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## Notice of Decision and Reasons for Decision

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Applicant:	'DC6'
Agency:	Department of Transport
Decision date:	31 May 2021
Exemptions considered:	Sections 30(1), 35(1)(a)
Citation:	'DC6' and Department of Transport ( <i>Freedom of Information</i> ) [2021] VICmr 151 (31 May 2021)

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FREEDOM OF INFORMATION – emails – site investigations – train infrastructure – West Gate Tunnel Project – Wyndham Vale Stabling Facility – stabling yard – storage of contaminated tunnel spoil – public interest considerations

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 35(1)(a).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant information deleted in accordance with section 25, I have granted 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.

**Joanne Kummrow**

Public Access Deputy Commissioner

31 May 2021

## Reasons for Decision

### Background to review

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

The documents set out in schedule of documents for Freedom of Information request number: [reference] for which section 30(1) exemptions have been applied in full or in part. Further, noting that the Wyndham Vale stabling is now in operation, documents in the same schedule where section 34(4)(a) has been claimed are also sought.

I note V/Line is a wholly owned government agency delivering public services with taxpayers' money. The third part of this request relates to the decision under consideration by the Government to use the Wyndham Vale stabling yards for the storage of toxic tunnel spoil from the West Gate Tunnel.

As the owner of the land, V/Line /Department of Transport I VicTrack will have been consulted and will have had communication with other areas of government and with the tunnel constructors concerning the use of the Wyndham Vale stabling yards for the storage of toxic tunnel spoil.

I also seek these documents.

Personal information of non-executive personnel is excluded from the request.

2. The Agency identified 104 documents falling within the terms of the Applicant's request.
3. In relation to part three of the Applicant's request, the Agency refused access to the documents in full, relying on section 14(1)(a) and the exemption in section 30(1).
4. The Agency's decision letter sets out the reasons for its decision.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant advised they do not seek review of documents in parts one and two of their request as these documents are already subject to review in a separate matter under consideration by OVIC. Also, the Applicant does not seek review of the Agency's application of section 14(1)(a) to the documents, and has excluded the personal affairs of non-executive Agency officers from their request. Therefore, these documents and information are excluded from this review.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request, submission dated 31 August 2020, as well as the attached consultation documents; and
  - (b) the Applicant's review application and subsequent communications with OVIC.
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 exemptions

### *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;
  - (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.<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?*

14. The documents comprise communications between a number of government agencies regarding a project to provide storage for 'spoil' from the West Gate Tunnel Project (the **Project**) at the Wyndham Vale Stabling Facility (the **Stabling Yards**).
15. While certain information in the documents is factual, I consider the majority of information constitutes matter in the nature of opinion, advice and recommendation prepared by Agency officers.

*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?*

16. I am satisfied the documents were prepared in the course of the deliberative processes of the relevant agencies, being the delivery of the Project.

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

17. In determining if disclosure of the documents would be 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.
18. In the circumstances of this matter, I have given weight to the following relevant factors:
- (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;

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

- (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.

19. In its submission, the Agency advised it would be contrary to the public interest to release the documents for the following reasons:

- The documents contain advice, opinion or recommendations exchanged as part of the investigation of site options to store contaminated tunnel spoil from the Westgate Tunnel Project;
- Site investigations are continuing, and a decision is yet to be made as to where and how the tunnel spoil will be stored;
- The information contained in the e-mails do not reflect an endorsed government position on where and how the tunnel spoil will be stored;
- Release of this information at the current time would be likely to prejudice the decision making processes of government, and/or cause unwarranted concern from stakeholders; and
- There is understandably considerable concern from stakeholders about where and how contaminated tunnel spoil will be stored and the potential health and environmental impacts from such storage, however, release of the documents would not help address those concerns.

20. The Agency consulted with the Major Transport Infrastructure Authority (**MTIA**) prior to making its decision. This included entities that form part of the MTIA, including the Level Crossing Removal Project (**LXRA**) and the Project. In part, the MTIA submits:

(a) In relation to Document 1

As to section 30(1)(b), given:

- the preliminary stage of the decision-making to which these documents are directed,
- the sensitive nature of the subject matter,
- these documents (and in fact all of the documents on which WGTP [West Gate Tunnel Project] has been asked to consult) offer only an incomplete, preliminary and therefore likely misleading, summary of the status of the decision making and the factors that will be considered in the ultimate decision-making, lead to the conclusion that it is contrary to the public interest to disclose these documents. The risk of causing ill-informed and unnecessary debate, mischievous interpretations, causing undue concern and stress to stakeholders (by releasing

incomplete and outdated information), in circumstances where the relevant decision has not as yet been made, outweighs any public interest in gaining access to documents relevant to the decision making of Government.

