

## Notice of Decision and Reasons for Decision

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Applicant:	'EU8'
Agency:	Suburban Rail Loop Authority
Decision date:	15 September 2022
Exemptions and provisions considered:	Sections 25, 28(1)(b), 28(1)(ba), 28(1)(d), 30(1), 34(4)(a)(ii)
Citation:	'EU8' and Suburban Rail Loop Authority (Freedom of Information) [2022] VICmr 217 (15 September 2022)

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FREEDOM OF INFORMATION – Cabinet documents – Suburban Rail Loop project – disclosure of any deliberation or decision of the Cabinet – internal working documents – risk register – disclosure not contrary to the public interest – Agency not involved in trade or commerce

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 differs from the Agency's decision.

On the information available, I am satisfied the exemption in section 28(1)(d) applies to parts of the documents. However I have decided the documents are not exempt under sections 28(1)(b), 28(1)(ba), 30(1), 34(4)(a)(i) or 34(4)(a)(ii).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is granted in part.

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

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

15 September 2022

## Reasons for Decision

### Background to review

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

I seek a copy of the IDC [Interdepartmental Committee] establishment submission referred to therein in an email dated [date], a copy of the SRLA [Suburban Rail Loop Authority] top ten success factors Powerpoint presentation referred to in an email of [date], a copy of the SRL strategic risks document referred to in an email of [date], a copy of the revised sequencing document referred to in an email of [date] and a copy of the proposed SRLA engagement with key landholders referred to in an email of [date]. I do not seek the personal details of junior agency officers but am interested in the names (only) of senior agency or other departmental or ministerial officers or third parties.

2. The Agency identified four documents falling within the terms of the Applicant's request and decided to refuse access to the documents in full. The Agency relied on the exemptions under sections 28(1)(b), 28(1)(ba), 28(1)(d), 30(1) and '34(4)(a)' to refuse access to the documents. 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 copies 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. I have considered all 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.

### Complaint concerning adequacy of search and missing documents

9. Alongside their review request, the Applicant raised a concern regarding the adequacy of the Agency's document searches. Specifically, the Applicant raised concerns the Agency's decision did not identify 'a copy of the proposed SRLA engagement with key landholders referred to in an email of [date]'.
10. In accordance with section 61B(3), I have determined to address these concerns as part of my review. OVIC staff made inquiries with the Agency regarding the Applicant's concern, which confirmed no such document exists. The Applicant was advised of the findings following those inquiries. The Applicant subsequently agreed to close the complaint.
11. In the circumstances, I am satisfied the Applicant's concerns have been addressed to the fullest extent possible in that I am satisfied the Agency conducted a thorough and diligent search and no further action is required in regard to the Applicant's concerns.

## Review of exemptions

### ***Section 28(1) – Cabinet documents***

12. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
13. In *Ryan v Department of Infrastructure*,<sup>1</sup> the Victorian Civil and Administrative Tribunal (**VCAT**) observed:

It has been said that a document is not exempt merely because it has some connection with Cabinet, or is perceived by departmental officers or others as being of a character that they believe ought to be regarded as a Cabinet document or because it has some Cabinet “aroma” around it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exemptions [(now five)]” in section 28(1) of the Act.
14. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.
15. Section 28(3) provides the exemption in section 28(1) does not apply to a document to the extent it contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.<sup>2</sup>

### ***Section 28(1)(b) – Document prepared for purpose of submission for consideration by the Cabinet***

16. Section 28(1)(b) provides a document is exempt if it has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet.
17. A document will be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to the Cabinet for its consideration. In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to the Cabinet.<sup>3</sup>
18. Document 1 is a written submission to the Suburban Rail Loop Interdepartmental Committee (**SRL IDC**) which is comprised of seven principal officers of relevant agencies, including the Agency that made the decision subject to review.
19. I note the Agency’s submission on the relationship between this document and a subcommittee of cabinet. Due to the sensitivity of such information, and the Agency’s view that it may itself be exempt information, I have not further preproduced its submission here.
20. While I note the document is marked ‘cabinet-in-confidence’, such markings are not determinative.
21. In my view, it is apparent on the face of the document that the sole, substantial or dominant purpose of the document was to make a recommendation to the SRL IDC, a committee of senior public servants, rather than Cabinet or a sub-committee of Cabinet.
22. Accordingly, I am not satisfied Document 1 is exempt pursuant to section 28(1)(b).
23. My decision in relation to section 28(1)(b) is outlined in the Schedule of Documents in **Annexure 1**.

