

Notice of Decision and Reasons for Decision

Applicant:	'FL6'
Agency:	Victorian Building Authority
Decision date:	27 December 2023
Sections and provisions considered:	Sections 30(1), 31(1)(d), 33(1) and 25
Citation:	'FL6' and Victorian Building Authority (Freedom of Information) [2023] VICmr 109 (27 December 2023)

FREEDOM OF INFORMATION – Financial Probity Escalation Review – application for renewal of registration following company liquidation – internal assessment and conclusion -

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.

While I am satisfied certain information is exempt from release under section 30(1), I am not satisfied the remaining information is exempt from release under sections 30(1), 31(1)(d) or 33(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt 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.

Please refer to pages 11-12 for information about further review rights through the Victorian Civil and Administrative Tribunal.

Shantelle Ryan
Acting Public Access Deputy Commissioner

27 December 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the initial request and sought access to:
 - 1- Copies of applications for initial registration, including forms (and applications forms), renewals along with copies of supporting evidence including attachments documentation provided (by the practitioner and/or Company) to the VBA for:
[named individual]
[named company]
 - 2- Copies of the annual fee and proof of the required insurance, renewed insurance which covers the registration period/s, provided to the VBA by the practitioner and/or Company:
[named company]
 - 3- [named individual] [named company]
Any complaint made against them.
 - 4- [named individual] [named company]
 - a- A copy of the Show cause notice issued for the practitioner and/or Companies.
 - b- A copy of the Notice of decision issued for the practitioner and/or Companies.
2. The Agency identified 66 documents falling within the terms of the Applicant's request and granted access to the documents in part. 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.

Concerns about the adequacy of document searches

4. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches in relation to their FOI request.
5. In accordance with section 61B(3), the complaint was dismissed and these concerns were dealt with under this review.
6. OVIC staff made further enquiries with the Agency to address the Applicant's concerns. The outcome of those enquiries was communicated to the Applicant.
7. Based on the Agency's response, I am satisfied the Agency undertook a thorough and diligent search for the requested documents. Accordingly, I consider the Applicant's complaint has been fully pursued and there is no need to make further enquiries or take further action under the FOI Act in relation to those particular concerns.
8. The Applicant advised they only sought access to the Financial Probity Escalation Review assessment in the documents. This document forms part of the Application Review-Endorsement, being Document 2 of Item (a) in the documents released by the Agency.

9. Accordingly, this review is of pages 8-20 of Document 2 of Item (a) only. The remaining pages of that document, and all other documents located by the Agency, are irrelevant to the scope of this review.
10. I have examined a copy of the document subject to review.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I have considered all communications and submissions received from the parties.
13. 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.
14. 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.
15. 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.

Review of exemptions

Section 30(1) – Internal working documents

16. 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.
17. The exemption does not apply to purely factual material in a document.²
18. 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.

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

² Section 30(3).

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19. 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'.³

Does the document 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?

20. 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.
21. 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.⁴
22. Section 30(3) provides that 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.
23. The document was prepared by an agency officer for the purpose of assisting an agency decision maker to exercise its regulatory responsibilities, and contains the agency officer's analysis of evidence and makes a recommendation about the exercise of those regulatory responsibilities.
24. Having considered the content and context of the document, I am satisfied it is matter in the nature of opinion, advice and recommendation or consultation or deliberation of Agency officers.

Was the document 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?

25. 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.⁵
26. In *Re Waterford and Department of Treasury (No.2)*,⁶ 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.
27. For the same reasons as those set out above, I am satisfied the document was prepared in a deliberative process of the Agency, being a determination on whether to grant an endorsement renewal to a third-party applicant.

³ *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].

⁴ *Mildenhall v Department of Education* (1998) 14 VAR 87.

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

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

Would disclosure of the document be contrary to the public interest?

28. 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.
29. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁷
 - (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.
30. The document was prepared following an application by a third party for a renewal of their endorsement as [profession of third party].
31. As part of this renewal application assessment process a Financial Probity Escalation Review was required. This assessment was undertaken by an Agency officer and reported to the

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

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decision-maker on the application, also an Agency officer. The document is intended for internal use within the agency only for the purpose of deciding the renewal application.

32. I consider the contents of this document allow the assessment and decision-making processes of the Agency to be better understood.
33. The document details financial matters associated with the renewal applicant, including the external administration of a company they were involved with.
34. The report contains screenshots from the renewal applicant's communications with the Agency, and from two external [reports]. The document also contains a templated assessment matrix, including questions and systems for ranking certain information, which has been applied by the Agency officer to the circumstances.
35. I consider the release of substantive information provided by the third party applicant to the Agency would be contrary to the public interest. If statements made to the Agency were released, this ability to collect information may be impaired – that is, people may be less likely to provide frank information to it on a voluntary basis.
36. Further, I consider the release of the techniques of analysis used to conduct these assessments would be contrary to the public interest. In my view, the ability to use a consistent method of assessment, keep this method internal and record the assessment responses supports the functioning of these assessments, which would be adversely impacted by disclosure.
37. While I do not consider the [third party] would likely be reluctant to provide further information to the Agency in future on these matters, I acknowledge the release of which excerpts of the report were chosen to include in the document would reveal aspects of the Agency's assessment methods and potentially compromise the process. I also note one of the reports extracted in this document appears to be available for purchase in full from ASIC Connect online.⁸ In my view, this established scheme is a more appropriate way to obtain financial information about this company outside the context of the Agency's analysis of it.
38. Noting the above, I have also considered whether the public interest in transparency of the Agency's decision making would overcome the public interest in protecting the effectiveness of this process. I also acknowledge the genuine interest the Applicant has in obtaining access to this information. Having reviewed the document, I have identified two areas of the document

