

## Notice of Decision and Reasons for Decision

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Applicant:	No Sky Rail on Frankston Line Incorporated
Agency:	Major Transport Infrastructure Authority
Decision Date:	31 October 2019
Exemptions considered:	Sections 30(1), 33(1)
Citation:	<i>No Sky Rail on Frankston Line Incorporated and Major Transport Infrastructure Authority (Freedom of Information)</i> [2019] VICmr 153 (31 October 2019)

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FREEDOM OF INFORMATION – Sky Rail – environmental impact assessment – preliminary or draft report – research methodology – noise assessment

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 additional information in the document.

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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
31 October 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant amended their original request.
2. The amended request was for access to the following documents:

Any reports assessing the potential impacts (including impacts on the community) of the [location] Train Stabling Facility (Facility) and associated mitigation measures in respect of:

  - a) light;
  - b) noise;
  - c) air; and/or
  - d) the migratory bird species supported by the Edithvale-Seaford Wetlands Environment Area in the vicinity of the Facility.
3. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to grant access to the documents in part.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant also informed OVIC it was of the view the Agency had not located additional documents relevant to its FOI request.
6. On 26 August 2019, the Applicant agreed the additional documents did not fall within the scope of the original FOI request. OVIC advised the Applicant to make a new FOI request for the relevant documents. The Applicant agreed to this resolution.
7. On 1 August 2019, the Applicant indicated they did not seek personal affairs information. Given that personal affairs information was the only information exempted by the Agency in Document 1, it is not subject to review. Accordingly, this review relates to Document 2 only (**the document**).
8. I note, while the Agency's decision letter advised the Applicant that Document 2 was denied in full, it provided a redacted copy of the document to the Applicant in error. Therefore, I have taken the fact certain information from the document was released to the Applicant into consideration in my decision.
9. I have examined a copy of the document subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. 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 and in various emails to OVIC staff;
  - (c) the Agency's submissions dated 18 June 2019 and 9 October 2019; and

(d) other communications between OVIC staff, the Applicant and the Agency.

12. 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.

### ***Preliminary view***

13. This Office provided the Agency with my preliminary view on this matter, including:

- (a) the document clearly acknowledges the results and findings in the report relate to the particular circumstances in this matter;
- (b) the document acknowledges that, if certain circumstances were to change, the modelling used would have to be updated;
- (c) given these disclaimers in the report, the release of the document is unlikely to mislead the public or lead to uninformed debate;
- (d) the section of the report that relates to the 'existing noise environment' does not appear to be sensitive as it relates to prevailing factors external to the project; and
- (e) there is a public interest in releasing information that relates to 'noise modelling methodology' as it enables public scrutiny of the Agency's methodology.

The Agency was asked whether it would like to provide any further information or a submission in response to the preliminary view.

14. The Agency responded to my preliminary view stating:

- (a) release of the report would be contrary to the public interest as it is preliminary and contains 'modelled predictions of operational noise' that has not yet undergone the required 'field monitoring and testing';
- (b) the disclaimer on the document alone would not be enough to mitigate the possibility of the public being misled; and
- (c) the public interest and curiosity about possibilities merely considered by government is frequent and continues despite government messaging about the tenuous nature of such proposals.

The Agency also acknowledged that, if the Information Commissioner does not agree the document is exempt in full under section 30(1), that further information in the document could be released to the Applicant and identified the information that could be released.

### **Review of exemptions**

15. The Agency relied on the exemptions under sections 30(1) and 33(1) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

### **Section 30(1)**

16. 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;
- (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.

17. The exemption does not apply to purely factual material in a document.<sup>1</sup>

18. I note background information provided by the Agency in relation to the document, that it relates to a new train storage facility being built in [location]. The new facility is located in a mixed commercial and industrial area.

19. The document provides the Agency with specialist advice relating to planning and environmental approvals and includes an assessment of noise emissions. This assessment was undertaken in accordance with applicable criteria in the *State Environmental Protection Policy No N-1* and the *Victorian Passenger Rail Infrastructure Noise Policy*.

*Does the document contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

20. 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.

21. The report was prepared by the [named] Joint Venture (**Joint Venture**). In its submission, the Agency advised the Joint Venture was engaged by the Agency for the purposes of the Level Crossing Removal Project. Furthermore, the document states the Joint Venture is engaged 'to provide specialist planning and environmental approvals advice'. I am satisfied, for the purposes of this review, the Joint Venture is an 'officer' of the Agency.

22. Further, I am satisfied the document discloses matter in the nature of opinion, advice or recommendation prepared by an officer of the Agency.

*Was this information communicated in the course of an Agency's deliberative processes?*

23. I am satisfied the document was communicated in the course of the Agency's deliberative functions related to the planning and assessments required as part of the Level Crossing Removal Project.

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

24. In deciding if disclosure of the document would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.

25. In its decision, the Agency advised it would be contrary to the public interest for the document to be released because it contains information that is preliminary in nature. This is because 'the modelled predictions of operational noise have not yet undergone the required field monitoring and testing'.

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<sup>1</sup> Section 30(3).

The Agency advised the document considers two stages of the potential project design and the second stage is yet to be finalised and may not proceed. The Agency submitted the release of this information has the potential to cause unnecessary confusion, ill-informed debate and could be misrepresented.