(b) In relation to Documents 2 to 6, 8 and 9

As to the substance of the documents, to the extent the document concerns responsibility and ownership of land as a general part of the project and does not relate to use of the land for storage of toxic waste, WGTP considers it does not fall within the scope of the request.

...

The document contains internal communications and recommendations, and information being sought for the purposes of giving opinions, on gaining access to the WV [Wyndham Vale] land for certain purposes. On that basis, and repeating the matters set out in relation to [...] above, WGTP considers the document falls within the scope of section 30(1)(a) of the Act.

(c) In relation to Document 7

WGTP objects to its release under section 30(1) of the Act and/or section 35(1)(a) of the Act.

This email is expressly stated to be confidential and not for circulation.

The attachment contains an internal working draft of a request and proposal, with then current opinions and recommendations of the officers involved. The request and proposal also contains confidential information on the WGTP project.

On that basis, and repeating the matters set out in relation to document 2 above, WGTP considers the document falls within the scope of section 30(1)(a) of the Act.

For the same reasons set out in relation to [...] with respect to the stage of the decision making and the risks were the information released, WGTP considers the document also falls within the scope of section 30(1)(b) of the Act.

Furthermore, given the information was conveyed by WGTP in confidence and is otherwise of a nature that WGTP considers that section 30(1) makes it exempt, the email and attachment is also or alternatively exempt under section 35(1)(a) of the act.

(d) Further, in relation to Documents 2, 4 and 9

WGTP also notes that some of the attachments are documents that are obtainable on payment of a fee (from the Land Titles Office) and presumably those documents should therefore be excluded from release under section 14(1)(a) of the Act.

21. Having reviewed the documents and considered their contents and context, I am not satisfied it would be contrary to the public interest to release the documents for the following reasons:

- (a) I acknowledge certain information in the documents is sensitive, as it relates to the proposed disposal of contaminated waste. I also note communications between public sector entities can be sensitive and concern contentious issues.
- (b) However, the intention to investigate the use of the Stabling Yards as a temporary storage facility for spoil from the Project is now publicly known.<sup>2</sup>

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<sup>2</sup> See West Gate Tunnel Project website at <https://westgatetunnelproject.vic.gov.au/construction/soil-management>.

- (c) I note the Environment Protection Authority, which has an important statutory role in approving any site before its use, has approved three sites for the disposal of spoil from the Project.<sup>3</sup>
- (d) I am of the view, where documents concern sensitive matters affecting the community, the public and government is better served by transparency rather than by maintaining secrecy. In this regard, the FOI Act allows the public to have visibility of and to better understand how government makes decisions, and importantly provides transparency as to decision making processes and accountability for any decisions made.
- (e) I note the Agency's submission the documents relate to sensitive matters involving 'the potential health and environmental impacts from such storage'. However, I do not agree any anticipated concerns of 'stakeholders' about the content of the documents outweigh the strong public interest in the disclosure of such documents where they involve environmental issues.
- (f) Disclosure of the documents would serve the public interest by promoting public sector transparency and accountability, including in the performance of the Agency's functions, public oversight of expenditure of public funds and accountability for decisions made.
- (g) I consider the Applicant, [description of role], along with members of the public, are capable of understanding the documents were produced at a particular point in time and may not represent a final decision reached by the Agency. Consequently, I do not accept disclosure of the documents would necessarily cause 'confusion' or 'unnecessary debate'.
- (h) I also consider there is a public interest in disclosure due to the importance of public engagement and participation in government policy and decision making. In any event, I consider the question of whether debate is necessary or not, should be left to the public rather than to government.
- (i) I do not accept the disclosure of the documents relating to the early or preliminary stages of a project, as in this matter, would necessarily be contrary to the public interest. In my view disclosure of the documents demonstrates public sector employees diligently fulfilling their professional duties and responsibility to provide their expertise on a range of technical subjects. I consider public scrutiny of such deliberations can improve advice provided to government where Agency officers know it may be subject to public scrutiny.

22. Accordingly, I am not satisfied a majority of information in the documents is exempt under section 30(1).

23. My decision in relation to section 30(1) is set out in the Schedule of Documents at **Annexure 1**.

*Scope of the request*

24. In relation to the contention by the Agency that certain information in the documents is out of scope of the request I have determined:

- (a) Information regarding ownership and responsibility of land falls within the scope of the request. In my view, the Applicant seeks communications between agencies and the building contractor regarding the Project, and this information broadly falls within the scope of the request.

