

Notice of Decision and Reasons for Decision

| | |
|------------------------|--|
| Applicant: | 'EM2' |
| Agency: | Department of Transport |
| Decision date: | 25 May 2022 |
| Exemptions considered: | Sections 28(1)(c), 28(1)(d), 30(1) |
| Citation: | 'EM2' and Department of Transport (Freedom of Information) [2022] VICmr 138 (25 May 2022) |

FREEDOM OF INFORMATION – cabinet document – meeting minutes – cabinet deliberations – Rail Plan

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied certain information in the document is exempt under section 28(1)(d). However, I am not satisfied the document is exempt from release under section 28(1)(c) or 30(1).

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 to document is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

25 May 2022

Reasons for Decision

Background to review

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

Final electronic copies of minutes, agendas and all attachments for all meetings created for reporting on the development of the [region] Rail Plan from [date range]. Personal information of non-executive personnel can be excluded. Do not transfer to Rail Projects Victoria.
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in part under sections 28(1)(c), 28(1)(d) 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.
9. 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.

Review of exemptions

Section 30(1) – internal working documents

10. 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

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

(c) disclosure of the matter would be contrary to the public interest.

11. The exemption does not apply to purely factual material in a document.²

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?

12. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.³

13. Considered broadly, I am satisfied the document contains information in the nature of opinion, advice and recommendations prepared by Agency officers.

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?

14. 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 the government.⁴

15. In *Re Waterford and Department of Treasury (No.2)*,⁵ 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.

16. I am satisfied the document was made in the course of the Agency performing its deliberative function, namely making an assessment of infrastructure projects.

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

17. In determining if 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:⁶

- (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (c) 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;

² Section 30(3).

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

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

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (d) 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;
 - (e) 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
 - (f) 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.
18. In relation to whether disclosure of the document would be contrary to the public interest, the Agency submits:
- Release of information that is known to be inaccurate or unverified would be contrary to the public interest as it would be likely to cause confusion or be misleading. Anchoring bias is likely to exacerbate the problem of disclosing inaccurate information. There are also reputational impacts for the Department in disclosing information that is known to be inaccurate, incorrect or unverified.
19. On the information before me, I am not satisfied disclosure of the opinion, advice and recommendations in the document would be contrary to the public interest for the following reasons:
- (a) While I acknowledge the information relates to the expenditure of public funds, I do not consider the information is sensitive given there is already publicly available information regarding the project and its receipt of government funding.
 - (b) I acknowledge the Agency's submission the amount of public funding referenced in the document may be inaccurate. However, I consider the Agency could address this issue by providing details of the correct amount of funding to avoid any confusion in relation to project funding. In my view, it is clear the funding amount recorded in the document was provided at a certain point in time and may be subject to change given the document records minutes of meeting, rather than a formal budget submission.
 - (c) There is a public interest in the community being better informed about the expenditure of public funds and the decision making processes of government. By providing access to information that demonstrates the basis upon which decisions are made, disclosure of documents like this builds community trust in government and its decision making processes.
 - (d) I am not satisfied disclosure of the relevant information in the document would negatively impact upon the nature or quality of advice and recommendations prepared by Agency officers for future or similar projects. I note the views of the Victorian Civil and Administrative Tribunal (VCAT) in *Graze v Commissioner for State Revenue*,⁷ which observed the possibility of public scrutiny in some circumstances would provide for better administrative decision making. In any case, it is arguable Agency officers are responsible for ensuring advice provided is accurate, complete and properly considered on matters central to its governmental functions.
 - (e) Concerns regarding the reputation of an agency are, in my view, not relevant as a public interest factor, nor would any such consideration outweigh the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative processes.

⁷ [2013] VCAT 869 at [25]-[27].

