

Notice of Decision and Reasons for Decision

Applicant:	'ER9'
Agency:	Major Transport Infrastructure Authority
Decision date:	29 July 2022
Exemptions considered:	Sections 30(1), 32(1)
Citation:	'ER9' and Major Transport Infrastructure Authority (Freedom of Information) [2022] VICmr 191 (28 July 2022)

FREEDOM OF INFORMATION – Western Roads Upgrade (WRU) Project – [Project Deed] – infrastructure – internal working documents – legal professional privilege

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 in that I have decided to release additional information to the Applicant in Documents 2, 3 and 4.

As I am satisfied it would be practicable to edit the documents to delete irrelevant information in accordance with section 25, access to Documents 2, 3 and 4 is granted in part.

I am satisfied Documents 1 and 5 to 8 are exempt in full under section 32(1), and Document 8 is also exempt under section 30(1).

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
29 July 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents related to the Western Roads Upgrade Project [(the **Project**)].
2. Following consultation with the Agency, the Applicant clarified the terms of their FOI request:

[*Specific request terms redacted* - In summary, the Applicant made a nine-part request seeking access to documents relating to the Project, the Project Deed and subcontracting and third party notification actions and requirements.]
3. In its decision letter dated 1 October 2021, the Agency relied on section 27(2)(a) to neither confirm nor deny the existence of the requested documents as it stated to do so would disclose information exempt from release under section 34(1)(b). In doing so, the Agency stated it did not search for or identify any documents to which the Applicant sought access. 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.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. Following intervention by OVIC in relation to the Agency's reliance on section 27(2)(a), the Agency elected to make a fresh decision in relation to the Applicant's request. However, following a request for an extension of time to make its fresh decision, the Agency did not make a fresh decision by 29 April 2022 in accordance with an extension of time I granted to the Agency under section 49M(2).
7. As the Agency made a fresh decision out of time, I proceeded with my review on the basis of the original decision.
8. On 2 May 2022, the Agency provided the Applicant and OVIC with a copy of its purported fresh decision, which I have considered as part of my review as a submission rather than a fresh decision given it was made out time (**fresh decision submission**).
9. In its fresh decision submission, the Agency submits it located eight documents relevant to Part 9 of the Applicant's request only to which it refused access in full under sections 30(1) and 32(1). The Agency advised no documents were located for Parts 1 to 7, and Part 8 of the request had previously been withdrawn by the Applicant.
10. I have examined a copy of the documents subject to review.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I have considered all communications and submissions received from the parties during the review.
13. I acknowledge the Applicant's interest in the documents and the significant delay it has experienced since first submitting its FOI request to the Agency.
14. The Applicant does not seek access to personal affairs information of Agency officers and other third parties in the documents. Therefore, this information is irrelevant information for the purpose of section 25, which is discussed below.

15. 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.
16. 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.
17. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Additional documents located during the review

18. Following the Agency making a purported fresh decision and a review of the eight documents it located as relevant to the Applicant's request, OVIC staff made inquiries with the Agency as to whether all relevant documents that fall within the terms of the Applicant's request had been located.
19. Following OVIC staff inquiries, the Agency located additional pages relevant to three documents subject to review, being three email chains and a draft letter attachment. While the Agency considers these documents are irrelevant to the Applicant's request, having reviewed the documents, I am satisfied they fall within the terms of the Applicant's request and I have considered as part of my review.

Review of exemptions

Section 32(1) – Legal professional privilege

20. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.

Legal professional privilege

21. A document will be subject to legal professional privilege where it contains a confidential communication between:
 - (a) the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
 - (b) the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

- (c) the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.²

Client legal privilege

22. A document will be subject to client legal privilege where it contains a 'confidential communication' between:
- (a) the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice; or
 - (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.
23. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.
24. Legal privilege exists to protect the confidentiality of communications between a client and their legal representative.
25. The High Court of Australia has held the purpose of legal privilege ensures a client can openly and candidly discuss legal matters with their legal representative and seek legal advice:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.³

26. In determining if legal privilege applies, I must consider the dominant purpose for which the confidential communication was made.⁴ Therefore, whether a document is legally privileged will depend upon the purpose for which it was brought into existence and is a question of fact.
27. The relevant intention will be that of the legal representative, which will generally be for the purpose of providing legal advice to their client, as it is in the present case.
28. The High Court of Australia described this legal principle as:
- ... a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.⁵
29. 'Dominant' in the context of determining whether the dominant purpose for which a document was created, requires there must be a 'clear and paramountcy' of purpose for privilege to attach.⁶

² *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v WorkSafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

³ *Grant v Downs* (1976) 135 CLR 674, 685.

