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Notice of Decision and Reasons for Decision

Applicant: 'AR5'
Agency: Victorian Planning Authority
Decision Date: 12 November 2019
Exemptions considered: Section 30(1)
Citation: *'AR5' and Victorian Planning Authority (Freedom of Information) [2019]*
VICmr 159 (12 November 2019)

FREEDOM OF INFORMATION – draft reports – impact assessment report – retail and employment needs economic assessment – council and planning authority planning documents

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 in that I have decided to release the documents in part.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

12 November 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - (a) Quarry Impact Assessment, prepared by [a third party (draft [year])];
 - (b) Economic report, prepared by [a third party] (now known as [third party name]) (draft [year]); and
 - (c) Traffic and Transport Assessment, prepared by [a third party] (draft [year]).
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant indicated they were seeking the documents in their draft form. The Applicant advised they were not seeking personal affairs information.
5. I have examined copies 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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application and subsequent communications;
 - (c) the Agency's submission dated 17 September 2019 and attached legal advice dated 25 July 2019;
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.

Review of exemptions

9. The Agency relied section 30(1) to deny access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

10. 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.
11. The exemption does not apply to purely factual material in a document.¹
 12. 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, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
 13. 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’.²
 14. 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.
 15. In deciding whether disclosure of the matter would be contrary to the public interest, I have taken the following into consideration³:
 - (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;
 - (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.
 16. The Agency advised the reports were commissioned by [a local] Council in partnership with the Agency. The Agency advised it consulted with the Council and the two consultancies who completed the documents. [A local] Council did not object to the release of the documents. The author of Document 1 also did not object to the release of the document it prepared, however the author of Document 2 did object.
 17. The author of Document 2 objected on the basis that it is an outdated report. The final version of the report will use updated analysis of building approvals data and population forecasts, both of which

¹ Section 30(3).

² *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].

³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

will have changed since [year]. The author stated that it would be misleading to release the draft report where an updated version will soon be available.

Agency submission

18. The Agency submitted that the release of the documents would disclose matter in the nature of opinion, advice or recommendation prepared by consultants engaged by it and the Council and that they were prepared as part of the deliberative processes involved in the urban land use planning functions of the Agency and Council.
19. The Agency further noted:
 - (a) the documents present the opinions, advice and recommendations of the consultants;
 - (b) Document 1 focuses on establishing an appropriate buffer distance between two quarries and a sewerage plant and sensitive land uses, such as housing. Although there are guidelines for buffer zones these need to be interpreted and require the exercise of professional judgement;
 - (c) Document 2 provides an opinion on the likely economic viability of retail and employment uses in the [location] area. Although this is based on factual information, it is primarily a matter of professional opinion;
 - (d) redacting the documents under section 25 would remove the meaning from the reports;
 - (e) both drafts rely on different assumptions regarding the extent of the activity at a current quarry;
 - (f) part of [a person's] property was proposed for residential development in the [year] drafts, on the assumption that there would be no expansion to the existing quarry. In final versions, this part of the property is now proposed for industrial development, as it is within the buffer of an expanded quarry. The Agency believes it would be contrary to the public interest for the applicant to use the [year] draft report to argue for residential development if future expansion of the quarry would conflict with such a development;
 - (g) the Agency intends to make both reports available on its website in [month year];
 - (h) the Agency also provided legal advice in support of the decision the documents are exempt under section 30(1), in summary, disclosure of the documents would be contrary to the public interest because:
 - i. some of the information in the reports may be outdated and misleading such that disclosure at this time would hinder rather than help discussion;
 - ii. the draft reports have been superseded by different version which are based on a different underlying assumption which adds to the potential for them to be misleading;
 - iii. the final reports will shortly be available to the public such that the draft reports may cause confusion, ill informed, and unnecessary debate, particularly once the final reports are published. It is well established that draft documents are generally inappropriate for release particularly where the final version of the document is made public;

- iv. VCAT has previously accepted that the dangers of releasing documents that do not necessarily represent an agency's final views or opinions were 'obvious'; release of such documents could be misleading and confusing and rather than assisting public confidence, may have the opposite effect;
- v. To release a draft implicitly attributes to an agency a view of policy which is not ultimately held, or which were only held in a materially amended form;
- vi. The more sensitive or contentious the issues involved in the communication should not be disclosed. Sensitive issues can include information about commercially sensitive matters, about the workings of high levels of government, contentiousness of the sensitive matter, or sensitive economic analysis;
- vii. It is contrary to the public interest to disclose documents reflecting possibilities considered but not eventually adopted, as such disclosure would be likely to lead to confusion and ill-informed debates about what happened rather than what did.
- viii. In addition, there is a line of decided cases which support the conclusion that the public interest will generally come down against release of draft documents in favour of holding the documents exempt.⁴

Assessment of Document 1 under section 30(1)

