

## Notice of Decision and Reasons for Decision

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Applicant:	'FH9'
Agency:	Moira Shire Council
Decision date:	4 August 2023
Exemption and provision considered:	Sections 34(1)(b), 25
Citation:	'FH9' and Moira Shire Council (Freedom of Information) [2023] VICmr 80 (4 August 2023)

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FREEDOM OF INFORMATION – draft document – disclosure not contrary to the public interest – business undertaking – information acquired from a business undertaking

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 a document 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 section 34(1)(b) applies to the information made exempt in the document.

As the Applicant does not seek access to personal affairs information, and it is practicable to delete this information from the documents in accordance with section 25, I have granted access to the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 34(1)(b).

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

4 August 2023

## Reasons for Decision

### Background to review

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

Copies of all expert reports regarding noise and odour which the Moira Shire Council commissioned from third parties for the purpose of its investigation under the Public Health and Wellbeing Act 2008 into [the Applicant's] complaints about noise and odour from the [third party business].
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under section 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. During the review, an initial view was provided to the Agency that section 34(1)(b) would likely not apply to the document. The Agency disagreed and OVIC continued to a formal decision.
5. During the review the Applicant indicated they do not seek access to personal affairs information of third parties. Accordingly, all personal affairs information is irrelevant and is to be deleted in accordance with section 25.
6. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
10. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
11. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This

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

involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

## Review of exemptions

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

12. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would disclose information 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?*

13. In *Thwaites v Department of Human Services*,<sup>2</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.
14. The phrase ‘business, commercial or financial undertaking’ generally refers to an entity, such as a company or organisation, that is engaged in business, trade, or commerce for a financial profit or gain.
15. I am satisfied the information to which the Agency refused access under sections 34(1)(b) was obtained by the Agency from a commercial or business undertaking (the **Undertaking**).

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

16. VCAT has also recognised the words ‘business, commercial or financial nature’ have their ordinary meaning.<sup>3</sup>
17. I am satisfied the document exempted by the Agency contains information provided by an undertaking that relates to matters of a business, commercial or financial nature.

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

18. 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;

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<sup>2</sup> (1999) 15 VAR 1.

<sup>3</sup> *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

- (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.
19. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,<sup>4</sup> 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; or
  - (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.
20. I consider the phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b), contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word 'unreasonably' in section 34(1)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed 'unreasonably' to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.
21. Accordingly, section 34(1)(b) contemplates a business undertaking may be exposed to a certain level of disadvantage. The question is whether any such disclosure would expose the undertaking unreasonably to disadvantage.
22. 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>5</sup>
23. Following consultation, in accordance with section 34(3), the Undertaking advised the Agency it objected to disclosure of information in the document on grounds that releasing inaccurate information could cause the Agency to have to provide an explanation, and that in those circumstances that would lead to public mistrust in the Agency. The Undertaking also advised it considered disclosure would cause it to lose business, and could be used to its competitors' advantage.

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<sup>4</sup> [2007] VCAT 1301 at [33].

<sup>5</sup> Section 34(3).

24. Having reviewed the document and decision of the Agency and views of the Undertaking, based on the information before me, I am not satisfied disclosure of the information to which the Agency refused access would expose the Undertaking unreasonably to disadvantage, for the following reasons:
- (a) There is no evidence to demonstrate, other than in the most general terms as expressed by the Undertaking, how disclosure of the information in the documents would enable its competitors to engage in destructive competition with the Undertaking or gain a commercial advantage over the Undertaking, from the disclosure of this information to the Applicant under the FOI Act.
  - (b) Rather, the information in the document relates to the specific circumstances and outcomes of the field study subject of the review.
  - (c) There is no evidence to demonstrate how disclosure of the information would lead to the drawing of unwarranted conclusions as to the Undertaking's business affairs and position with detrimental commercial or market consequences.
  - (d) Should the business undertaking consider the document misleading, they or the Agency may provide the Applicant with further or updated information to assist in their understanding of the information in the documents.
  - (e) While I acknowledge the nature of release under the FOI Act is unrestricted and unconditional, I do not consider the documents are being sought by a commercial competitor of the business undertaking. Rather, the Applicant is exercising their right to access information in relation to their original complaints being made about noise and odour quality.
25. Accordingly, I am not satisfied the document is exempt from release under section 34(1)(b).

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

26. 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.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</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>7</sup>
28. I have considered the effect of deleting irrelevant information from the document. 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 document will retain meaning.

### **Conclusion**

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<sup>6</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>7</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].

29. On the information before me, I am not satisfied section 34(1)(b) applies to the information made exempt in the document.
30. As the Applicant does not seek access to personal affairs information, and it is practicable to delete this information from the document in accordance with section 25, I have granted access to the document in part.

### **Review rights**

31. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>8</sup>
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
34. 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.
35. 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>11</sup>

### **Third party review rights**

36. As I have determined to release a document that contains information of a business, financial, commercial nature relating to a business undertaking, 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>12</sup>
37. In this case, I am satisfied it is practicable to notify the relevant third party of their review rights and confirm they will be notified of my decision on the date of decision.

### **When this decision takes effect**

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

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<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and 50(3FA).

<sup>12</sup> Sections 49P(5), 50(3A).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Draft Moira Shire – Field Odour Survey Results [date] to [date]	16	Refused in full Section 34(1)(b)	Release in part Section 25 The document is to be released with names and contact details of third parties deleted in accordance with section 25.	<p><b>Section 34(1)(b):</b> I am not satisfied the document contains information that would expose the undertaking unreasonably to disadvantage for the reasons outlined in the Notice of Decision, above.</p> <p><b>Section 25:</b> The following personal affairs information is irrelevant to the request:</p> <ul style="list-style-type: none"> <li>• the third party’s name and direct email address on page 1;</li> <li>• the names and signatures on page 15.</li> </ul> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25.</p>