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Notice of Decision and Reasons for Decision

Applicant:	'CN5'
Agency:	Department of Transport
Decision date:	18 January 2021
Exemption considered:	Section 30(1)
Citation:	'CN5' and Department of Transport (<i>Freedom of Information</i>) [2021] VICmr 13 (18 January 2021)

FREEDOM OF INFORMATION – infrastructure – infrastructure costing and analysis – external consultant report – option analysis – funding bid

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 as I have decided to release additional information in the documents.

I am not satisfied the information deleted by the Agency is exempt under section 30(1).

As I am satisfied it would be practicable to edit the documents to delete irrelevant information in accordance with section 25, I have decided to grant access to the documents in part.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

18 January 2021

Reasons for Decision

Background to review

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

All documents relating to the decision to remove the footbridge over McMahons Creek, adjacent to Woods Point Road. All documents relating to future options for the removed footbridge over McMahons Creek, adjacent to Woods Point Road. All quotes obtained by VicRoads concerning the replacement of the footbridge over McMahons Creek, adjacent to Woods Point Road. Where a discrete document does not exist, yet the information requested could be generated in the form of a report, I request the production of a document pursuant to s19 of the Act. Please note that personal information of non-executive staff, such as names and addresses, is not required. Accordingly, documents can be edited to redact such information.

2. In its decision, the Agency identified eight documents falling within the terms of the Applicant's request. It granted access to one document in full, five documents in part, and refused access to two documents in full, relying on the exemptions under section 30(1) and 33(1).
3. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access. The Applicant indicated they do not seek review of information deleted under section 33(1) or information that was agreed to be removed as irrelevant information under section 25.
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.
8. Following inquiries made by OVIC staff, the Agency clarified that Document H, which the decision letters states was released in full, was released in part with irrelevant information deleted in accordance with section 25.
9. During the review, the Applicant also raised concerns regarding the adequacy of the document search conducted by the Agency. Following inquiries by OVIC staff, no further documents were located during this review.
10. 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.
11. I also note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemption

Section 30(1) – Internal working documents

12. 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.

13. The exemption does not apply to purely factual material in a document.¹

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?

14. The documents subject to review relate to options considered in relation to a footbridge that was located over McMahon's Creek that was removed in 2017.

15. In relation to this limb of section 30(1), the Agency's decision states 'the documents disclose opinion, advice or recommendation of officers of the former VicRoads in relation to a range of early options being considered because the documents disclose material under deliberation that has taken place between officers of VicRoads on these matters'.

16. I am satisfied the documents were prepared by agency officers and external consultants engaged on behalf of the Agency and meet the definition of an 'officer' under section 5(1).

17. In my view, some of the information in Documents A and C is factual and is therefore not exempt under section 30(1). However, I am satisfied the remaining documents subject to review contain information that would disclose matter in the nature of opinion, advice, recommendations and consultation concerning options considered.

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?

18. I consider the information was prepared in the course of the deliberative processes involved in the functions of the agency, namely, maintenance and infrastructure work.

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

19. In deciding whether 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.

20. In deciding whether disclosure of the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:²

- (a) the right of every person to gain access to documents under the FOI Act;

¹ Section 30(3).

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

- (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;
- (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.

21. The Agency submits disclosure of the information would be contrary to the public interest for the following reasons:

- the communications were made during the initial development work of a major project on matters that have yet to be finalised. The communications reflect options considered but not adopted, and would likely lead to confusion and promote pointless and ill-informed debate about what might have happened rather than what is still under consideration;
- the communications involve sensitive and contentious issues;
- disclosure of the documents would no longer reflect the current status of the project and would provide a misleading representation of decision making on the project, would be unfair to a decision-maker and may prejudice the integrity of the decision-making process; and
- disclosure would inhibit the full provision of views and discussion of options in future predecisional communications.

22. In this matter, I have determined none of the information deleted by the Agency is exempt under section 30(1). In determining whether disclosure would be contrary to the public interest, I have considered the following factors:

- (a) The degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents.

Having considered publicly available information, I consider the removal of the footbridge to be of significant interest to members of the community despite the passage of time since its removal.