⁸[\[redacted link to company ASIC extract\]](#)

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where the various public interests in this matter can be more clearly balanced, being the application details/documents at the beginning of the assessment, and the outcomes section.

Application details and documents

39. Page 1 of this document contains general application details and a list of documents supplied by the applicant. It also lists the reasons for the escalation to the Financial Probity Escalations Review.
40. In my view, the content of this page is either likely to be available publicly or is not sensitive in nature.
41. Further, I am satisfied the details of information and documents collected are consistent with what is available online about these types of processes, and does not show the way this information is then assessed by the Agency. From the bottom of page 1, the assessment analysis sections commence. From this section until the end of the detailed assessment, I consider the information would be contrary to the public interest to release.

Outcomes

42. Pages 12 and 13 contain the 'Outcome' of the assessment. This contains a summary of some of the main points of the assessment, and the recommendations.
43. Several words in the outcome section reference the methods used to assess the information, and I consider this is contrary to the public interest to release for the reasons discussed above.
44. The remaining information in this section lists some of what the Agency deemed to be relevant in the assessment and provides a summary of how the conclusion was arrived at.
45. I consider this information provides a level of understanding about the Agency's decision making, without the need to provide the level of detail in the earlier sections where disclosure would compromise the assessment process.
46. On balance, I am satisfied this section would not be contrary to the public interest to release, except for words 9-13 of the first sentence after the 'Outcome' heading.

Conclusion on section 30(1)

47. In conclusion, I have determined the following information the Agency found to be exempt would be contrary to the public interest to release and is therefore exempt under section 30(1):
 - (a) from the bottom row of page 1 to the 'Outcome' section of the document; and
 - (b) from the 'outcome' section, words 9-13 of the first sentence.
48. In relation to the other information, I am not satisfied it would be contrary to the public interest to release. Therefore, it is not exempt under section 30(1). I will consider the application of section 31(1)(d) to this information.

Section 31(1)(d) – Disclosure of methods for preventing, detecting, investigating breaches of the law

49. Section 31(1)(d) provides (subject to this section) a document is exempt if its disclosure would, or would be reasonably likely to, 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'. Section 31(1)(d) is subject to other provisions in section 31.
50. The exemptions in section 31(1) do not apply to widespread and well-known methods and procedures.⁹
51. As I have determined certain information found to be exempt by the Agency under 30(1) and 31(1)(d) is not exempt under section 30(1), I will briefly address the application of section 31(1)(d) to this information.
52. The purpose of this document is to assess a person's suitability to be endorsed by the Agency as a professional [type], and does not disclose methods or procedures for preventing, detecting, investigating or dealing with breaches or evasions of the law.
53. Further, as discussed above, the nature of the information I have determined to release is consistent with the information on the Agency's website and is general in nature. I do not consider it is at the level of detail which would compromise the Agency's assessment strategies.
54. Accordingly, I am not satisfied the information which is not exempt under section 30(1) is exempt under section 31(1)(d) either.
55. My decision on section 31(1)(d) is set out in the Schedule of Documents in **Annexure 1**.

Section 33(1)– Documents affecting personal privacy of third parties

56. 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 (a **third party**);¹⁰ and
 - (b) such disclosure would be 'unreasonable'.

Does the document contain personal affairs information of individuals other than the Applicant?

57. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.¹¹

⁹ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

¹⁰ Sections 33(1) and 33(2).

¹¹ Section 33(9).

58. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.¹²
59. The Agency applied section 33(1) to the middle name of the applicant for renewal, the name and position title of an Agency officer, a registration number and an application number.
60. Given my decision to release the Financial Probity Escalation review document in part, I have also considered whether the substantive information proposed for release from this document constitutes the personal affairs information of the applicant for renewal.
61. In the circumstances, I am satisfied this information constitutes the personal affairs information of third parties.

Would disclosure of the personal affairs information be unreasonable?

62. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
63. In *Victoria Police v Marke*,¹³ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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'.¹⁴ The Court further held, '[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 by a lesser or greater degree'.¹⁵
64. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
 - (a) the nature of the personal affairs information;
 - (b) the circumstances in which the information was obtained;
 - (c) the applicant's interest in the information;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of disclosure of information, if released;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;

¹² *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].

¹³ [2008] VSCA 218 at [76].

¹⁴ *Ibid.*

¹⁵ *Ibid* at [79].

- (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.¹⁶

Consultation

65. While the Agency attempted to consult with the renewal applicant, no response was received. There is no information before me indicating the Agency undertook consultation with the Agency officers. However, in the circumstances, I accept the third parties whose personal affairs information remains subject to review would likely object to the release of their information to the Applicant in the circumstances.

