

Notice of Decision and Reasons for Decision

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| Applicant: | 'AP4' |
| Agency: | Development Victoria |
| Decision Date: | 10 October 2019 |
| Exemption considered: | Section 28(1)(b) |
| Citation: | 'AP4' and Development Victoria (<i>Freedom of Information</i>) [2019] VICmr 139 (10 October 2019) |

FREEDOM OF INFORMATION – Suburban Rail Loop – Cabinet documents – documents prepared by an external consultant for submission and consideration by Cabinet

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.

I am satisfied the documents are exempt under section 28(1)(b). As I have determined it would not be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I am satisfied the documents are exempt in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
10 October 2019

Reasons for Decision

Background to review

1. On 3 September 2018, the Applicant made a request to the Agency for access to documents relating to the Suburban Rail Loop, which is a project that will involve the construction of an underground rail link that will 'connect major railway lines from the Frankston line to the Werribee line via Melbourne Airport' (the **Project**).¹ The Project was announced by the Victorian Government in August 2018.
2. By email dated 12 October 2018, the Applicant amended the request for access to the following documents:
 - ...documents relating to the Suburban rail Loop including but not limited to:
 - feasibility reports in relation to the project
 - overview reports in relation to the project
 - summary reports in relation to the project
 - planning reports in relation to the project
 - ...created between 1 January 2018 and 27 August 2018.
3. In its decision, the Agency identified three documents falling within the terms of the Applicant's request.
4. It decided to refuse access to the documents in full under sections 28(1)(b), 28(1)(ba), 30(1), 32(1) and 34(4)(a)(ii). The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. During the review, the Agency advised it also relied on sections 32(1) and 28(1)(ba) to refuse access to the documents.
7. I have been briefed by OVIC staff, who attended the Agency's office to inspect the documents subject to review on two occasions.²
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. On 22 August 2019, OVIC staff informed the Applicant about the Agency's reliance upon two additional exemptions and invited the Applicant to make a written submission in response.
10. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submissions dated 23 May, 18 July and 7 August 2019;
 - (d) supporting documents provided by the Agency for inspection on 18 July and 10 September 2019; and
 - (e) all communications between this office and the Agency and the Applicant.

¹ See for example <https://bigbuild.vic.gov.au/projects/suburban-rail-loop>.

² Section 63D provides that the production of a document claimed to be exempt under section 28 may only be inspected at the premises of the agency or Minister.

11. 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.

Submissions

12. The Agency is responsible for the development and delivery of state-significant projects in Victoria, which includes the proposed Suburban Rail Loop project, the subject of documents under review.
13. The Agency requested parts of its submissions remain confidential. In summary, the Agency submits the documents are exempt in full for the following reasons:
 - (a) The documents are exempt under section 28(1)(b) as they were commissioned by the Agency from external consultants and legal advisors for the sole purpose of a confidential submission for the consideration of Cabinet.
 - (b) The documents are exempt under section 30(1) as they were commissioned by the Agency for the purpose of the deliberative process involved in the statutory functions of the Agency. Disclosure of the documents would be contrary to the public interest as the documents are preliminary and speculative in nature, the release of which would give rise to unnecessary speculation and mislead the public. In turn this would undermine the decision relating to the Project.
 - (c) The documents are exempt under section 34(4)(a) as disclosure would be likely to expose the Agency unreasonably to disadvantage on the basis they contain commercially sensitive information in respect to the deliberative processes of the Agency as well as other government agencies. Disclosure would disadvantage the ability of the Agency to advise on and/or deliver commercial outcomes on the Project and future projects.
 - (d) The documents are exempt under section 28(1)(ba) as, in addition to being prepared for submission for consideration of Cabinet, the documents were also prepared to enable Agency officers to brief and advise relevant Ministers on the feasibility of the Project ahead of the relevant Cabinet meetings.
 - (e) Lastly, Document 3 is exempt in full under section 32(1) as it is a confidential communication between a legal adviser and their client and is subject to legal privilege exemption.
14. The Applicant did not make a submission in relation to the review.

