

## Notice of Decision and Reasons for Decision

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Applicant:	'DT2'
Agency:	Department of Transport
Decision date:	8 October 2021
Exemptions considered:	Sections 28(1)(d), 30(1), 35(1)(a), 35(1)(b)
Citation:	'DT2' and Department of Transport (Freedom of Information) [2021] VICmr 300 (8 October 2021)

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FREEDOM OF INFORMATION – Urban Air Mobility Steering Committee – advice – information provided in confidence – deliberation or decision of the Cabinet – disclosure not contrary to the public interest

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

While I am satisfied the documents are exempt in part under section 28(1)(d), I am not satisfied they are exempt under sections 35(1)(a) or 35(1)(b).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access to Document 1 and 2 is granted in part.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

8 October 2021

## Reasons for Decision

### Background to review

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

I am seeking documents held by the Department of Economic Development, Jobs, Transport and Resources (and Invest Victoria which is part of this department). Dating from [date] – [date]. Which are reports, policies, advice, or final briefings (to the Secretary of Transport, the CEO of Invest Victoria, the Minister for Transport, the Treasurer)

Relating to:

- policy development or advice regarding Urban Air Mobility eVTOL or electric Vertical Take Off and Landing;
- Uber Air's Melbourne trial.

2. The Agency identified two documents falling within the terms of the Applicant's request and refused access to the documents in full relying on the exemptions in sections 35(1)(a) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

### Review application

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, being a Background Paper (**Document 1**) and terms of reference relating to the Urban Air Mobility (UAM) Steering Committee (**Document 2**).
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.
7. 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.
8. 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.
9. Further, in conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring it is correctly made under the FOI Act and any other applicable law in force at the time of my decision. This can include considering the application of exemptions not relied upon by the Agency in its decision.

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

## Review of exemptions

### *Section 28(1) – Cabinet documents*

10. While the Agency did not rely on section 28 in its decision to refuse access to Documents 1 and 2, having reviewed these documents, I am of the view its application in this matter should be considered.
11. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
12. In *Ryan v Department of Infrastructure*,<sup>2</sup> the Victorian Civil and Administrative Tribunal (**VCAT**) observed:

It has been said that a document is not exempt merely because it has some connection with Cabinet, or is perceived by departmental officers or others as being of a character that they believe ought to be regarded as a Cabinet document or because it has some Cabinet “aroma” around it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exemptions [(now five)]” in section 28(1) of the Act.

### *Section 28(1)(d)*

13. Section 28(1)(d) provides a document is exempt if its disclosure would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
14. A document will be exempt under section 28(1)(d) if, for example, there is evidence the Cabinet discussed advice or options submitted for its consideration and made a decision arising from the advice and options presented.<sup>3</sup>
15. A ‘decision’ means any conclusion as to the course of action the Cabinet adopts whether that be conclusions as to final strategy on a matter or conclusions about how a matter should proceed.<sup>4</sup>
16. Where a decision or a recommendation of the Cabinet is made public, releasing information of the decision made does not disclose the decision or deliberation of the Cabinet for the purpose of section 28(1).<sup>5</sup>
17. As the reasons for my decision are also subject to consideration under section 28(1)(d), I am limited in what information I can disclose in my reasons for decision.
18. I am satisfied certain information in the documents discloses a deliberation of a subcommittee of the Cabinet. Therefore, I am satisfied this information is exempt under section 28(1)(d). However, while I note similar information in the documents appears in a subsequent Cabinet submission, given the information in the submission is significantly more detailed, I have determined section 28(1)(d) applies to certain information in the documents only.
19. My decision in relation to section 28(1)(d) is set out in the conclusion below.

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<sup>2</sup> (2004) VCAT 2346 at [33].

<sup>3</sup> *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

<sup>4</sup> *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

<sup>5</sup> *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

## ***Section 35(1) – Documents containing material obtained in confidence***

### ***Section 35(1)(b)***

20. The Agency relies on the exemption under section 35(1)(b) to refuse access to Document 1.
21. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
22. Confidentiality can be expressed or implied from the circumstances of the matter.<sup>6</sup>
23. The Agency submits:

This document was supplied to the department by Invest Victoria in confidence, and was created for the Urban Air Mobility (UAM) Steering Committee explicitly to inform matters of internal government consideration in relation to the emerging concept of Urban Air Mobility in Victoria. It was provided to a limited number of people, namely the members of the UAM Steering Committee.