⁴ *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67; 201 CLR 49.

⁵ *Grant v Downs* (1976) 135 CLR 674, 677.

⁶ See *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332; *Commissioner of Taxation v Pratt Holdings* [2005] FCA 1247.

30. Having reviewed Documents 1 and 5 to 8, I am satisfied they constitute confidential communications prepared for the Agency by its professional legal advisers, for the dominant purpose of obtaining or providing legal advice.
31. However, I am not satisfied Documents 2, 3 and 4 contain information subject to legal privilege, for the following reasons:
 - (a) the documents do not communicate confidential legal advice prepared and provided by the Agency's professional legal advisors, but rather allude to issues the Agency is seeking further advice or information on;
 - (b) the information is largely in the nature of factual background and general;
 - (c) certain information is in the public domain; and
 - (d) while the documents are marked as 'subject to legal professional privilege' and were reviewed by a lawyer employed by the Agency, this does not mean the documents are necessarily subject to legal privilege.

Has legal privilege in the documents been waived?

32. Legal privilege in a document will be lost where the client acts in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client's express or implied consent.⁷
33. An implied waiver of privilege will occur when a positive act of a party is inconsistent with maintaining the confidentiality in the communication irrespective of whether waiver of privilege was the subjective intention of the party.
34. On the information before me, there is no evidence to suggest privilege in the documents has been waived by the Agency.
35. Therefore, I am satisfied Documents 1 and 5 to 8 are subject to legal privilege and are exempt from release under section 32(1).
36. The Schedule of Documents in **Annexure 1** outlines my decision on section 32(1) in relation to each document.

Section 30(1) – Internal working documents

37. A document will be exempt under section 30(1) if the following requirements are met:
 - (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 document would be contrary to the public interest.
38. The exemption does not apply to purely factual material in a document.⁸

⁷ Sections 122(2) and 122(3) of the *Evidence Act 2008* (Vic) (for client legal privilege) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

⁸ Section 30(3).

Were the documents prepared by an officer of the Agency or a Minister?

39. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person employed by or on behalf of an agency, whether or not the person is one to whom the provisions of *the Public Administration Act 2004* (Vic) apply.
40. I am satisfied Documents 2 to 4, and 8 were prepared by Agency officers.

Do the documents contain information in the nature of opinion, advice, recommendation, consultation or deliberation?

41. For the requirements of section 30(1) to be met, the document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.
42. 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.⁹
43. Section 30(3) provides purely factual information is not exempt under section 30(1).
44. I am satisfied the documents contain information in the nature of opinion and recommendation, as well as a significant amount of factual information that is not exempt from release by virtue of section 30(3).

Were the documents made in the course of, or for the purpose of, the deliberative processes involved in the functions of the Agency?

45. 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.¹⁰
46. In *Re Waterford and Department of Treasury (No.2)*,¹¹ 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.
47. I am satisfied the documents were made in the course of, and for the purpose of, the Agency's deliberative processes for briefing the relevant areas of government on the project in question.

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

48. In determining whether disclosure of the documents 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 facilitate and promote the disclosure of information.
49. In its fresh decision submission, the Agency sets out the reasons it considers disclosure of the documents would be contrary to the public interest :

I have reached this decision on the basis of the documents being draft versions, pending finalisation and subsequent approval and endorsement. As they are draft documents, they do not reflect the final position or decision on particular issues, and therefore disclosure is likely to confuse or lead to

⁹ *Mildenhall v Department of Education* (1998) 14 VAR 87.

¹⁰ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

¹¹ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

unnecessary debate. On this basis, I am of the view that release of drafts which may be out of date, and therefore could cause confusion, is contrary to the public interest.

50. In determining whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:¹²
- (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.
51. Having reviewed the documents and considered submissions received from the Agency and Applicant, I consider there are factors that weigh both in favour and against disclosure. However, on balance, I have determined disclosure of Documents 2 to 4 would not be contrary to the public interest for the following reasons:
- (a) I accept the documents contain sensitive information, however, I must consider a range of factors in deciding whether disclosure would be contrary to the public interest.
 - (b) In my view, most information in the documents is factual, and does not constitute the opinion or advice of Agency officers.
 - (c) Document 2 appears to be the only draft document, while Document 3 is a signed, well-considered and final version of the document. While the content of Document 2 differs slightly from the final version in Document 3, the draft document does not reveal significant information that differs from the final version. Similarly, Document 4 appears to be a well-considered and final version of the document and not a draft document.
 - (d) While the documents contain some specific information, for the most part they set out general processes and potential future actions that I do not consider would affect future negotiations. In my view, the Agency has not demonstrated that disclosure of the documents would have a detrimental impact on the State's satisfactory resolution of the issues the subject of the documents.