- 20. Document 1 is an 'Impact Assessment Report' for the '[location] Precinct Structure plan'. It is dated [month year]. It was prepared by a consultancy engaged by a local government council and the Agency. The report notes the scope of the report was the impact of the [location] Precinct Structure Plan relating to, for example, a review of environmental and planning operations, air, noise, vibration and blasting impacts and an analysis on environmental risks.
- 21. My view is that significant parts of the document contain factual information, for example, maps, information from planning documents (including some that are publicly available, for example Plan Melbourne), graphs and figures of wind speeds, the types and outcomes of inspections and testing conducted (for example noise monitoring results), and rules and procedures that are publicly available (for example EPA documentation). This information is therefore not exempt from release under section 30(3).
- 22. I also consider that disclosure of certain parts of the document would disclose matter in the nature of opinion, advice of recommendation prepared by an officer (in this instance, an officer includes the consultancy that prepared the report on behalf of the agency) in the course of, or for the purpose of the deliberative purposes of the Agency – in this instance, planning considerations for an area known as the [location] Precinct. I therefore must consider whether disclosure of such information would be contrary to the public interest.
- 23. I note the Agency's submission that the assessment was conducted based on an assumption about a local quarry that may no longer be accurate. I also note the Agency's submission that final reports will be released in the coming months. However, weighing all the factors in this matter, I have decided it would not be contrary to the public interest to release the document, for the following reasons:
 - (a) the document is not marked draft, rather, according to the last page, it is the final signed version 'approved for issue';

⁴ Yarra City v Roads Corporation [2009] VCAT 2646 at [24]

- (b) the consultancy and one of the agencies that commissioned the report do not object to its release;
- (c) the document itself details its limitations and assumptions – I therefore consider its release is unlikely to cause confusion;
- (d) the applicant is specifically seeking the draft document rather than the final version that the Agency states will be published shortly;
- (e) even if this were to be considered a draft document, there is no overarching exemption for draft documents, rather, their release must be contrary to the public interest. Merely disclosing information or deliberations that takes place during an agency’s decision-making process is not necessarily contrary to the public interest, rather, making an agency’s decision-making process more transparent, potentially by publishing draft documents, is consistent with the purposes of the FOI Act;
- (f) in my view, speculation about the matter, including those aspects that may have been considered but were not ultimately adopted, will occur regardless of whether the document is disclosed or not. Whether such speculation can be properly characterised as one that is ‘ill-informed’ will often be a matter of subjective judgement.
- (g) If there is a subsequent version of the document currently in existence, then it is up to the Agency to advise the applicant of that fact and how to obtain it;
- (h) I do not consider the agency has provided any information in support of its contention that release would be contrary to the public interest. Any changes to its contents can be explained to the applicant;
- (i) There is a strong public interest in the community being informed about the potential changes to the area subject to the planning and assessment documents. Responsible government calls for an adequate degree of transparency to enable informed public debate. I consider that releasing the disputed document in full would, if anything, increase the quality of information available to the public upon which any debate is based. If the public is informed about the analysis and underpinnings of policies and projects only after a decision has been made, then the ability of the public to genuinely engage in effective debate is significantly reduced.

24. As the document is not exempt from release under section 30(1), it is to be released to the applicant with only personal affairs information deleted from the document as it is irrelevant to the request.

Assessment of Document 2 under section 30(1)

- 25. Document 2 is an ‘economic assessment’ of ‘retail and employment needs’. It is marked as a draft document dated [month year]. It was prepared by a consultancy engaged by a local government council and the Agency. The purpose of the report is to ‘provide guidance for future retail and employment opportunities in the [location] PSP’.
- 26. As with Document 1, I consider a significant amount of information in the report is purely factual information, for example, the existing conditions of the area, including land use, maps, and publicly available information such as the Melbourne [location] Corridor Plan, Plan Melbourne, and Australian Bureau of Statistics data. In fact, in my view, Document 2 is made up primarily of such information.
- 27. However, I also consider that disclosure of certain parts of the document would disclose matter in the nature of opinion, advice of recommendation prepared by an officer (in this instance, an officer

includes the consultancy that prepared the report on behalf of the agency) in the course of, or for the purpose of the deliberative purposes of the Agency.

28. As with Document 1, I note the Agency's view that a finalised version of the document will be published, and in this case, the consultancy objects to its release on the grounds that its assessments are based on 2017 data. I also note that Document 2 is marked draft and there is no final report date. However, weighing all the factors in this matter, I have decided it would not be contrary to the public interest to release the document, for similar reasons to that set out above in relation to Document 1 as well as:
- (a) it is clear that the opinions and recommendations in the report are based on 2017 data, as that data is cited throughout the report (and in some cases the data is as old as 2015 or 2012). I also note that the report itself refers to the analysis being undertaken on the basis of information available at the time;
 - (b) while it is a draft document, it appears to be at a well-developed stage, in that it is clearly formatted and edited for submission to the agencies that commissioned it;
 - (c) one of the Agencies that commissioned the report does not object to its release. It is therefore difficult to argue disclosure of the document would meet the significant threshold of being contrary to the public interest;
 - (d) as with Document 1, if there is a subsequent version of the document currently in existence, then it is up to the Agency to advise the applicant of that fact and how to obtain it;
 - (e) I am sceptical disclosure would affect the quality of advice prepared for the Agency in the future. I note the views of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Graze v Commissioner for State Revenue*,⁵ which observed the possibility of public scrutiny in some circumstances would provide for better administrative decision making. In this matter, the information was prepared by a consultancy with legal and professional obligations to provide accurate advice.
29. As the document is not exempt from release under section 30(1), it is to be released to the applicant with only personal affairs information deleted from the document as it is irrelevant to the request.

Deletion of exempt or irrelevant information

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷

⁵ [2013] VCAT 869.

⁶ *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 [82].

⁷ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

32. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

33. On the information available, I am satisfied the section 30(1) does not apply to the documents. The documents are therefore to be released to the Applicant with the irrelevant information, being the personal affairs information, deleted.

Review rights

34. 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.⁸
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
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 (international callers dial +61 3 8685 1462).
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.¹¹

When this decision takes effect

39. 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.

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).