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<sup>3</sup> See Environmental Protection Authority at <https://www.epa.vic.gov.au/for-community/current-projects-issues/west-gate-tunnel-project/west-gate-tunnel-project-emps#approved-emps>.

- (b) A lease agreement with a third party, which is an attachment to an email, does not relate to the Project or the storage of waste spoil, and falls outside the scope of the request.
- (c) I agree certain documents are available for a fee and therefore are not subject to the FOI Act due to the operation of section 14(1)(a). I note these documents are not sought by the Applicant and are identified in the Schedule of Documents below.

***Section 35(1)(a) – Information provided in confidence to an agency that would be exempt if generated by the agency***

- 25. A document is exempt under section 35(1)(a) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of person or a government to an agency or a Minister; and
  - (b) the information would be exempt matter if it were generated by an agency or Minister.
- 26. The MTIA submits a document it provided to the Agency is exempt under section 35(1)(a) as it would be exempt under section 30(1) if it had been generated by the Agency. The document is referred to as a 'draft brief', confidential and not for circulation.
- 27. I accept the document was provided to the Agency by the MTIA and the document was communicated in confidence.
- 28. However, for the reasons set out in paragraph 23 I do not consider section 30(1) applies to the document. It is therefore not exempt under section 35(1)(a).
- 29. My decision in relation to section 35(1)(a) is set out in the Schedule of Documents at **Annexure 1**.

***Section 25 – Deletion of exempt or irrelevant information***

- 30. 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.
- 31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>4</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>5</sup>
- 32. 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.
- 33. 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, as to do so would not require substantial time and effort, and the edited documents would retain meaning.
- 34. My decision in relation to section 25 is set out in the Schedule of Documents at **Annexure 1**.

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<sup>4</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>5</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

## **Conclusion**

35. On the information before, I am not satisfied the documents are exempt under sections 30(1) or 35(1)(a).
36. Further, I am satisfied certain information in the documents is irrelevant as set out in the Schedule of Documents being:
  - (a) personal affairs information of non-executive Agency officers;
  - (b) information on pages 75 to 97 of the PDF document provided by the Agency; and
  - (c) information the Agency determined exempt under section 14(1)(a).
37. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant information deleted in accordance with section 25, I have granted access to the documents in part.
38. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

## **Review rights**

39. 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.<sup>6</sup>
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>8</sup>
42. 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.
43. 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>9</sup>

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

44. My decision does not take effect until the Agency's 14 day review period expires.
45. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> Sections 50(3F) and (3FA).



Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	Page number (number of pages)	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	FW: Access to Wyndham Vale site	1 – 37 (37)	Refused in full  Section 30(1)	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 30(1):</b> In my view these documents contain essentially factual information and are neither preliminary nor sensitive in nature.</p> <p>For these reasons, and the reasons set out in the Notice of Decision above, I am not satisfied it would be contrary to the public interest to disclose the document. Accordingly, I am not satisfied it is exempt under section 30(1).</p> <p><b>Section 25:</b> The Applicant does not seek access to the personal affairs of non-executive Agency staff. This includes names, physical and email addresses and telephone numbers. This information is irrelevant to the request and as it is practicable to delete it in accordance with section 25, the document is to be released in part.</p>

Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	Page number (number of pages)	Agency's Decision	OVIC Decision	OVIC Comments
2.	[date]	FW: Wyndham Vale land query (Lot B on Plan of Subdivision 708620X)	38 – 50 (13)	Refused in full Sections 30(1), 14(1)(a)	<b>Release in part</b>  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	<b>Section 30(1):</b> For the reasons set out in the Notice of Decision above, I am not satisfied it would be contrary to the public interest to disclose the documents. Accordingly, I am not satisfied it is exempt under section 30(1).  <b>Section 25:</b> The Applicant does not seek access to documents for which the Agency relied on section 14(1)(a) to refuse access. In the PDF document supplied to OVIC by the Agency, the relevant are pages 44 to 49. Therefore, this information is irrelevant to the Applicant's request as well as the information described in Document 1. As it is practicable to delete this information in accordance with section 25, the document is to be released in part.
3.	[date]	Fw: Access to Wyndham Vale site	51 – 54 (4)	Refused in full Section 30(1)	<b>Release in part</b>  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	<b>Section 30(1):</b> See comments for Document 2.  <b>Section 25:</b> See comments for Document 1.

Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	Page number (number of pages)	Agency's Decision	OVIC Decision	OVIC Comments
4.	[date]	Fw: Wyndham Vale land query (Lot B on Plan of Subdivision 708620X)	55 – 67 (13)	Refused in full Sections 30(1), 14(1)(a)	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 30(1):</b> See comments for Document 2.</p> <p><b>Section 25:</b> The Applicant does not seek access to documents for which the Agency relied on section 14(1)(a) to refuse access. In the PDF document supplied to OVIC by the Agency, the relevant are pages are pages 62 to 67. Therefore, this information is irrelevant to the Applicant's request, as well as the information described in Document 1. As it is practicable to delete this information in accordance with section 25, the document is to be released in part.</p>

Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	Page number (number of pages)	Agency's Decision	OVIC Decision	OVIC Comments
5.	[date]	Re: Wyndham Vale land query (Lot B on Plan of Subdivision 708620X)	68 – 97 (30)	Refused in full  Section 30(1)	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 30(1):</b> See comments for Document 2.</p> <p>I note page 68 contains sensitive information as it relates to 'current negotiations'. However, I note no consultation took place with this third party. However, on balance, I consider the limited information in the document means I am not satisfied it would be contrary to the public interest to release it. Accordingly, I am not satisfied it is exempt under section 30(1).</p> <p><b>Section 25:</b> I accept the Agency's submission that pages 75 to 97 fall outside the scope of the Applicant's request. The Applicant specifically seeks access to communications between agencies regarding the use of the Stabling Yards for a specific purpose. Therefore, this information is irrelevant to the Applicant's request, as well as the information described in Document 1. As it is practicable to delete this information in accordance with section 25, the document is to be released in part.</p>

Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	Page number (number of pages)	Agency's Decision	OVIC Decision	OVIC Comments
6.	[date]	Fw: Wyndham Vale land query (Lot B on Plan of Subdivision 708620X)	98 – 128 (31)	Refused in full  Section 30(1)	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 30(1):</b> See comments for Document 2.</p> <p>I note the document includes maps and a 'design package'. I note the design package is marked 'for information not for construction'. Therefore, I consider it is clear these plans are preliminary in nature and for planning purposes. In my view, members of the public are capable of understanding such plans are preliminary and subject to change.</p> <p>Accordingly, for these reasons set out in the Notice of Decision above, I am not satisfied it would be contrary to the public interest to disclose the document.</p> <p>Accordingly, I am not satisfied it is exempt under section 30(1).</p> <p><b>Section 25:</b> See comments for Document 1.</p>

Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	Page number (number of pages)	Agency's Decision	OVIC Decision	OVIC Comments
7.	[date]	DRAFT Brief for Land Wyndham Vale - Confidential	129 – 133 (5)	Refused in full Section 30(1)	<b>Release in part</b> Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	<p><b>Section 30(1):</b> I note the document includes a document marked 'confidential not for circulation'. While I have taken this marking into consideration, it is not determinative.</p> <p>While I note this document is a draft, in my view the preliminary nature of a document does not mean disclosure is necessarily contrary to the public interest. Rather, the disclosure of such documents can demonstrate to the public the ways in which decisions are made, and can assist the community to participate in such decisions.</p> <p>Accordingly for these reasons and the reasons set out above, I have decided it would not be contrary to the public interest to release the document and it is not exempt under section 30(1).</p> <p><b>Section 35(1)(a):</b> The document is not exempt under section 35(1)(a) for the reasons set out above.</p> <p><b>Section 25:</b> See comments for Document 1.</p>

Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	Page number (number of pages)	Agency's Decision	OVIC Decision	OVIC Comments
8.	[date]	SAVED: RE: Access to Wyndham Vale site	134 – 136 (3)	Refused in full  Section 30(1)	<b>Release in part</b>  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	<b>Section 30(1):</b> See comments for Document 2.  <b>Section 25:</b> See comments for Document 1.
9.	[date]	Wyndham Vale land query	137 – 145 (9)	Refused in full  Sections 30(1), 14(1)(a)	<b>Release in part</b>  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	<b>Section 30(1):</b> See comments for Document 2.  <b>Section 25:</b> The Applicant does not seek access to documents for which the Agency relied on section 14(1)(a) to refuse access. In the PDF document supplied to OVIC by the Agency, the relevant are pages are pages 139 to 144. Therefore, this information is irrelevant to the Applicant's request, as well as the information described in Document 1. As it is practicable to delete this information in accordance with section 25, the document is to be released in part.