

Notice of Decision and Reasons for Decision

Applicant:	'BL6'
Agency:	Department of Transport
Decision date:	14 April 2020
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'BL6' and Department of Transport (<i>Freedom of Information</i>) [2020] VICmr 112 (14 April 2020)

FREEDOM OF INFORMATION – meeting minutes – meeting agenda – reference group – community representatives – infrastructure project

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.

I am not satisfied the documents are exempt under sections 30(1) or 33(1), and have decided to grant access to the documents in full.

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

14 April 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

Copies of the agenda and minutes for all meetings of the Geelong Fast Rail Reference Group, from [date] to the date of receipt of this request.
2. In its decision, the Agency identified four documents falling within the terms of the Applicant's request and relied on sections 30(1) and 33(1) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. 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
 - (c) information provided by the Agency on 28 January and 23 March 2020.
7. On 1 April 2019, the Premier of Victoria made an announcement about the Geelong Fast Rail Reference Group (**Reference Group**), including that:

The Reference Group will be chaired by Member for Geelong Christine Couzens and include community representatives living in and around Geelong, along with stakeholders from councils, businesses, transport users, indigenous groups and educational institutions.

Seven of the 18-strong Reference Group are community representatives selected through an online Expression of Interest process late last year, and have strong links with the area.¹
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

Section 30(1)

9. Section 30(1) has three requirements:

¹ Media Release, Premier of Victoria, 'Geelong Community Has Its Say On Fast Rail' at <https://www.premier.vic.gov.au/geelong-community-has-its-say-on-fast-rail/> (1 April 2019) (accessed 14 April 2020).

- (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.

10. The exemption does not apply to purely factual material in a document.²

11. I must also be satisfied disclosure of the documents would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.³

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. I note the reference group is made up of Agency officers, a Minister, representatives of community groups and other members of the community.

13. I am satisfied all members of the reference group, for the purposes of the FOI Act, can be said to be agency officers in that they are either employed or engaged by the Agency.

14. Having reviewed the documents, I am also satisfied they disclose matter in the nature of opinion and advice, and also represent consultation undertaken in relation to the Agency's functions.

Were the documents 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?

15. I am satisfied the documents were created in the course of the Agency's deliberative processes – being community consultation undertaken in relations to a large public infrastructure project.

Would disclosure of the documents be contrary to the public interest?

16. In deciding if release is 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.

17. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following factors:⁴

- (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;

² Section 30(3).

³ *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].

⁴ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.

18. In the Agency's decision, it stated:

This exemption has been applied to records of preliminary deliberation and discussion, including possible proposals in relation to matters not yet formally decided. It is not considered to be in the public interest to release options which, although having been discussed may not ultimately be adopted, particularly when the project is at such an early stage, and final decisions regarding such matters are still some time away.

19. In its submission, the Agency advised participants did not complete a confidentiality agreement/deed to participate in the reference group.

20. In their review request, the Applicant advised they do not consider section 30(1) applies to the documents as they relate to discussions by the Reference Group, rather than any formal recommendations made.

21. For the following reasons, I am not satisfied disclosure of the documents would be contrary to the public interest:

- (a) I do not consider information in the documents to be particularly sensitive. I agree with the Applicant, that it is clear from the documents that reflect discussions that have taken place by the Reference Group on a range of topics that will affect the project and the community, rather than any sensitive formal decisions made, or to be made, about the project.
- (b) The Reference Group comprises [specified number of] members. There is no information before me to suggest discussions by the Reference Group were confidential, or undertaken in confidence by any of the Reference Group members. As such, I am not satisfied information discussed by the Reference Group has not been discussed outside that forum by any of its members.
- (c) I do not consider disclosure of the documents would inhibit the future work or discussions of the Reference Group.
- (d) The documents are in their final form and their disclosure represents views expressed on issues discussed at Reference Group meetings. It is clear the Reference Group was not established as a decision making body. As such, it is clear the views discussed and recorded in the documents are not binding on any decision made on the project. Rather the Reference Group serves as a consultative and community representative body.

- (e) The documents provide information about the Agency's consultative process in relation to the project, namely the establishment of a reference group with members who are appointed to represent the various views of the community on the project. Therefore, I consider disclosure of the documents provides for greater public scrutiny of a public consultation process.

