

## Notice of Decision and Reasons for Decision

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Applicant:	'DX8'
Agency:	Major Transport Infrastructure Authority
Decision date:	7 January 2022
Exemptions and provision considered:	Sections 28(1)(c), 30(1), 33(1), 25
Citation:	'DX8' and Major Transport Infrastructure Authority (Freedom of Information) [2022] VICmr 8 (7 January 2022)

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FREEDOM OF INFORMATION – level crossing removal – feasibility assessment – internal working document – Cabinet submission – personal affairs information – OVIC preliminary view provided – varied decision

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 satisfied certain information in the document subject to review is exempt from release under section 28(1)(c). However, I am not satisfied the remaining information in the document is exempt under sections 30(1) or 33(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25, access to document is granted 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

7 January 2022

## Reasons for Decision

### Background to review

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

I am requesting the engineering report and technical assessment, that the [Level Crossing Removal Project] LXP claims on its website, were the basis of their recommendation to the Government to build an elevated rail line through [location in Victoria]
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under section 30(1). 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. During the review, the Applicant indicated they do not seek access to the mobile telephone numbers of third parties. Accordingly, this information is irrelevant for the purposes of section 25, which is discussed below.
5. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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.

### Preliminary view

10. During the review, the Agency was provided with my preliminary view that the documents are not exempt under section 30(1) and invited to provide a further submission or consider making a fresh decision under section 49M.
11. In response, the Agency maintained its view the documents are exempt under section 30(1) and provided additional information in support of this view. The Agency also advised it relies on an additional exemption under section 28(1)(c) in relation to page 10 of the document.

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

*Does the document contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

14. For section 30(1) to apply, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
15. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>1</sup>
16. I am satisfied the document, contains opinion, advice and recommendations prepared Agency officers. However, I am also satisfied certain information in the document is factual in nature.

*Was the document made in the course of, or for the purpose of, the deliberative processes involved in the functions of the Agency?*

17. 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>2</sup>
18. In *Re Waterford and Department of Treasury (No.2)*,<sup>3</sup> the former Victorian 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.

19. I am satisfied the document was prepared for the purpose of the Agency’s deliberative processes in relation to the consideration of options for a level crossing removal project.

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

20. In determining whether disclosure of a document 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

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<sup>1</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>2</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>3</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

facilitate and promote the disclosure of information. In doing so, I have given weight to the following factors:<sup>4</sup>

- (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 document and the broader context giving rise to the creation of the document;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the document 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 document 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 a document in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

21. The Agency submits:

By way of background, the option chosen for removing a level crossing is only endorsed by Government following extensive technical investigations of the level crossing removal site undertaken as part of the contract award (analogous to a tender) for each crossing. In an effort to increase transparency and assist in stakeholder consultation following the announcement of the removal of a level crossing, the indicative option selection was introduced. This has proved effective in situations where preliminary desktop assessments, including the Assessments, have indicated that only one option is feasible or where it has clear benefits over other feasible options, to provide more information to the public early in the project about the potential nature of the works affecting them.

The Assessments are conducted at a very early stage in the decision to remove a crossing. They are desktop reviews of already-available information (such as from Google Maps) which does not contain the more extensive engineering, ecological, geological and hydrogeological investigations and data analysis that occurs as part of the contract award for the removal. At the point of those later investigations there is the prospect of information being uncovered that would alter assumptions in the Assessments and lead to a different option for removal being pursued than the indicative option. Stakeholder feedback is one factor that is also taken into account when deciding on the final option along with other factors in the option assessment framework in the LXR Program Business Case.

We submit that release of the Assessments would, in contrast to increasing the public's awareness of decisions made, lead to inappropriate debate, namely that the options at this stage are not set in stone and are based on an incomplete set of investigations. This inappropriate debate would then have negative flow-on effects for stakeholder engagement and consultation as works continue on the project.

