

## Notice of Decision and Reasons for Decision

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Applicant:	'FS6'
Agency:	Department of Jobs, Skills, Industry and Regions
Decision date:	6 January 2025
Exemption considered:	Section 34(4)(a)(ii)
Citation:	'FS6' and Department of Jobs, Skills, Industry and Regions (Freedom of Information) [2024] VICmr 55 (6 January 2025)

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FREEDOM OF INFORMATION – grants funding – sum awarded – Agency not acting in trade or commerce

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 fresh 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 and more information is to be released.

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

My reasons for decision follow.

Penny Eastman  
**Public Access Deputy Commissioner**

6 January 2025

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to totals of expenditure and grant funding provided to [a specified category of grant recipients].
2. The Agency created a document meeting the terms of the Applicant's request under section 19 and granted access to it in part.
3. The Agency refused access to certain information under section 34(4)(a)(ii). The Agency's decision letter sets out the reasons for its decision.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to certain information in the document.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review. On [date], the Agency made a fresh decision. This is within the required 28 days under section 49M(2).
6. Unusually, the Agency's fresh decision did not release any further information or add or remove any applied exemptions. The Agency advised the purpose of its fresh decision was to provide further information about the application of section 34(4)(a)(ii). In my view, this information could have been provided directly to the Applicant by the Agency without the need to take action under section 49M(1).
7. 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.
8. I have examined a copy of the information in the document subject to review. This information is the overall cumulative total grant funding figure for all entities and the individual total funding and quarterly expenditure figures relating to a specific [recipient] for [timeframe] and [timeframe] as part of the Skills First Program<sup>1</sup>.
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

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<sup>1</sup> <https://www.vic.gov.au/skills-first>

facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

#### Review of application of *section 34(4)(a)(ii)*

13. A document is exempt under section 34(4)(a)(ii) if:
  - (a) the agency is engaged in trade or commerce;
  - (b) the document contains information of a business, commercial or financial nature; and
  - (c) disclosure of the document would be likely to expose the agency unreasonably to disadvantage.

#### *Limb 1: Is the Agency engaged in trade and commerce?*

14. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>2</sup>
15. The Victorian Civil and Administrative Tribunal (VCAT) has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.<sup>3</sup> VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.<sup>4</sup> An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency’s other functions.<sup>5</sup>
16. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.<sup>6</sup>
17. While I accept the phrase ‘trade and commerce’ may be interpreted broadly,<sup>7</sup> it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.<sup>8</sup>
18. As noted above, the information subject to review in the document lists the amount of funds provided to a [recipient] in the course of a competitive grants process. The grant is associated with the delivery of the Skills First Program, where I understand it is to be used to subsidise TAFE or related course fees for participants in trade training programs.
19. In its fresh decision, the Agency described one of its many functions as being “...the administration of grants and funding under the Skills First Program, which is directed at ensuring that Victoria has the skilled workforce it needs now and into the future”.

<sup>2</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

<sup>3</sup> *Gibson v La Trobe City Council (General)* [2008] VCAT 1340 at [33], citing *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134 per Deane J, with whom Brennan J agreed.

<sup>4</sup> *Ibid* at [34].

<sup>5</sup> *Marple v Department of Agriculture* (1995) 9 VAR 29 at [46].

<sup>6</sup> *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

<sup>7</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

<sup>8</sup> *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35], citing *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 604.

20. As such, I am satisfied the expenditure on grants and funding under this Program as reflected in the document is within the usual functions of the Agency. I note that overall expenditure for the Skills First Program is also reported in the Agency's annual report.

21. In support of its application of section 34(4)(a)(ii), the Agency's fresh decision advised:

While the Skills First Program is a critical part of government's role in promoting a strong economic position for the State underpinned by a suitably skilled workforce, the funding process is competitive. When TAFEs, Dual Sector Registered Training Organisations (RTO), private RTOs and Industry Associations applying for grants or funding under the Skills First Program and DJSIR are engaged in a process which is commercial in nature.

The information exempted relates to matters of a business, commercial, or financial nature and if it was disclosed, it would likely result in unreasonable disadvantage to DJSIR by creating unnecessary discussion and competition amongst various Industry Associations, TAFEs and RTOs. In turn, this would disadvantage the Skills First Program by potentially leading to disruption of settled allocations as a result of increased competition between recipients if recipients sought to obtain increases in provisions allocated to them based on amounts allocated to competitors, including by providing information the department, in support of their applications, which is inaccurate. Disruption to the effectiveness of the Skills First Program could also arise if recipients sought to leverage their participation in the Skills First Program against DJSIR approving increases in their allocations. These actions would compromise the Skills First Program's ability to promote the skilled workforce which Victoria needs to support Victoria's economic prosperity.

22. In determining whether the first limb of section 34(4)(a)(ii) is made out, I have carefully considered the Agency's position, the redacted content as well as past relevant case law. I note the Agency released the quarterly and cumulative grant funding figures for other expenditure as contained in the document to the Applicant.

23. In my view, where the Government enters into a contract on behalf of the State of Victoria in exchange for the provision of services, it does not generally do so as an entity engaging in commercial activity itself, but rather to fulfil its core role to deliver government services.

24. While I accept that an agency is not precluded from relying on the exemption under section 34(4)(a)(ii)<sup>9</sup> where its activities are predominately 'governmental', I consider this exemption requires an agency be subject to a commercial environment similar to that which a business would be subject to. I do not consider this is the scenario in this case, as I am satisfied the administration of grants and funding under the Skills First Program is within the usual functions of the Agency and while potential grant recipients are involved in a competitive / commercial process, the Agency has no competitors in the delivery of this function. Accordingly, I am not satisfied the Agency is engaged in trade or commerce in the context of this matter.

25. The first limb of this exemption is thus not met, and it is not necessary for me to further consider the other required limbs of this exemption.

26. The information is therefore not exempt under section 34(4)(a)(ii) and the document is to be released in full.

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<sup>9</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

### Conclusion

27. On the information before me, I am not satisfied the information redacted by the Agency in the document is exempt from release under section 34(4)(a)(ii). Access to the document is granted in full.

### Timeframe to seek a review of my decision

28. If the Agency is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>10</sup>
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
30. 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.
31. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it applies to VCAT for a review of my decision.<sup>12</sup>

### When this decision takes effect

32. 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.

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<sup>10</sup> Section 50(3D).

<sup>11</sup> Section 52(9).

<sup>12</sup> Section 50(3F).