

## Notice of Decision and Reasons for Decision

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Applicant:	'FF8'
Agency:	VicScreen
Decision date:	15 June 2023
Exemptions and provision considered:	Sections 30(1), 34(4)(a)(ii), 35(1)(b), 25
Citation:	'FF8' and VicScreen (Freedom of Information) [2023] VICmr 61 (15 June 2023)

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FREEDOM OF INFORMATION – meeting agendas – meeting minutes – film funding – incentives – grants – relationship with private entity – Agency engaged 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 decision to refuse access to documents requested by the Applicant under the FOI Act.

The effect of my decision is the same as the Agency's; however, I have determined certain information is exempt under section 30(1) as well as section 34(4)(a)(ii).

As 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, I have determined to grant access to the documents in part.

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

My reasons for decision follow.

**Sven Bluemmel**  
Information Commissioner

15 June 2023

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - (a) the VicScreen Board Agendas and Minutes; and
  - (b) a record report of the reading pack documents for each Board Meeting filed on VicScreen's document management system, TRIM, produced under section 19 of the FOI Act.
2. The timeframe for the request is from 6 November 2020 to and including 16 December 2022.
3. The Agency identified 60 documents falling within the terms of the Applicant's request and decided to release 49 documents in full, and 11 documents in part, exempting certain information under sections 33(1), 34(4)(a)(ii) and 35(1)(b). 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.
5. The Applicant advised they seek review of the Agency's application of sections 34(4)(a)(ii) and 35(1)(b).
6. I have examined a copy of the documents 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 involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

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

## Review of exemptions

### **Section 30(1) – Internal working documents**

12. The Agency did not apply section 30(1) to the documents. However, given the nature of some of the information exempted by the Agency under section 34(4)(a)(ii), I have decided to examine whether section 30(1) applies to that information.
13. The information relates to a particular issue being managed by the VicScreen Board. The Agency's decision letter describes this information as follows:

Documents 30, 33, 34, 37, 55, 56, 57 and 59 contain business and commercial information relating to a VicScreen arrangement involving a private entity. VicScreen has a contractual relationship with the private entity and is currently engaged in contract management processes. The release of the business and commercial information in these documents would prejudice VicScreen's ability to conduct these contract management processes by compromising their confidentiality and significantly undermining VicScreen's capacity to reach a mutually beneficial and commercial outcome, and to maintain a productive working relationship with the entity. On conclusion of these contract management process, VicScreen will enter negotiations for a new contractual arrangement with the same entity. Release of this information would prejudice VicScreen's position in this negotiation. On this basis, I am satisfied that release of the business and commercial information in Documents 30, 33, 34, 37, 55, 56, 57 and 59 would be likely to expose VicScreen to unreasonable disadvantage.

14. The Agency also provided a submission to this office regarding the above information. I am unable to further detail that submission here as to do so would reveal information the Agency considers exempt.
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>2</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>3</sup>

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<sup>2</sup> Section 30(3).

<sup>3</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].

*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>4</sup>
21. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant information deleted, where it is practicable to do so.
22. I am satisfied the documents disclose matter in the nature of opinion, advice and recommendations prepared by Agency officers, reflecting the discussions had and decisions made regarding a particular process the Agency is currently engaged with.

*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?*

23. 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>5</sup>
24. In *Re Waterford and Department of Treasury (No.2)*,<sup>6</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.

25. In the circumstances of this matter, I am satisfied the documents were made in the course of the deliberative processes of the Agency, that of managing its relationship with an external entity.

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

26. 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.
27. In deciding whether release of the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>7</sup>

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<sup>4</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>5</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

<sup>6</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>7</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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;
  - (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.
28. I have determined it would be contrary to the public interest to release certain information for the following reasons:
- (a) I accept the Agency's submission that the information is sensitive and disclosure would be likely to detrimentally affect its relationship with the external entity concerned;
  - (b) a productive relationship between the Agency and the entity serves an important public purpose;
  - (c) while the Agency is fulfilling a government function, and therefore would be in a position of advantage in some aspects of the relationship, there is a commercial aspect to the information in the documents, the disclosure of which I consider may affect the commercial opportunities of the Agency;
  - (d) the information in the documents is not aged to a point where it is no longer sensitive; and
  - (e) while I generally consider it is in the public interest for agencies to be transparent about their activities, in this case I consider the public interest weighs against disclosure where the impact of disclosure would likely be detrimental to the Agency fulfilling its functions.
29. I am therefore satisfied certain information in the documents is exempt under section 30(1).
30. My decision in relation to section 30(1) set out in the Schedule of Documents in **Annexure 1**.

**Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage**

31. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, ‘in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage’. 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 which would be likely to expose the agency unreasonably to disadvantage.

