

Notice of Decision and Reasons for Decision

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| Applicant: | 'FK6' |
| Agency: | City of Melbourne |
| Decision date: | 6 December 2023 |
| Section considered: | Section 34(1)(b) |
| Citation: | 'FK6' and City of Melbourne (<i>Freedom of Information</i>) [2023] VICmr 100 (6 December 2023) |

FREEDOM OF INFORMATION – council documents – grants program – grant application – successful grant application – budget – business undertaking – expose business 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 is the same as the Agency's decision. I am satisfied Document 3 is exempt from release under section 34(1)(b).

Given my decision is the same as the Agency's decision and it granted access to the Documents 1 and 2 in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of those document with irrelevant information deleted. In relation to Document 3, I am not satisfied it is practicable to provide the Applicant with an edited copy with exempt information deleted. Accordingly, access is refused in full.

My reasons for decision follow.

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

Please refer to page 6 for information about further review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

Joanne Kummrow
Acting Information Commissioner

6 December 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to a [named] Grants Program application form 2023 submitted by [an event management agency] in partnership with [another business undertaking] (the **Applicant**).
2. On [date], following consultation with the Agency, the Applicant advised it did not seek access to personal affairs information and require access to specific sections of the application form only.
3. The Agency located three documents falling within the terms of the Applicant's request, and granted access to Documents 1 and 2 in part with irrelevant information deleted, and refused access to Document 3 in full under section 34(1)(b). The Agency's decision letter sets out its reasons for 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. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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 exemption

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

10. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would:
 - (a) disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking; and
 - (b) the information relates to other matters of a business, commercial or financial nature; and

- (c) 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?

11. 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.
12. Document 3 forms part of an application made to the Agency from an event management agency (**business undertaking**) for the [named] Grants Program (**grant program**).
13. [Contextual information about the named grants program]
14. Document 3 is a ‘budget’ for the proposed ‘activation’ and sets out the unit/hourly cost to deliver specific components of the proposed ‘activation’ to which it sought grant funding.
15. I am satisfied the information was acquired by the Agency from a business undertaking.

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

16. VCAT has recognised the words ‘business, commercial or financial nature’ have their ordinary meaning.²
17. I am satisfied the document concerns matters of a business, commercial or financial nature.

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

18. 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—whether the information is generally available to competitors of the undertaking;

- (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; and
- (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.

¹ (1999) 15 VAR 1.

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

19. 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 from release 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.
20. 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 introducing 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. The question is whether any such disclosure would expose the undertaking unreasonably to disadvantage.
21. The Agency's decision states:

Disclosure of that information would reveal to competitors and other prospective clients of [the business undertaking] the terms on which it is willing to do business. That would give [the business undertaking's] competitors an unfair competitive advantage that would not otherwise be available to them and would also significantly inhibit [the business undertaking] from negotiating similar future applications or contracts on terms that are the most favourable to it. That would unreasonably disadvantage [the business undertaking] from being able to compete in the relevant market and to make strategic business decisions that are most advantageous to it.
22. In determining whether disclosure of commercially sensitive information would expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify the undertaking and seek its views on disclosure.⁴ The Agency consulted with the business undertaking, which objected to disclosure as it considered the document contains its intellectual property that could be replicated for future grant applications.
23. In determining whether disclosure would expose the business undertaking, I have considered the following factors:
 - (a) the 'activation' proposed by the business undertaking in the grant application was for a collaboration between the business undertaking and [the Applicant];
 - (b) the grant application was made by the business undertaking, not [the Applicant];
 - (c) the business undertaking was successful in receiving a grant;
 - (d) the business undertaking and the Applicant have previously collaborated on projects;

³ [2007] VCAT 1301 at [33].

⁴ Section 34(3).

- (e) there is information before me suggesting that there may be a legal dispute between the businesses;
 - (f) the document sets out the unit/hourly cost to deliver specific components of its 'activation' project and such information is unlikely to be available to its competitors;
 - (g) I am satisfied information in the document could be used by the business undertaking's competitors to engage in destructive competition with the business undertaking and to gain a competitive advantage against the business undertaking in any future grant applications for similar projects; and
 - (h) I consider it is reasonably likely that the Applicant is in competition with the business undertaking.
24. On careful consideration of these factors, I am satisfied disclosure of Document 3 would be reasonably likely to expose the business undertaking unreasonably to disadvantage. Accordingly, I am satisfied the document is exempt from release under section 34(1)(b).

Section 25 – Deletion of exempt or irrelevant information

25. 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.
26. 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
27. I have considered the information the Agency deleted from Documents 1 and 2 as irrelevant. I agree it falls outside the scope of the Applicant's request.
28. Given my decision is the same as the Agency's decision and it granted access to the Documents 1 and 2 in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of those document with irrelevant information deleted.
29. I have considered the effect of deleting exempt information from Document 3. In my view, it is not practicable for the Agency to delete the exempt information, because it would render the document meaningless.

Conclusion

30. Given my decision is the same as the Agency's decision and it granted access to the Documents 1 and 2 in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of those document with irrelevant information deleted.

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].

- 31. I am satisfied Document 3 is exempt from release under section 34(1)(b).
- 32. As I am satisfied it is not practicable to provide the Applicant with an edited copy of Document 3 with exempt information deleted in accordance with section 25, access is refused in full.
- 33. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Timeframe to seek a review of my decision

- 34. If either party to this review is not satisfied with my decision, they are entitled to apply VCAT for it to be reviewed.⁷
- 35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
- 36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
- 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.¹⁰

When this decision takes effect

- 39. My decision does not take effect until the Agency's 14 day review period expires.
- 40. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

| Document No. | Date of document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|--|--------------|-------------------------------------|---|---|
| 1. | [Date] | [Named] Grants Program Activation Form | 18 | Released in part Section 25 | Released in part Section 25 No further information is to be released. | Section 25: On [date], the Applicant specified the specific pages and section of this document to which they seek access. I am satisfied the information redacted by the Agency is either personal affairs information or sections of the document that were not sought by the Applicant. |
| 2. | [Date] | PowerPoint Presentation | 48 | Released in part Section 25 | Released in part Section 25 No further information is to be released. | Section 25: I am satisfied the information redacted from this document is personal affairs information that is not sought by the Applicant. |
| 3. | [Date] | Activation Budget | 1 | Refused in full Section 34(1)(b) | Refused in full Section 34(1)(b) | Section 34(1)(b): I am satisfied the document is exempt from release in full under section 34(1)(b) for the reasons provided in the Notice of Decision above. |