22. Accordingly, I am not satisfied the documents are exempt under section 30(1).

Section 33(1)

23. 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;⁵ and
- (b) such disclosure would be 'unreasonable'.

24. 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 such information may be reasonably determined.⁶

25. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of an individual's personal privacy in the circumstances.

26. While a public servant's classification may be a relevant consideration in certain circumstances, it is not determinative. This view is consistent with *Victoria Police v Marke* in the Victorian Supreme Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', the personal privacy exemption 'arises only in cases of unreasonable disclosure', and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.⁷ Accordingly, it is not appropriate to take a blanket approach in deciding whether disclosure of a public servant's personal information is unreasonable on their seniority. Rather the particular context and circumstances of each matter must be considered.

27. While I acknowledge concerns expressed by agencies about the disclosure of personal affairs information of their staff in decisions subject to review under the FOI Act, I consider the FOI Act requires the maximum amount of information be disclosed unless special circumstances apply.

28. 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.⁸ However, I do not consider this to be a relevant factor in the circumstances.

29. During the review, the Agency advised it did not consult with relevant third parties in accordance with section 33(2B).

Do the documents contain personal affairs information of people other than the applicant?

30. The document contains the following personal affairs information:

- (a) the names of a Minister, Members of Parliament and local councillors;

⁵ Sections 33(1) and (2).

⁶ Section 33(9).

⁷ [2008] VSCA 218 at [76].

⁸ Section 33(2A).

- (b) the names of Agency officers;
- (c) the names of community representatives;
- (d) the names of community group members; and
- (e) the personal views expressed by Reference Group members from which their names could be reasonably determined.

Would disclosure of the personal affairs information be unreasonable?

31. The Agency advised the following in relation to the application of section 33(1) to the documents:

The RPV individuals whose names are withheld are a [job title], a non-executive member of the [description of] team, and an external [description of specialty] consultant.

It continues to be the department's view that committees are accountable as a group for their output or decision making and that it is inappropriate to identify members in relation to their individual contributions to meetings. Disclosure of such material is likely to inhibit future participation and sharing of views, and the effectiveness of the group as a body inclusive of and reflecting community views.

32. I have decided it would not be unreasonable to release the personal affairs information the Agency exempted under section 33(1) for the following reasons:

- (a) In relation to the Agency officers, I can see no special circumstances in this matter that supports a view disclosure of their names would be unreasonable regardless of their seniority.
- (b) There is no information before me to suggest there is any sensitivity about the release of the names of community representatives or that they had any expectation of privacy when agreeing to participate in the Reference Group. Rather, their views were voiced in a large meeting for which notes were being taken and minutes recorded.
- (c) The contributions from all Reference Group members are in the nature of general discussion about an infrastructure project. They do not refer to personal or sensitive issues.
- (d) For the above reasons, I do not consider disclosure of the views of the Reference Group members would inhibit similar discussion and communication in the future.
- (e) As set out above, I consider the documents provide information about the Agency's consultative process in relation to the project, namely the establishment of a reference group with members who are appointed to represent the various views of the community on the project.

33. Accordingly, I am not satisfied the documents are exempt under section 33(1).

Conclusion

34. On the information before me, I am not satisfied the documents are exempt under sections 30(1) or 33(1), and have decided to grant access to the documents in full.

Review rights

35. 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.⁹
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
38. 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.
39. 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.¹²

Notification of third party review rights

40. As I have decided to release documents that contain the personal affairs of third parties and it is practicable to notify those persons of their review rights,¹³ the relevant third parties will be notified of their right to apply to VCAT within 60 days from the date they are given notice of my decision.¹⁴

When this decision takes effect

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

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).

¹³ Section 49P(5).

¹⁴ Section 50(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	[date]	Meeting agenda	1	Release in part Section 33(1)	Release in full	Section 33(1): Parts of the document are not exempt for the reasons set out above.
2	[date]	Meeting minutes	5	Release in part Sections 30(1), 33(1)	Release in full	Sections 30(1) and 33(1): Parts of the document are not exempt for the reasons set out above.
3	[date]	Meeting agenda	1	Release in part Section 33(1)	Release in full	Section 33(1): Parts of the document are not exempt for the reasons set out above.
4	[date]	Meeting minutes	6	Release in part Sections 30(1), 33(1)	Release in full	Sections 30(1) and 33(1): Parts of the document are not exempt for the reasons set out above.