However, regardless of the sensitivity of the issues, disclosure of the documents in this instance would serve the public interest by promoting public sector transparency and accountability in relation to how the Agency responded to the safety concerns regarding the footbridge and options considered in response.

- (b) The stage of a decision or status of policy development or a process being undertaken at the time the communications were made.

I also acknowledge the documents reflect various options considered during the initial stages of the project, that were not adopted and do not reflect the current status of the project. However, I am not persuaded by the Agency's submission this would likely lead to confusion and promote pointless and ill-informed debate about what might have happened rather than what is still under consideration.

The Applicant, who is a Member of Parliament, along with members of the public, is capable of understanding the documents were produced over three years ago, at a time when options were being considered, such that most of the documents do not necessarily represent a final position or decision reached by the Agency at the conclusion of a decision making process.

Where the documents contain estimated costs, I do not consider disclosure will cause confusion in relation to this project. It would be reasonably clear the costs quoted in the documents are estimates relevant at a particular point in time and that estimates for projects can change over time.

Consequently, I do not accept disclosure of the documents would necessarily cause confusion or promote ill-informed debate about the options considered at that point in time. In my view, such arguments underestimate the capacity of the public to be informed about advice received and decisions made by agencies and government. It also minimises the importance of public engagement and participation in government policy making and decision making. In any event, I consider that the question of whether debate is necessary or not should be left to the public rather than to government.

Nevertheless, if this remains of concern to the Agency, it is open for it to release the documents to the Applicant with any necessary additional information to eliminate or minimise any confusion or misunderstanding concerning the documents.

- (c) 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.

I do not agree with the Agency's submission that release of the documents would provide a misleading representation of decision making on the project, would be unfair to a decision-maker or prejudice the integrity of the decision-making process.

Most of the information concerning the various options considered by the Agency is contained in the Level 3 Inspection Report prepared by an external consultant on behalf of the Agency. In my view, this document clearly and logically sets out the details of the inspection, options for consideration by the Agency and the consultants' recommendations. In my view, this indicates the Agency was well-informed of the recommended options available to it.

While the options may not reflect the current status of the project, the information considered by the Agency in 2017 nevertheless formed part of the decision making process at that point in time and would likely inform the decision making on the project to date.

I also consider it is not the function of the FOI Act to exempt such deliberations from disclosure, rather the FOI Act provides an opportunity to see how government makes its decisions, at any stage of the decision making process, and to provide added accountability for those decision making processes, regardless of whether particular options considered were pursued.

- (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.

I am not satisfied disclosure of the documents under this FOI request would inhibit Agency officers from providing fulsome advice and opinions during decision making processes in this project, which is ongoing, or similar projects in the future.

In this matter, the documents contain debate and differing views amongst agencies in relation to options considered at a particular point in time. I do not accept that disclosure of documents containing differing opinions would stifle debate or discussion within or between agencies and its contractors. Rather, the documents demonstrate that public sector employees are diligently fulfilling their function to provide their expertise on matters the agencies are responsible for. In my view, public scrutiny of these types of deliberations can improve such advice where agency officers know that they may be subject to public scrutiny. This is particularly important where options considered have significant impact on the community.

23. On consideration of the above, I am not satisfied the information deleted by the Agency is exempt under section 30(1).
24. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Deletion of exempt or irrelevant information

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ 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 25.⁴
27. As outlined above, the Applicant does not seek review of information they agreed to be removed as 'irrelevant information' or exempted by the Agency under section 33(1).
28. I have considered the effect of deleting exempt and irrelevant information from the documents in accordance with section 25. In my view, it is practicable for the Agency to delete the exempt and irrelevant information as it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

29. On the information before me, I am not satisfied the information deleted by the Agency under section 30(1) is exempt.
30. My decision in relation to each document is outlined in the Schedule of Documents in **Annexure 1**.
31. As I am satisfied it would be practicable to delete irrelevant and exempt information from the documents in accordance with section 25, I have decided to grant access to the documents in part.

³ *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 at [82].

⁴ *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].