*Is the Agency engaged in trade and commerce?*

32. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>8</sup>
33. 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>9</sup> VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.<sup>10</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>11</sup>
34. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.<sup>12</sup>
35. While the phrase ‘trade and commerce’ may be interpreted broadly,<sup>13</sup> it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.<sup>14</sup>
36. The fact an agency’s predominant activities may be described as ‘governmental’ does not preclude it from relying on the exemption under section 34(4)(a)(ii).<sup>15</sup>
37. The Agency submits is it engaged in trade or commerce due to the operation of the *Film Act 2001* (Vic) that sets out its functions, including:
- (a) providing financial and other assistance to the Victorian screen industry;
  - (b) promoting the use of Victorian locations and services for screen production; and

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<sup>8</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

<sup>9</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

<sup>10</sup> *Ibid* at [34]; *Re Ku-Ring-Gai Co-operative Building Society* (No 12) Ltd (1978) 22 ALR 621 at [649].

<sup>11</sup> *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

<sup>12</sup> *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

<sup>13</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

<sup>14</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

<sup>15</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].

- (c) providing financial assistance to organisations, events or activities, including festivals, conferences, publications or exhibitions where film or other screen based-programs are made, seen or discussed;
- (d) developing relationships with other organisations to improve the Victorian screen industry;
- (e) establishing or facilitating relationships for the development of film, television or multimedia programs; and
- (f) developing relationships or entering into partnerships with other organisations, including government bodies to improve the film, television and multimedia industry in Victoria.

38. The Agency further submits:

In addition, as Victoria's creative and economic development agency, VicScreen has a key role in delivering the Victorian Government's Screen Strategy - a transformational, whole of-government plan to invigorate Victoria's screen industry, create jobs, foster new talent and generate significant economic returns. In performing that role, VicScreen is required to undertake activities in trade and/or commerce including delivering economic benefits to the State. One way in which VicScreen delivers those economic benefits is to attract interstate and international screen productions to Victoria by offering screen incentives in a competitive market context.

39. I accept the competitive nature of parts of the functions of the Agency, primarily in competing with other Australian state governments to attract arts projects to Victoria. I therefore consider the Agency is engaging in trade or commerce regarding the funding of certain projects.

*Do the documents contain information of a business, commercial or financial nature?*

40. The phrase 'information of a business, commercial or financial nature' is not defined in the FOI Act. Therefore, the words 'business, commercial or financial nature' should be given their ordinary meaning.<sup>16</sup>
41. I am satisfied the information in the documents is of a business, commercial or financial nature as it relates to the funding amounts allocated to certain projects.

*Would disclosure be likely to expose the Agency unreasonably to disadvantage?*

42. Whether disclosure is likely to expose an Agency *unreasonably* to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that likely to follow from disclosure of the information.
43. The provision contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage, and that any such exposure must be unreasonable.
44. I am satisfied disclosure of certain information identified by the Agency would expose it unreasonably to disadvantage for the following reasons:

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<sup>16</sup> *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

- (a) I consider the information is highly sensitive and confidential;
  - (b) the information is not publicly available;
  - (c) I accept the Agency's submission that projects are genuinely 'footloose' and that disclosure of the information would place the Agency at a disadvantage when negotiating with private entities to bring projects to Victoria;
  - (d) such information could be used by the Agency's competitors to the Victorian government's disadvantage; and
  - (e) I note the Agency does publish certain information about the projects where disclosure would not expose it to disadvantage. There is therefore some transparency around the funding process, without publishing individual grant amounts.
45. I am therefore satisfied that the remainder of the information, not exempted under section 30(1) as described above, is exempt under section 34(4)(a)(ii).
46. My decision in relation to section 34(4)(a)(ii) set out in the Schedule of Documents in **Annexure 1**.

***Section 35(1)(b) – Information obtained in confidence***

47. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

*Was the information obtained in confidence?*

48. The Agency applied section 35(1)(b) to a small amount of information in Documents 13 and 31.
49. Given the sensitive nature of the information, I am satisfied the information exempted by the Agency was provided to it in confidence. Further, given it appears to have been provided voluntarily and that open communication between the parties concerned about such matters would be essential to the Agency's effective collaboration with external entities, I consider disclosure would likely impair the agency from obtaining similar information in the future.
50. The information is therefore exempt under section 35(1)(b).
51. My decision in relation to section 35(1)(b) set out in the Schedule of Documents in **Annexure 1**.

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

52. 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.

53. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>17</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>18</sup>
54. Given my decision has the same effect as the Agency's decision and it granted access to the documents in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted.

### **Conclusion**

55. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 30(1), 34(4)(a)(ii) and 35(1)(b).
56. As 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, access is granted in part.

