

Notice of Decision and Reasons for Decision

Applicant:	'DF1'
Agency:	Department of Transport
Decision date:	16 June 2021
Exemptions considered:	Sections 28(1)(b), 28(1)(ba), 30(1), 33(1)
Citation:	'DF1' and Department of Transport (Freedom of Information) [2021] VICmr 173 (16 June 2021)

FREEDOM OF INFORMATION – ministerial briefing – design and planning – light rail link – business case – expenditure of public funds – Cabinet submission – issues to be considered by Cabinet

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 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 satisfied Documents 1 to 9 are exempt under sections 28(1)(b) or 28(1)(ba).

While I have determined certain information in Document 10 is exempt under section 33(1), I am satisfied section 30(1) does not apply to this document.

I am satisfied it is practicable to provide the Applicant with an edited copy of Document 10 with exempt information deleted in accordance with section 25. Accordingly, I have granted access to this document in part. In relation to Documents 1 to 9, I am satisfied these documents are exempt in full.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

16 June 2021

Reasons for Decision

Background to review

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

Any reports, memos, consultation summaries, briefings notes and recommendations related to the routes, alignments and network infrastructure requirements of a potential light rail link between [location] to [location]. Please note that I rule out searches for emails and I refer to documents produced from [date] onwards.

2. The Agency identified 10 documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 28(1)(a), 28(1)(b), 28(1)(c) and 30(1). The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties.
6. 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.
7. 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 28(1) – Cabinet documents

8. 'Cabinet' includes a committee or sub-committee of Cabinet.¹
9. In *Ryan v Department of Infrastructure*,² 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)(b) – Document prepared for purpose of submission for consideration by the Cabinet

10. Section 28(1)(b) provides a document is an exempt document if it was prepared by a Minister, or on his or her behalf or by an agency, for the purpose of submission for consideration by the Cabinet.

¹ Section 28(7)(a).

² (2004) VCAT 2346 at [33].

11. A document will only be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission for consideration by the Cabinet. In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to the Cabinet.³
12. A report prepared by an external consultant is a document prepared by an 'agency' for the purposes of section 28(1)(b).⁴
13. My decision in relation to section 28(1)(b) is set out in the Schedule of Documents in **Annexure 1**.

Section 28(1)(ba) – Document prepared for purpose of briefing a Minister

14. Section 28(1)(ba) provides a document is an exempt document if it was prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
15. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which it was prepared was to brief a Minister in relation to issues to be considered by the Cabinet.⁵ In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to the Cabinet.⁶
16. The Cabinet briefing purpose must be 'immediately contemplated' when the document is created. The exemption cannot apply merely because the Cabinet ultimately considered an issue.⁷
17. The word 'briefing' means a 'short accurate summary of the details of a plan or operation. The purpose...is to inform'. A document should have the character of briefing material and will be of such character if it contain 'information or advice...prepared for the purpose of being read by, or explained to, a [m]inister'. It requires more than having 'placed a document before a Minister'.⁸
18. The term 'issues to be considered by Cabinet' within the meaning of section 28(1)(ba) requires that it must be more than just 'likely' that Cabinet will consider it. There must be an intention or expectation the issues will be considered by the Cabinet, even if they are not ultimately considered. Evidence that a matter was included in a Cabinet agenda will meet this test.⁹
19. My decision in relation to section 28(1)(ba) is set out in the Schedule of Documents in **Annexure 1**.

³ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

⁴ See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

⁵ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

⁶ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

⁷ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

⁸ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁹ *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996). See also *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998); *Hulls v Department of Treasury and Finance (No 2)* (1994) 14 VAR 295 at [320]-[321]; reversed on other grounds by the Court of Appeal: *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331; 15 VAR 360; [1999] VSCA 117.

Section 30(1) – Internal working documents

20. 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.
21. The exemption does not apply to purely factual material in a document.¹⁰
22. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of an agency, a member of an agency’s staff, and any person employed by or for an agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.
23. I must also be satisfied releasing this information would not be contrary to the public interest. This requires a ‘process of the weighing against each other conflicting merits and demerits’.¹¹
24. In determining if disclosure 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.
25. I have given weight to the following relevant factors:¹²
- (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

¹⁰ Section 30(3).

¹¹ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

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

- (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.

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

Section 33(1) – Documents affecting personal privacy

27. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI Act would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person other than the Applicant (a **third party**);¹³ and
- (b) such disclosure would be ‘unreasonable’.

28. Information relating to a person’s ‘personal affairs’ includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.¹⁴

29. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the protection of a third party’s personal privacy in the circumstances.

30. In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁵ However, I do not consider this to be a relevant factor in the circumstances.

31. In determining whether disclosure of a document would involve the unreasonable disclosure of a third party’s personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.¹⁶

32. My decision in relation to section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

33. 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.

34. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁷ 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 25.¹⁸

¹³ Sections 33(1) and (2).

¹⁴ Section 33(9).

¹⁵ Section 33(2A).

¹⁶ Section 33(2B).

¹⁷ *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].

¹⁸ *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].

35. I have considered the effect of providing the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25.
36. While I am satisfied it is practicable to delete the exempt information in Document 10, I am not satisfied it is practicable to do so in relation to Documents 1 to 9.
37. My decision in relation to section 25 is set out in the Schedule of Documents in **Annexure 1**

Conclusion

38. On the information before me, I am satisfied Documents 1 to 9 are exempt under sections 28(1)(b) or 28(1)(ba).
39. While I have determined certain information in Document 10 is exempt under section 33(1), I am satisfied section 30(1) does not apply to this document.
40. I am satisfied it is practicable to provide the Applicant with an edited copy of Document 10 with exempt information deleted in accordance with section 25. Accordingly, I have granted access to this document in part. In relation to Documents 1 to 9, I am satisfied these documents are exempt in full.
41. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁹
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²¹
45. 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.
46. 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.²²

When this decision takes effect

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

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁰ Section 52(5).

