

## Notice of Decision and Reasons for Decision

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Applicant:	'BC8'
Agency:	V/Line Corporation
Decision Date:	20 February 2020
Exemptions considered:	Sections 30(1), 34(1)(b), 34(4)(a)(ii)
Citation:	'BC8' and V/Line Corporation ( <i>Freedom of Information</i> ) [2020] VICmr 32 (20 February 2020)

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FREEDOM OF INFORMATION – transport documents – country train replacement taxi – country train replacement bus – train station closures – transport costs – incomplete data – competitive pricing

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 the document requested by the Applicant under the FOI Act.

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

I am not satisfied the document is exempt under sections 30(1), 34(1)(b) or 34(4)(a)(ii) and have determined to grant access to the document in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
20 February 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents.
2. Following consultation with the Agency, the Applicant clarified their initial request to the following documents:
  - A document listing the cost of all incidents where V/Line has paid for a train replacement Taxi, including the date, line, station and cost, in date order from [date] to the date of this request.
  - A document listing the cost of all unplanned or unscheduled incidents where V/Line has paid for a train replacement bus, including the date, line, station and cost, in date order from [date] to the date of this request.
  - A document listing all planned station or line closures where V/Line has utilised replacement transport.
3. In its decision, the Agency identified three documents falling within the terms of the Applicant's request and granted access to two documents and refused access to one document in full.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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) information provided with the Applicant's review application;
  - (c) the Agency's submissions dated 4 and 17 February 2020; and
  - (d) correspondence between the Agency and OVIC staff during the review.
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 on the exemptions under sections 30(1) and 34(1)(b) to refuse access to the document in full. 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.<sup>1</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?*

12. The document subject to review is a spreadsheet listing types of incidents and total costs incurred by the Agency in paying for train replacement taxis.
13. The Agency's submission dated 4 February 2020 states:

... [the data set] is incomplete as regional stations also provide taxi vouchers directly to customers. This data is not always captured ...
14. Having reviewed the document, I am not satisfied it contains information in the nature of opinion, advice, recommendation, consultation or deliberation. Rather, I am of the view the document contains factual information, which is not exempt by virtue of section 30(3).
15. Nor am I satisfied such the document was 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.
16. Even if I was persuaded the first and second limbs of section 30(1) were met, I do not consider it would be contrary to the public interest for the document to be disclosed. I am of the view, in releasing the document, it is open to the Agency to provide any further explanation about data in the document to assist the Applicant in understanding the status of the data or any further information that has become available since the document was created to ensure the data is not misinterpreted.
17. Accordingly, I am not satisfied this document is exempt under section 30(1).

### **Section 34(1)(b)**

18. Section 34(1)(b) provides a document is an exempt if its disclosure under the FOI Act would disclose information acquired by an agency from a business, commercial or financial undertaking and the information relates to 'other matters of a business, commercial or financial nature and the disclosure of the information would be likely to expose the undertaking unreasonable to disadvantage'.

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

*Does the document contain information acquired by the Agency from a business, commercial or financial undertaking?*

19. The Agency's submissions dated 4 February and 17 February 2020 state:

V/Line is currently in the process of releasing a Request For Proposal to selected vendors in the Commercial Passenger Vehicle space (including taxis) and release of this data may corrupt the tender process.

...

V/Line is an internal business unit. The undertaking has further advised that release of the total sums spent data is likely to expose it to a disadvantage in the competitive market for the provision of services. V/Line is seeking a competitive pricing model from vendors that will lead to cost saving initiatives and innovation, as well as greater auditability and controls.

20. Given this information was obtained from an internal business unit of the Agency, I am not satisfied it was obtained from a business, commercial or financial undertaking.

21. Accordingly, I am not satisfied the document is exempt under section 34(1)(b).

#### **Section 34(4)(a)(ii)**

22. Having reviewed the Agency's submission, it appears to be applying the exemption under section 34(4)(a)(ii) rather than section 34(1)(b). For the purpose of completeness, I will also consider the exemption under section 34(4)(a)(ii).

23. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, 'in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage'.

*Is the Agency engaged in trade or commerce?*

24. The Victorian Civil and Administrative Tribunal (**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>2</sup> It has adopted the view of the Federal Court of Australia these terms are 'of the widest import'.<sup>3</sup>

25. For the purposes of this matter, I am not satisfied the Agency is engaged in trade or commerce purely on the basis it is conducting a tender process for the procurement of commercial passenger vehicle services. Rather, in doing so, I consider it was carrying out a governmental function to provide cost-efficient transport services to regional Victoria.

26. In this regard, I note the decision of *Pallas v Roads Corporation*,<sup>4</sup> in which Judge McNamara held:

In carrying out its road building functions the Corporation engages in Governmental activities rather than in trade or commerce. In the same way as the Minister in *Unilan* in making the speech at the International Conference and the Secretary of the Department of Sustainability and Environment in engaging in correspondence relative to the renewal of timber harvesting licences.

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 companies which might tender for an undertake the contract clearly are engaged in trade or commerce. That fact

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<sup>2</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

<sup>3</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>4</sup> [2013] VCAT 1967 at [33].

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.

27. In any case, even if I was persuaded this requirement of the exemption was met, I am not satisfied the second limb of section 34(4)(a)(ii) is satisfied.
28. I am of the view release of the cumulative transport costs incurred by the Agency in providing train replacement services – as opposed to individual rates per hour or costs per kilometre – would not expose the Agency unreasonably to disadvantage in relation to V/Line Corporation seeking a competitive pricing model from vendors.
29. Additionally, I am of the view transparency and accountability in the expenditure of public funds outweighs any potential disadvantage to which the Agency may be exposed if the document is disclosed.
30. Accordingly, I am not satisfied disclosure of the document would expose the Agency unreasonably to disadvantage. Therefore, I am not satisfied the document is exempt under section 34(4)(a)(ii).

### **Conclusion**

31. On the information before me, I am not satisfied the document is exempt under sections 30(1), 34(1)(b) or 34(4)(a)(ii) and have determined to grant access to the document in full.

### **Review rights**

32. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>5</sup>
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>6</sup>
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>7</sup>
35. 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.
36. 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>8</sup>

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

37. 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.

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<sup>5</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>6</sup> Section 52(5).

<sup>7</sup> Section 52(9).

<sup>8</sup> Sections 50(3F) and (3FA).