

Notice of Decision and Reasons for Decision

Applicant:	'FS1'
Agency:	Victorian Infrastructure Delivery Authority
Decision date:	9 July 2024
Exemption considered:	Section 34(1)(b)
Citation	'FS1' and Victorian Infrastructure Delivery Authority (Freedom of Information) [2024] VICmr 50 (9 July 2024)

FREEDOM OF INFORMATION – payment schedule – western roads upgrade – subcontracts – public private partnership – insolvent company

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

Notice of Decision

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

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied certain information in the documents is exempt from release under section 34(1)(b). However, I have decided to release further information in the documents where I am satisfied section 34(1)(b) does not apply.

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 and irrelevant information in accordance with my decision has been provided to the Agency.

Please refer to page 7 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Sean Morrison
Information Commissioner

9 July 2024

Reasons for Decision

Background to review

1. The Applicant's request was for access to:
 1. Attachments to the letter from [an undertaking] to MRPV dated [date], limited to the initial 3 months of claims and certificates as follows:
 - (a) Month 1 – [an undertaking's] Payment claim, [an undertaking's] Payment Certificate, [an undertaking's] Statutory declaration;
 - (b) Month 2 – [an undertaking's] Payment claim, [an undertaking's] Payment Certificate, [an undertaking's] Statutory declaration; and
 - (c) Month 3 – [an undertaking's] Payment claim, [an undertaking's] Payment Certificate, [an undertaking's] Statutory declaration.
 2. The following correspondence (excluding attachments):
 - (a) the letter from [an undertaking] to the State dated [date] entitled [an undertaking's] Unpaid Invoices;
 - (b) the letter from [an undertaking] to the State dated [date] entitled Notification of Subcontractor Dispute;
 - (c) the letter from the State to [an undertaking] dated [date] entitled Re: [specified company] (State's [date] letter);
 - (d) the letter from [an undertaking] to the State dated [date] entitled [an undertaking's] Unpaid Invoices;
 - (e) the information received from [an undertaking] on [date] and [date] (under cover emails entitled RE: Subcontractor disputes;
 - (f) the information received from [an undertaking] on [date] (under cover emails entitled RE: Subcontractor disputes; and
 - (g) copies of all correspondence subsequent to the [undertaking] letter on [date] (Document 10) regarding the matter of [an undertaking's] Unpaid Invoices, including but not limited to the MRPV response to this Letter.
 3. Noting the statement by [specified company] in the [date] Letter "We consider it prudent for representatives of [a contractor], [an undertaking] and the State to meet, on a without prejudice basis, to discuss the appropriate pathway forward". – please provide the minutes from this meeting.
 4. The following meeting minutes and presentations:
 - (a) copies of the minutes from this meeting in [date] where the State was notified of [an undertaking's] engagement;
 - (b) copy of the written presentation to the State noting [an undertaking's] engagement. This presentation would be from [date];

- (c) copy of Senior Representative Group meeting minutes from [date]; and
 - (d) Provide copy of Senior Representative Group meeting minutes from [date].
- 2. The Applicant agreed to exclude the personal affairs information of all third parties identified in the documents from the scope of their request.
- 3. The Agency identified 28 documents falling within the terms of the Applicant's request and decided to:
 - (a) grant access to 24 documents in part; and
 - (b) refuse access to four documents in full.
- 4. The Agency relied on section 34(1)(b) to refuse access to information in the documents.
- 5. The Agency's decision letter sets out the reasons for its decision.

Review application

- 6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
- 7. I have examined a copy of the documents subject to review.
- 8. The Applicant advised that they only seek review of Documents 6, 9, 12 and 28. The documents are three payment claims and a PowerPoint presentation.
- 9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
- 10. I have considered relevant communications and submissions received from the parties.
- 11. 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.
- 12. 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.
- 13. 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'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

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

Review of exemption

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

14. A document or information is exempt under section 34(1)(b) if three requirements are satisfied:
- (a) the document or information was acquired from a business, commercial, or financial undertaking; and
 - (b) the information relates to matters of a business, commercial or financial nature; and
 - (c) disclosure of the information is likely to expose the undertaking unreasonably to disadvantage (based on matters listed in section 34(2) and any other relevant considerations).

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

15. The documents subject to review concern the Western Roads Upgrade, which was completed in early 2021.²
16. [Background information omitted].
17. [Background information omitted].
18. [Background information omitted].
19. The payment schedules were obtained from [an undertaking], which I am satisfied is a business and commercial undertaking.

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

20. The second condition requires the acquired information to have a business, commercial, or financial nature. ‘Business’, ‘commercial’ and ‘financial’ should each be given their ordinary meaning.³
21. Information will ‘relate to’ matters of a business, financial or commercial nature if there is a sufficient or material connection or relationship between the information that would be disclosed by the disclosure of the documents and matters of a business, financial or commercial nature.⁴
22. The documents subject to review are payment schedules, where [an undertaking] is listed as the claimant and [an undertaking] as the respondent. [Specified undertakings] are named in the header.

² <https://bigbuild.vic.gov.au/news/roads/western-roads-upgrade-now-complete>.

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

⁴ *Commissioner of State Revenue v Tucker* [2021] VCAT 238, [158], citing *J & G Knowles & Associates Pty Ltd v Commissioner of Taxation* [2000] FCA 196.