Review of exemptions

15. The Agency relied on the exemptions in sections 28(1)(b), 28(1)(ba), 30(1), 32(1) and 34(4)(a)(ii) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision

Section 28(1)(b) – Cabinet document exemption

16. Section 28(1) provides a document is an exempt document if it was 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. However, section 28(1) will not apply to a document to the extent the document 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.
18. The definition of 'Cabinet' in section 28(7)(a) includes a committee or sub-committee of Cabinet.

19. In *Ryan v Department of Infrastructure*,³ 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” about it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exceptions [(now five)]” in section 28(1) of the Act.

20. In *Department of Infrastructure v Asher*,⁴ the Victorian Court of Appeal stated:

At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or feasible or may advance an argument for a particular point of view. The former would say nothing as to Cabinet’s deliberations, the latter might say a great deal.

21. A document will only 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 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 Cabinet.⁵
22. However, VCAT has recognised section 28(1)(b) turns upon the purpose for which the document was created. It is not necessary to show a document was submitted to Cabinet.⁶ Nor is it necessary to prove Cabinet considered the document to satisfy the requirements of section 28(1)(b).⁷
23. A report prepared by an external consultant is a document prepared by an ‘agency’ for the purposes of section 28(1)(b).⁸
24. In the context of considering documents prepared by an external consultant, the exemption is not contingent upon the author of the document being made aware of their ultimate use, but rather the purpose for which the documents were ‘commissioned by those who commissioned it’.⁹

Was the document prepared by a Minister, or on their behalf by an agency?

25. As stated above, the documents were commissioned by the Agency from external consultants and legal advisors.
26. I am satisfied each of the documents were prepared by external consultants commissioned by the Agency.

Was the document prepared for the purpose of submission for consideration by Cabinet?

27. As outlined above, the key consideration under section 28(1)(b) is whether, at the time a document was created, the sole or one of the substantial purposes for which a document was prepared was for submission for consideration by Cabinet.

³ [2004] VCAT 2346 at [33].

⁴ [2007] VSCA 272 at [8].

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

⁶ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34].

⁷ *Ibid.*

⁸ See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

⁹ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 453; [2004] VCAT 1657 at [28]; *Asher v Department of Premier & Cabinet* [2008] VCAT 450 at [43] and [74].

28. Having considered the information submitted by the Agency, I am satisfied the documents were prepared for the purpose of submission for consideration by Cabinet. While not required, in this case, this finding is supported by the fact the documents were submitted to Cabinet for its consideration.

Does the document contain purely statistical, technical or scientific material?

29. Having been briefed by OVIC staff, who inspected the documents claimed to be exempt under section 28(1)(b), I am satisfied the documents do not contain purely statistical, technical or scientific material that could be disclosed without also disclosing any deliberation or decision of Cabinet. Consequently, I am satisfied the exception in section 28(3) does not apply.
30. Accordingly, on the information before me, I am satisfied the documents are exempt under section 28(1)(b).

Sections 28(1)(ba), 30(1), 32(1) and 34(4)(a)(ii)

31. As I have determined the documents are exempt under section 28(1)(b), it is not necessary for me to consider the other exemptions relied on by the Agency under sections 28(1)(ba), 30(1), 32(1) and 34(4)(a)(ii).

Deletion of exempt or irrelevant information

32. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
34. In light of my finding above in relation to section 28(1)(b), I am satisfied the documents are exempt in full and no obligation arises under section 25 to provide the Applicant with an edited copy of the documents.

Conclusion

35. I accept the expenditure of significant public funds on major infrastructure projects raises genuine and significant public interest considerations regarding the accountability and transparency of government decision making. However, it is important to note the exemptions under section 28(1) do not allow me to take into account any public interest considerations, but rather whether the legal requirements of the relevant exemption are satisfied.
36. In this case, on the information before me, I am satisfied the documents are exempt under section 28(1)(b).
37. As I have determined it would not be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I am satisfied the documents are exempt in full.

¹⁰ *Mickelburgh 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].

¹¹ *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] and [155].

Review rights

38. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
41. 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.
42. 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.¹⁵

When this decision takes effect

43. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).