

Notice of Decision and Reasons for Decision

Applicant:	'GB4'
Agency:	Sustainability Victoria
Decision date:	16 June 2025
Exemptions and provision considered:	Sections 30(1), 34(1)(b), 35(1)(b), 25
Citation:	'GB4' and Sustainability Victoria (Freedom of Information) [2025] VICmr 76 (16 June 2025)

FREEDOM OF INFORMATION – landfill operators – disposal of hazardous waste – Environmental Protection Agency (EPA) – Recycling Victoria – development of government policy – commercially sensitive information – public interest

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 and further information is to be released. However, I am satisfied sections 30(1) and 34(1)(b) applies to the document in part.

The document is to be released in accordance with the marked-up copy provided to the Agency with my decision.

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

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

16 June 2025

Reasons for Decision

Background to review

1. The Applicant made a request that was transferred to the Agency from the Department of Energy, Environment and Climate Action, seeking access to the following:

[t]he report, completed by [a third party] into the short, medium and long term need for landfill disposal of category B hazardous wastes.
2. The Agency identified one document falling within the terms of the request, being [the report]. Access to the document was refused in full under sections 30(1), 34(1)(b) and 35(1)(b). 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. In the original FOI request to the Agency, the Applicant confirmed they do not require personal affairs information in the document. This information has therefore been removed as it is irrelevant to the request.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have examined a copy of the document subject to review and considered all relevant communications and submissions received from the parties, including the Agency's response to my preliminary view as discussed below.
7. 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.
8. 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.

Preliminary view

9. I provided the Agency with my preliminary view that the document was not exempt in full. In doing so I advised I did not consider the document was exempt under sections 34(1)(b) or 35(1)(b), and provided a marked up copy of the document with my view on the material exempt under section 30(1).

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

10. The Agency responded noting it understood but did not agree with my preliminary view. It requested, in particular, that I reconsider the application of section 34(1)(b) to a small amount of additional information, being the names of businesses referred to in the report.
11. My decision in relation to that information is described below.

Review of exemptions

Section 30(1) – Internal working documents

12. 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.
13. The exemption does not apply to purely factual material in a document.²
14. 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.
15. In the circumstances of the matter, I consider the external consultant who completed the report to be an officer of the Agency for the purpose of the FOI Act and my consideration of section 30(1).

First requirement – Opinion, advice, recommendation, or consultation or deliberation

16. I am satisfied that certain content in the document is in the nature of opinion, advice or recommendation. I am also satisfied that certain content contains factual data that is intertwined with the opinions of agency officers.
17. However, the document also contains factual content that is not intertwined with opinion, advice or recommendation and this factual content is not exempt under section 30(1).

Second requirement – Deliberative process

18. I am satisfied the document was prepared for the deliberative processes of the Agency in the development of the Victorian Recycling infrastructure Plan (VRIP).

Third requirement - Would disclosure of the documents be contrary to the public interest?

19. 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

² Section 30(3).

disclosure of information. This requires a 'process of the weighing against each other conflicting merits and demerits'.³ The balancing of public interest factors for and against disclosure does not begin from empty scales or a blank page. Instead, I consider the FOI Act requires the balancing to occur from and within a default position that the document or information should be released.

20. 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:⁴
- (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 document and the broader context giving rise to the creation of the document;
 - (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 document 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 document 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 document;
 - (f) the impact of disclosing the document 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.
21. Having reviewed the document and submissions received, I am satisfied disclosure of certain information would be contrary to the public interest.
22. The management of hazardous waste is a government responsibility carefully managed and subject to significant public scrutiny.
23. In these circumstances the public interest in disclosure often weighs heavily in favour of transparency. However, this document contains information prepared by the Agency at an early stage of policy development. It also involves government engaging with the private sector that has specialist expertise. I note the government is responsible for ensuring the community has access to the services the facility provides, and that it delivers value for money in a competitive environment.

³ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Halls* [1999] VSCA 117 at [30].

