

Notice of Decision and Reasons for Decision

Applicant:	'FP9'
Agency:	City of Melbourne
Decision date:	24 May 2024
Exemptions considered:	34(1)(b), 34(4)(a)(ii)
Citation:	'FP9' and City of Melbourne (Freedom of Information) [2024] VICmr 31 (24 May 2024)

FREEDOM OF INFORMATION – contract – successful tenderer – [subject on contract] – service specification

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 satisfied the document contains information that is exempt from release under section 34(1)(b), and I have decided to release the document to the Applicant in part with irrelevant and exempt information deleted in accordance with section 25.

A marked-up copy of the document showing exempt or irrelevant information in accordance with my decision has been provided to the Agency.

Please refer to page 9 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

If review is not sought at VCAT, this decision takes effect when the review period expires and the Agency will provide the Applicant with the marked-up document in accordance with my decision.

My reasons for decision follow.

Sean Morrison
Information Commissioner

24 May 2024

Reasons for Decision

Background to review

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

...an agreement with [company] to provide [specified] services following [a tender].
2. The Applicant also advised the Agency that they were willing to receive an edited copy of the document with personal affairs information removed as irrelevant information in accordance with section 25.
3. The Agency identified one document falling within the terms of the Applicant's request and refused access in full under sections 34(1)(b) and 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.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On [date], the Agency advised OVIC of its intention to make a fresh decision, which was required to be made within the required 28 days under section 49M(2).
7. On [date], the Agency advised OVIC that it decided not to make a fresh decision. Accordingly, my review of the Agency original decision recommenced.
8. I have examined a copy of the document subject to review.
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

¹ *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

14. 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?

15. In *Thwaites v Department of Human Services*,² VCAT observed the phrase ‘information acquired’ in section 34(1) signifies the need for some positive handing over of information in some precise form.
16. The document subject to review is a signed contract between the Agency and a [company] (the **undertaking**) for the provision of [specified] services.
17. The terms of a concluded contractual agreement may or may not contain information acquired from an undertaking.³ Each case needs to be examined on its own merits to determine whether in fact:
 - (a) an agency acquired information from the undertaking; and
 - (b) whether disclosure of the terms of the concluded contract would disclose the acquired information.⁴
18. For the purposes of this review, I accept the document contains information acquired from the business undertaking within the terms of the agreement.

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

19. VCAT has also recognised the words ‘business, commercial or financial nature’ have their ordinary meaning.⁵
20. The document, being a contract, inherently concerns matters of a business, commercial and financial nature.

² (1999) 15 VAR 1.

³ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [19]-[20].

⁴ *Specialist Diagnostic Services Pty Ltd v Western Health* [2016] VCAT 17 at [50]-[51].

⁵ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

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

21. Section 34(2) provides:

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;
- (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.

22. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,⁶ 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; and
- (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.

23. 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.

24. The Agency consulted with the undertaking in accordance with section 34(3) and the undertaking explained that the document contains a significant amount of highly sensitive intellectual property, disclosure of which could cause it significant disadvantage when responding to tenders and other business opportunities.

25. I accept the release of commercial documents within a commercially competitive environment, may cause a certain measure of disadvantage. However, the test in regard to section 34(1)(b) is whether disclosure would be likely to expose a business undertaking *unreasonably* to disadvantage.

⁶ [2007] VCAT 1301 at [33].

26. I have considered the decision in *Asher v Victorian WorkCover Authority*,⁷ in which VCAT questioned whether disclosure of documents concerning a tender process conducted by the Victorian WorkCover Authority would expose the successful tenderer unreasonably to disadvantage. VCAT balanced public interest factors of accountability and transparency with other factors such as that the contract was non-exclusive and the undertaking's evidence that it would be disadvantaged in the marketplace for future tenders and concluded:

there is greater weight to be placed on the need for transparency and accountability than on the tenuous evidence that the company will be disadvantaged vis-à-vis its competitors. Although the information is not generally available to the company's competitors, that is only one of the factors for consideration and that factor by itself does not militate against disclosure.⁸

27. With respect to the document subject to my review, while access to the document was refused in full, the Agency has marked-up Schedules 1, 2 and 3 as exempt from release under section 34(1)(b) (in addition to section 34(4)(a)(ii)). A small amount of information was also exempted in the main contract at pages 7 and 8. Schedule 1 sets out special conditions, Schedule 2 sets out the service specifications and Schedule 3 sets out the costs.

28. On careful consideration, I have decided that section 34(1)(b) does not apply to all information in the document on the basis that disclosure would not be likely to expose the undertaking unreasonably to disadvantage for the following reasons:

- (a) the contract commenced in [year] and has run for several years;
- (b) it largely concerns the undertaking's contractual responsibilities; and
- (c) I do not accept certain disclosure would allow competitors to draw unwarranted inferences on the business undertaking's current and future projects given the information does not provide any insight into the undertaking's current or future business and financial affairs.

29. However, there is information in the document that is commercially sensitive in nature, as it discloses individual breakdowns of total costs specific to the undertaking and commentary in response to the Agency's questions that include details and technical information about the services and technology offered. In my view, such information is intellectual property that could be used by competitors and thereby expose undertakings to commercial disadvantage. Disclosure of this information will not necessarily promote the public interest of transparency concerning the Agency's contractual dealings in this instance, considering other information I have determined to release.