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<sup>1</sup> (2004) VCAT 2346 at [33].

<sup>2</sup> *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

<sup>3</sup> *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

***Section 28(1)(ba) – Document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet***

24. Section 28(1)(ba) provides a document is exempt if it has been prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
25. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which the document was prepared was to brief a Minister in relation to an issue to be considered by the Cabinet.<sup>4</sup> In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to Cabinet.<sup>5</sup>
26. The Cabinet briefing purpose must be ‘immediately contemplated’ when the document is created. The exemption cannot apply merely because Cabinet ultimately considered the issue.<sup>6</sup>
27. The word ‘briefing’ means a ‘short accurate summary of the details of a plan or operation. The ‘purpose...is to inform’. Therefore the document should have the character of briefing material. A document will be of such character if it contains ‘information or advice...prepared for the purpose of being read by, or explained to, a [m]inister’. It requires more than having ‘placed a document before a Minister’.<sup>7</sup>
28. The term ‘issues to be considered by the Cabinet’ within the meaning of section 28(1)(ba), requires that it must be more than just ‘likely’ the Cabinet will consider it. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if not ultimately considered. Evidence that a matter was included on the Agenda for a Cabinet meeting will meet this test.<sup>8</sup>
29. As noted above, it is apparent on the face of the document that the sole, substantial or dominant purpose of preparation of the document was to make a recommendation to the SRL IDC. I am not persuaded that the document was prepared for the purpose of briefing a Minister.
30. Accordingly, I am not satisfied Document 1 is exempt pursuant to section 28(1)(ba).
31. My decision in relation to section 28(1)(ba) is outlined in the Schedule of Documents in **Annexure 1**.

***Section 28(1)(d) – Disclosure would involve disclosure of any deliberation or decision of the Cabinet***

32. The Agency relies on section 28(1)(d) to exempt from release information in Documents 1 and 4.
33. Section 28(1)(d) provides a document is an exempt document if its disclosure would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
34. A document will be exempt under section 28(1)(d) if there is evidence the Cabinet discussed various options in a document and deliberated upon and/or adopted one or more options submitted to the Cabinet for its consideration.<sup>9</sup>

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<sup>4</sup> *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

<sup>5</sup> *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

<sup>6</sup> *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

<sup>7</sup> *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

<sup>8</sup> *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996). See also *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998); *Hulls v Department of Treasury and Finance (No 2)* (1994) 14 VAR 295 at [320–321]; reversed on other grounds by the Court of Appeal: *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331; 15 VAR 360; [1999] VSCA 117.

<sup>9</sup> *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

35. A 'decision' means any conclusion as to the course of action the Cabinet adopts whether it is a conclusion as to final strategy on a matter or about how a matter should proceed.<sup>10</sup>
36. Where a decision of the Cabinet is made public, an announcement about the issue decided will not disclose the Cabinet's decision or deliberation.<sup>11</sup>
37. In *Asher v Department of Sustainability and Environment*,<sup>12</sup> the Victorian Civil and Administrative Tribunal (VCAT) held that where a document, on its face, does not disclose a decision or deliberation of the Cabinet, or the extent of the Cabinet's interaction with a document is unclear, section 28(1)(d) will not apply.
38. As noted above, Document 1 is marked 'cabinet-in-confidence'. However, for the most part Document 1 does not disclose a decision or deliberation of Cabinet or a sub-committee of cabinet and the Agency's submission does not provide sufficient clarity regarding Cabinet's interaction with the document for section 28(1)(d) to apply.
39. However I consider small parts of Documents 1 and 4 record the substance of several items that were deliberated by a committee, which the Agency submits is a sub-committee of Cabinet. Accordingly, I am satisfied that certain information in Documents 1 and 4 is exempt pursuant to section 28(1)(d).
40. My decision in relation to section 28(1)(d) is outlined in the Schedule of Documents in **Annexure 1**.