Review rights

32. 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.⁵
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
35. 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.
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.⁸

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

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
A	N/A	Funding bid and photographs	6	Released in part Section 30(1), 25	Release in part Section 25 This document is to be released, except for the information deleted by the Agency under section 25 as 'not relevant', which is to remain deleted in accordance with section 25.	<p>Section 30(1): Document A is a funding bid for an option considered by the Agency that was ultimately unsuccessful. The information deleted by the Agency includes a description of the option to which the bid relates, and the amount funding requested. In my view, this information is factual in nature as it concerns a final decision made by the Agency to pursue a particular option for funding. Accordingly, it does not reflect advice, recommendation, opinion, consultation or deliberation that has taken place between Agency officers for the purposes of section 30(1). Even if I were satisfied of this, I do not consider disclosure of the document would be contrary to the public interest for reasons outlined above in the Notice of Decision.</p> <p>Accordingly, the deleted information in the document is not exempt under section 30(1).</p> <p>Section 25: The Applicant does not seek review of information deleted by the Agency as 'irrelevant information'.</p> <p>I am satisfied it would be practicable to</p>

Annexure 1 – Schedule of Documents

						edit the document to delete irrelevant information in accordance with section 25.
B	[Date]	Email and photographs	5	<p>Released in part</p> <p>Sections 30(1), 33(1), 25</p>	<p>Release in part</p> <p>Section 25</p> <p>The information deleted by the Agency under section 30(1) is to be released as it is not exempt. The remaining information deleted by the Agency as ‘not relevant’ or exempt under section 33(1) is to remain deleted as I am satisfied it is irrelevant information for the purpose of this review.</p>	<p>Section 30(1): I am satisfied the information deleted by the Agency contains information in the nature of advice, consultation or deliberation. However, I am not satisfied it would be contrary to the public interest to release this information for reasons outlined above in the Notice of Decision.</p> <p>Accordingly, the information deleted by the Agency is not exempt under section 30(1).</p> <p>Section 25: The Applicant does not seek review of the personal affairs information deleted from this document under section 33(1). Such information is to remain deleted under section 25 as it is ‘irrelevant information’ for the purposes of this review.</p> <p>Also see comments for Document A.</p>
C	[Date]	Email chain	4	<p>Released in part</p> <p>Sections 30(1), 33(1), 25</p>	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released in accordance with the following directions:</p>	<p>Section 30(1): This is an email chain between agencies concerning the footbridge and an option being considered by the Agency at that point in time.</p> <p>I am satisfied most of the deleted information contains matter in the</p>

Annexure 1 – Schedule of Documents

					<p>(a) the information deleted by the Agency under section 30(1) is to be released as it is not exempt information;</p> <p>(b) the information deleted by the Agency in the second last line of page 2 is to be released as it is not exempt under section 30(1) and it is relevant to the Applicant’s request; and</p> <p>(c) the remaining information deleted by the Agency as ‘not relevant’, or as exempt under section 33(1), is to remain deleted in accordance with section 25, as it contains irrelevant information.</p>	<p>nature of advice and consultation undertaken between the agencies in relation to the option being considered. However, I am not satisfied release of the information would be contrary to the public interest for reasons outlined above in the Notice of Decision.</p> <p>Section 25: I am satisfied the email dated [date and time] is irrelevant to the Applicant’s FOI request as it concerns the provision of documents for processing under the FOI Act.</p> <p>I am not satisfied the information deleted by the Agency in the second last line on page 2 of Document C is irrelevant to the FOI request. Accordingly, I have considered whether it is exempt under section 30(1). See my comments above.</p> <p>See comments for Document B.</p>
D	[Date]	Level 3 Inspection Report and appendixes	69	<p>Released in part</p> <p>Sections 30(1), 25</p>	<p>Release in part</p> <p>Section 25</p> <p>This document is to be released, except for the information deleted by the Agency as ‘not relevant’, which is to remain deleted in accordance with</p>	<p>Section 30(1): The information claimed exempt by the Agency includes descriptions and discussion of the options being considered, the estimated costs associated with each option, and a table comparing each option.</p> <p>I do not consider disclosure of the information in this document would be contrary to the public interest for</p>

