

Notice of Decision and Reasons for Decision

Applicant: 'EF2'
Agency: Department of Transport
Decision date: 4 February 2022
Exemption considered: Section 31(1)(a)
Citation: 'EF2' and Department of Transport (Freedom of Information) [2022]
VICmr 74 (4 February 2022)

FREEDOM OF INFORMATION – VicRoads – Drive Test – Licence Testing Officer's Manual – Test Route Development Manual – prejudice the proper administration of the law – *Road Safety Act 1986* (Vic)

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision differs from the Agency's decision in that I have determined to grant access to additional information in the documents.

While I am satisfied certain information is exempt from release under section 31(1)(a), I have determined to release further information in the documents where I am satisfied it is not exempt on grounds it is publicly available.

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 the documents is granted in part.

During the review, the Agency determined certain information in Document 1 is not exempt, and I am satisfied this information should be released by the Agency to the Applicant.

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
4 February 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. VicRoads Drive Test Licence Testing Officers Manual Version 2.0 or its successor including all updates, bulletins, frequently asked questions or addendums released post publication date.
 2. VicRoads Drive Test Route Design Manual.
2. The Agency identified two documents falling within the terms of the Applicant's request, being:
 - (a) **Document 1:** VicRoads Drive Test – Licence Testing Officer's Manual
 - (b) **Document 2:** VicRoads Drive Test – Test Route Development Manual.
3. It granted access to Document 1 in part and refused access to Document 2 in full under section 34(4)(a)(ii). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access; advising they sought access to the information in full for driving instruction practice.

Agency fresh decision

5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On 3 November 2021, the Agency made a fresh decision to release further information in Document 1 and applied a different exemption under section 31(1)(a) to refuse access to Document 1 in part and Document 2 in full. The Agency no longer relies on the exemption under section 34(4)(a)(ii).
7. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
8. Following its fresh decision, the Agency agreed to release further information exempted from release in error in Document 1.
9. I have examined a copy of the documents subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties.
12. 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.
13. 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 exemption

Section 31(1)(a) – Disclosure of documents that would prejudice the enforcement or proper administration of the law

14. Subject to section 31, section 31(1)(a) provides a document is exempt if its disclosure under the FOI Act would, or would be reasonably likely to prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance.
15. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.¹
16. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.²
17. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.³
18. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
19. The Agency submits release of the documents would be likely to prejudice its proper administration of road safety under the *Road Safety Act 1986* (Vic) (**Road Safety Act**) in a particular instance.
20. The Agency's fresh decision letter states:

In this matter, I am satisfied the proper administration of the *Road Safety Act 1986* would be prejudiced if the Test Route Development Manual and 'parts' of the Licence Testing Officer's Manual were disclosed, because this information is more effective when covert and disclosure would be likely to enable motorists to circumvent the law.

...

Accordingly, I have decided that the documents are exempt under section 31(1)(a) because:

- They are working operational documents;
- VicRoads Licence Testing Officers have passed a training program on the practical application of the test assessment criteria. The training program provides specific knowledge and skills to enable Officers to apply the assessment criteria reliably in a range of different situations.
- Most of the Licence Testing Officer's Manual has been provided as a lot of the information contained within it is publicly available on the VicRoads website. However, parts of Manual that are not public have been denied because if disclosed, would provide unwarranted insight to drive test applicants by unveiling components of the test to which the Officer is independently looking to assess, and the specific criteria that VicRoads has for each route – linked to the assessment, and would therefore undermine road safety outcomes;
- Similarly, disclosure of the Test Route Development Manual would affect the integrity of the drive test, particularly how VicRoads, as the regulator under the *Road Safety Act 1986*, structures an in-vehicle drive test to ensure that the key components of the drive test are fulfilled – the test route being a significant component of that. Any impact on the integrity of the test, in its current state, is likely to have adverse road safety impacts; and

¹ *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

² *Ibid*, Bergman at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

³ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

- How the routes are formulated is really the heart of the integrity of the test and whilst instructors know what the routes are for certain sites, test applicants being 'trained' exclusively to pass the test needs to be avoided as much as possible.

21. In response to the Agency's fresh decision, the Applicant submits:

Designing and correctly maintaining drive test routes is critical to the efficacy of the drive test. In adult education, the principals of assessment are that they should be Valid, Reliable, Fair and Flexible. The current inconsistencies from one test route to another and the lack of regular auditing and maintenance to regularly update test route scripts and applications makes some drive test routes invalid, unreliable and unfair. The lack of a duty of care by some Licence Testing Officers charged with the application of the drive test combined with the lack of maintenance then makes the test inflexible.

...

I take my role as a client advocate seriously and it was as a result of events that happened on a drive test recently that I felt the need to have a legitimate authorised copy of the documents I've requested.