#### ***Section 30(1) – Internal working documents***

41. 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.
42. The exemption does not apply to purely factual material in a document.<sup>13</sup>
43. I must also be satisfied releasing this information is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>14</sup>

*Do the documents 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?*

44. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.

<sup>10</sup> *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

<sup>11</sup> *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

<sup>12</sup> [2010] VCAT 601.

<sup>13</sup> Section 30(3).

<sup>14</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

45. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>15</sup>
46. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant information deleted, where it is practicable to do so.
47. Having reviewed the documents, I am satisfied the documents were prepared by an Agency officer and contain matters in the nature of opinion, advice or recommendation.

*Were the documents 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?*

48. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>16</sup>
49. In *Re Waterford and Department of Treasury (No.2)*,<sup>17</sup> the former Victorian Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

50. I am satisfied the documents were prepared for the deliberative processes involved in the functions of the Agency, being the administrative functions associated with implementing the Suburban Rail Loop project.

*Would disclosure of the documents be contrary to the public interest?*

51. 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 disclosure of information.
52. Having reviewed the documents and considered the Agency’s reasons for decision and the Applicant’s and the Agency’s submissions, on balance, I have determined disclosure of Documents 1 and 3 would not be contrary to the public interest. In reaching this decision, I have given weight to the following relevant factors:<sup>18</sup>
- (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 documents and the broader context giving rise to the creation of the documents;
  - (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
  - (d) whether disclosure of the documents 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;

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<sup>15</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>16</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>17</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>18</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (e) whether disclosure of the documents 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 documents;
  - (f) the impact of disclosing documents 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.
53. In summary, I do not consider disclosure of the information would reasonably be considered to have a significant negative impact on the project such that its disclosure would be contrary to the public interest.
  54. Having carefully reviewed the information in the documents, I do not consider the specific information sought by the Applicant is particularly sensitive or controversial. Rather, it describes, in general terms, governance structures of the SRLA, general information about the project, possible risks affecting the project and how those risks may be mitigated. I consider such information is what would reasonably be expected in relation to a public sector project, as managing risk is a critical aspect of public sector governance.
  55. On balance, I consider the public interest in the community being informed about the way in which the Agency performs its statutory functions weighs in favour of release, where disclosure of the risks identified will likely contribute to greater public scrutiny and community participation in the implementation of major infrastructure projects such as the Suburban Rail Loop.
  56. While I acknowledge Document 3 is subject to change as a 'living document', I do not consider that this factor weighs against disclosure. If 'living documents' were to be routinely exempt, it would allow for the exemption to be applied more broadly than I consider is the intention of this provision. While I accept the risks and associated mitigation strategies may be subject to change as the project progresses, or risks subside or new or different risks emerge, from my review of the documents, they appear to be well developed and sufficiently finalised such that they can be relied upon at a relevant point in time and distributed by the Agency to 'governance groups'. In any event, it would be open to an agency proactively to publish current versions of such documents whenever they are updated.
  57. The Agency submits disclosure of the documents would likely affect the frankness and candour of Agency officers. However, as the Agency officers were engaged in their required duties, I do not accept disclosure would have any material or lasting effect on future advice where they are required to provide advice to the Agency in accordance with their employment responsibilities and relevant public sector values in the *Code of Conduct for Victorian Public Sector Employees* issued by the Victorian Public Sector Commissioner under section 61 of the *Public Administration Act 2004* (Vic).<sup>19</sup>
  58. The Agency submits it has concerns about the document providing a part explanation only, and outdated information. However, I consider any such concerns can be addressed by the Agency providing additional or supporting information to the Applicant, or indeed the public as a whole, at the time the document is released to provide any necessary context to the information. Further, I am satisfied members of the public are capable of understanding that the matters subject to the documents, being a large infrastructure project, change over time as new information becomes available.

