

## Notice of Decision and Reasons for Decision

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Applicant: 'E16'  
Agency: Department of Environment, Land, Water and Planning  
Decision date: 17 March 2022  
Exemption considered: Section 30(1)  
Citation: 'E16' and Department of Environment, Land, Water and Planning  
(Freedom of Information) [2022] VICmr 106 (18 March 2022)

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FREEDOM OF INFORMATION – ministerial briefing – Minister for Planning – Public Accounts and Estimates Committee (PAEC) hearing – urban planning – land development – Arden precinct

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 while I am satisfied certain information in Document 9 is exempt from release under section 30(1), I have determined additional information is not exempt and is to be released.

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.

A marked-up copy of Document 9 indicating the information the Agency agreed to release during the review and the further information I have determined to release will be provided to the Agency for its reference.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

17 March 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

Briefs identified in DELWP FOI [reference number] as specified below:

Planning 2020/21 PAEC Estimates Hearing 1.02 State Population Facts and Figures 1.07 Ministerial Powers for Intervention (Call ins & 20(4)) 1.08 Plan Melbourne Implementation 1.10 CBD built form controls 1.12 Distinctive Areas and Landscapes 4.04 Public housing renewal program 7.02 Priority Precincts responsibilities 7.03 Arden

2. The Agency identified 9 documents falling within the terms of the Applicant's request and refused access to certain information in the documents under sections 30(1) and 33(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. During the review, the Applicant advised they seek review of information exempted from release by the Agency under section 30(1). Accordingly, Document 9 is subject to review only.
5. Further, the personal affairs information of third parties is irrelevant information for the purposes of section 25.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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

10. Document 9 is a briefing prepared for the Minister for Planning in preparation for his appearance at a 2020-21 Budget Estimates Hearing.
11. The document concerns 'BP3 Output: Planning, Building and Heritage' and a new 'Arden Precinct' to be developed in North Melbourne. The Victorian Planning Authority website provides information about this planning project and amendments to the planning scheme to facilitate the new precinct.<sup>1</sup> The Agency refused access to Document 9 in part under section 30(1).
12. On 11 February 2022, the Agency provided OVIC with a submission and marked-up copy of Document 9 in which it indicated 'certain information exempted under section 30(1) can be released as it is no longer claimed exempt'.

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<sup>1</sup> Victorian Planning Authority, 'Arden Precinct' at <https://vpa.vic.gov.au/project/arden/> (accessed on 17 March 2022).

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

13. 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.

14. The exemption does not apply to purely factual material in a document.<sup>2</sup>

*Does the document 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?*

15. 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.

16. 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>3</sup>

17. The document describes events and potential developments related to the Arden precinct. Documents in which ‘one Officer informs another of a sequence of events’ do not disclose information in the nature of opinion, advice or recommendation,<sup>4</sup> and are factual information.<sup>5</sup> I consider these factors apply to parts of the document that describe actual events that have occurred.

18. The information the Agency continues to seek to exempt from release concerns information provided by Agency officers to the Minister in relation to certain external organisations and their proposed involvement in the Arden precinct.

19. Certain information exempted by the Agency is matter in the nature of opinion and advice, prepared by an Agency officer for the purposes of providing background information to the Minister.

*Was the document 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?*

20. 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>6</sup>

21. In *Re Waterford and Department of Treasury (No.2)*,<sup>7</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

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<sup>2</sup> Section 30(3).

<sup>3</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>4</sup> *Re City Parking Pty Ltd* (1996) 10 VAR 170.

<sup>5</sup> Section 30(3).

<sup>6</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>7</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

22. I am satisfied the document was prepared in the course of the Agency's deliberative processes in briefing the Minister for Planning in preparation for an appearance at a PAEC hearing on budget and planning matters.

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

23. In determining whether disclosure of the document 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. In doing so, I have given weight to the following relevant factors:<sup>8</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; 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.

24. In its decision letter, the Agency states in relation to the document:

Brief 7.03 - Arden Precincts, has had material in the nature of opinion or advice exempted under this section. The views expressed by the authors are either speculative or preliminary in nature and do not reflect the views of the Minister. Disclosure would be contrary to the public interest as the document would misrepresent the final position on the matters being still being decided upon.

25. The Agency requested its submission made during the review remain confidential. However, I am not able to adequately set out my reasons for decision without disclosing certain information in the submission, which I do not consider is particularly sensitive.

26. In summary, the Agency submits disclosure of the document in full would be contrary to the public interest as:

- (a) the document discusses matters that did not progress in the way suggested in the document;

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<sup>8</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (b) the views expressed in the document are either speculative or preliminary in nature;
  - (c) the document represents 'point in time views' on a matter in the early stages of deliberation;
  - (d) disclosure would be misleading and result in unnecessary speculation; and
  - (e) the document does not have appropriate contextual information included with it, and therefore, would misrepresent the final position on the matters being discussed, leading to confusion and unnecessary debate.
27. Having considered the content and nature of the document, and information provided by the parties, I am satisfied disclosure of certain information in the document would not be contrary to the public interest for the following reasons:
- (a) While I note the Agency's willingness to disclose further information in the document during the review, I consider additional information can be released as it is factual in nature.
  - (b) I accept information provided by the Agency to the Minister may not reflect final outcomes for any private company, as contemplated in the briefing to the Minister. In this way, I accept the information provided by Agency officers is speculative or preliminary in nature. I also consider this is evidence the document was created at an early stage of the planning process for the Arden precinct.
  - (c) Having searched publicly available resources, it is not apparent the information I propose to exempt from release is otherwise in the public domain.
  - (d) Removal of certain information from the document does not inhibit the public interest in disclosure of government information in that the majority of information in Document 9 is now to be released. The exempt information describes a proposal involving an external organisation and does not involve a decision or action taken by the Agency, Minister or the Government which should otherwise be subject to disclosure in the interests of public transparency and accountability.
  - (e) It is clear from publicly available information that the Arden precinct project has progressed since Document 9 was created and is subject to a planning process and public consultation involving the Victorian Planning Authority, which is responsible for coordinating and overseeing the urban renewal project.
28. Having considered the content of the document and its broader context, I am satisfied disclosure of certain information on page 2 of Document 9 would be contrary to the public interest and is exempt from release under section 30(1). However, all other information in the document is to be released.
29. A marked-up copy of Document 9 indicating the information the Agency agreed to release during the review and the further information I have determined to release will be provided to the Agency for its reference.

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

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>9</sup> and the effectiveness of the deletions. Where

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<sup>9</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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>10</sup>

32. I have considered the effect of deleting exempt and irrelevant information from the document. I am satisfied it is practicable to do so, as it would not require substantial time and effort, and the edited document would retain meaning.

### **Conclusion**

33. I am satisfied certain information in Document 9 is exempt from release under section 30(1), however, I have determined additional information in the document is not exempt and is to be released.
34. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.
35. A marked-up copy of Document 9 indicating the information the Agency agreed to release during the review and the further information I am satisfied is not exempt from release in accordance with my decision will be provided to the Agency.

### **Review rights**

36. 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.<sup>11</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
39. 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.
40. 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>14</sup>

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

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

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<sup>10</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].

<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and 50(3FA).