

## Notice of Decision and Reasons for Decision

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Applicant:	'EG6'
Agency:	Department of Transport
Decision date:	11 July 2022
Exemptions considered:	Sections 28(1)(d), 30(1)
Citation:	'EG6' and Department of Transport (Freedom of Information) [2022] VICmr 88 (11 July 2022)

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FREEDOM OF INFORMATION – Public Accounts and Estimates (**PAEC**) briefing – PAEC public inquiry – internal working documents – disclosure contrary to public interest – Cabinet documents

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 have decided to release additional information where I am satisfied it is not exempt from under section 30(1) and 28(1)(d).

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

11 July 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - I seek copies of the following briefs identified in FOI [reference number].
  - 2.06 West Gate Tunnel Complementary Projects Millers Road and Williamstown Road studies,
  - 2.2.07 Inner West Roads issues Westgate Tunnel and connected roads, inner west air quality,
  - 2.3.01 Regional Roads Victoria Overview,
  - 3.14.01 BP3 performance measures Public Transport,
  - 3.14.07 Enterprise Agreements V/Line, Tram, Bus, Metro Rail, Rail,
  - 3.2.02 Operation Esperance V/Line & Metro,
  - 3.14.08 Contact Centre contract negotiation and extension,
  - 3.14.10 Progress on Public Transport Commitments,
  - 3.2.05 Ballarat Corridor Performance, Additional Service, Government Investment and Key Issues.
2. The Agency identified nine documents totalling 43 pages that fall within the terms of the Applicant's request and refused access to certain information in the documents under sections 28(1)(b), 30(1) and 34(4)(a)(ii). 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 advised they do not seek review of six of the nine documents. Accordingly, this review relates to Documents 2, 4 and 9 only.
5. During the review, the Agency advised it no longer relies on the exemption in section 28(1)(b) in relation to Document 4 and instead relies on the exemptions in sections 28(1)(d) and 30(1).
6. I have examined a copy of the documents subject to review. In summary, the documents are briefs prepared for the Secretary or Minister for the purpose of their appearance before the Public Accounts and Estimates Committee. Information about this parliamentary committee is set out below.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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
10. 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.

## **Public Accounts and Estimates Committee (PAEC)**

11. In undertaking this review, I have had regard to the purpose and objective of PAEC to understand the purpose for which the documents subject to review were created.
12. PAEC is a Joint Committee of the Victorian Parliament and conducts ‘detailed scrutiny of the Government’s annual spending and revenue (the budget estimates)’.
13. In summary, PAEC performs an important function on behalf of the Victorian Parliament, and in turn the Victorian community by scrutinising the expenditure and administration of public funds by government agencies.
14. Section 14(1) of the *Parliamentary Committees Act 2003* (Vic) prescribes PAEC’s functions:
  - (1) The functions of the Public Accounts and Estimates Committee are—
    - (a) if so required or permitted under this Act, to inquire into, consider and report to the Parliament on—
      - (i) any proposal, matter or thing concerned with public administration or public sector finances;
      - (ii) the annual estimates or receipts and payments and other Budget papers and any supplementary estimates of receipts or payments presented to the Assembly and the Council;
      - (iii) audit priorities for the purposes of the Audit Act 1994.
15. Information about PAEC and its work is available online.<sup>1</sup> The following extracts set out relevant information regarding the Committee’s objectives, conduct of public hearings to ‘scrutinise the expenditure and activities of ministerial portfolios including the Parliamentary Departments’, and its estimates and outcomes function.<sup>2</sup>
16. The Committee’s objectives are:

The Committee’s budget estimates inquiry aims to benefit the Parliament and the community by:

  - promoting the accountability, transparency and integrity of the executive and the public sector
  - encouraging effective and efficient delivery of public services and assets
  - enhancing the understanding of the budget estimates and the wider economic environment and
  - assisting members of Parliament in their deliberation on the appropriation bills.
17. The Committee holds public hearings each year:

Around June, the Committee holds two weeks of public hearings with all Ministers and the Parliamentary Presiding Officers. At the hearings, the Committee asks questions about a variety of matters, including the decisions that led to the framing of the Budget, departmental performance targets, and issues of financial significance to the State. Witnesses may take some questions on notice or agree to provide the Committee with further information...
18. The Committee’s estimates and outcomes function involves:

During May the Committee holds public hearings to scrutinise the expenditure and activities of ministerial portfolios including the Parliamentary Departments. All Ministers and senior departmental

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<sup>1</sup> See Parliament of Victoria, Committees, Public Accounts and Estimates Committee at <https://www.parliament.vic.gov.au/paec> (accessed 11 July 2022).

<sup>2</sup> See Parliament of Victoria, *The Public Accounts and Estimates Committee Briefing Paper* at [https://www.parliament.vic.gov.au/images/stories/committees/paec/PAEC\\_Brochures/Introduction\\_to\\_the\\_PAEC\\_August\\_2021.pdf](https://www.parliament.vic.gov.au/images/stories/committees/paec/PAEC_Brochures/Introduction_to_the_PAEC_August_2021.pdf) (accessed 11 July 2022).

officers appear before the Committee and are questioned on the proposed expenditure of departments for the next financial year. Before the Budget is brought down by the Treasurer, the Committee forwards a questionnaire to all departments, seeking information to supplement details that will be contained in the Budget papers. The evidence given at the public hearings is reviewed and where the Committee considers necessary, further information may be sought. The Budget Estimates report is tabled in the following spring session of Parliament (September or October).

The Committee's objective in its scrutiny of the budget estimates in the 58th Parliament was to:

- assist Members of Parliament in their deliberation on the appropriation bills
- make recommendations which promote clear and full disclosure of the information contained in the budget papers
- provide Members of Parliament and the Victorian community with an improved understanding of the budget
- provide feedback on the performance measures that the Government proposes to discontinue
- encourage economical, efficient and effective government administration.

## Review of exemptions

### ***Section 30(1) – Internal working documents***

19. 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.

20. The exemption does not apply to purely factual material in a document.<sup>3</sup>

21. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of the agency's staff, and any person employed or engaged by or on behalf of an agency, whether or not they are subject to the *Public Administration Act 2004* (Vic).

22. The documents subject to review were prepared for a Minister in preparation for their attendance before the PAEC committee.

*Do the documents 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?*

23. For the requirements of section 30(1) to be met, 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.

24. 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>4</sup>

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<sup>3</sup> Section 30(3).

<sup>4</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

25. The Agency submits Document 2 is not purely factual and contains the opinion, advice or recommendation of an Agency officer in relation matters of ongoing concern for the Secretary before their appearance before the PEAC.
26. Having reviewed the documents, I am satisfied they contain information prepared by an Agency officer and disclose matter in the nature of opinion, advice or recommendation.

*Were the documents 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?*

27. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>5</sup>
28. In *Re Waterford and Department of Treasury (No.2)*,<sup>6</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.
29. Having assessed the documents, I am satisfied they were prepared in the course of the deliberative processes of the Agency, in that the briefings were prepared for the Secretary of the Department of Transport in preparation for their appearance before the PAEC.

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

30. Determining whether disclosure of the document would be contrary to the public interest involves a 'process of the weighing against each other conflicting merits and demerits'.<sup>7</sup>
31. I must also consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have had regard to the detailed submissions provided by the Agency.
32. In relation to Document 2, the Agency submits:

Revealing speculative comment on matters of regulatory risk, for example, may have a negative impact on the administration of such matters. It would also have the impact of stifling such advice to the Secretary in written form. These are consequences that are contrary to the public interest.
33. In relation to Document 4, the Agency relies on *The Herald and Weekly Times Pty Ltd v Department of Premier and Cabinet*<sup>8</sup> with respect to the application of section 30(1) to the document. The Agency also submits the exempt information:
  - (a) relates to an ongoing investigation and release of the exempt information would cause unjustified and damaging speculation around the process/outcome of the investigation;
  - (b) relates to sensitive and contentious issues;
  - (c) the exempt information was not disclosed or mentioned by the Secretary at the PAEC;

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<sup>5</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>6</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>7</sup> *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].

