

Notice of Decision and Reasons for Decision

Applicant:	'CO4'
Agency:	Major Transport Infrastructure Authority
Decision date:	28 January 2021
Exemptions considered:	Sections 30(1), 34(4)(a)(ii)
Citation:	'CO4' and Major Transport Infrastructure Authority (<i>Freedom of Information</i>) [2021] VICmr 21 (28 January 2021)

FREEDOM OF INFORMATION – ministerial briefing – traffic modelling reports – roads upgrades

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.

On the information available, I am not satisfied the exemptions in sections 30(1) or 34(4)(a)(ii) apply 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.

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

28 January 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. A copy of any reports which contain traffic modelling or engineering information (such as Road Design & Geometry) in relation to '[location]' from [date];
 2. A copy of any briefings which relate to '[location]' from [date];
 3. A copy of any business case related to the '[location]' project from [date]; and
 4. All memos and ministerial briefings provided to the Minister for Transport Infrastructure which contains information related to '[location]' or the '[location] project' from [date].
2. The Applicant advised they are not seeking personal affairs information of non-executive Agency officers or third parties.
3. In its decision, the Agency identified 16 documents falling within the terms of the Applicant's request. It decided to grant access to the documents in part. The Agency relied on the exemptions in sections 28(1)(d), 29, 30(1), 32(1), 34(1)(b) and 34(4)(a)(ii) to refuse access to parts of the documents. 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.
5. The Applicant indicated they are seeking review of the decision to refuse access to information exempted under section 30(1) in Documents 7 and 10 through to 16.
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.
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.
10. I 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 exemptions

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. In deciding if 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.
16. 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 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; 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.

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 Halls* [1999] VSCA 117 at [30].

³ *Halls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

Agency submission

17. The Agency submitted the following in relation to the application of section 30(1) in this matter:

(a) In relation to Document 7, first redaction:

[the Agency] has undertaken a comprehensive review of all project materials and has determined that the Project has never been described in the terms referred to in the exempt line of paragraph 1 of the Brief, further supporting that its inclusion in this specific Brief was due to an error only...

(b) In relation to Documents 10 to 16, the Agency submitted, in summary:

- (i) the documents are sensitive, contentious and preliminary in nature;
- (ii) the information relates to only one part of the planning process;
- (iii) as such disclosure would cause unnecessary debate and confusion;
- (iv) it is not a simple process to provide further information to an applicant to avoid such confusion;
- (v) the documents are highly technical and are likely to be misinterpreted;
- (vi) the Agency refers OVIC to *Peter Ryan MP v Melbourne Water (General)*⁴ wherein the Tribunal was satisfied preliminary modelling was exempt under section 30(1);
- (vii) disclosure would inhibit the frankness and candour of Agency officers;
- (viii) if the authors of these types of documents became concerned that the contents would be subject to public scrutiny, they would likely change the scope of the advice they provide;
- (ix) there is a real likelihood that release may result in decision makers opting to not seek predictive modelling information in the preliminary stages of project planning;
- (x) a benefit review process will involve assessing the Project to determine the benefits it has provided, including traffic counts and collection to report on the traffic benefits the Project has delivered;
- (xi) in the Agency's view, it is more appropriate that the Project be judged by the final, up to date and accurate analysis of the benefits of the project as part of the review process mechanism, rather than preliminary predictive modelling which is now out of date;
- (xii) the Project has only just entered construction and will not be completed for at least another two years. As a result, the traffic modelling reports are not considered final, and there is a high likelihood that updated versions of the modelling may be undertaken over the construction period, especially in light of current Covid-19 impacts and what that may mean for traffic volumes in a post Covid-19 world.

18. My decision in respect of each document in relation to the application of section 30(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 34(4)(a)(ii)

19. Section 34(4)(a)(ii) provides:

A document is an exempt document if

- (a) it contains

⁴ [2009] VCAT 2079.

...

- (ii) 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;

...

- 20. 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’.⁵ VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.⁶
- 21. The provision contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage, and that any such exposure must be unreasonable.
- 22. My decision in respect of each document in relation to the application of section 34(4)(a)(ii) is set out in the Schedule of Documents at **Annexure 1**.

Deletion of exempt or irrelevant information

- 23. 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.
- 24. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁷ 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 25.⁸
- 25. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant’s request because it relates to personal affairs information not sought by the Applicant. I have determined additional information is irrelevant where the Applicant has not sought review of certain information in the documents.
- 26. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

- 27. On the information available, I am not satisfied the exemptions in sections 30(1) or 34(4)(a)(ii) apply to the documents.
- 28. 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

⁵ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

⁶ *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].

⁷ *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].

⁸ *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].