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<sup>19</sup> See, for example, the public sector value of 'Responsiveness' which requires Victorian public sector employees to demonstrate responsiveness by 'providing frank, impartial and timely advice to the Government'.

59. For the reasons set out above, I am not satisfied disclosure of the requested information in the documents would be contrary to the public interest.
60. Accordingly, I am not satisfied the documents are exempt under section 30(1).

***Section 34(4)(a)(i) and (ii) – Information that would expose the Agency unreasonably to disadvantage***

61. Section 34(4)(a) provides a document is an exempt document if it contains ‘a trade secret’ or ‘in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature’ that would if disclosed under the Act be likely to expose the agency unreasonably to disadvantage.
62. A document is exempt under section 34(4)(a)(i) if:
- (a) the agency is engaged in trade or commerce;
  - (a) the document contains a trade secret; and
  - (b) disclosure of which would be likely to expose the agency unreasonably to disadvantage.
63. A document is exempt under section 34(4)(a)(ii) if:
- (c) the agency is engaged in trade or commerce;
  - (d) the document contains information of a business, commercial or financial nature; and
  - (e) disclosure of which would be likely to expose the agency unreasonably to disadvantage.

***Is the Agency engaged in trade and commerce?***

64. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>20</sup>
65. The VCAT has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.<sup>21</sup> VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.<sup>22</sup> An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency’s other functions.<sup>23</sup>
66. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.<sup>24</sup>
67. While the phrase ‘trade and commerce’ may be interpreted broadly,<sup>25</sup> it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.<sup>26</sup>
68. The fact an agency’s predominant activities may be described as ‘governmental’ does not preclude it from relying on the exemption under section 34(4)(a)(ii).<sup>27</sup>

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<sup>20</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

<sup>21</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

<sup>22</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

<sup>23</sup> *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

<sup>24</sup> *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

<sup>25</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

<sup>26</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

<sup>27</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

69. I adopt the view of VCAT expressed in *Pallas v Roads Corporation* (**Pallas decision**) that a government agency engaged in meeting its public functions is not engaged in trade or commerce. In the Pallas decision, VCAT held in relation to expenditure by VicRoads:

In carrying out its road building functions the Corporation engages in Governmental activities rather than in trade or commerce...

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is. A consumer who purchases a consumer item from a department store is not, for that reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.<sup>28</sup>

70. In my view, the limited financial and operational information referred to by the Agency in the documents is not evidence of it being 'engaged in trade or commerce' for the purposes of section 34(4)(a). Further, while the Agency is engaged in large infrastructure projects, involving significant budgets, as the Agency is publicly funded it is engaged in governmental rather than commercial activities.
71. Accordingly, I am satisfied the Agency is not engaged in trade and commerce in the context of section 34(4)(a) for the purposes of this matter and the first requirement under sections 34(4)(a)(i) and (ii) is not met.
72. While I am not satisfied the Agency is engaged in trade or commerce, for completeness, I have considered the second and third requirements under sections 34(4)(a)(i) and (ii).

*Do the documents contain information of a business, commercial or financial nature?*

73. The phrase 'information of a business, commercial or financial nature' is not defined in the FOI Act. Therefore, the words 'business, commercial or financial nature' should be given their ordinary meaning.
74. The Agency submits that Documents 2 and 3 contain 'commercial and strategic thinking in relation to the construction industry' and 'commercially sensitive information about potential funding risks and impacts' respectively.
75. Based on my review of the relevant information in the documents, I am satisfied they contain commercial and financial information in the broadest sense.

*Do the documents contain trade secrets?*

76. Like the Victorian FOI Act, the Commonwealth FOI Act does not define 'trade secret'. Interpreting the Commonwealth legislation, the Full Federal Court held 'trade secret' does not have a technical legal meaning and the ordinary meaning is used.<sup>29</sup> Further, what is a trade secret is primarily a question of fact. The information must be comprised of secrets used or useable in trade but a trade secret does not need to be technical or confidential information.
77. There is no information before me to suggest that either Documents 2 or 3 contain trade secrets.