⁴ *Halls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

24. In my view, disclosure of certain information in the document could effect the ability of government to deliver to the community the management of hazardous waste. This clearly would not be in the public interest.
25. It may be that as time passes and the waste management options have been further considered, that the document would be much less sensitive and disclosure would no longer be contrary to the public interest.
26. Accordingly, at this time, certain information, as set out in the marked up copy of the document provided to the Agency with the decision, is exempt under section 30(1).
27. However, I have determined that disclosure of certain information in the document would not be contrary to the public interest.
28. The purpose of the report is to inform the Agency's strategic planning for hazardous waste and development of the VRIP, which I consider to be an issue of public interest.
29. Statutory responsibility for landfill planning transferred from the Agency to Recycling Victoria (RV) after the report was completed. RV's website provides information about online consultation with stakeholders during March to April 2024 to inform the development of the VRIP. It also hosted online information sessions to provide further insights to the VRIP and gain feedback from stakeholder participants.
30. I consider some of the information to relate to current circumstances, for example waste types and tonnage, that can be released without harm to the Agency fulfilling its functions.
31. I also consider it to be in the public interest for agencies to be transparent and accountable in the performance of functions and the use of resources involving tax-payer funding. I am of the view that disclosure of certain information in the document is consistent with the principles of good governance in promoting trust and confidence in government.
32. Accordingly, I have determined the remainder of the document is not exempt from release under section 30(1).

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

33. 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?

34. The document contains data relating to volumes of waste for landfill disposal that was acquired from a third party business undertaking, being a waste facility operator.
35. I note the Agency's advice that since the document was written, the business has been acquired by another business undertaking.
36. The document also contains information about a number of waste disposal companies, including the types of waste they manage.

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

37. I am satisfied the data on volumes of waste for landfill disposal, and financial data relating to gate fees and costs for landfill disposal, are of a business, commercial or financial nature.

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

38. 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—
- (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.

39. 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.
40. I note that while the Agency consulted with the current management of the [specified] facility, the Agency could not provide a copy of the document to it (given its confidentiality). This business undertaking was therefore unable to assess specifically how disclosure might affect them. However, I can see that they advised they thought commercially sensitive information should be redacted from the document.

41. However, I note that in a second submission to OVIC, the Agency provided more information about the waste management industry and the impact disclosure would have on the current management of [the facility] and Recycling Victoria.
42. I therefore acknowledge the difficulties with the Agency in processing the request, also noting that responsibility for waste management moved from the Agency to Recycling Victoria in 2023, adding complexity to the decision.
43. I also note that the Agency advised it was not able to consult with all the businesses concerned because they would not have been able to share the document, and because some of the data is aggregated.
44. Having reviewed the document, and the Agency's confidential submissions in relation to section 34(1)(b) and consultation notes, I am not satisfied disclosure of certain information would place the businesses noted in the document to disadvantage for the following reasons:
 - (a) while the information may not be known to competitors, I consider the document contains information for the [specified] facility specifically, that would be unique to it;
 - (b) much of the data regarding [the facility] relates to 2020-2021, around four years ago;
 - (c) some of the information is aggregated and therefore could not be attributed to a certain business;
 - (d) some of the information in the document is general information about the management of waste, types of waste, and relevant legislation;
 - (e) while I appreciate waste management is a competitive market, the document does not contain technical detail of how [the facility] is managed, or any detail about how waste is treated or specific costs of any of its operations;
 - (f) I am not satisfied, based on the information before me, that the information could not be released without causing substantial harm to any of the businesses concerned;
 - (g) I consider the public interest in disclosure of information about the facility, given community interest in it, and the potential impact on the community, outweighs any disadvantage experienced by disclosure of information provided by any of the businesses concerned.
45. Accordingly, I have determined that most of the document is not exempt under section 34(1)(b).
46. However, I note the Agency's submissions about the competitiveness of the waste management industry, and so I have determined that the disclosure of the names of certain business undertakings as highlighted by the Agency on [date] would expose them unreasonably to disadvantage.
47. I therefore find that certain content is exempt under section 34(1)(b). This information is reflected in the marked-up copy of the document provided to the Agency following my decision.