23. The documents contain cost breakdowns for various aspects of the construction project including total costs and itemised descriptions of services and associated costs.
24. I am satisfied the information relates to matters of business, commercial and financial nature.

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

25. In considering whether disclosure will expose an undertaking to unreasonable disadvantage, an agency or Minister should, along with any other relevant consideration, have regard to the factors set out in section 34(2). These include:
- (a) whether the information is generally available to competitors of the undertaking;
 - (b) whether the information would be exempt 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.
26. Other relevant consideration includes whether disclosure would:
- (a) give a competitor of the undertaking a competitive financial advantage;
 - (b) enable that competitor to engage in destructive competition with the undertaking; or
 - (c) lead to unwarranted conclusions about the undertaking's financial affairs and position that result in commercial and market consequences.⁵
27. The exemption in section 34(1)(b) balances government transparency and public accountability against protecting legitimate commercial interests.
28. The Agency's decision letter states:

MRPV consulted with [an undertaking] who confirmed their objection to the disclosure of information contained within 9 documents on the basis that it would be likely to expose them unreasonably to disadvantage.

[The undertaking] objected to the disclosure of information related to detailed cost breakdowns and pricing methodology for construction related labour and materials contained in the payment schedules and other documents, which [the undertaking] has advised is still considered commercial and sensitive information due to it being relevant to other ongoing Projects currently in the market. Further, [the undertaking] also objected to the disclosure of information pertaining

⁵ *Dalla-Riva v Department of Treasury and Finance* [2007] VCAT 1301, [33].

to the identities of other companies [affected by a specified matter], as this is considered the commercial information of those companies.

Having considered their objections and the contents of the documents, I have determined that the 9 documents are exempt, either in part or in full, under section 34(1)(b) of the FOI Act as they contain information of a commercial and/or financial nature which would be likely to expose the third parties unreasonably to disadvantage if released.

29. I am satisfied that disclosing the itemised cost information would expose [a specified undertaking] unreasonably to disadvantage and is exempt from release under section 34(1)(b) for the following reasons:
- (a) Itemised descriptions of services undertaken and associated costs for the project is not information that typically would be available to entities other than [various specified undertakings] and the Agency itself.
 - (b) Itemised costing information is commercially sensitive information, as it reveals what [specified undertakings] were willing to pay for certain services.
 - (c) Releasing information of this kind would improve the negotiating position of competitors and future subcontractors of [a specified undertaking].
 - (d) The itemised costs for the project still have relevance to the other undertakings involved in the Western Roads Upgrade, such as [a specified undertaking], despite the project's completion, the passage of time since the documents were created, and [the status of specified undertakings].
30. However, I am not satisfied that disclosing total amounts in the payment schedule would expose [a specified undertaking] unreasonably to disadvantage for the following reasons:
- (a) A key purpose of access to information under the FOI Act is to ensure government dealings with commercial undertakings, as well as the expenditure of the public funds, are better able to be subject to public scrutiny.
 - (b) Private companies contracting with government agencies should reasonably expect a greater degree of transparency and accountability given the use of public funds for the procurement and purchase of goods and services.
 - (c) The total contract and invoice amounts can be disclosed without causing harm to the competitive position of [the undertaking].
31. Accordingly, while I am satisfied certain information in the documents is exempt from release under section 34(1)(b), I have decided to release further information in the documents where I am satisfied that section 34(1)(b) does not apply.

Section 25 – Deletion of exempt or irrelevant information

32. 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.

33. Deciding whether it is 'practicable' to delete exempt or irrelevant information requires consideration of:
- (a) the effort involved in making the deletions from a resources point of view;⁶ and
 - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.⁷
34. The Agency has only released a small amount of information in Document 28 and the remainder was refused on the basis it is irrelevant to the terms of the Applicant's request. I have reviewed the document, and I am satisfied the information released to the Applicant is the only information in the document that is relevant to the terms of [their] request.
35. I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, as to do so will not take time or effort and the documents will remain meaningful.

Conclusion

36. On the information before me, I am satisfied certain information in the documents is exempt from release under section 34(1)(b). However, I have decided to release further information in the documents where I am satisfied section 34(1)(b) does not apply.

Timeframe to seek a review of my decision

37. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
40. 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.
41. 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.¹¹

Third party review rights

⁶ *Mickelborough v Victoria Police* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁷ *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]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.

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

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and 50(3FA).

42. As I have determined to release information in the documents that contain information of a business, financial, commercial nature relating to a business undertaking, if practicable, I am required to notify the undertaking of its right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹²
43. I am satisfied that it is practicable to notify the undertaking of its review rights and confirm that it will be notified of my decision as soon as practicable.

When this decision takes effect

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

¹² Sections 49P(5), 50(3A) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision
6.	[Date]	Payment Schedule	20	Refused in full Section 34(1)(b)	Release in part Sections 34(1)(b), 25 The document is to be released in accordance with the marked-up version provided to the Agency with my decision.
9.	[Date]	Payment Schedule	20	Refused in full Section 34(1)(b)	Release in part Sections 34(1)(b), 25 The document is to be released in accordance with the marked-up version provided to the Agency with my decision.
12.	[Date]	Payment Schedule	21	Refused in full Section 34(1)(b)	Release in part Sections 34(1)(b), 25 The document is to be released in accordance with the marked-up version provided to the Agency with my decision.
28	[Date]	PowerPoint presentation	38	Released in part Section 25	Release in part Section 25 No further information is to be released.