

Notice of Decision and Reasons for Decision

Applicant:	'FT8'
Agency:	City of Port Phillip
Decision date:	27 December 2024
Exemption and provision considered:	Sections 34(1)(b), 25
Citation:	'FT8' and City of Port Phillip (Freedom of Information) [2024] VICmr 66 (27 December 2024)

FREEDOM OF INFORMATION – *Food Act 1984* (Vic) – food safety – information acquired from a business undertaking – disclosure likely to expose an undertaking unreasonably to disadvantage

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

Notice of Decision

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

My decision on the Applicant's request in relation to the application of section 34(1)(b) is the same as the Agency's decision and no further information is to be released.

I confirm the information exempted by the Agency under section 33(1) is irrelevant information for the purposes of the Applicant's request.

For information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**), please refer to the end of my decision.

My reasons for decision follow.

Sean Morrison
Information Commissioner

27 December 2024

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:

Please search documents from [date range] of all businesses that hold a certificate of registration of food premises who are registered under the food act registration of [date range] with [a specified street address].

Please provide documents, appointments made, inspections requests and inspections conducted of the above retailers that have been issued an order under Section 19 (2) of the Food Act Order during the above mentioned dates by any City of Port Phillip Health services officers or their external agents of the health services departments.

As this is an FOI request of great public interest, please release to me everything you deem to be of public concern within the purview of your powers.

Please only redact the names or identities of individuals involved in this process that are extraneous to the core issues.

2. The Agency identified 32 documents falling within the terms of the Applicant's request and refused access to all documents in full under section 34(1)(b). The Agency also refused access to nine of these documents in full under sections 31(1)(a) and 31(1)(d) and 12 of these documents in part under section 33(1). 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.
4. I have examined a copy of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. During the review, the Agency submitted it no longer relies on the exemptions under section 31(1)(a) and 31(1)(d). Therefore, I have not considered these exemptions as part of my review.
7. During the review, the Applicant submitted they do not seek access to personal affairs information of third parties. Therefore, I have not considered the exemption under section 33(1) as part of my review and all information refused by the Agency under section 33(1) is irrelevant information pursuant to section 25.
8. My review therefore focuses on the Agency's application of section 34(1)(b).
9. I have considered relevant communications and submissions received from the parties.

10. 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.
11. 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.

Review of exemptions

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

12. 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?

13. In *Thwaites v Department of Human Services*,¹ VCAT observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
14. I am satisfied the information subject to review was acquired from a business undertaking or is intertwined with information acquired from a business undertaking.

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

15. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.²
16. I am satisfied the information subject to review relates to matters of a business, commercial or financial nature.

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

17. Section 34(2) provides that 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—

¹ [1999] 15 VAR 1.

² *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

- (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.
18. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,³ 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.
19. I consider the phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b), contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word 'unreasonably' in section 34(1)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed 'unreasonably' to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.
20. Accordingly, 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.
21. In determining whether disclosure of commercially sensitive information in a document would expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify an undertaking and seek its views on disclosure.⁴
22. The Agency advised it consulted with the third party business undertakings.
23. While certain business undertakings objected to the release of their information, the views of a business undertaking are not determinative and are only one factor to be considered.

³ [2007] VCAT 1301 at [33].

⁴ Section 34(3).

24. In its decision, the Agency stated:

The documents have been exempted on the basis that they would disclose highly sensitive information which Council has obtained which relates to matters of a business, commercial or financial nature. The disclosure of this information is very likely to expose the businesses concerned to some or all of the following disadvantages:

- Reputational damage
- Loss of business
- An unfair advantage gained by their competitors

25. The documents subject to review were created as part of the Agency meeting its regulatory obligations and statutory functions under the *Food Act 1984* (Vic) (**Food Act**).

26. I acknowledge there is a public interest in evaluating aspects of the Agency's regulation and enforcement of the Food Act for transparency and accountability purposes.

27. However, in the circumstances, I consider disclosure of the information would be likely to expose the undertaking/s unreasonably to disadvantage for the following reasons:

- (a) I have placed weight on the nature of the information and the limited publicly available information regarding each business undertaking and its compliance or non-compliance with the Food Act.
- (b) I recognise the business undertakings in [the specified street] are in competition with each other and that information relating to each business undertaking and its compliance with the Food Act is unlikely to be available to their competitors.
- (c) I consider disclosure may lead to the drawing of unwarranted conclusions as to a business undertaking's position with respect to food handling and safety measures.
- (d) I am satisfied the level of reputational damage from disclosure would cause substantial harm to the business undertaking/s in a commercial context.

Section 25 – Deletion of exempt or irrelevant information

28. 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.

29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ 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 25.⁶

⁵ *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].

⁶ *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].

30. As stated above, the Applicant does not seek access to any personal affairs information of third parties. Therefore, this type of information is to be treated as irrelevant information pursuant to section 25.
31. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is not practicable for the Agency to delete the irrelevant and exempt information, because deleting the irrelevant and exempt information would render the documents meaningless.

Conclusion

32. I confirm the personal affairs information exempted by the Agency under section 33(1) is information not sought by the Applicant.
33. I am satisfied the remaining information in the documents is exempt from release under section 34(1)(b).
34. As such, the effect of my decision in relation to the application of section 34(1)(b) is the same as the Agency's decision and no further information is to be released.

VCAT review rights and timeframe

35. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
37. 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.
38. 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.⁹
39. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁷ Section 50(1)(b).

⁸ Section 52(5).

⁹ Section 50(3FA).