²¹ Section 52(9).

²² Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Document

Document No.	Date of Document	Document Description	No. of Pages	Agency decision	OVIC Decision	OVIC Comments
1	[date]	BMIN [reference] Unsigned and undated Briefing for Minister for Public Transport	5	Refused in full Section 30(1)	Refuse in full Section 28(1)(ba)	<p>Section 28(1)(ba): During the review the Agency advised it relies on the exemption under section 28(1)(ba) in relation to this document. I agree it contains information either the same or substantially similar to information in Document 9.</p> <p>While I note this document is dated prior to Document 9, the Agency submits Document 9 was being drafted at the time this document was prepared.</p> <p>I am satisfied this document was prepared for the purpose of briefing a Minister in relation to an issue to be submitted for consideration by the Cabinet. Accordingly, I am satisfied the document is exempt under section 28(1)(ba).</p>
2	[date]	BMIN [reference] Unsigned and undated Briefing for Minister for Transport Infrastructure	12	Refused in full Section 30(1)	Refuse in full Section 28(1)(ba)	<p>Section 28(1)(ba): See comments for Document 1.</p>
3	[date]	Unsigned and undated Briefing for Minister for Transport Infrastructure	4	Refused in full Sections 28(1)(ba), 30(1)	Refuse in full Section 28(1)(ba)	<p>Section 28(1)(ba): This document is the covering briefing to Documents 4, 5 and 6. I am satisfied it was prepared for the purpose of briefing a Minister in relation to issues to be submitted for consideration by a sub-committee of the Cabinet. Accordingly, I am satisfied the document is exempt under section 28(1)(ba).</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency decision	OVIC Decision	OVIC Comments
4	[date]	Undated and unsigned Cabinet Submission	4	Refused in full Sections 28(1)(b), 30(1)	Refuse in full Section 28(1)(b)	Section 28(1)(b): From the information before me, I am satisfied the document was prepared by a Minister or by an agency on the Minister's behalf for the purpose of submission to a subcommittee of the Cabinet. Accordingly, I am satisfied the document is exempt under section 28(1)(b).
5	[date]	Attachment 1 to Cabinet Submission in Document 4	10	Refused in full Sections 28(1)(b), 30(1)	Refuse in full Section 28(1)(b)	Section 28(1)(b): See comments for Document 4.
6	[date]	Attachment 2 to Cabinet Submission in Document 4	51	Refused in full Sections 28(1)(b), 30(1)	Refuse in full Section 28(1)(b)	Section 28(1)(b): See comments for Document 4.
7	[date]	Unsigned and undated Briefing for Minister for Transport (this document has two attachments, which are contained in Document 5)	3	Refused in full Sections 28(1)(ba), 30(1)	Refuse in full Section 28(1)(ba)	Section 28(1)(ba): I am satisfied this document was prepared for the purpose of briefing a Minister in relation to an issue to be submitted for consideration by the Cabinet. Accordingly, I am satisfied the document is exempt under section 28(1)(ba).
8	[date]	Undated Briefing for a Minister	4	Refused in full Sections 28(1)(c), 30(1)	Refuse in full Section 28(1)(ba)	Section 28(1)(ba): See comments for Document 7.

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9	[date]	Draft Preliminary Business Case	84	Refused in full Sections 28(1)(b), 30(1)	Refuse in full Section 28(1)(b)	Section 28(1)(b): I accept the Agency's submission the document was prepared by the Agency for the purpose of submission for consideration by the Cabinet. Accordingly, I am satisfied the document is exempt under section 28(1)(b).
10	[date]	External consultant report – <i>[location to location] Link – Preliminary demand forecasting report (Stage 1) – [month year]</i>	96	Refused in full Section 30(1)	Release in part Sections 33(1), 25 The document is to be released with names and signatures deleted in accordance with section 25.	<p>Section 30(1): This document is in final form. It contains demand modelling for several rail link project options. The document was prepared by an external consultant, that is an agency officer for the purposes of the FOI Act.</p> <p>While the document contains a substantial amount of factual information, some of which is publicly available, I accept it contains matter in the nature of opinion, advice and recommendation. Further, it was created for the deliberative purposes of the Agency, that of determining options for transport infrastructure in relation to the rail link.</p> <p>I have decided it would not be contrary to the public interest to release it for the following reasons:</p> <ul style="list-style-type: none"> • the document is in final form; • publicly available information shows the project has received Federal government funding of up to \$475 million under the

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						<p>Government's Infrastructure Investment Program, including for 'planning and preconstruction activities to construct a rail line in south-east Melbourne to service the Monash Precinct';</p> <ul style="list-style-type: none"> • it is clear from the document's stated purpose and conclusions it contains information upon which a future decision may be made in relation to the development of the rail link project rather than any determinative government decision or commitment to complete the project; and • I consider members of the community benefit from access to such publicly funded project planning and development information to allow for greater transparency of and participation in government decision making. <p>Section 33(1): The document contains the names and signatures of third parties, which is personal affairs information for the purposes of section 33(1).</p> <p>I have determined it would be unreasonable to release the names and signatures of the document's authors as the information, while not particularly sensitive, will not assist the Applicant in interpreting or understanding the</p>

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						<p>content or context of the documents. The persons named are employees or agents of the external consultant. In these circumstances, where the document is to otherwise be released to the Applicant, I have determined the personal privacy of those persons outweighs any interest in obtaining the names of the report authors.</p> <p>Section 25: I have determined it is practicable to delete exempt information from the document in accordance with section 25.</p>