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

48. I note that some of the information claimed exempt by the Agency under section 35(1)(b) I have determined is exempt under section 30(1). I have not further considered section 35(1)(b) to that same information.
49. 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.
50. Section 35(2) provides that this section does not apply to information—
 - (a) acquired by an agency or a Minister from a business, commercial or financial undertaking; and
 - (b) that relates to trade secrets or other matters of a business, commercial or financial nature.

Was the information obtained in confidence?

51. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.⁵
52. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.⁶
53. The Agency's decision letter provides the responses received during its third party consultation with the EPA and RV, in seeking their views on disclosure of the document:

RV advised that the [report] "contains confidential information received from landfill operators or other third parties."

EPA responded..."[t]he report is based on considerable information provided by EPA, which EPA has obtained because of the reporting obligations of proponents provided by the *Environment Protection Act 2017*. The information in the report that proponents give to EPA is used to regulate them, which can lead to sanction for breach of the law and subsequent review rights. EPA gave this information to Sustainability Victoria (SV) in confidence. It would not provide similar information in future if it thought that SV would disclose it, whether that is under the FOI Act. To the extent that the information appears in the document and to which the analysis by the authors of the report could allow a person to determine the information EPA has provided, EPA considers that it should be exempt under section 35(1)(b) of the FOI Act."

54. I am satisfied that information obtained from the landfill operators and the EPA to inform the report was provided in confidence.

⁵ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

⁶ *XYZ v Victoria Police* [2010] VCAT 255 at [265], referring to *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

Would disclosure of the information be contrary to the public interest as it would be reasonably likely to impair the ability of an agency to obtain similar information in the future?

55. I accept there was no statutory obligation on the EPA to provide information it obtained under the *Environment Protection Act 2017*, to the Agency for the purpose of producing the report. However, there is a statutory obligation for the waste services concerned to provide information to the EPA. Disclosure would therefore not impede the collection of the information by the EPA.
56. I am also mindful of the EPA's position that would not provide similar information in future if it thought the Agency would disclose it to the extent that disclosure could allow a person to determine the information EPA has provided.
57. However, I also consider the EPA has an obligation to work with other government agencies to deliver government services.
58. I also note the information is at a high level, some is aggregated, and some is very brief. I am not satisfied, in these circumstances, that the information is so sensitive that its disclosure would prevent the Agency from receiving similar information in the future.
59. Accordingly, I have determined the remainder of the information in the document is not exempt under section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

60. 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.
61. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸
62. As stated above, the Applicant does not seek access to personal affairs information and therefore this content is irrelevant for the purposes of this review.
63. I have considered the effect of deleting irrelevant and exempt information from the document. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited document would retain meaning.

⁷ *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].

⁸ *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

64. On the information before me, I am not satisfied the document is exempt in full from release under section 30(1), 34(1)(b) or 35(1)(b).
65. However, I am satisfied certain information is exempt under sections 30(1) and 34(1)(b).
66. As it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access is granted to the document in part.
67. The document is to be released in accordance with the marked-up copy provided to the Agency following my decision.

Timeframe to seek a review of my decision

68. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
69. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
70. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
71. 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.
72. 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.¹²

Third party review rights

73. As I have determined to release a document that contain information of a business, financial, commercial nature relating to a business undertaking, and information claimed exempt under section 35(1)(b), if practicable, I am required to notify the relevant third parties of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹³
74. 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, either on the date it is made or as soon as practicable thereafter.

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and 50(3FA).

¹³ Sections 49P(5), 50(3A), 50(3AB) and 52(3).

When this decision takes effect

75. 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.

Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision
1.	[Date]	Report	60	Refused in full Sections 30(1), 34(1)(b) and 35(1)(b)	Release in part Sections 30(1), 34(1)(b), 25 The document is to be released in accordance with the marked-up copy provided to the Agency following my decision.