

Notice of Decision and Reasons for Decision

Applicant:	'BH4'
Agency:	Barwon Health
Decision Date:	19 March 2020
Exemptions considered:	Sections 33(1), 34(1)(b)
Citation:	'BH4' and Barwon Health (<i>Freedom of Information</i>) [2020] VICmr 73 (19 March 2020)

FREEDOM OF INFORMATION – performance reports – monthly service level reports – drill down reports – incident reports – provision of pathology services – service turnaround times – Riskman – matters of a business, commercial or financial nature

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 is the same as the Agency's decision.

I am satisfied the documents are exempt under sections 33(1) and 34(1)(b).

As I am satisfied it is not practicable to delete exempt information from the documents in accordance with section 25, I have determined to refuse access to the documents in full.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

19 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. A copy of Barwon Health incident reports relating to pathology services, including those recorded in Barwon Health's Risk Management (Riskman) system, from [date]
 2. Copies of pathology monthly service level reports provided by [company name], including any reports relating to measures or tracking of performance against service levels contained in the pathology services contract, from [date].
 3. A copy of the Ethical Employment Statement submitted by [company] as part of its tender for a contract for the provision of pathology services.
 4. Copies of drill down reports provided by [company] in relation to service level failures, from [date].
 5. Copies of correspondence between Barwon Health and [company] relating to critical incident/s.
2. In its decision, the Agency identified five documents falling within the terms of the Applicant's request. The Agency refused access to four documents in full.
3. The Agency further advised the document described at point 3 had been replaced with a Supplier Code of Conduct – Commitment Statement at the time of the tender. A copy of the Statement and the Code of Conduct to which it refers was released to the Applicant in full.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the Documents.
5. During the course of the review, the Agency identified further documents relevant to the terms of the Applicant's request.
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On 6 December 2019, the Agency made a fresh decision refusing access to the documents described at paragraph 1 and the additional documents identified.
8. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
9. The Applicant advised they are not seeking access to personal affairs information in the documents.
10. I have examined copies of the documents subject to review, which comprise:
 - (a) incident reports (**Document 1**);
 - (b) turn-around time reports (**Documents 2, 3 and 4**); and
 - (c) issue Log, including data and descriptions of incidents (**Document 6**).
11. I note the incident reports detail information about incidents that occurred during the provision of pathology services. The turn-around reports provide information about the length of time taken to

provide those services. The issue log provides both data and descriptive information about the incidents.

12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated [date];
 - (b) information provided with the Applicant's review application;
 - (c) the Applicant's submission dated [date]; and
 - (d) the Agency's submissions dated [dates].
14. 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.

Review of exemptions

15. The Agency relied on the exemption under section 34(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.
16. As part of my review, I have also considered the application of section 33(1) to the documents.

Section 34(1)(b)

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

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

18. In *Thwaites v Department of Human Services*,¹ the Victorian Civil and Administrative Tribunal (VCAT) held the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
19. [Company name] is contracted by the Agency to provide pathology services to the Agency's inpatients, outpatients and aged care residents.
20. The Agency submits:
 - (a) [Company name] is a business and commercial undertaking as it provides pathology services for profit;

¹ (1999) 15 VAR 1.

- (b) the performance reports and drill down reports were provided to the Agency by [company name];
- (c) the incident reports are generated by the Agency, however, they contain information provided by [company name]; and
- (d) the incident reports also contain information entered by staff of the Agency concerning pathology services provided by [company name]. The information discloses matters of a commercial nature relating to [company name], that is, the provision of services to patients. The expression 'acquired by' has been interpreted to extend to information captured in a contract.² The expression also extends to information captured in an incident report. The incident reports have been used as a confidential mechanism to manage the contract with [company name].

21. I am satisfied the information in the Documents was acquired by the Agency from [company name], and [company name] is a business, commercial or financial undertaking.

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

- 22. The words 'business, commercial or financial nature' should be given their ordinary meaning.³
- 23. I am satisfied the Documents relate to matters of a business and commercial nature, namely [company name]' performance under a commercial arrangement.

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

24. In considering the third limb of the exemption, I must consider the factors set out in section 34(2) which provide that, in deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, 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;
- (d) whether there are any considerations in the public interest in favour of disclosure that 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
- (e) any other consideration or considerations which in the opinion of the agency or Minister is relevant.

25. I have also had regard to *Dalla-Riva v Department of Treasury and Finance*,⁴ in which VCAT held a document will be exempt under section 34(1)(b) if its disclosure would:

- (a) give a competitor of the undertaking a competitive financial advantage;

² *Specialist Diagnostic Services Pty Ltd v Western Health* [2016] VCAT 17.