22. I acknowledge the Applicant's personal interest in receiving access to a copy of the requested documents in full.
23. However, having considered the Agency's reasons for decision and submission, I accept granting access to certain information exempted from release by the Agency would prejudice the proper administration of the Road Safety Act in relation to the components and criterion behind the drive test development and test route in practice, noting these processes are designed to ensure the integrity of licence testing and maintaining road safety in Victoria through the proper administration of the Road Safety Act.
24. In particular, I accept the Agency's submission disclosure of information regarding the test route formulation and specific components of test criteria would be reasonably likely to prejudice the effectiveness of methods used to assist in testing and verifying a drive test applicant's understanding of road safety practices. I am also satisfied this is a 'particular instance' in which the administration of the law may be prejudiced.
25. Accordingly, I accept certain information exempted from release by the Agency would disclose specific methods and details used for testing the application of road safety principles during licence testing.
26. Disclosure under the FOI Act involves the unrestricted and unconditional release of a document, which means an applicant is free to use or further disseminate a document as they please, which could reasonably involve a document the subject of this review being disseminated online or accessed by drive test instructors, test applicants and the general public.
27. During the review, the Applicant submitted certain information is available on the Agency's website, the *VicRoads Drive Test*, a 72 page manual released in April 2012,⁴ and this document includes information contained in the documents subject to review.
28. Section 31(1)(a) does not apply to widespread and well known methods and procedures.⁵
29. Having compared the documents subject to review with publicly available information, I do not consider the disclosure of certain information, which is already publicly available would be

⁴ Available at the VicRoads website, https://www.vicroads.vic.gov.au/-/media/files/formsandpublications/licences/driving_instructors_drive_test_criteria.ashx?la=en&hash=255D4A35046584312883302A115213E0.

⁵ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

reasonably likely to prejudice the effectiveness of methods used to test and verify a drive test applicant's understanding of road safety practices.

30. Therefore, while I am broadly satisfied disclosure of certain information in the documents would be reasonably likely to prejudice the Agency's proper administration of the Road Safety Act, I am satisfied certain additional information in the documents is not exempt from release under section 31(1)(a) and should be released to the Applicant.

Do any exceptions under section 31(2) apply?

31. Section 31(2) outlines six circumstances where the exemption under section 31(1) will not apply when there is a public interest in granting access to a document.
32. The Applicant submits the exceptions under sections 31(2)(b) and 31(2)(c) apply in this case.
33. The exception under section 31(2)(b) provides a document will not be exempt under section 31(1) if it reveals the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law.
34. I am not persuaded there is evidence to support such a finding in this case. Accordingly, I am satisfied the exception under section 31(2)(b) does not apply.
35. The exception under section 31(2)(c) provides a document is exempt from release under section 31(1) if it contains any general outline of the structure of any program adopted by an agency for investigating breaches of, or enforcing or administering, the law.
36. I accept the documents outline the structure of process adopted by the agency in administering the Road Safety Act. Nevertheless, I consider disclosure of certain information would be contrary to the public interest, for the reasons explained above. As such, I am not persuaded there is evidence to support such a finding in this case. Accordingly, I am satisfied the exception under section 31(2)(c) does not apply.
37. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 31(1)(a).

Section 25 – Deletion of exempt or irrelevant information

38. 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.
39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
40. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete this information from the documents, because it would not require substantial time and effort, and the edited documents would retain meaning.

⁶ *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].

⁷ *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

41. While I am satisfied certain information is exempt from release under section 31(1)(a), I have determined to release further information in the documents where I am satisfied it is not exempt on grounds it is publicly available.
42. 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 the documents is granted in part.
43. During the review, the Agency determined certain information in Document 1 is not exempt, and I am satisfied this information should be released by the Agency to the Applicant.
44. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

45. 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.⁸
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
48. 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.
49. 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.¹¹

When this decision takes effect

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

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ 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]	VicRoads Drive Test – Licence Testing Officer's Manual	97	Released in part Section 31(1)(a)	<p>Release in part</p> <p>Sections 31(1)(a), 25</p> <p>The document is to be released, except for the following information which is exempt under section 31(1)(a) and is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> (a) Sections 2.2, 2.3, 2.4 and 2.5 (including contents page descriptions of same); (b) Section 3.3 (including contents page description of same), except for the last four lines on page 11; (c) Sections 3.4, 3.5 and 3.6 (including contents descriptions of same); (d) Section 4.4 (including contents description of same); (e) Appendix A (including contents description of same); (f) Pages 87 and 88 (including contents description of same); and 	<p>Section 31(1)(a): For the reasons set out in the Notice of Decision above, I am satisfied disclosure of certain information concerning the planning and execution of drive licence test route design would be reasonably likely to prejudice the proper administration of the law, in this case, the administration of the Road Safety Act.</p> <p>However, where information in the document is published on the Agency's website, as referred to in the Notice of Decision above, I am satisfied the information is not exempt under section 31(1)(a).</p> <p>Accordingly, I am satisfied certain information in the document is exempt under section 31(1)(a)</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
					(g) Appendix C except for the 'Task' column.	
2.	[date]	VicRoads Drive Test – Test Route Development Manual	66	Refused in full Section 31(1)(a)	<p>Release in part</p> <p>Sections 31(1)(a), 25</p> <p>The document is to be released, except for the following information which is exempt under section 31(1)(a) and is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> (a) Sections 3.5, 3.6 and 3.7 (including contents page descriptions of same); (b) Sections 4.5, 4.6 and 4.7 (including contents page descriptions); (c) All of section 5 (including contents page descriptions); (d) All of section 6 (including contents page descriptions); (e) Sections 7.1, 7.2 and 7.3 (including contents page descriptions); (f) Section 8.7 (including contents page description); 	<p>Section 31(1)(a): See comments for Document 1.</p> <p>To assist, the Agency will be provided with a marked up copy of Document 2 indicating information I am satisfied is exempt under section 31(1)(a).</p> <p>Section 25: See comments for Document 1.</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
					(g) Appendix A (including contents page description); (h) Appendix B (including contents page description); (i) Appendix D (including contents page description); (j) Appendix E (including contents page description); (k) Appendix F (including the contents page description); and (l) Appendix I (including the contents page description).	