<sup>8</sup> (Review and Regulation) [2013] VCAT 250.

- (d) the information is not publicly available; and
  - (e) public interest in the Secretary of the Department of Transport receiving confidential advice on matters of public importance and being able to respond appropriately to questions asked by the PAEC.
34. In relation to Document 9, the Agency submits the exempt information represents a view at a point in time and subsequent release would serve to confuse the final outcome of the matters raised in the document.
35. In determining whether the information exempted from release by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>9</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 documents and the broader context giving rise to the creation of the documents;
  - (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 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
  - (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.
36. On balance, I am not satisfied disclosure of the information exempted by the Agency would be contrary to the public interest for the following reasons:
- (a) As set out above, the broader context giving rise to the creation of the documents involves the preparation of briefings for the Secretary of the Department to assist them in their appearance before a PAEC public hearing. As the PAEC's objective is to scrutinise budget estimates, there is a public interest in disclosure of information where it further serves to provide additional transparency and accountability in respect to an agency carrying out of its governmental functions and associated expenditure of public funds.
  - (b) Much of the information was selected for inclusion by Agency officers with the knowledge it may be disclosed or could be drawn upon by the Secretary during the PAEC public hearing.
  - (c) Having reviewed Documents 4 and 9, I consider much of the information exempted from release by the Agency does not appear to be contentious. However, I acknowledge the information in Document 2 appears to be more sensitive. In my view, most of the information

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<sup>9</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

could reasonably be described as opinion or advice that comprises broad and general statements.

- (d) It is unlikely disclosure of the information exempted from release by the Agency would have a detrimental impact on the preparation of future briefings by Agency officers given the role of PAEC and its conduct of public hearings at which senior departmental officers must appear and provide evidence on budget estimates and outcomes.
- (e) In relation to Document 4, I do not agree disclosure of the exempt information would have a detrimental effect on an ongoing investigation or cause undue speculation around any investigation.
- (f) The fact information may not have been disclosed during a PAEC hearing, for example, in response to a question by a PAEC member, in my view, does not weigh in favour of the information remaining undisclosed when sought by an applicant under the FOI Act.
- (g) In relation to Documents 2 and 9, I do not agree disclosure of the information would cause confusion or unnecessary debate. Rather, it is open to the Agency to provide further information about the current status of information provided in the briefing, should this be necessary.
- (h) There is considerable public interest in the disclosure of information relating to public transport issues. These critical services are publicly funded and serve a broad section of the community. Therefore, the public interest would be served by additional transparency and accountability with disclosure of this information by the Agency in respect to the carrying out of its governmental functions.

37. Accordingly, I am not satisfied the information exempted from release by the Agency in Documents 2, 4 and 9 is exempt under section 30(1).

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

### ***Section 28(1) – Cabinet documents***

39. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.

40. In *Ryan v Department of Infrastructure*,<sup>10</sup> 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.

41. 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.<sup>11</sup>

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<sup>10</sup> (2004) VCAT 2346 at [33].

<sup>11</sup> *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

*Section 28(1)(d) – Disclosure would involve disclosure of any deliberation or decision of the Cabinet*

42. As I am not satisfied Document 4 is exempt from release under section 30(1), I consider whether certain information is exempt under section 28(1)(d).
43. Section 28(1)(d) provides a document is an exempt document if its disclosure would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
44. A document will be exempt under section 28(1)(d) if there is evidence that the Cabinet discussed various options in the document and deliberated upon and/or adopted on or more of the options for its consideration.<sup>12</sup>
45. A ‘decision’ means any conclusion as to the course of action the Cabinet adopts whether it is a conclusion as to final strategy on a matter or conclusions about how a matter should proceed.<sup>13</sup>
46. Where a decision of the Cabinet is made public, the announcement in relation to the issue decided will not disclose the Cabinet’s decision or deliberation.<sup>14</sup>
47. The Agency was asked to provide evidence that this information would disclose a deliberation or decision of the Cabinet. I am limited in the amount of information I can provide about the submission provided by the Agency as to do so would reveal information the Agency considers is exempt.
48. In summary, the Agency advised the exempt information relates to issues that may be considered by the Cabinet in the future. However, I note the document is approximately one and a half years old. At the time of the Agency’s decision, there was no information to suggest that the issues in the document had been deliberated on or decided by the Cabinet.
49. Accordingly, I am not satisfied disclosure of information in Document 4 would disclose a deliberation of the Cabinet, and is not exempt from release under section 28(1)(d).