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

⁴ [2007] VCAT 1301 at [33].

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

26. Further, I note the narrowing by Parliament of the exemptions under section 34 by the passing of the *Freedom of Information (Miscellaneous Amendments) Act 1999* (Vic). In the second reading speech, it was stated:

The Freedom of Information Act provides an exemption for a range of information relating to business, commercial and financial matters that is obtained by government agencies from business organisations. This exemption has been employed in the past, under the guise of commercial confidentiality, to prevent disclosure of documents that should be open to public scrutiny.

The bill narrows the ambit of this exemption. Under the proposed amendments documents will be exempt only if disclosure of information relating to business, commercial or financial matters would be likely to expose a business organisation unreasonably to a disadvantage. This narrower exemption will operate in conjunction with the government's policy commitment to post all contracts for the delivery of services to the community on behalf of the government on the Internet. This will ensure that Victorians are aware of and better able to scrutinise business undertakings entered into by the government.⁵

27. In line with the above, I consider the exemption in section 34(1)(b) contemplates a commercial undertaking may be exposed to a certain level of disadvantage due to disclosure of a document under the FOI Act. Therefore, the issue to determine is whether the undertaking is likely to be exposed unreasonably to disadvantage.

28. The Agency consulted with [company name], which objected to the release of information in the Documents. [Company name] provided the following information in support of its view that disclosure of the documents would expose it unreasonably to disadvantage:

The Victorian Civil and Administrative Tribunal in the matter of *Specialist Diagnostic Services Pty Ltd v Western Health* [2016] VCAT 17 (SDS) examined the issue of whether the disclosure of equivalent information relating to laboratory testing would expose the undertaking unreasonably to disadvantage. The Tribunal's ruling assists in detailing and confirming the adverse effects which such a disclosure would have.

The laboratory testing industry and the provision of laboratory testing to hospitals is an intensely competitive industry, as noted by the Tribunal.

The likelihood of disadvantage as a result of the provision of the information to the applicant in this case should also take into account the fact that once disclosed to the applicant, the information can be publicly disclosed, and made freely available to all current and future competitors of [company name].

...

Access to the information in the Requested Documents would enable [company name's] competitors to gain a competitive advantage as they would be able to examine the service level requirements contained in [company name's] pathology services contract and strategically adopt service level requirements that make their own contracts and bids more attractive. This would clearly undermine [company name's] bargaining position and unreasonably expose it to disadvantage in any future tendering and negotiation processes.

Further, disclosure of the Requested Documents without the context of other information is likely to result in misinterpretation by competitors and the entities with which [company name] does business. In the absence of surrounding information, test results and incident reports can easily be misconstrued as critical service failures. This could lead to competitors levelling unjustified criticism against [company

⁵ *Victorian Parliamentary Debates*, Legislative Assembly, 11 November 1999, 350.

name] in their own tenders, and [company name's] existing and potential client base making assumptions unfavourable to [company name]. [Company name] would be placed in a position where it would have to explain the content of the Requested Documents.⁶ There is a significant risk of unwarranted conclusions being drawn from the incomplete information in the Requested Documents, and consequently a substantial and adverse effect on the commercial interests of [company name].

...

The Riskman system contains highly sensitive information, including narratives on the events and nature of quality breaches, and details on the perceived causes of breaches – many of which may have dual responsibility (both hospital and lab). The purpose of the Riskman document is to identify a root cause for a failure. These documents are highly sensitive. They would highlight areas of risk, reveal patterns of risk, and could reveal areas requiring remediation or amendment. Such information would enable competitors to use the contents of the reports to criticise [company name] without a full understanding of the nature of the incidents raised and the action taken as a result. The information could be taken out of context, and used to criticise [company name] publicly, in a way which would be highly damaging commercially, given other competitors would not have equivalent information disclosed.

...

...the turnaround time reports and Riskman reports created under the contract are all treated as commercially confidential, and are not disclosed to the market or seen by competitors. Turnaround times and accuracy are significant elements in any tender proposal in the area of pathology services, and were accepted as a distinguishing competitive factor by the Tribunal in the SDS case. The Tribunal found that turnaround times in combination with test type and urgency classification could provide insight into the operational processes needed to match a competitor's offer, such as the number of staff, location and laboratory size, allowing price structures to be inferred.

29. I accept the submission from [company name] that disclosure of the information in the documents subject to this review would expose it to commercial disadvantage. The issue before me therefore is whether that disadvantage would be unreasonable with reference to the factors set out above in section 34(2).