29. 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
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
32. 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 (international callers dial +61 3 8685 1462).
33. 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

When this decision takes effect

34. 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).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
Note: The applicant has not sought review of Documents 1 to 6 or Documents 8 or 9.						
7.	[month year]	Ministerial Briefing – [location] Upgrade	296	<p>Release in part</p> <p>Sections 25, 30(1), 34(4)(a)(ii)</p> <p><i>NB – Information deleted under section 25 is considered Cabinet-in-Confidence by the Agency</i></p>	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p>Section 25: Certain information in the document is not sought by the Applicant and is therefore not subject to review. This is the signatures and telephone numbers of Agency officers and the attachment identified by the Agency. Also irrelevant to the request is the redaction at 3(c) as the Applicant is not seeking review of this part of the document.</p> <p><u>Redaction in point 1</u></p> <p>Section 30(1): This information appears factual in nature. However, I note the Agency's submission that the technical detail is incorrect. In my view, even if this information were opinion, advice or recommendation, it would not be contrary to the public interest to release it. In my view members of the public are capable of understanding that such drafting errors occur in documents. Further, the exemption in section 30(1) is not intended to prevent disclosure of errors made by Agencies. Rather, disclosure of such errors can provide transparency that may assist to prevent such errors occurring in the</p>

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						<p>future. This part of the document is therefore not exempt under section 30(1).</p> <p><u>Redaction of point 6</u></p> <p>Section 30(1): The information is in the nature of opinion, advice or recommendation. However, I have decided it would not be contrary to the public interest to release it, given it is general in nature, does not reveal sensitive or contentious information, and I do not consider its disclosure would have any effect on the Agency. This part of the document is therefore not exempt under section 30(1).</p> <p>Section 34(4)(a)(ii): While the applicant has not sought review of section 34(4)(a)(ii), as the applicant has specifically sought review of this redaction, I have had regard to this exemption to this redaction only.</p> <p>I am not satisfied the Agency is engaged in trade or commerce in relation to the information in the document. Rather, it is undertaking its governmental function of upgrading public infrastructure. However, even if it were engaged in trade or commerce, I do not</p>

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						consider disclosure would be likely to expose the Agency unreasonably to disadvantage for similar reasons as set out in my assessment of section 30(1) above. The information is general in nature, and I do not consider it would disclose information that would not be reasonably expected to be the case in such matters. This part of the document is therefore not exempt under section 34(4)(a)(ii).
10.	[month year]	[Reference redacted] Traffic Modelling Report	26	Refuse in full Section 30(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	<p>Section 25: The Applicant is not seeking review of personal affairs information. In this document this is the two names that appear on page 1. This information is therefore irrelevant to the request.</p> <p>Section 30(1): I note the report was created by a third party to conduct traffic analysis. For the purposes of the Act, the authors of the report are considered Agency officers.</p> <p>The document includes both factual information and the opinion, advice and recommendation of Agency officers.</p> <p>I have decided it would not be contrary to the public interest to disclose this information for the following reasons:</p>

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						<ul style="list-style-type: none"> • while I note the Agency states the document is preliminary, in my view, members of the public are capable of understanding decision making can be iterative and decisions about what course to take in relation to a particular project can change over time; • I also note the Agency states that the document presents only part of the decision making process but again, I consider members of the community are capable of understanding that the report represents one part of the decision making process; • I do not agree that disclosure would mean that the government would no longer seek such traffic modelling reports on which it relies to make decisions, as this would essentially amount to the agency abandoning efforts to make informed decisions in relation to public infrastructure; • in my view, there is a public

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						<p>interest in the information on which a decision is made being open to public scrutiny;</p> <ul style="list-style-type: none"> in my view, disclosure can only strengthen the integrity of government decision making as it allows community participation in those decisions. <p>The document is therefore not exempt under section 30(1).</p>
11.	[month year]	[Reference redacted] Traffic Modelling Report	70	Refuse in full Section 30(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	See comments for Document 10.
12.	[month year]	[Reference redacted] Traffic Modelling Report	9	Refuse in full Section 30(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with	See comments for Document 10.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					section 25.	
13.	[month year]	[Reference redacted] Traffic Modelling Report	11	Refuse in full Section 30(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	See comments for Document 10.
14.	[month year]	[Reference redacted] Traffic Modelling Report	7	Refuse in full Section 30(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	See comments for Document 10.
15.	[month year]	[Reference redacted] Traffic Modelling Report	70	Refuse in full Section 30(1)	Release in part Section 25 The document is to be released	See comments for Document 10.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					with irrelevant information deleted in accordance with section 25.	
16.	[month year]	[Reference redacted] Traffic Modelling Report	59	Refuse in full Section 30(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	See comments for Document 10.