20. Accordingly, I am not satisfied disclosure of the relevant information in the document would be contrary to the public interest, and the information is not exempt from release under section 30(1).
21. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 28(1)(c) - A copy or draft of, or an extract from a Cabinet document

22. In relation to Cabinet documents and the exemptions under section 28(1), 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” about it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exceptions” in section 28(1) of the Act.^[11] But the language used to describe the exemptions is itself open to different interpretations.⁸

23. A document will be exempt from release under section 28(1)(a), 28(1)(b) or 28(1)(ba) if:

- (a) the official record of any deliberation or decision of the Cabinet;
- (b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet;
- (ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;

24. The Cabinet includes a committee or sub-committee of the Cabinet.⁹

25. A document will be a copy of a Cabinet document if it is a reproduction of a Cabinet document, for example, a photocopy of a Cabinet submission.

26. A draft Cabinet document is a ‘preliminary version’ of a Cabinet document. A document will not be considered a draft simply because it was created before the relevant Cabinet document or because there is information common to both a document and a Cabinet document. The relevant document should be a draft of the actual Cabinet document, preferably marked ‘draft’ and not be documents of ‘different kinds prepared by different agencies’.¹⁰

27. In relation to an extract from a Cabinet document, a document will usually contain a reproduction of part of the text or material from a Cabinet document such as a quote, paraphrase, or summary. Simply referring to a Cabinet document is not sufficient.¹¹

28. In relation to whether a document contains an extract from a Cabinet document for the purposes of section 28(1)(c), Justice Morris, VCAT President held in *Honeywood v Department of Human Services*:¹²

The question of whether a document contains extracts from a Cabinet submission has not been authoritatively determined. In *Smith v Department of Sustainability and Environment*^[2] I commented that it would appear that a document cannot “contain extracts from” a Cabinet document if it was created before the preparation of the Cabinet document. In *Mildenhall v Department of Education*^[3] it was suggested that a document will “contain extracts from” a Cabinet document if it contains a quotation or paraphrase of that document. Commonly a document that is an extract from

⁸ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [33] (per Justice Morris, VCAT President) quoting *Birnbauer v Department of Industry Technology and Resources* [1986] 1 VAR 279.

⁹ Section 28(7).

¹⁰ *Asher v Department of Infrastructure* (2006) 25 VAR 143.

¹¹ *Mildenhall v DoE* (unreported, VCAT, Glover M, 16 April 1999).

¹² (General) [2006] VCAT 2048 at [19].

another document will contain an attribution to the other document, but I accept that the absence of an attribution will not be fatal. The question will need to be determined by reference to all the evidence. In particular, the absence of an attribution will not be fatal where there is direct evidence before the tribunal of a process of extracting content from a Cabinet submission to be included in a document which is claimed to be exempt under section 28(1)(c) of the Act.

29. In *Smith v Department of Sustainability and Environment*,¹³ Justice Morris earlier held:

There was another claim for exemption advanced that I will briefly comment on. This was a claim under section 28(1)(c) of the Act. The respondent submitted that the KPMG report (dated March 2003) contained “extracts from” the Cabinet submission dated 7 May 2003. Clearly the Cabinet submission dated 7 May 2003 is a document that was prepared by a minister for the purpose of submission for consideration by Cabinet. However I cannot accept the argument that the KPMG Report contains “extracts from” that Cabinet submission. It is true that the Cabinet submission contains passages which are identical to passages in the KPMG Report. I would characterise the Cabinet submission as containing “extracts from” the KPMG Report. However I cannot accept the argument that the reverse would apply, as the KPMG Report was a predecessor in time of the Cabinet submission. Notwithstanding what might have been said by Deputy President Macnamara in *Mildenhall No (2)*,¹³ I would doubt that the expression “extracts from” could operate so as to apply to a document that was a predecessor of the document that was referred to in paragraphs (a), (b) or (ba) of section 28(1).¹⁴

30. The Agency was asked to provide evidence to support its decision that information in the document is exempt from release under section 28(1)(c).

31. The Agency submits the document contains extracts from two Cabinet submissions and provided copies of those submissions for my review.

32. I note one of the Cabinet submissions provided is dated [date]. However, the document subject to review is dated [earlier date]. Therefore, the document subject to review was created before the relevant Cabinet submission. As held in the decisions above, a document cannot contain an extract from a Cabinet submission if the document was created before a Cabinet document referred to in section 28(1)(a), 28(1)(b) or 28(1)(ba).

