

## Notice of Decision and Reasons for Decision

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| Applicant:            | 'GF3'  |
| Agency:               | South Gippsland Shire Council  |
| Decision date:        | 21 June 2024   |
| Exemption considered: | Section 34(1)(b)   |
| Citation:             | 'GF3' and South Gippsland Shire Council (Freedom of Information)<br>[2025] VICmr 61 (21 June 2024) |

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FREEDOM OF INFORMATION – Timber Harvest Plan – *Timber Harvesting Act 2014* (Vic) – Code of Practice for Timber Production 2014 – disclosure would not expose 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

My decision on the Applicant's request differs from the Agency's decision.

The document subject to review is not exempt under section 34(1)(b) and is to be released to the Applicant.

Please refer to page 5 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
Acting Public Access Deputy Commissioner

21 June 2024

## Reasons for Decision

### Background to review

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

Timber Harvesting Plan for Turtons Creek Plantation also known as Fellas plantation or coupe – Dollar-Woorarra West Rd Turtons Creek.
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to it in full under section 34(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. I have examined a copy of the document 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. I have considered relevant communications and submissions received from the parties.
7. 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.
8. 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*

9. 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.
10. The document subject to review is a timber harvest plan prepared by a third party business undertaking and submitted to the Agency.

11. I note such plans are required by the Code of Practice for Timber Production 2014 (as amended 2022). Such plans are required to be submitted to local councils prior to harvesting and to include certain details.<sup>1</sup>
12. I am satisfied the document contains information acquired by the Agency from a business, and that the information, considered broadly, relates to matters of a business nature.

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

13. 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—
  - (e) and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.
14. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,<sup>2</sup> 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.
15. 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

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<sup>1</sup> Code of Practice for Timber Production 2014, see page 52.

<sup>2</sup> [2007] VCAT 1301 at [33].

where a business undertaking would be exposed 'unreasonably' to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.

16. 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.
17. In determining whether disclosure of commercially sensitive information in a document would expose a business undertaking unreasonably to disadvantage, if practicable, an agency must notify an undertaking and seek its views on disclosure.
18. The Agency advised it consulted with the third party business undertaking to seek its view on disclosure of the document. I have reviewed the third party's response to the Agency. In summary, the third party states the document contains operational details, the disclosure of which could cause substantial harm to its competitive position in the industry and could lead to unwarranted conclusions about its business affairs. The third party business undertaking also considered disclosure could result in commercial consequences, including disruptions to its operations.
19. I have carefully considered the Agency's and third party business undertaking's positions. I have decided disclosure of the document would not be reasonably likely to expose the business undertaking unreasonably to disadvantage, principally because the document contains very little information about the business. Given this limited detail, I do not agree that disclosure would cause substantial harm or lead to unwarranted conclusions about its business affairs.
20. I also note that a majority of the information about the location, roads and maps of the parcel of land is publicly available. I do not consider disclosure of the intended haulage path will have any impact on the business undertaking given the lack of options in the area and that such routes are visible to the public.
21. I also do not consider, based on the information before me, the disclosure of the planned volume of the harvest will have any impact on the business undertaking, including to its competitors.
22. Finally, as described above, disclosure under the FOI Act does not preclude some disadvantage to a business undertaking. Rather, that disadvantage must be unreasonable. In this matter, I consider the public interest weighs in favour of disclosure to hold the local government accountable for the management of Victorian forestry.
23. The document is therefore not exempt under section 34(1)(b).

## Conclusion

24. On the information before me, I am not satisfied the document is exempt from release under section 34(1)(b). The document is therefore to be released to the Applicant.

### Timeframe to seek a review of my decision

25. If the Agency is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>3</sup>
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>4</sup>
27. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it applies to VCAT for a review of my decision.<sup>5</sup>

### Third party review rights

28. As I have determined to release documents that contain information of a business, financial, commercial nature relating to a business undertaking, if practicable, I am required to notify that business undertaking of its right to seek review by VCAT of my decision within 60 days from the date the business undertaking is given notice.<sup>6</sup>
29. In this case, I am satisfied it is practicable to notify the relevant third party business undertaking of its review rights and confirm this notification will occur on the date of my decision or as soon as possible thereafter.

### When this decision takes effect

30. 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.

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<sup>3</sup> Section 50(3D).

<sup>4</sup> Section 52(9).

<sup>5</sup> Sections 50(3F) and 50(3FA).

<sup>6</sup> Sections 49P(5), 50(3A), and 52(3).