30. I have considered the provisions of section 34(2) as follows:

(a) Whether the information is generally available to competitors of the undertaking

I accept the information relating to 'turn-around' times and incident reports are not generally available to the business undertaking's competitors. Further, I accept as this type of information is not available for other similar business undertakings, its release would be likely to cause significant disadvantage to [company name]. In the context of a highly competitive industry, I accept this would be unreasonable.

(b) Whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking

I note [company name's] reference to *Specialist Diagnostic Services Pty Ltd v Western Health*⁷ (SDS decision) in which an applicant contested a decision by Western Health not to release the provisions of its contract with another pathology company that set out the turnaround time requirements and penalties for failing to meet those requirements.

The information in Documents 2, 3, 4 and 6 contain the turnaround times and related turn-around time data for various services and at various locations. While the documents in this matter are similar, but not the same, I have given weight to evidence submitted by the

⁶ In *Specialist Diagnostic Services* at [85], the Tribunal noted 'disclosure of the information could lead Dorevitch's other clients to draw unwarranted comparisons based on incomplete information and place Dorevitch in a position where it needed to explain those differences. I accepted that this could potentially also harm Dorevitch's commercial or financial interests and damage Dorevitch's ability to favourably negotiate contracts with other hospitals in the future'.

⁷ [2016] VCAT 17.

pathology company in the SDS decision, which I consider is transferable to this matter, concerning the competitive nature of the pathology industry and the significant detrimental impact of disclosure of this type of information. For example, contractual obligations can be inferred from actual turnaround times.

Therefore, I am satisfied the information cannot be disclosed without causing substantial harm to the competitive position of [company name].

- (c) 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 on environmental grounds

In relation to this provision, the Applicant submits there are public interest considerations in favour of disclosure:

... Clinical information of this nature that is expressed as de-identified broad performance data is public health data the disclosure of which is in the public interest because it is potentially beneficial for the wellbeing of the general public.

I have carefully considered whether disclosure of the information in the documents would be in the public interest.

In the SDS decision, in considering whether the public interest would be served by disclosure of the documents, VCAT held the turnaround requirements themselves, without any information about the pathology company's performance against those requirements, would not inform the public about whether the company is complying with its contract. VCAT accepted the submissions of the pathology company in that matter that the release of such information would potentially have the reverse effect of providing an incomplete and potentially misleading picture.

In this matter, I accept while there is a public interest in the release of information about the performance of a private company delivering public services, the release of the specific information in this matter is not likely to fulfill that function. That is, the turnaround times and incident reports will not indicate whether [company name] is meeting its contractual requirements, and in fact may not provide an accurate or complete account. In these particular circumstances, which involve the provision of health services, I have given weight to this consideration.

In my view it is open to the Applicant to request other information, for example information about how the health service audits its pathology contract or any other documents the health service considers relevant, in order to satisfy public accountability for that contract.

Further, there is a public interest in disclosure of documents where they indicate the services to be provided under a contract are not being delivered satisfactorily, or wrong-doing in some way. While the documents contain technical details about pathology services, and I do not have the technical expertise to make an informed judgement as to whether they reveal any negative trends or issues, I note the Applicant did not raise any specific concerns of this nature. In any case, from my view of the documents there is nothing that prompts me to consider such matters are a factor in support of disclosure in the public interest in this case.

Therefore, I am satisfied any public interest considerations do not outweigh the competitive disadvantage the business undertaking would be reasonably likely to be exposed to if the documents were disclosed to the Applicant under the FOI Act.

31. On the information before me, I am satisfied Documents 1, 2, 3, 4, 6 and 7 are exempt under section 34(1)(b).

Section 33(1)

32. I have determined certain information in Documents 1 and 6 is also exempt under section 33(1). This information relates to the recording of incidents during the provision of pathology services.

33. 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;⁸ and
- (b) such disclosure would be 'unreasonable'.

Does the document contain personal affairs information?

34. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.⁹
35. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.¹⁰
36. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to identify a third party.¹¹
37. I note the Applicant does not seek access to personal affairs information and is willing to receive an edited copy of the documents with personal information deleted. However, given the sensitive nature of the documents and the specific details unique to each incident, I consider it would be difficult to remove all information capable of identifying a person without rendering the documents meaningless.
38. While the reports vary in the amount of detail provided, many contain a detailed description of the incident, when and where it happened, actions taken, follow up action required, and a range of data about the incident. I note also some reports reveal a patient's medical condition.
39. Accordingly, I am satisfied Documents 1 and 6 contain information that could identify or be used to re-identify a person, other than the Applicant, even where their names are removed.

