

Notice of Decision and Reasons for Decision

Applicant:	'EG2'
Agency:	Department of Transport
Decision date:	19 July 2022
Exemption considered:	Section 28(1)(b)
Citation:	'EG2' and Department of Transport (Freedom of Information) [2022] VICmr 84 (19 July 2022)

FREEDOM OF INFORMATION – Cabinet documents – major transport infrastructure project – business case – [location] Bypass – document prepared for the purpose of submission for consideration by the 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 is exempt from release under section 28(1)(b).

As I am satisfied it is not practicable to provide an edited copy the document with exempt information deleted in accordance with section 25, I have refused access to the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
19 July 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the business case for the [location] Bypass.
2. The Agency identified the business case falling within the terms of the Applicant's request and refused access to the document in full under sections 28(1)(b) and 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. I have examined a copy of the document 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

9. 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.

Section 28(1)(b) – Cabinet submission

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.
11. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
12. A document will be exempt from release under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to the Cabinet for its consideration.

¹ (2004) VCAT 2346 at [33].

13. 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.²
14. Section 28(3) provides the exemption in section 28(1) does not apply to a document to the extent it 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.³
15. Further, section 28(3) has been held not to apply in the following circumstances:

In relation to the exception contained in section 28(3) of the Act, an examination of the business plan and its annexures satisfies me that there is no material of a purely statistical, technical or scientific nature such that the exemption would apply. I agree with the opinion of Mr Oulton that it does not contain any purely technical, scientific or statistical information. Statistical, scientific and technical information in the business case appears by way of argument, evaluation, proposals and modelling relating to the Project, based on subjective assumptions by, or inputs from, the relevant authors, experts or consultants.⁴

16. In its submission to OVIC, the Agency advises:

Consultation with the relevant program areas indicate that the [location] Bypass Project Business Case was drafted for the primary or dominant purpose of submission for consideration by Cabinet and is therefore exempt from disclosure under section 28(1)(b) of the FOI Act. Note that the business case was ultimately not submitted to Cabinet for funding consideration due to revised budget priorities. It remains a working draft document.

The DOT Cabinet Services Branch confirmed by e-mail on [date] that Document 1 was listed in the budget submission tracking report and presented to [a subcommittee of Cabinet] on [date] in a list of projects intended for submission to Cabinet for funding consideration.

17. From the information before me, I am satisfied the document was prepared for the dominant purpose of submission for consideration by the Cabinet based on the following factors:
 - (a) I accept that a signed letter provided to OVIC from a senior Agency officer with knowledge of the project and attesting to the document having been created for a budget submission to be considered by the Cabinet provides sufficient evidence to satisfy me of the sole or substantial purpose for which the document was created.
 - (b) The document is a business case for a major transport infrastructure project that was prepared by VicRoads and is marked 'Cabinet-in-confidence'.
 - (c) I accept the purpose of the document was to seek approval from the Cabinet for public funding to finance a major transport infrastructure project with a significant cost. It is generally known that, based on the high value of a government funded project, such expenditure cannot be approved by the relevant Minister or Department and will be subject to consideration by the Cabinet.
 - (d) In relation to section 28(3), having reviewed the document. I am satisfied it does not contain purely statistical, technical or scientific information. Rather, as stated above, the document contains information that was prepared by technical experts based on the application of their expert knowledge, rather than merely quoting or referencing facts and technical data devoid of any analysis or deliberation.

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

³ *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

⁴ *Donnellan v Linking Melbourne Authority (Revised) (Review and Regulation)* [2014] VCAT 1027 at [63].

18. Accordingly, I am satisfied the document is exempt from release under section 28(1)(b).

Section 30(1) – Internal working documents

19. In light of my decision on section 28(1)(b), it is not necessary for me to consider the additional exemption relied on by the Agency.

Deletion of exempt or irrelevant information

20. 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.

21. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁵ 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 25.⁶

22. I have considered the effect of deleting exempt information in the document in accordance with section 25. I am satisfied it is not practicable to do so given it would render the document meaningless.

Conclusion

23. On the information before me, I am satisfied the document is exempt from release under section 28(1)(b).

24. As I am satisfied it is not practicable to provide an edited copy the document with exempt information deleted in accordance with section 25, access to the document is refused in full.

Review rights

25. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷

26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸

27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹

28. 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.

29. 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.¹⁰

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and 50(3FA).