...

The Background Paper is an Invest Victoria document, and it was intended that the information would be provided to members of the UAM Steering Committee only.

The relevant division and Invest Victoria have advised that the document was provided to the department in confidence.

### **Was the document provided to the Agency in confidence?**

24. When determining whether information was communicated in confidence to an agency, it is necessary to consider the position from the perspective of the communicator.<sup>7</sup> Further, confidentiality can be expressed or implied from the circumstances of the matter.<sup>8</sup>
25. The Agency advises Document 1 was provided in confidence by Invest Victoria, which is another Victorian Government agency.
26. Considering the nature of the information and the purpose for which it was provided to the Agency, I am satisfied Invest Victoria communicated the information in confidence to the Agency.

### **Would disclosure of the information be contrary to the public interest?**

27. The Agency advises:

The Department has strong working relationships with a number of Victorian government agencies, such as Invest Victoria. The department submits that if Document 1 is released, its working relationship with Invest Victoria and similar agencies would likely be compromised. This may make it more difficult or less likely that such agencies would be willing to work with the department and provide confidential information to the department in the future.

28. I do not accept the Agency's submissions as I am not satisfied government agencies would be inhibited from exercising their statutory and governmental functions to provide relevant information

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<sup>6</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>7</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

<sup>8</sup> *Ibid.*

and advice to each other, particularly where agencies are required to work together towards implementing government projects.

29. Accordingly, I am satisfied Document 1 is not exempt under section 35(1)(b).

*Section 35(1)(a)*

30. The Agency relies on the exemption under section 35(1)(a) to refuse access to Document 2 on grounds it was provided to the Agency by Invest Victoria.

31. For completeness, in addition to considering whether section 35(1)(a) applies to Document 2, I have also considered whether it would apply to Document 1.

32. 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 a 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.

33. The Agency advises it consulted with Invest Victoria regarding disclosure of the documents.

Was the information communicated in confidence to the Agency?

34. Having reviewed the documents, I accept Invest Victoria communicated the information in confidence to the Agency.

35. Therefore, I am satisfied the first condition of section 35(1)(a) is met.

Would the information be exempt matter if it were generated by an agency or Minister?

36. I must now consider if the information in the documents had been generated by an agency, whether it would be exempt under the FOI Act.

37. The Agency submits that had the documents been generated by the Agency they would be exempt matter under section 30(1).

38. 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 in 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.

39. Section 30(3) provides purely factual information is not exempt under section 30(1).

40. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency and any person engaged by or on behalf of an agency, whether or not that person is subject to the *Public Administration Act 2004* (Vic).<sup>9</sup>

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<sup>9</sup> See *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services (No 2)* (1998) 14 VAR 347.

*Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or minister or in consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?*

41. For section 30(1) to be satisfied, a document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.
42. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that its release would disclose matter of that nature.<sup>10</sup>
43. Having reviewed the documents, I am satisfied they contain information in the nature of opinion, advice and recommendations prepared by officers of Invest Victoria.
44. Accordingly, I am satisfied the first requirement is met.

Were the documents made in the course of the Agency's deliberative processes?

45. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>11</sup>
46. In *Re Waterford and Department of Treasury (No.2)*,<sup>12</sup> the Commonwealth Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
47. I am satisfied the documents were made in the course of the Agency's deliberative processes, that of developing public policy in relation to UAM.
48. Accordingly, I am satisfied the second requirement is met.

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

49. Determining whether disclosure of information would be contrary to the public interest requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>13</sup>
50. I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of government held information and documents. In doing so, I have taken the following factors into consideration:<sup>14</sup>
  - (a) the right of every person to seek 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;

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<sup>10</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>11</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>12</sup> (1981) 1 AAR 1.

<sup>13</sup> *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].

<sup>14</sup> *Halls 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 making 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.