Mandatory consideration

66. In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁷ I am satisfied this is not a relevant factor in this matter.

Third party name, application reference number and Agency officer position title

67. The name of the third-party renewal applicant, the application reference number and the Agency officer's position title have already been released to the Applicant, either in the document subject to review or other documents prepared in the same context. In my view, this reduces the sensitivity of the further disclosure of this information significantly.
68. Further, I am satisfied the middle name of the third-party renewal applicant is available publicly.

Third party registration number

69. The registration number of the third-party renewal applicant is not particularly sensitive. Further, I note similar information in relation to [redacted] registrations is available on the Consumer Affairs Victoria website.

Agency officer name

70. Generally speaking, I consider there is nothing particularly sensitive about disclosing the identity of Victorian public sector employees where their personal affairs information concerns or arises in the context of them performing their ordinary duties, is already known to an applicant or is publicly available.
71. The documents subject to review are official documents of the Agency and provide a record of Agency officers carrying out their usual employment duties and responsibilities within a professional context, which in this instance is the assessment of a Financial Probity Escalation Review. The personal affairs information does not concern those persons in their private or personal capacity. In my view, the personal affairs information of the Agency officers is not particularly sensitive in the circumstances of the matter.

¹⁶ Section 33(2A).

¹⁷ Section 33(2A).

72. While I do not have information before me concerning the views of the officers, and they may object to disclosure, there is no information before me to suggest the Applicant intends to disseminate the personal affairs information.

Details from the Financial Escalation Probity review document

73. As discussed above, certain information proposed for release is likely to be publicly available and general in nature. In these instances, I consider the impacts of release on the personal privacy of the third party are also reduced.
74. Further, as noted above, I am satisfied the release of this information contributes to the public interest in transparency of the Agency's processes in a way which I am not satisfied compromises the Agency's assessment processes.

Conclusion on section 33(1)

75. Having carefully considered the circumstances of this matter, I am not satisfied it would be unreasonable to disclose personal affairs information.
76. In summary, I am not satisfied it would be unreasonable to release the name of the applicant for renewal, the name and position title of an Agency officer, a registration number and an application number, or the substantive details in the Financial Probity Escalation review document.
77. My decision on section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

78. 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.
79. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁸ 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 25.¹⁹
80. As discussed above, I am satisfied pages 1-8 and page 21 of the document subject to review are irrelevant, as well as the other documents located by the Agency.
81. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort and the edited documents would retain meaning.

¹⁸ *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].

¹⁹ *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].

Conclusion

82. On the information before me, I am satisfied certain information in the documents is exempt from release under section 30(1).
83. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted in part.

Timeframe to seek a review of my decision

84. 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.²⁰
85. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²¹
86. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²²
87. 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.
88. 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.²³

Third party review rights

89. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, 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.²⁴
90. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights and confirm they will be notified of my decision on the date of decision.

When this decision takes effect

91. 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.

²⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²¹ Section 52(5).

²² Section 52(9).

²³ Sections 50(3F) and 50(3FA).

²⁴ Sections 49P(5), 50(3).

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Annexure 1 – Schedule of Documents

Document No.		Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
2.	Various	Application Review – Endorsement	13	Released in part Sections 30(1), 31(1)(d), 33(1)	Release in part Sections 30(1), 25 The document is to be released except for the following information which is exempt under section 30(1) or irrelevant and are to be deleted in accordance with section 25: <ul style="list-style-type: none"> • pages 1-7 of the document, which are not part of the Financial Probity Escalation Review assessment, and are irrelevant to the scope of this review; • the final row of the table on page 8 of the document, which is exempt under section 30(1); • the information redacted by the Agency from pages 9-18 of the document, which is exempt under section 30(1); • the information redacted by the Agency on page 19 	<p>Section 30(1): I am satisfied the document constitutes matter in the nature of opinion, advice, recommendation and consultation or deliberation between Agency officers, prepared during a deliberative process of the Agency.</p> <p>I am satisfied certain information in the document would be contrary to the public interest to release and is exempt under section 30(1) for the reasons outlined in my Notice of Decision above.</p> <p>Section 31(1)(d): I am not satisfied disclosure of the information I have not found to be exempt under section 30(1) would prejudice the effectiveness of methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law. Therefore, I am not satisfied this information is exempt under section 31(1)(d).</p> <p>Section 33(1): I am not satisfied it would be unreasonable to disclose the personal affairs information in this document for</p>

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Document No.		Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>up to (but not including) the heading 'Outcome', which is exempt under section 30(1); and</p> <ul style="list-style-type: none">• From the section titled 'Outcome', words 9-13 of the first sentence; and• page 21 of the document, which is not part of the Financial Probity Escalation Review assessment and is irrelevant to the scope of this review.	<p>the reasons outlined in the Notice of Decision, above.</p> <p>Section 25: This document contains information which is irrelevant to this review, being pages 1-7 of the document, and page 21 of the document, which do not form part of the Financial Probity Escalation Review assessment.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.</p>