Agency. I therefore consider third party business undertakings that engaged in the tender process were made aware of the Agency's obligations under the FOI Act and that information they provided may be further disclosed.
  - (b) 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.<sup>9</sup> The Agency advised that it did not consult with the third party undertakings identified in the documents. There is therefore no information before me as to the impact disclosure would have on the businesses.
  - (c) As stated under point 31, the documents date back [several years] and given this passage of time I consider any commercial sensitivity around the content has significantly reduced. Further, the substance of the tender is not one that is commonly advertised and I therefore do not consider disclosure of the documents would expose the business undertakings to unreasonable disadvantage in tendering for any future contracts.
  - (d) In response to OVIC's initial view on this review, the Agency stated it had no issue if OVIC determines section 34(1)(b) does not apply to the documents.
41. Accordingly, I am not satisfied disclosure of Documents 1 and 2 would expose the business undertakings unreasonably to disadvantage and these documents are therefore not exempt from release under section 34(1)(b).

### ***Section 25 – Deletion of exempt or irrelevant information***

42. 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.
43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>10</sup> 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.<sup>11</sup> As stated above, the Applicant does not seek access to personal affairs information and therefore this content as contained in

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<sup>9</sup> Section 34(3).

<sup>10</sup> *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].

<sup>11</sup> *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].

Documents 1 and 2, as well as in the additional Documents 3 and 5, is irrelevant for the purposes of this review.

44. I have considered the effect of deleting irrelevant information from these documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### Conclusion

45. On the information before me, I am not satisfied Documents 1 and 2 are exempt from release under sections 30(1), 33(1) and 34(1)(b). These documents are to be released to the Applicant with irrelevant personal affairs information deleted in accordance with section 25.
46. In relation to the additional Documents 3 to 11 which I determined are relevant to the scope of the request, I do not consider information in these documents is exempt from release under the FOI Act. These documents are therefore to be released to the Applicant, with any irrelevant personal affairs information deleted in accordance with section 25.
47. The Schedule of Documents at **Annexure 1** details my decision for each document.

### Timeframe to seek a review of my decision

48. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>12</sup>
49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
51. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
52. 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.<sup>15</sup>

### Third party review rights

53. As I have determined to release documents that contain information of a business, financial, commercial nature relating to a business undertaking/s, 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.<sup>16</sup>

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<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and 50(3FA).

<sup>16</sup> Sections 49P(5), 50(3A), and 52(3).

54. In the circumstances, I have decided notifying the relevant third business undertaking/s of their review rights is not practicable as I am of the view that notifying them would be an unnecessary instruction for the following reasons:
- (a) the nature of the information;
  - (b) the context in which the information was provided; and
  - (c) the passage of time since the documents were created.

**When this decision takes effect**

55. 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 title as provided by the Agency	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Year]	Tender Evaluation Report Achieving Response Time Targets RFT [number]	8	<p><b>Refused in full</b></p> <p>Section 30(1) – applied in full</p> <p>Section 33(1) – applied in part, to the names of Agency staff</p> <p>Section 34(1)(b) – applied in full</p>	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information, being personal affairs information of third parties only, deleted in accordance with section 25.</p>	<p><b>Section 30(1):</b> I am satisfied that disclosure of the document would not be contrary to the public interest, and the relevant information is not exempt from release under section 30(1).</p> <p><b>Section 33(1):</b> During the review, the Applicant confirmed they do not seek access to personal affairs information.</p> <p><b>Section 34(1)(b):</b> I am not satisfied disclosure of the document would expose the relevant business undertaking/s unreasonably to disadvantage. It is therefore not exempt from release under section 34(1)(b).</p> <p><b>Section 25:</b> The Applicant does not seek access to personal affairs information. This information is therefore irrelevant to the request. I am satisfied it is practicable to delete this information from the document.</p>

Document No.	Date of document	Document title as provided by the Agency	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
2.	[Date]	Business Case RFT [number] for Achieving Response Time Targets	3	<p><b>Refused in full</b></p> <p>Section 30(1) – applied in full</p> <p>Section 33(1) – applied in part, to the names of Agency staff</p> <p>Section 34(1)(b) – applied in full</p>	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information, being personal affairs information of third parties only, deleted in accordance with section 25.</p>	<p><b>Sections 30(1), 33(1), 34(1)(b), 25:</b> See comments for Document 1.</p>
3.	[Date]	Part A Achieving Response Time Targets	20	<p><b>N/A</b></p> <p>Not assessed as relevant to the terms of the Applicant’s FOI request in the Agency’s original decision.</p>	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information, being personal affairs information of third parties only, deleted in accordance with section 25.</p>	<p><b>Section 25:</b> This document was provided to OVIC by the Agency in the course of my review. I assessed it as relevant to the terms of the Applicant’s FOI request.</p> <p>The Agency has not claimed any exemptions to this document. As the Applicant does not seek access to personal affairs information, this information is irrelevant to the request and is to be deleted from the document in accordance with section 25.</p>

Document No.	Date of document	Document title as provided by the Agency	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	N/A	Part B Specification Achieving Response Time Targets	6	N/A See comments for Document 3.	Release in full	<b>Section 25:</b> This document was provided to OVIC by the Agency in the course of my review. I assessed it as relevant to the terms of the Applicant's FOI request. The Agency has not claimed any exemptions to this document and advised it can be released in full.
5.	N/A	Part C Agreement for the Provision of Services Achieving Response Time Targets	32	N/A See comments for Document 3.	Release in part  Section 25  The document is to be released with irrelevant information, being personal affairs information of third parties only, deleted in accordance with section 25.	See comments for Document 3.
6.	N/A	Part D Response Schedule Achieving Response Time Targets	28	N/A See comments for Document 3.	Release in full	See comments for Document 4.

Document No.	Date of document	Document title as provided by the Agency	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
7.	N/A	Part D Attachment 1 Pricing Schedule Achieving Response Time Targets	1	N/A  See comments for Document 3.	Release in full	See comments for Document 4.
8.	[Date]	Addenda 1 Achieving Response Time Targets	1	N/A  See comments for Document 3.	Release in full	See comments for Document 4.
9.	[Date]	Addenda 2 Achieving Response Time Targets	2	N/A  See comments for Document 3.	Release in full	See comments for Document 4.
10.	[Date]	Addenda 3 Achieving Response Time Targets	1	N/A  See comments for Document 3.	Release in full	See comments for Document 4.
11.	N/A	Revised Part D Response Schedule Achieving Response Time Targets	28	N/A  See comments for Document 3.	Release in full	See comments for Document 4.