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					<p>section 25.</p> <p>The information marked as ‘not relevant’ on Appendix A.22 (page 61 of the PDF to OVIC) is to be released, as it is relevant to the Applicant’s request and is not exempt under section 30(1).</p>	<p>reasons outlined above in the Notice of Decision.</p> <p>I note that the business undertaking which prepared the document on behalf of the Agency did not have any concern as to the disclosure of the document to the Applicant in response to the FOI request. Accordingly, I have not considered the application of section 34(1)(b).</p> <p>Section 25: I am not satisfied the information deleted by the Agency as ‘not relevant’ on page ‘Appendix A.22’ (page 61 of the PDF provided to OVIC) is irrelevant information. Accordingly, I have considered whether the information is exempt under section 30(1). See my comments above.</p> <p>See comments for Document A.</p>
E	N/A	Spreadsheet Option A	25	<p>Refused in full</p> <p>Sections 30(1), 25</p>	<p>Release in part</p> <p>Section 25</p> <p>This document is to be released, except for the information deleted by the Agency as ‘not relevant’, which is irrelevant information to be deleted in accordance with section 25.</p>	<p>Section 30(1): This is the Agency’s internal breakdown of the cost and time estimates for Option A.</p> <p>It is clear on the face of the document that the figures are estimates only and may not necessarily reflect the final costs associated with this option or a future funding bid. Further, on the information before me, it appears that these estimates are no longer relevant to the status of this project at this point</p>

Annexure 1 – Schedule of Documents

						<p>in time.</p> <p>For reasons outlined above in the Notice of Decision, I am not satisfied it would be contrary to the public interest to release this document.</p> <p>Section 25: See comments for Document A.</p>
F	N/A	Spreadsheet Option C	23	<p>Refused in full</p> <p>Sections 30(1), 25</p>	<p>Release in part</p> <p>Section 25</p> <p>This document is to be released, except for the information deleted by the Agency as ‘not relevant’, which is irrelevant information to be deleted in accordance with section 25.</p>	<p>Section 30(1): See comments for Document E.</p> <p>Section 25: See comments for Document A.</p>
G	[Date]	Internal memo and communication	7	<p>Released in part</p> <p>Sections 30(1), 25</p>	<p>Release in part</p> <p>Section 25</p> <p>The information deleted by the Agency as ‘not relevant’ is to remain deleted in accordance with section 25. The remainder of the document is to be released.</p>	<p>Section 30(1): The information deleted by the Agency under section 30(1) is factual in nature. Accordingly, it is not exempt under section 30(1).</p> <p>Section 25: See comments for Document A.</p>
H	[Date]	Interoffice memo and attachments	9	<p>Released in part</p>	<p>Release in part</p>	<p>During the review, the Agency confirmed the information marked as exempt under section 30(1) in this</p>

Annexure 1 – Schedule of Documents

				<p>Section 25</p>	<p>Section 25</p> <p>The information deleted by the Agency under point 6 is to be released.</p> <p>The attachments to Document H is to be released, except for the initials of third parties, which are to be deleted in accordance with section 25.</p> <p>Except for the above, the remaining information deleted by the Agency is to remain deleted in accordance with section 25, as it contains irrelevant information.</p>	<p>document is an error and should have been marked as irrelevant information under section 25. Although the Applicant does not seek review of information deleted under section 25, I am not satisfied the information is irrelevant under section 25, as it is not information that was agreed to be removed from the scope of the FOI request by the Applicant. Accordingly, I will consider whether the information is exempt under section 30(1).</p> <p>The attachment to Document H was not part of the Agency’s decision and was brought into the scope of this review following inquiries by OVIC staff. The Agency submits the document is exempt under section 30(1).</p> <p>Section 30(1): I am not satisfied it would be contrary to the public interest to release the information deleted by the Agency under point 6 for reasons outlined above in the Notice of Decision.</p> <p>I am not satisfied it would be contrary to the public interest to disclose the attachment for reasons outlined above in the Notice of Decision.</p> <p>Section 25: As the attachment to Document H contains initials of third parties, such information is to be deleted as the Applicant does not seek access to personal affairs information of</p>
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Annexure 1 – Schedule of Documents

						non-executive staff. See comments for Document A.
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