22. Having reviewed the document and considered the Agency's reasons set out in its decision letter and submission made during the review, I am not satisfied disclosure of the document would be contrary to the public interest for the following reasons:

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<sup>4</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (a) Whilst I note the document could be considered sensitive as it relates to the expenditure of public funds, similar projects continue along Melbourne’s rail network, reducing the sensitivity of the document.
- (b) I acknowledge the Applicant has a strong interest in the Agency’s processes with respect to this project, where the level crossing removal involves and will impact their local area.
- (c) Further, I consider there is a considerable public interest in members of the public being able to evaluate and understand decisions made by government. By providing access to information that demonstrates the basis upon which decisions are made, disclosure of a document like this builds community trust in government decision making processes. Therefore, I consider disclosure of the document serves the public interest in promoting open and accountable government.
- (d) I acknowledge the Agency’s submission the document was created at an early stage in the decision making process regarding the removal of a level crossing. However, I do not accept its disclosure would be likely to misinform or confuse the public or cause unnecessary debate. I am satisfied the document provides sufficient contextual information such that it is reasonably clear the document was created at a particular point in time and may be one of a number of sources of advice contributing to the Agency’s overall assessment of the project. I also consider it would be open to the Agency to provide an explanation as to its current position regarding the project and any related issues or concerns at the time of releasing the document, should it consider it necessary to do so.
- (e) I am not satisfied disclosure of the relevant information in the document would negatively impact upon the nature or quality of advice and recommendations prepared by Agency officers for future or similar projects. I note the views of the Victorian Civil and Administrative Tribunal (VCAT) in *Graze v Commissioner for State Revenue*,<sup>5</sup> which observed the possibility of public scrutiny in some circumstances would provide for better administrative decision making. Similar level crossing removal projects have been undertaken and continue to be implemented across the Melbourne metropolitan rail network, and there is no objective evidence to establish disclosure of the document, would be reasonably like to impact the quality of advice prepared by Agency officers, including external consultants who are paid a commercial fee for their service, for future similar projects.

23. Accordingly, I am satisfied disclosure of the document under the FOI Act would not be contrary to the public interest, and is not exempt under section 30(1).

**Section 28(1)(c) – A document containing a draft, extract or copy of a Cabinet document**

24. During the review, the Agency invited me to consider the application of section 28(1)(c) in relation to page 10 of the document.

25. In relation to Cabinet documents and the exemptions available under section 28(1):

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” about it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exceptions” in section 28(1) of the Act.<sup>11</sup> But the language used to describe the exemptions is itself open to different interpretations.<sup>6</sup>

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<sup>5</sup> [2013] VCAT 869 at [25]-[27].

<sup>6</sup> *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [33] (per Justice Morris, VCAT President) quoting *Birnbauer v Department of Industry Technology and Resources* [1986] 1 VAR 279.

26. Section 28(1)(c) provides a document is an exempt document if it is a copy or a draft of, or contains extracts from, a document referred to in sections 28(1)(a), (b) or (ba).
27. Sections 28(1)(a), (b) and (ba) exempt from release a document if it is:
- (a) the official record of any deliberation or decision of the Cabinet;
  - (b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet;
  - (ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;
28. A document will be a copy of a Cabinet document if it is a reproduction of a Cabinet document, for example, a photocopy of a Cabinet submission.
29. A draft Cabinet document is a 'preliminary version' of the document. A document will not be considered a draft simply because it was created before the relevant Cabinet document or because there is information common to both a document and a Cabinet document. The relevant document should be a draft of the *actual* Cabinet document, and be preferably marked as 'draft' and not documents of 'different kinds prepared by different agencies'.<sup>7</sup>
30. In relation to an extract from a Cabinet document, a document will usually contain a reproduction of part of the text or material from a Cabinet document such as a quote, paraphrase, or summary. Simply referring to a Cabinet document is not sufficient.<sup>8</sup>
31. In this case, the Agency submits page 10 contains an extract from a Cabinet submission.
32. In relation to whether a document contains an extract from a Cabinet document for the purposes of section 28(1)(c), Justice Morris (VCAT President) held in *Honeywood v Department of Human Services*:<sup>9</sup>