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<sup>28</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [57]-[58].

<sup>29</sup> *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Another* (1992) 108 ALR 163.

*Would disclosure of the document be likely to expose the Agency unreasonably to disadvantage?*

78. Section 34(4) contemplates disclosure of a document containing information of a business, commercial or financial nature under the FOI Act may expose an agency to a certain measure of disadvantage.
79. In the context of section 34(4)(a)(ii), ‘disadvantage’ has been interpreted to be in the nature of an agency engaged in trade or commerce being exposed to commercial or competitive disadvantage. For example, in *Accident Compensation Commission v Croom*,<sup>30</sup> ‘disadvantage’ contemplated by this section is interpreted as ‘disadvantage in a business, commercial or financial sense’.<sup>31</sup>

In my opinion, the word “disadvantage” in the context of trade or commerce and information of a business, commercial financial in nature means injury of a financial kind.<sup>32</sup>

80. The term ‘likely’ in the context of this section means ‘probable, such as well might happen or be true’.<sup>33</sup>
81. Whether any disadvantage would be ‘unreasonable’ depends on the particular facts and circumstances of the matter and involves a balancing exercise.<sup>34</sup>
82. Further, it is not enough to establish there is a likelihood of disadvantage as any such exposure to disadvantage must be ‘unreasonable’ in the circumstances.<sup>35</sup>
83. In relation to Document 2, the Agency submits:

Disclosure of this information would reveal SRLA’s internal deliberations and strategy regarding commercial-in-confidence matters. It would expose SRLA unreasonably to disadvantage as market participants would be alerted to the types of internal and commercial considerations that are front-of-mind for key SRLA decision-makers.

84. In relation to Document 3, the Agency submits:

As a general rule, risk registers seek to cover the field in relation to the types of risks an organisation might face at any given point in time and is a subjective assessment. Taken out of context, the information in this document is likely to create unfounded speculation in the market about SRLA’s funding status and commercial strategies.

In particular, I draw your attention to the following references in Document 3:

- (i) The risk register proposes mitigations under the column “TREATMENT”, which details matters which are commercial-in-confidence to SRLA.
- (ii) For example, [redacted]. This information has the potential to create unfounded speculation in the market in relation to SRLA’s funding status and commercial strategies.

85. Having considered the information in Documents 2 and 3 and the above factors, I do not consider disclosure would expose the Agency unreasonably to disadvantage for the following reasons:

- (a) for the most part the information in the documents is general in nature;

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<sup>30</sup> [1991] 2 VR 322.

<sup>31</sup> Ibid 325.

<sup>32</sup> Ibid 331.

<sup>33</sup> *Asher v Department of Innovation, Industry and Regional Development* [2005] VCAT 2702 at [38]; *Gibson v Latrobe City Council (General)* [2008] VCAT 1340 at [39].

<sup>34</sup> *Asher MP v Department of Innovation, Industry and Regional Development (General)* [2005] VCAT 2702 at [28] and [38].

<sup>35</sup> *Re Byrne and Swan Hill Rural City Council* (2000) 16 VAR 366 as cited in *Dalla-Riva v Department of Treasury and Finance* [2005] VCAT 2083 at [30].

- (b) much of the information in the documents would not be unexpected in relation to managing infrastructure projects;
- (c) I am not satisfied, based on the information before me, that disclosure would disadvantage the Agency in a commercial sense as the information in the documents is not sufficiently detailed;
- (d) the Agency is a large government entity with considerable market power and influence, in these circumstances I am not satisfied disclosure would place it at a disadvantage in any future commercial negotiations.