¹² *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (e) I consider the Applicant and members of the public are capable of understanding the documents were produced at a particular point in time, may be preliminary nature, and may or may not represent a final decision reached by the Agency.
- (f) I consider the question of whether public debate in relation to such matters involving government is necessary or not, or whether the public have confidence in the actions and decisions of government agencies, should be left to the public rather than to the Government.
- (g) Should the Agency consider disclosure of the documents would lead to any misunderstanding by the Applicant or the public more generally, it is open to the Agency to release the documents to the Applicant with any necessary additional information to eliminate or minimise any confusion or misunderstanding concerning the documents or to place the documents into a fuller context.
- (h) I do not consider disclosure of the documents would reasonably impact upon the Agency's ability, and that of other government agencies, to meet its legislative obligations.

52. Accordingly, I am satisfied Documents 2, 3 and 4 are not exempt from release under section 30(1).

53. However, I am satisfied disclosure of Document 8 would be contrary to the public interest on grounds it is an early and incomplete draft document. It has a number of track changes and sets out possible options that were not adopted. While draft documents are not exempt as a class of documents, I accept disclosure of this particular document would be contrary to the public interest given its preliminary and draft nature in the context of this matter. Accordingly, I am satisfied Document 8 is exempt from release under section 30(1).

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

Section 25 – Deletion of exempt or irrelevant information

55. 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.

56. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴

57. I have considered the effect of deleting irrelevant personal affairs information from Documents 2, 3 and 4. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited documents would retain meaning.

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

Conclusion

59. On the information before me, I am satisfied Documents 1, 5, 6, 7 and 8 are exempt from release under section 32(1) in full.

60. However, I am not satisfied Documents 2, 3 and 4 are exempt from release under section 30(1).

¹³ *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].

¹⁴ *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].

61. As I am satisfied it is practicable to provide the Applicant with an edited copy of the Documents 2, 3 and 4 with irrelevant information deleted in accordance with section 25, access to these documents is granted in part.
62. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

63. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
64. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
65. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
66. 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.
67. 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.¹⁸

When this decision takes effect

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

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ 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]	Email chain with two attachments - Memorandum Advice to [Major Roads Project Victoria] MRPV and an undated Letter draft	8	Refused in full Sections 30(1), 32(1)	Refuse in full Sections 30(1), 32(1)	<p>Section 32(1): I am satisfied the document is exempt from release under section 32(1) for the reasons set out in the Notice of Decision above.</p> <p>Section 30(1): The letter attached to the email chain is an early working draft setting out possible options. I am satisfied this document is exempt from release under section 30(1) for the reasons set out in the Notice of Decision above.</p>
2.	[date]	DRAFT - Briefing to Minister for Transport Infrastructure	5	Refused in full Sections 30(1), 32(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	<p>Section 30(1): I am not satisfied the document is exempt from release under section 30(1) for the reasons set out in the Notice of Decision above.</p> <p>Section 32(1): The document is a draft briefing for the Minister for Transport Infrastructure and conveys primarily background and factual information. There is no information before me to satisfy me it contains legal advice or was created for the dominant purpose of providing or receiving legal advice. Accordingly, I am not satisfied the document is exempt from release under section 32(1).</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						deleted in accordance with section 25, namely, the names of Agency officers and their telephone numbers, which are not sought by the Applicant.
3.	Various	Briefing to Minister for Transport Infrastructure	5	Refused in full Sections 30(1), 32(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 30(1): See comments for Document 2. Section 32(1): See comments for Document 2. Section 25: See comments for Document 2.
4.	[date]	DRAFT - Memorandum to Department of Treasury and Finance	3	Refused in full Sections 30(1), 32(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 30(1): See comments for Document 2. Section 32(1): See comments for Document 2. Section 25: See comments for Document 2.
5.	[date]		5	Refused in full	Refuse in full	Section 32(1): See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Email and attached Draft Advice Memorandum		Sections 30(1), 32(1)	Section 32(1)	
6.	[date]	Email and attached Draft Advice Memorandum	4	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1.
7.	[date]	Draft Advice Memorandum	2	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1.
8.	[date]	Draft Memorandum MRPV	16	Refused in full Sections 30(1), 32(1)	Refuse in full Sections 30(1), 32(1)	Section 32(1): See comments for Document 1. Section 30(1): I am satisfied the document is exempt from release under section 30(1) for the reasons set out in the Notice of Decision above.