Would release of the personal affairs information be unreasonable?

40. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
41. In *Victoria Police v Marke*,¹² the Supreme Court of Victoria held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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'.

⁸ Sections 33(1) and (2).

⁹ Section 33(9).

¹⁰ *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

¹¹ *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].

¹² [2008] VSCA 218 at [76].

42. As also stated in *Victoria Police v Marke*, '[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 to a lesser or greater degree'.¹³

43. In determining whether disclosure of the personal information in the documents would be unreasonable, I have considered the following factors:

(a) The nature of the personal affairs information and the circumstances in which the information was obtained

The nature of the personal affairs information is described above and ranges in its sensitivity. However, it relates to incidents that occurred in the course of people receiving health services, which are implicitly personal and sensitive in nature. As such, I consider the community has a strong expectation that such information will be kept confidential. Even if it would be difficult to re-identify individuals in certain instances, given the nature of the information, I am of the view caution should be exercised in considering whether its release would be unreasonable. This factor weighs against disclosure.

(b) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

The applicant provided the following information with their review application:

[Description of Applicant's professional role and interest in Barwon Health's clinical pathology services.]

...

The documents requested relate to the work of scientists and is therefore particularly relevant information for them with respect to employment and professional considerations.

...

Clinical information of this nature that is expressed as de-identified broad performance data is public health data the disclosure of which is in the public interest because it is potentially beneficial for the welfare and the well-being of the general public.

I consider the information in the documents is precisely that sought by the Applicant and, as such, their purpose for seeking the information is likely to be achieved if it were to be disclosed. This factor weighs in favour of disclosure.

(c) Whether any public interest would be promoted by release of the information

On the information before me, I do not consider there is a public interest in the disclosure of the information for the reasons set out above in relation to my consideration of section 34(1)(b) above. This factor weighs against disclosure.

(d) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

I consider it is reasonably likely the individuals, the subject of the information, being patients of the health service would object to any information that could potentially identify them, their medical condition and health services received. This factor weighs against disclosure.

¹³ [2008] VSCA 218 at [79].

- (e) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

Having considered the nature of the information and the circumstances in which it was obtained, I consider it is reasonably likely release of certain information in the documents could lead to the persons to whom it relates suffering a measure of stress and anxiety. I consider this factor weighs against disclosure.

- (f) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁴

In determining if release of the personal affairs information of third parties would be unreasonable, I must consider whether disclosure of information in the documents would, or would be reasonably likely, to endanger the life or physical safety of any person.¹⁵ I do not consider this is a relevant factor in this matter.

44. Having weighed the above factors, I am satisfied disclosure of the personal affairs information contained in the documents is unreasonable in the circumstances.
45. Accordingly, I am satisfied the documents are also exempt under section 33(1).

Deletion of exempt or irrelevant information

46. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
47. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁶ 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 25.¹⁷
48. I have considered the effect of deleting irrelevant and exempt information from the documents in accordance with section 25. While I note the Applicant is willing to accept documents with personal affairs information and commercial information deleted, I am satisfied it is not practicable to delete irrelevant and exempt information from the documents as to do so it would require substantial time and effort, and the edited documents would not retain meaning.

Conclusion

49. On the information before me, I am satisfied the documents are exempt under sections 33(1) and 34(1)(b).
50. As I am satisfied it is not practicable to delete exempt information from the documents in accordance with section 25, I have determined to refuse access to the documents in full.
51. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

¹⁴ Section 33(2A).

¹⁵ Section 33(2A).

¹⁶ *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].

¹⁷ *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].

Review rights

52. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁸
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
55. 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.
56. 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.²¹

When this decision takes effect

57. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁹ Section 52(5).

²⁰ Section 52(9).

²¹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
1.	Various	Riskman incident reports	743	Refuse in full Section 34(1)(b)	Refuse in full Sections 34(1)(b), 33(1)
2.	[Month, Year]	[Location] Turn Around Time Monitoring	8	Refuse in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
3.	[Month, Year]	[Location] Turn Around Time Monitoring	8	Refuse in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
4.	Undated	[Redacted] Transition Monitoring	8	Refuse in full Section 34(1)(b)	Refuse in full Section 34(1)(b)
5.	[Date]	Supplier Code of Conduct Commitment Statement with Supplied Code of Conduct	4	Release in full	Not subject to review
6.	Various	Issue log	4	Refuse in full Section 34(1)(b)	Refuse in full Sections 34(1)(b), 33(1)
7.	Various	Riskman [year]	3	Refuse in full Section 34(1)(b)	Refuse in full Section 34(1)(b)