### **Review rights**

57. 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>19</sup>
58. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>20</sup>
59. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>21</sup>
60. 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.
61. 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>22</sup>

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

62. 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>17</sup> *Mickelburgh 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>18</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].

<sup>19</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>20</sup> Section 52(5).

<sup>21</sup> Section 52(9).

<sup>22</sup> Sections 50(3F) and (3FA).

**Annexure 1 – Schedule of Documents**

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
Only documents subject to review appear in the table below.						
13.	15/04/2021	Minutes	7	Release in part Section 35(1)(b)	<b>Release in part</b> Sections 35(1)(b), 25 The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 35(1)(b):</b> I am satisfied the information identified by the Agency in the document is exempt under section 35(1)(b) for the reasons described above in the Notice of Decision. <b>Section 25:</b> I have determined it is practicable to delete exempt information from the document.
30.	28/10/2021	Agenda	3	Release in part Section 34(4)(a)(ii)	<b>Release in part</b> Sections 30(1), 25 The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 30(1):</b> I am satisfied the information exempted by the Agency under section 34(4)(a)(ii) is exempt under section 30(1) for the reasons described above in the Notice of Decision. <b>Section 25:</b> See comments for Document 13.
31.	28/10/2021	Minutes	6	Release in part Section 35(1)(b)	<b>Release in part</b> Sections 35(1)(b), 25 The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 35(1)(b):</b> See comments for Document 13. <b>Section 25:</b> See comments for Document 13.
33.	2/12/2021	Agenda	3	Release in part	<b>Release in part</b>	<b>Section 30(1):</b> I am satisfied the information exempted by the Agency

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
				Section 34(4)(a)(ii)	Sections 30(1)(b), 25 The document is to be released with exempt information deleted in accordance with section 25.	under section 34(4)(a)(ii) is exempt under section 30(1) for the reasons described above in the Notice of Decision. <b>Section 25:</b> See comments for Document 13.
34.	2/12/2021	Minutes	7	Release in part Section 34(4)(a)(ii)	<b>Release in part</b> Sections 30(1)(b), 25 The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 30(1):</b> I am satisfied the information exempted by the Agency under section 34(4)(a)(ii) is exempt under section 30(1) for the reasons described above in the Notice of Decision. <b>Section 25:</b> See comments for Document 13.
37.	24/02/2022	Minutes	6	Release in part Section 34(4)(a)(ii)	<b>Release in part</b> Sections 30(1), 34(4)(a)(ii), 25 The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 30(1):</b> I am satisfied the information exempted by the Agency on page 2 under section 34(4)(a)(ii) is exempt under section 30(1) for the reasons described above in the Notice of Decision. <b>Section 34(4)(a)(ii):</b> I am satisfied the information the Agency exempted on page 3 is exempt under section 34(4)(a)(ii) for the reasons described above in the Notice of Decision. <b>Section 25:</b> See comments for Document 13.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
55.	20/10/2022	Agenda	3	Release in part Section 34(4)(a)(ii)	<b>Release in part</b> Sections 30(1), 25 The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 30(1):</b> I am satisfied the information exempted by the Agency under section 34(4)(a)(ii) is exempt under section 30(1) for the reasons described above in the Notice of Decision. <b>Section 25:</b> See comments for Document 13.
56.	20/10/2022	Minutes	8	Release in part Section 34(4)(a)(ii)	<b>Release in part</b> Sections 30(1)(b), 25 The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 30(1):</b> I am satisfied the information exempted by the Agency under section 34(4)(a)(ii) is exempt under section 30(1) for the reasons described above in the Notice of Decision. <b>Section 25:</b> See comments for Document 13.
57.	20/10/2022	Record report	3	Release in part Section 34(4)(a)(ii)	<b>Release in part</b> Sections 30(1), 25 The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 30(1):</b> I am satisfied the information exempted by the Agency under section 34(4)(a)(ii) is exempt under section 30(1) for the reasons described above in the Notice of Decision. <b>Section 25:</b> See comments for Document 13.
59.	1/12/2022	Minutes	11	Release in part Section 34(4)(a)(ii)	<b>Release in part</b> Sections 30(1), 34(4)(a)(ii), 25 The document is to be released with exempt and	<b>Section 30(1):</b> I am satisfied the information exempted by the Agency on page 3 and page 10 under section 34(4)(a)(ii) is exempt under section 30(1)

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					irrelevant information deleted in accordance with section 25.	<p>for the reasons described above in the Notice of Decision.</p> <p><b>Section 34(4)(a)(ii):</b> I am satisfied the information the Agency exempted on page 7 is exempt under section 34(4)(a)(ii) for the reasons described above in the Notice of Decision.</p> <p><b>Section 25:</b> See comments for Document 13. As the Applicant is not seeking personal affairs information, the information the Agency determined exempt under section 33(1) is irrelevant to the request.</p>