86. The documents are therefore not exempt under sections 34(4)(a)(i) or 34(4)(a)(ii).

### ***Section 25 – Deletion of exempt or irrelevant information***

- 87. 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.
- 88. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>36</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless they are not ‘practicable’ and release of the document is not required under section 25.<sup>37</sup>
- 89. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

- 90. On the information available, I am satisfied the exemption in section 28(1)(d) applies to parts of the documents. However I have decided the documents are not exempt under sections 28(1)(b), 28(1)(ba), 30(1) or 34(4)(a)(i) or 34(4)(a)(ii).
- 91. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is granted in part.

### **Review rights**

- 92. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (VCAT) for it to be reviewed.<sup>38</sup>
- 93. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>39</sup>
- 94. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>40</sup>

<sup>36</sup> *Mickelborough v Victoria Police* (General) [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier* (General) [2012] VCAT 967 at [82].

<sup>37</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division* (Review and Regulation) [2013] VCAT 1267 at [140], [155].

<sup>38</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>39</sup> Section 52(5).

<sup>40</sup> Section 52(9).

95. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
96. 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.<sup>41</sup>

**When this decision takes effect**

97. My decision does not take effect until the Agency's 14 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>41</sup> Sections 50(3F) and (3FA).

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Submission to Suburban Rail Loop Interdepartmental Committee	3	<p><b>Refused in full</b></p> <p>Sections 28(1)(b), 28(1)(ba), 28(1)(d), 30(1)</p>	<p><b>Release in part</b></p> <p>Sections 28(1)(d), 25</p> <p>The document is to be released except for information that is exempt under section 28(1)(d), which is to be deleted in accordance with section 25, being:</p> <ul style="list-style-type: none"> <li>the text of 'Key Point' 1 on page 1.</li> </ul>	<p><b>Section 28(1)(b):</b> I am not satisfied this document was created for the purpose of submission to Cabinet for its consideration for the reasons set out above.</p> <p><b>Section 28(1)(ba):</b> I am not satisfied this document was created for for the purpose of briefing a Minister in relation to issues to be considered by Cabinet for the reasons set out above.</p> <p><b>Section 28(1)(d):</b> I am satisfied disclosure of certain information in the document would involve disclosure of a deliberation of a sub-committee of Cabinet for the reasons set out above in my Notice of Decision.</p> <p><b>Section 30(1):</b> The document is not exempt under section 30(1) for the reasons set out above.</p>
2.	[date]	SRLA top ten success factors	4	<p><b>Refused in full</b></p> <p>Sections 30(1), 34(4)(a)</p>	<p><b>Release in part</b></p> <p>The document is to be released with irrelevant information</p>	<p><b>Section 30(1):</b> See comments for Document 1.</p> <p><b>Section 34(4)(a)(i), 34(4)(a)(ii):</b> I am not satisfied the Agency is engaged</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					deleted in accordance with section 25.	in trade or commerce for the reasons set out above in the Notice of Decision  <b>Section 25:</b> I agree the draft version of the document provided to this office is outside the scope of the request and it is therefore irrelevant to the request.
3.	[date]	SRL strategic risks	2	<b>Refused in full</b>  Sections 30(1), 34(4)(a)	<b>Release in full</b>	<b>Section 30(1):</b> See comments for Document 1.  <b>Section 34(4)(a)(i), 34(4)(a)(ii):</b> See comments for Document 2.
4.	[date]	Revised sequencing document	1	<b>Refused in full</b>  Sections 28(1)(d), 30(1)	<b>Release in part</b>  Sections 28(1)(d), 25  The document is to be released except for information that is exempt under section 28(1)(d), which is to be deleted in accordance with section 25, being:  <ul style="list-style-type: none"> <li>the redaction made by the Agency in the</li> </ul>	<b>Section 28(1)(d):</b> See comments for Document 1. However, I am not satisfied that the mere mention that a sub-committee is due to meet on a particular day would reveal a deliberation or decision is exempt under section 28(1)(d).  <b>Section 30(1):</b> See comments for Document 1.  <b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>document relating to 24 February; and</p> <ul style="list-style-type: none"> <li>the redaction made by the Agency in the document relating to 13 April.</li> </ul>	document with exempt information deleted in accordance with section 25.