The question of whether a document contains extracts from a Cabinet submission has not been authoritatively determined. In *Smith v Department of Sustainability and Environment*<sup>[2]</sup> I commented that it would appear that a document cannot "contain extracts from" a Cabinet document if it was created before the preparation of the Cabinet document. In *Mildenhall v Department of Education*<sup>[3]</sup> it was suggested that a document will "contain extracts from" a Cabinet document if it contains a quotation or paraphrase of that document. Commonly a document that is an extract from another document will contain an attribution to the other document, but I accept that the absence of an attribution will not be fatal. The question will need to be determined by reference to all the evidence. In particular, the absence of an attribution will not be fatal where there is direct evidence before the tribunal of a process of extracting content from a Cabinet submission to be included in a document which is claimed to be exempt under section 28(1)(c) of the Act.

33. In *Smith v Department of Sustainability and Environment*<sup>10</sup> Justice Morris earlier held:

There was another claim for exemption advanced that I will briefly comment on. This was a claim under section 28(1)(c) of the Act. The respondent submitted that the KPMG report (dated March 2003) contained "extracts from" the Cabinet submission dated 7 May 2003. Clearly the Cabinet submission dated 7 May 2003 is a document that was prepared by a minister for the purpose of submission for consideration by Cabinet. However I cannot accept the argument that the KPMG Report contains "extracts from" that Cabinet submission. It is true that the Cabinet submission contains passages which are identical to passages in the KPMG Report. I would characterise the Cabinet submission as containing "extracts from" the KPMG Report. However I cannot accept the argument that the reverse would apply,

<sup>7</sup> *Asher v Department of Infrastructure* (2006) 25 VAR 143.

<sup>8</sup> *Mildenhall v DoE* (unreported, VCAT, Glover M, 16 April 1999).

<sup>9</sup> (*General*) [2006] VCAT 2048 (11 October 2006) at [19].

<sup>10</sup> (*General*) [2006] VCAT 1228 (4 July 2006) at [28].

as the KPMG Report was a predecessor in time of the Cabinet submission. Notwithstanding what might have been said by Deputy President Macnamara in *Mildenhall No (2)*,<sup>[3]</sup> I would doubt that the expression “extracts from” could operate so as to apply to a document that was a predecessor of the document that was referred to in paragraphs (a), (b) or (ba) of section 28(1).<sup>[4]</sup>

34. In response to enquiries from OVIC staff, the Agency provided a copy of the covering page of a Cabinet submission and certain pages from an attachment to the Cabinet submission for my review.
35. Given the nature of documents subject to section 28(1), I am limited in the amount of information I can provide about the documents provided to support the Agency’s submission in relation to section 28(1)(c).
36. The date of the Cabinet submission is not evident from the front page provided. The attachment to the Cabinet submission is dated [date]. The document subject to review is dated [date]. Therefore, I accept the document was created after the attachment to the Cabinet submission.
37. Having examined page 10 of the document and the relevant page of the attachment to the Cabinet submission provided by the Agency, I am satisfied this page contains an extract from a page in a document previously created for the purpose of submission for consideration by the Cabinet.
38. Accordingly, I am satisfied page 10 of the document is exempt from release under section 28(1)(c).

***Section 33(1) – Personal affairs information of third parties***

39. As I have determined certain information the Agency exempted from release under section 30(1) is not exempt, I have considered the application of section 33(1), as the information includes the personal affairs information of persons other than the Applicant (**third parties**).
40. 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; and
  - (b) such disclosure would be ‘unreasonable’ in the circumstances.

*Do the documents contain the personal affairs information of individuals other than the Applicant?*

41. Information relating to the ‘personal affairs’ of a person includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.<sup>11</sup>
42. The document contains the names and position titles of Agency officers.
43. I am satisfied the names and position titles of Agency officers are ‘personal affairs information’ for the purposes of section 33(1).

*Would the release of the personal affairs information of third parties be unreasonable in the circumstances?*

44. Determining whether disclosure of a document would be unreasonable involves balancing the public interest in the disclosure of official information held by a government agency with the interest in protecting an individual’s personal privacy in the circumstances.<sup>12</sup>

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<sup>11</sup> Section 33(9).