26. In its submission, the Agency added the following:
- (a) the document relates to a significant and contentious project the outcome of which has not been settled or decided. Additionally, decisions in relation to whether the final project would proceed had still not been made; and
  - (b) the provision of high level, independent, frank and fearless advice from the Agency's staff would be inhibited by the disclosure of preliminary design concepts and this would have unintended, adverse effects on the integrity or effectiveness of decision-making processes.
27. Consistent with the preliminary view provided to the Agency, I agree further information in the document is not exempt and should be released. Therefore, my review is of the remaining information the Agency maintains is exempt under sections 30(1) and 33(1).
28. The remaining information the Agency considers is exempt under section 30(1) relates to any mention of, and details relating to, the later proposed stages of the project.
29. 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:<sup>2</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.
  - (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.
  - (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.
30. I have decided disclosure of the document would not be contrary to the public interest for the following reasons:

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<sup>2</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (a) Information already released to the Applicant in redacted form and in the Agency's decision letter discloses the various stages of the project, including details about the proposed later stages of the project.
- (b) The information is sensitive, as it relates to potential noise generated by the facility. However, I consider it is this sensitivity that also gives rise to a significant public interest in the disclosure of such information to the public, which are impacted by noise levels or seek access to the information in order to better understand government decision making.
- (c) The report is in draft form, however, as it is dated 12 September 2017, it is most likely in its final form.
- (d) I note it has generally been accepted by VCAT that it may be contrary to the public interest to prematurely release the preliminary views and recommendations provided as part of a deliberative function of an agency.<sup>3</sup> However, having considered the information before me, I do not find this argument persuasive in the circumstances of this matter. Speculation about the project, including those aspects that continue to be under consideration, will occur regardless of whether the document is disclosed or not. Whether such speculation can be properly characterised as one that is 'misleading' will often be a matter of subjective judgement.
- (e) I am of the view members of the public are capable of understanding that, given the passage of time since the document's completion and the current status of the project, the document contains preliminary information that will be subject to change. I consider the Agency in releasing the document will be able to provide any further explanation to assist the public in understanding information in the document given the current status of the project or further information that has become available since the document was created.
- (f) I am sceptical disclosure of the document 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*,<sup>4</sup> 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 engaged by the Agency for a fee and which had legal and professional obligations to provide accurate advice to the Agency.
- (g) There is a strong public interest in the community being informed about the potential impact of infrastructure projects. Responsible government calls for an adequate degree of transparency to enable informed public debate. I consider releasing Document 2, if anything, will 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 is made by government, the ability of the public to genuinely engage in effective debate is significantly reduced.

31. Accordingly, I am not satisfied disclosure would not be contrary to the public interest to release and the document is not exempt under section 30(1).

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<sup>3</sup> *McIntosh v Police (Vic)* [2009] VCAT 1868.

<sup>4</sup> [2013] VCAT 869.

### **Section 33(1)**

32. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>5</sup> and
  - (b) such disclosure would be 'unreasonable'.
33. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>6</sup>
34. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
35. Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.
36. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.<sup>7</sup> However, this obligation does not arise if:
- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
  - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
  - (c) it is not practicable to do so.<sup>8</sup>
37. The Agency decided the street numbers of certain addresses in the documents is personal affairs information. The Agency did not consult with the third parties in this matter.
38. I agree the information is in a form from which a person's name and address could be identified.
39. I note the applicant is not seeking personal affairs information, however, may be seeking the specific information referred to here as it relates to the location from which noise has been measured. I therefore have considered further whether release of this information would be unreasonable.
40. I have decided this information is exempt under section 33(1). I make this decision noting that it would have been preferable for those persons concerned to have been consulted as they may have no concerns about the release of these locations. However, as I do not know the circumstances of

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<sup>5</sup> Sections 33(1) and (2).

<sup>6</sup> Section 33(9).

<sup>7</sup> Section 33(2B).

<sup>8</sup> Section 33(2C).

their participation in the planning project, including any undertaking made by those persons or the Agency, I consider it would be unreasonable to release this information.

### ***Deletion of exempt or irrelevant information***

41. 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.
42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>9</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>10</sup>
43. On 1 August 2019, the Applicant agreed to exclude from the review any personal affairs information. I accordingly consider this information to be irrelevant.
44. I have considered the effect of deleting irrelevant information from the document. In my view, it is practicable for the Agency to delete such information, because it would not require substantial time and effort, and the edited document would retain meaning.

### ***Conclusion***

45. On the information available, I am satisfied the exemption in section 30(1) does not apply to the document. I have decided to grant access to the document with personal affairs information to be deleted as it is irrelevant.

### ***Review rights***

46. 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>11</sup>
47. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
49. 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.
50. 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>14</sup>

### ***When this decision takes effect***

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<sup>9</sup> *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].

<sup>10</sup> *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].

<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and (3FA).



51. 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.

Annexure 1 – Schedule of Documents

Doc	Date	Document Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	[Location] Train Stabling Facility – Matters of National Environmental Significance under the EPBC Act	8	Released in part Section 33(1)	Not subject to review	<p><b>Section 25:</b> On 1 August 2019, the Applicant excluded personal affairs information from the scope of the review. Accordingly, this information is irrelevant under section 25.</p> <p>As the only information exempted in this document is personal affairs information, this document is not subject to review.</p>
2.	[Date]	[Location] Train Stabling Facility Project – Land Use and Noise Impact Assessment	42	Refused in full Sections 30(1) and 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released with the street numbers deleted in accordance with section 25 as this information is exempt under section 33(1).</p>	<p><b>Section 30(1):</b> I am not satisfied the document is exempt under section 30(1) for the reasons set out above.</p> <p><b>Section 33(1):</b> I am satisfied it would be unreasonable to release the personal affairs information in the document for the reasons set out above.</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide an edited copy of the document with the exempt information deleted from the document in accordance with section 25.</p>