30. Accordingly, I am satisfied that section 34(1)(b) applies to parts of the document only as reflected in the marked-up version of the document provided to the Agency with this decision.

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

⁷ [2002] VCAT 369.

⁸ Ibid at [35]- [36].

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.⁹
- 33. Trade and commerce activities must 'of their nature, bear a trading or commercial character'.¹⁰
- 34. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself, or part of its operations, in a manner similar to a commercial entity.
- 35. Just because an agency is engaging in commercial or financial transactions, does not necessarily mean it is engaging in trade or commerce. Tendering out projects and entering commercial contracts does not necessarily constitute engaging in trade or commerce for the purpose of this exemption.
- 36. With respect to the contract subject to review, the Agency has tendered out and entered into a contract on behalf of the State of Victoria with a private undertaking in exchange for the provision of [specified] services for the purpose of managing [a specified service] in its municipality for the benefit of the public. It did not do so as an activity in the capacity of engaging in trade or commerce, but rather to fulfil its role to deliver governmental services and functions on behalf of the community. For this reason, I do not consider that section 34(4)(a)(ii) can apply to the document.
- 37. For completeness, I will briefly consider the remaining limbs of section 34(4)(a)(ii).

Does the document contain information of a business, commercial or financial nature?

- 38. The document is a contract, and as such, it inherently contains information of a business, commercial and financial nature.

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

- 39. 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.

⁹ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

¹⁰ *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.

40. Whether disadvantage would be unreasonable involves the consideration of all circumstances, including factors both in favour of, and against disclosure, such as:¹¹
- (a) the nature of the information;
 - (b) the circumstances in which the information was obtained or created;
 - (c) whether the information has any current relevance; and
 - (d) the identity of the applicant and the likely motives of the applicant.

41. In its decision, the Agency explained that disclosure would be likely to expose it unreasonably to disadvantage for the following reasons:

As noted the Contract contains [the undertaking's] proposed terms of services for the scope of works and other commercially sensitive information such as proposed pricing and fee structures. Disclosure of that information would therefore undermine the independence of the procurement process and inhibit the [Agency] from administering similar future procurement processes in a way that balances the needs of the municipality with the overall financial viability of the relevant business initiative.

Disclosure would also reveal to prospective suppliers of the [Agency] the terms on which the [Agency] is willing to do business which would significantly inhibit the ability of the [Agency] to negotiate similar future contracts on terms that are the most advantageous to the residents within the municipality for which it is responsible.

42. On careful consideration, I am not satisfied that disclosure would be likely to expose the Agency unreasonably to disadvantage for the following reasons:
- (a) The document represents its concluded negotiations with the undertaking and does not reveal the process of negotiations between the Agency and the business undertaking.
 - (b) There is certain information about the contract that is already in the public domain. For example, the Agency has the following information published on its website that the undertaking was awarded the contract [details about the annual value and expiry date].¹² The published [Council meeting resolutions] states that Council resolved to award the contract to the undertaking [details about the contract].¹³
 - (c) I am not satisfied there is sufficient evidence before me to support the view that disclosure would impact the ability of the State government to attract future offers from private sector companies, or from continuing to enter future negotiations in good faith, because the terms in which it did business in this instance would become publicly known.
43. Accordingly, I am not satisfied the document is exempt under section 34(4)(a)(ii).

¹¹ *Asher v Department of Innovation, Industry & Regional Development* [2005] VCAT 2702 at [42]-[43]; *Fitzherbert v Department of Health and Human Services* [2019] VCAT 201 at [61].

¹² Footnote omitted.

¹³ Footnote omitted.

Section 25 – Deletion of exempt or irrelevant information

44. 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.
45. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁴ 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 25.¹⁵
46. As stated above, the Applicant did not seek access to personal affairs information (being information that would identify a third party). Such information is irrelevant for the purposes of their FOI request.
47. The Agency determined that editing the document would not be practicable for the following reasons:
 - (a) the document is inherently of a business, commercial or financial nature which if disclosed would expose the undertaking or the Agency unreasonably to disadvantage and no amount of editing would enable the removal of that information;
 - (b) the subject matter and structure of the document are intrinsically intertwined such that redaction would not be an option; and
 - (c) editing would render the document meaningless, devoid of major features so that what remained would be misleading, lead to unnecessary speculation as to what was missing and be devoid of context.
48. I respectfully disagree with the Agency’s view that the document cannot practicably be edited. I consider there is a significant amount of information in the document that is not exempt from release, and disclosure of that information will allow the Applicant to have a general understanding of the contractual agreement and would not be misled by the non-disclosure of certain information.

Conclusion

49. I am satisfied the document contains information that is exempt from release under section 34(1)(b) and I have decided to release the document to the Applicant in part with irrelevant and exempt information deleted in accordance with section 25.
50. A marked-up copy of the document has been provided to the Agency with my decision.

Timeframe to seek a review of my decision

¹⁴ *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].

¹⁵ *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].

51. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
52. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
53. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
54. 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.
55. 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.¹⁹

Third party review rights

56. As I have determined to release a document that contains information of a business, financial, commercial nature relating to a business undertaking, 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.²⁰
57. In this case, I am satisfied it is practicable to notify the relevant undertaking of its review rights and confirm they will be notified of my decision on the date of decision.

When this decision takes effect

58. 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.

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and 50(3FA).

²⁰ Sections 49P(5), 50(3A) and 52(3).