<sup>12</sup> *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

45. The disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.<sup>13</sup>
46. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.<sup>14</sup>
47. Whether or not an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.<sup>15</sup>
48. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances of this matter, I have given consideration to the following factors:<sup>16</sup>
  - (a) the nature of the personal affairs information;
  - (b) the circumstances in which information was obtained by the Agency;
  - (c) the Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
  - (d) whether any public interest would be promoted by the release of the information;
  - (e) whether any individuals to whom the information relates object, or would be likely to object to the release of the information;
  - (f) the likelihood of further disclosure of the information if released;
  - (g) the likelihood disclosure would cause distress or anxiety to individuals it relates to; and
  - (h) whether disclosure of the information or would be reasonably likely to endanger the life or physical safety of any person.
49. The nature of the personal affairs information in the document is the name and position titles of Agency officers.
50. The Agency did not consult with the relevant third parties regarding their views on disclosure of their personal affairs information. Having considered the circumstances of the matter and nature of the information, it is unclear whether the third parties would be likely to object to the release of the information.
51. The personal affairs information was acquired by the Agency in the course of Agency officers carrying out their usual work duties and responsibilities in fulfilling the Agency's functions and obligations. As such, I consider the personal affairs information concerns these individuals in their professional capacity rather than in relation to their personal or private lives.
52. As noted above, the Applicant seeks access to the document to further understand government decision making in relation to a potential level crossing removal project in their local area.
53. I am also required to consider whether disclosure of the personal affairs information would, or would be reasonably likely, to endanger the life or physical safety of any person.<sup>17</sup> The term 'any person' is

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<sup>13</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>14</sup> [2008] VSCA 218 at [104].

<sup>15</sup> *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

<sup>16</sup> *Ibid.*

<sup>17</sup> Section 33(2A).



broad and extends to any relevant endangerment involving the safety of an applicant, a related third party or any other person. However, I do not consider this to be relevant factor.

54. In the circumstances, I am satisfied it is not reasonable for the position titles of certain third parties to be disclosed where the information relates to their professional work duties and responsibilities.
55. Accordingly, I am not satisfied this information is exempt under section 33(1).

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

56. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
57. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>18</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>19</sup>
58. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited document would retain meaning.

### **Conclusion**

59. On the information before me, I am satisfied certain information in the document subject to review is exempt from release under section 28(1)(c). However, I am not satisfied the remaining information in the document is exempt under sections 30(1) or 33(1).
60. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25, access to document is granted in part.
61. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

62. 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>20</sup>
63. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>21</sup>
64. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>22</sup>
65. 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.

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<sup>18</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>19</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].

<sup>20</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>21</sup> Section 52(5).

<sup>22</sup> Section 52(9).

66. 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>23</sup>

***Third party review rights***

67. As I have determined to release documents that contain information the Agency exempted under section 33(1), if practicable, I am required to notify the relevant third parties who provided the information to the Agency of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>24</sup>
68. Having considered the nature of the documents, the information to be disclosed and the number of third parties whose personal affairs information appears in the documents, I am satisfied it is not practicable to notify those persons of their review rights.
69. However, I note it is open to the Agency to notify the relevant third parties should it wish to do so.

***When this decision takes effect***

70. My decision does not take effect until the Agency's 14 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>23</sup> Sections 50(3F) and (3FA).

<sup>24</sup> Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Initial Feasibility Assessment – [location in Victoria]	24	<b>Refused in full</b>  Section 30(1)	<b>Release in part</b>  Sections 28(1)(c), 25  The document is to be released with the following information, which is exempt under section 28(1)(c), deleted in accordance with section 25:  <ul style="list-style-type: none"> <li>Page 10 of the document.</li> </ul> All irrelevant information is to remain 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 the document is exempt under section 30(1).  <b>Section 28(1)(c):</b> I am satisfied page 10 of the document is exempt under section 28(1)(c) for the reasons set out in the Notice of Decision above.  <b>Section 33(1):</b> I am not satisfied the personal affairs information in the document is exempt under section 33(1) for the reasons set out in the Notice of Decision above.  <b>Section 25:</b> I am satisfied the mobile telephone number of a third party is irrelevant information.  I am also satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.