33. The other Cabinet submission provided was prepared in [date]. I am limited in the amount of information I can provide about the documents provided to support the Agency’s submission in relation to section 28(1)(c) as to do so may reveal exempt information.

34. On the information before me, there is insufficient evidence to be satisfied the relevant information in the document subject to review constitutes an extract from a document referred to in sections 28(1)(a), 28(1)(b) or 28(1)(ba).

35. Accordingly, I am not satisfied the document is exempt from release under section 28(1)(c).

36. My decision in relation to section 28(1)(c) is set out in the Schedule of Documents in **Annexure 1**.

Section 28(1)(d) – Disclosure of any deliberation or decision of the Cabinet

37. 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.

38. A document will be exempt under section 28(1)(d) if there is evidence the Cabinet discussed and determined options or issues set out in the document.¹⁴

¹³ (General) [2006] VCAT 1228 at [28].

¹⁴ *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

39. A decision of the Cabinet includes a course of action set, or a determination made as to the final strategy for a matter or a conclusion as to how a matter should proceed.¹⁵
40. Where a decision made by the Cabinet is subsequently made public, as is usually the case, releasing information about the outcome of a Cabinet decision will not necessarily disclose a decision or deliberation of the Cabinet for the purpose of section 28(1)(d).¹⁶
41. In *Asher v Department of Sustainability and Environment*,¹⁷ VCAT held that where a document, on its face, does not disclose a decision or deliberation of the Cabinet, or the extent of the Cabinet's interaction with a document is unclear, section 28(1)(d) will not apply.
42. As noted above, the Agency provided me with a copy of two Cabinet submissions to assist me in my review. Given the nature of documents subject to section 28(1), I am limited in the amount of information I can provide about these documents. However, I consider the document subject to review contains similar information in relation to issues that were also discussed in the Cabinet submissions.
43. I have viewed the Certificates of Endorsement for the relevant submissions and note they were endorsed by the relevant committee of the Cabinet on [date] and [date]. Accordingly, I am satisfied the issues were deliberated on by a committee of the Cabinet.
44. Based on the information before me, I am satisfied the document contains information that would disclose the deliberations of a committee of the Cabinet.
45. Accordingly, I am satisfied certain information in the document is exempt from release under section 28(1)(d).
46. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

47. 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.
48. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁸ 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 25.¹⁹
49. I am satisfied the information deemed irrelevant by the Agency is not relevant to the terms of the Applicant's request as they do not seek access to the personal affairs information of the Agency's non-executive personnel.
50. I have considered whether 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. 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.

¹⁵ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

¹⁶ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

¹⁷ [2010] VCAT 601.

¹⁸ *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].

¹⁹ *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

51. On the information before me, I am satisfied certain information in the document is exempt from release under section 28(1)(d). However, I am not satisfied the document is exempt under section 28(1)(c) or 30(1).
52. 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 to the document is granted in part.

Review rights

53. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.²⁰
54. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²¹
55. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²²
56. 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.
57. 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.²³

When this decision takes effect

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

²⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²¹ Section 52(5).

²² Section 52(9).

²³ 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] | Meeting Minutes | 3 | <p>Released in part</p> <p>Sections 30(1), 28(1)(c), 28(1)(d)</p> | <p>Release in part</p> <p>Sections 28(1)(d), 25</p> <p>The document is to be released with the irrelevant personal affairs information and the information deemed exempt by the Agency under section 28(1)(d) deleted in accordance with section 25.</p> | <p>Section 30(1): For the reasons outlined in the Notice of Decision above, I am not satisfied information in the document is exempt from release under section 30(1).</p> <p>Section 28(1)(c): For the reasons outlined in the Notice of Decision, I am not satisfied this document is exempt from release under section 28(1)(c).</p> <p>Section 28(1)(d): For the reasons outlined in the Notice of Decision, I am satisfied certain information in this document is exempt from release under section 28(1)(d).</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt an irrelevant information deleted in accordance with section 25.</p> |