

Notice of Decision and Reasons for Decision

Applicant:	'CX9'
Agency:	Department of Transport
Decision date:	22 April 2021
Exemption considered:	Section 28(1)(b)
Citation:	'CX9' and Department of Transport (<i>Freedom of Information</i>) [2021] VICmr 109 (22 April 2021)

FREEDOM OF INFORMATION – Cabinet documents – Cabinet submission – business case – attachments – [Location] Rail Project – created for purpose of submission for consideration 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 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 is the same as the Agency's decision.

I am satisfied the document and attachments are exempt under section 28(1)(b).

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

22 April 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the revised business case for the [location] Rail Project (**Project**).
2. The Project ‘involves standardising and upgrading [distance] kilometres of rail track which services the [location] in Victoria’s [region].
2. In its decision, the Agency identified a document falling within the terms of the Applicant’s request to which it refused access to the document in full under sections 28(1)(b), 30(1), 34(1)(b) and 34(4)(a)(ii). 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. I have examined copies of the documents subject to review.
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.

Review of exemptions

Section 28(1) – Cabinet documents

9. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
10. In *Ryan v Department of Infrastructure*,¹ 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.

11. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.

¹ (2004) VCAT 2346 at [33].

Section 28(1)(b)

12. Section 28(1)(b) provides a document is an exempt document if it is 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.
13. 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 to Cabinet for its consideration.
14. 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 Cabinet.²
15. A report prepared by an external consultant is a document prepared by an 'agency' for the purposes of section 28(1)(b).³
16. The Agency submits the document is exempt under section 28(1)(b) as it was prepared for the dominant purpose of submission for consideration by Cabinet.

Was the document prepared by a Minister, or on their behalf by an agency?

17. The document is a 'Business Case Review' for the Project. It is marked 'Cabinet in Confidence'. Attached to the document are six attachments, which are referred to in the document.
18. I am satisfied the document was prepared by Agency officers. Further, I am satisfied certain parts of the document were prepared by external consultants, which I am satisfied constitute an 'agency' for the purposes of section 28(1)(b) given they were clearly engaged by the Agency to prepare the relevant parts of the document on behalf of and for the Agency.

Was the document prepared for the purpose of submission for consideration by the Cabinet?

19. Having considered the information before me, including additional contextual information provided by the Agency about the purpose for which the document was created, I am satisfied the document was prepared for the purpose of submission for consideration by Cabinet. Further, I am satisfied the document was submitted to and considered by Cabinet.
20. Accordingly, I am satisfied the document was created for the purpose of submission for consideration by the Cabinet.

Does the document contain purely statistical, technical or scientific material?

21. The exemption in section 28(1)(b) will not apply to a document to the extent the document contains purely statistical, technical or scientific material, unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.
22. I am satisfied the document does not contain purely statistical, technical or scientific material that could be disclosed without also disclosing any deliberation or decision of Cabinet. Consequently, I am satisfied the exception in section 28(3) does not apply.
23. Accordingly, I am satisfied the document is exempt under section 28(1)(b).

² *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

³ See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

24. As I am satisfied section 28(1)(b) applies, it is not necessary to also consider the application of sections 30(1), 34(1)(b) or 34(4)(a)(ii).

Deletion of exempt or irrelevant information

25. 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.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making deletions to a document 'from a resources point of view'⁴ and the effectiveness of such deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁵
27. I have considered the effect of providing the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to delete the exempt information, and the document is exempt in full.

Conclusion

28. On the information before me, I am satisfied the document is exempt under section 28(1)(b) and, as it is not practicable to delete the exempt information in accordance with section 25, the document is exempt in full.

Review rights

29. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁶
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
31. 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.
32. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application is made to VCAT for a review of my decision.⁸

⁴ *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].

⁵ *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].

⁶ Section 50(1)(b).

⁷ Section 52(5).

⁸ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	[Location] Rail Project Business Case Review – Working Draft [date] v[number]	90	Refused in full Sections 28(1)(b), 30(1), 34(1)(b)	Refuse in full Section 28(1)(b)	Section 28(1)(b): I am satisfied the document was prepared for the purpose of submission for consideration by Cabinet for the reasons set out in the Notice of Decision above. Section 25: I am satisfied it is not practicable to delete exempt information in the document in accordance with section 25. Accordingly, the document is exempt in full.
Attachment 1	[date]	Business Case Attachment 1 - [Region description] Victoria Freight Demand Update	41	Refused in full Sections 28(1)(b), 30(1), 34(1)(b), 34(4)(a)(ii)	Refuse in full Section 28(1)(b)	Sections 28(1)(b) and 25: See comments for Document 1.
Attachment 2	[date]	Business Case Attachment 2 - Rail Revival – [Location] Rail Project Business Case Refresh – Technical Report	55	Refused in full Sections 28(1)(b), 30(1), 34(1)(b)	Refuse in full Section 28(1)(b)	Sections 28(1)(b) and 25: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
Attachment 3a	[date]	Business Case Attachment 3a – Regional Rail [Project] – [Location] Rail Project – Basis of Estimate Report	65	Refused in full Sections 28(1)(b), 30(1), 34(4)(a)(ii)	Refuse in full Section 28(1)(b)	Sections 28(1)(b) and 25: See comments for Document 1.
5.	N/A	Business Case Attachment 3b – [location] Junction Signalling – Forecast cost to complete	3	Refused in full Sections 28(1)(b), 30(1), 34(4)(a)(ii)	Refuse in full Section 28(1)(b)	Section 28(1)(b) and 25: See comments for Document 1.
6.	[date]	Business Case Attachment 4 – [Location] Rail Project Upgrade – Economic and Financial Appraisal – Draft (prepared by Business undertaking)	17	Refused in full Sections 28(1)(b), 30(1)	Refuse in full Section 28(1)(b)	Sections 28(1)(b) and 25: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
7.	[date]	Business Case Attachment 5 – Improving rail in the [Location]Region – Investment logic map	1	Refused in full Sections 28(1)(b), 30(1)	Refuse in full Section 28(1)(b)	Sections 28(1)(b) and 25: See comments for Document 1.