51. The Applicant submits:

- On 11 June 2019 Uber (2019) together with the Victorian Government (2019) announced Melbourne would be a trial city for a new electric helicopter taxi service called Uber Air.
- Uber Air proposed using electric helicopters (that the company calls electric Vertical Take off and Landing – eVTOL - vehicles) to transport “tens of thousands of people”, with test flights commencing in 2020 and commercial operations in 2023.
- In response to COVID19, Uber (2020) reconfirmed its intention to pursue Melbourne as its first international trial city.
- Prior to and since this announcement in June 2019 almost no information has been made available to the public about the specific nature of what is proposed as part of Uber Air, or regarding the planning/ approval/ consultation process that government or companies behind Uber Air will undertake prior to test flights or commercial operations commencing.
- Uber Air has significant implications for people residing, visiting and working in Melbourne in terms of proposed flight routes and landing sites, noise and visual impacts, public safety for users and under flight paths, privacy of users and under flight paths, impact on telecommunications and internet services, use of airspace in crowded public spaces and around public buildings, intersection with emergency services helicopters.
- This proposal is of particular concern and public interest given the lack of precedent anywhere in the world (as noted by the Civil Aviation Safety Authority in Answers to Questions on Notice Supplementary Budget Estimates 2019-2020 Committee Question Number 394), the lack of a suitable planning approvals process, short timeframes (commencing commercial operations in 2023, with test flights from 2020), the scale of the proposal (to transport “tens of thousands of people”, likely involving 1,000 helicopters and 83 skyports), and public safety, noise and infrastructure implications with vehicles travelling at 241-321 km/h in urban areas).
- In addition, these issues are of heightened concern given Uber's documented poor safety record. For example, London's transport authority revoked the company's license to operate in 2019 due to safety concerns, and the US National Transportation Safety Board found that Uber's “inadequate safety culture” contributed to a 2018 car crash and pedestrian death involving an Uber self-driving vehicle.
- Lack of appropriate regulation, planning and community consultation has led to issues with other similar proposals by the ‘urban air mobility’ sector, such as drone delivery services in the ACT which led to a Parliamentary Inquiry.

52. The Agency submits it would be contrary to the public interest to disclose information in the documents.

53. In my view, the Agency's reasons disclose the content of those documents and, therefore, I have not detailed those reasons in my reasons for decision to avoid disclosing exempt information.
54. Having reviewed the documents, I consider there are factors that weigh both in favour and against disclosure. However, on balance I have determined it would not be contrary to the public interest to disclose the documents for the following reasons:
- (a) While the documents relate to preliminary investigations into a potential government activity, given the significance of the content, I consider the public interest weighs in favour of disclosure rather than secrecy.
  - (b) The documents themselves appear to be considered and in final form.
  - (c) For reasons similar to those described in paragraph 28 above, I do not consider disclosure of the documents would reasonably impact upon the Agency's ability, and that of other government agencies, to deliver on Victorian government projects and policies.
  - (d) The documents are brief and factual in nature, and in large part include research from publicly available information not related specifically to the development of the project.
  - (e) The project is significant and complex, involving a large number of government agencies. In these circumstances I consider the public interest weighs in favour of disclosure to provide for transparency and opportunities for members of the community to participate in government policy and decision making in relation to this new technology.
55. Accordingly, I am not satisfied the third requirement is met and the documents would not be exempt under section 30(1).
56. As I am not satisfied Documents 1 and 2 would be exempt under section 30(1), they are not exempt under section 35(1)(a).

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

57. 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.
58. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>15</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>16</sup>
59. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so, as editing the documents would not take substantial time and the documents would retain sufficient meaning.

### **Conclusion**

60. On the information before me, I am satisfied certain information in the documents is exempt under section 28(1)(d). However, I am not satisfied the documents are exempt under sections 35(1)(a) or section 35(1)(b).

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<sup>15</sup> *Mickelburgh 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>16</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].



61. The information exempt under section 28(1)(d) is:
- (a) in Document 1, point 9, the second line of text to the end of that sentence;
  - (b) in Document 2, under background, the second and third lines of text;
  - (c) in Document 2, under background, the third paragraph;
  - (d) in Document 2, in point 3, the first sentence.
62. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted to the documents in part.

### **Review rights**

63. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>17</sup>
64. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
65. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
66. 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.
67. 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>20</sup>

### **Third party review rights**

68. As I have determined to release documents that contain information the Agency determined is exempt under section 35(1), if practicable, I am required to notify any relevant person of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>21</sup>
69. In this case, I am satisfied it is practicable to notify the relevant third party of their review rights and confirm they will be notified of my decision on the date of decision.

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

70. My decision does not take effect until the third party's 60 day review period expires.
71. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</sup> Sections 50(3F) and (3FA).

<sup>21</sup> Sections 49P(5), 50(3B) and 52(3).