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

50. 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.
51. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>15</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>16</sup>
52. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant’s request because it relates to information of an administrative nature in the document.
53. As noted above, the Applicant does not seek review of the information deemed exempt under section 33(1). Accordingly, I am satisfied this information is irrelevant.

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<sup>12</sup> *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

<sup>13</sup> *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

<sup>14</sup> *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

<sup>15</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>16</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].



54. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

55. On the information before me, I am not satisfied the documents are exempt from release under section 30(1). I am also not satisfied certain information in Document 4 is exempt from release under 28(1)(d).
56. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant information deleted in accordance with section 25, access to the documents is granted in part.
57. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

58. 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>17</sup>
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
60. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
61. 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.
62. 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>20</sup>

### ***When this decision takes effect***

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

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<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</sup> Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	2.2.06 West Gate Tunnel Complementary Projects Millers Road and Williamstown Road studies	3	Released in part Section 33(1)	Not subject to review	
2.	[date]	2.2.07 Inner West Roads issues Westgate Tunnel and connected roads, inner west air quality	4	Released in part Sections 30(1), 33(1)	Release in part Section 25  The document is to be released except for the irrelevant information which is to be deleted in accordance with section 25.	<p><b>Section 30(1):</b> I am satisfied disclosure of this document would not be contrary to the public interest for the reasons outlined in the Notice of Decision above.</p> <p><b>Section 25:</b> The Applicant does not seek review of personal affairs information in the documents. Accordingly, I am satisfied this information is irrelevant information for the purpose of section 25 and is to remain deleted.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25. Accordingly, access to the document is granted in part.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
3.	[date]	2.3.01 Regional Roads Victoria Overview	4	Released in part Section 33(1)	Not subject to review	
4.	[date]	3.2.02 Operation Esperance V/Line & Metro	2	Released in part Section 28(1)(b)	Released in part Section 25  The document is to be released except for the irrelevant information which is to be deleted in accordance with section 25.	<p><b>Section 28(1)(b):</b> On{Date}, the Agency advised it no longer relies on the exemption under section 28(1)(b), but instead relies on sections 28(1)(d) and 30(1) to refuse access to this document.</p> <p><b>Section 28(1)(d):</b> I am satisfied disclosure of certain information in this document would not involve the disclosure of Cabinet deliberations or decisions. Accordingly, I am satisfied the relevant information is not exempt from release under section 28(1)(d).</p> <p><b>Section 30(1):</b> See comments for Document 2.</p> <p><b>Section 25:</b> See comments for Document 2.</p>
5.	[date]	3.2.05 - Ballarat Corridor - Performance, Additional Service,	4	Released in part Section 33(1)	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Government Investment and Key Issues				
6.	[date]	3.14.01 BP3 performance measures Public Transport	17	Released in part Section 33(1)	Not subject to review	
7.	[date]	3.14.07 Enterprise Agreements V/Line, Tram, Bus, Metro Rail, Rail	3	Released in part Section 33(1)	Not subject to review	
8.	[date]	3.14.08 Contact Centre contract negotiation and extension	2	Released in part Sections 33(1), 34(4)(a)(ii)	Not subject to review	
9.	[date]	3.14.10 Progress on Public Transport Commitments	4	Released in part Sections 30(1), 33(1)	Released in part Section 25  The document is to be released except for the irrelevant information which is to be deleted in accordance with section 25.	Section 30(1): See comments for Document 2.  Section 25: See comments for Document 2.