

Notice of Decision and Reasons for Decision

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| Applicant: | 'BD6' |
| Agency: | Department of Transport |
| Decision Date: | 27 February 2020 |
| Exemption considered: | Section 30(1) |
| Citation: | 'BD6' and Department of Transport (<i>Freedom of Information</i>) [2020] VICmr 39 (27 February 2020) |

FREEDOM OF INFORMATION – business case – major road project – internal working document – superseded information – whether release would be contrary to the public interest

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

27 February 2020

Reasons for Decision

Background to review

1. The Applicant, a Member of Parliament, made a request to the Agency for access to the following documents:

Documents containing the Government's assessment of options for the creation of bicycle lanes on St Kilda Road from the Yarra River to St Kilda Junction including assessments of impacts on vehicle movements, transit times, delays, access to intersecting roads and to public and private properties.
2. The Applicant excluded personal information of non-executive staff, such as names and addresses, from the scope of the FOI request.
3. In its decision, the Agency identified two documents falling within the terms of the Applicant's request, comprising:
 - (a) Document 1: 'St Kilda Road Bicycle Improvements Study – Traffic Impact Assessment; and
 - (b) Document 2: 'St Kilda Road Safety Improvement Project – Scenario 1 to 4'.
4. The Agency decided to refuse access to the documents in full.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. 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 submission dated 2 January 2020; and
 - (d) correspondence between OVIC staff, the Agency and the Applicant.
9. 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

10. The Agency relied on the exemption under section 30(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

11. 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.
12. The exemption does not apply to purely factual material in a document.¹
13. 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.
14. 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
15. VicRoads commissioned Documents 1 and 2 and contracted the services of consultants to draft these reports. For the purposes of section 30(1), I am satisfied the consultants are ‘officers’ of the Agency.
16. Having carefully reviewed the documents, I am satisfied they disclose the opinions, advice and recommendations of the authors and this information was provided in the course of, and for the purposes of, VicRoads’ deliberative functions relating to assessment of various factors in relation to the creation of bicycle lanes on St Kilda Road.
17. The relevant consideration with respect to section 30(1) is whether release of the opinions, advice and recommendations would be contrary to the public interest. In deciding this, 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.
18. 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:³
- (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 of 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;

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.

- (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.
19. In its submission, the Agency provided the following reasons for why disclosure would be contrary to the public interest:
- (a) the communications were made during the initial development work of a major project in the course of progressing the development of a final position that is still to be reached;
 - (b) the project is currently being undertaken by Major Road Projects Victoria;
 - (c) the communications reflect options considered but not adopted and would likely lead to confusion and promote pointless and ill-informed debate;
 - (d) the communications involve sensitive and contentious issues;
 - (e) disclosure of the documents would no longer reflect the current status of the project and would not fairly disclose the reasons for a future decision on the project, and would be unfair to a decision-maker and may prejudice the integrity of the decision-making process; and
 - (f) disclosure would inhibit frankness and candour in future pre-decisional communications.
20. Having reviewed the documents and based on the information before me, I have determined that it would not be contrary to the public interest to release the information, for the following reasons:
- (a) The documents comprise an expert report of a private consultant that clearly and logically sets out the issues, information relied on and provides informed and considered points, drawing on information that is factual in nature, regarding the various aspects of the project. The documents do not appear to contain contentious or controversial issues the disclosure of which would inhibit provision of similar advice in the future.
 - (b) The Agency also consulted with the consultants who drafted the reports; while not determinative, I note these consultants did not raise any objections to the release of their respective documents.
 - (c) I acknowledge the documents could be considered sensitive as they relate to an infrastructure project that directly affects members of the community. However, I consider any such sensitivity is better addressed by promoting transparency in government decision-making rather than by maintaining secrecy. By providing access to information that demonstrates well-considered administrative decisions, disclosure will serve the public interest and promote open and accountable actions of the public sector.
 - (d) I consider the Applicant, along with members of the public, is capable of understanding the documents were produced at a particular point in time, and that the documents are but one source of information used in the Agency's decision-making process. Consequently, I consider

there is little likelihood that disclosure of the documents would be contrary to the public interest in that it would cause confusion or mislead the public.

- (e) In addition to the point above, it is open to the Agency to release the documents to the Applicant with any necessary additional information to eliminate or minimise any confusion or misunderstanding concerning the documents.

21. I am not satisfied it would be contrary to the public interest for the documents to be released to the Applicant. Accordingly, I have determined the documents are not exempt under section 30(1).

Deletion of exempt or irrelevant information

22. 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.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
24. The Applicant excluded the personal affairs information of non-executive staff from the scope of the FOI request. I consider such information to be irrelevant to this review. Having reviewed the documents, I confirm that they do not contain the personal affairs information of executive staff.
25. I have considered the effect of deleting irrelevant information from the documents. 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 documents would retain meaning.

Conclusion

26. On the information available, I am not satisfied the exemption in section 30(1) applies to the documents. As it is practicable to edit the documents to delete irrelevant information, I have determined to grant access to the documents in part.

Review rights

27. 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.⁶
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
30. 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.

⁴ *Mickelburgh 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].

⁵ *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].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

31. 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.⁹

When this decision takes effect

32. 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.

⁹ Sections 50(3F) and (3FA).