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Notice of Decision and Reasons for Decision

Applicant: 'CK4'
Agency: Department of Environment, Land, Water and Planning
Decision Date: 8 December 2020
Exemption considered: Section 30(1)
Citation: 'CK4' and Department of Environment, Land, Water and Planning
(Freedom of Information) [2020] VICmr 342 (8 December 2020)

FREEDOM OF INFORMATION – [named] Project – internal working documents – draft documents – emails – disclosure not contrary to public interest

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 am not satisfied the documents are exempt under section 30(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of Documents 1 and 2 with irrelevant personal and business affairs information deleted in accordance with section 25, I have granted access in part. In relation to Document 3, I have granted access in full.

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

8 December 2020

Reasons for Decision

Background to review

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

Copies of DELWP's "Consent" / "Approvals" and associated dealings documents between DELWP and [another Victorian government agency], for the [project]. These include:

- *For the [named] project proposal to initially proceed (including any [another Victorian government agency] requirements);*
- *For [another Victorian government agency] to undertake the [named] project processes, including Public Land assessment and planning and public consultation requirements;*
- *For [another Victorian government agency's] [project] Master Plan and its' development;*
- *For [another Victorian government agency] Draft and Concept and Final [project] Development Plans and [project] [project] Plans including their public release.*
- *Date period: from [date range]*

[Notes/References - include: Previous correspondence with DELWP and with [another Victorian government agency].]

2. In its decision, the Agency identified three documents, totalling 35 pages, falling within the terms of the Applicant's request.
3. The Agency relied on section 30(1) to refuse access to two documents in full and granted access to one document in part.
4. As the Applicant does not seek access to personal affairs information of third party individuals and business information as part of their request, the Agency granted access to the documents with this information deleted in accordance with section 25.
5. The Agency's decision letter sets out its reasons for its decision.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 30(1)

12. 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 in 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.
13. The exemption does not apply to purely factual information in a document.¹
14. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency and any person engaged by or on behalf of an agency, whether or not the person is subject to the *Public Administration Act 2004* (Vic).²

Do the documents contain purely factual information?

15. Having reviewed the documents, I consider certain information in the documents is factual in nature and publicly available. Accordingly, such information is not exempt by virtue of section 30(3).

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or minister or in consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

16. Document 1 is a communication and engagement plan prepared by officers of [another Victorian government agency] and provided to the Agency for the purposes of providing feedback and advice in relation to a specified project.
17. Document 2 contains an email from the Agency to [another Victorian government agency] providing feedback and advice in relation to Document 1.
18. Document 3 is a report prepared by external consultants engaged by [another Victorian government agency] to prepare supporting documentation for an eventual planning permit submission that will be made by the Council regarding the development of mountain bike trails in the [location] I am satisfied the person who prepared the report is an 'officer' for the purposes of the FOI Act.
19. I am satisfied the documents disclose matter in the nature of opinion, advice or recommendation prepared by officers of the Agency.

Was the information communicated in the course of the Agency's deliberative processes?

20. Documents 1 and 3 were provided to the Agency as part of its role in providing feedback and advice to [another Victorian government agency] in relation to the project.

¹ Section 30(3).

² See *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services* (No 2) (1998) 14 VAR 347.

21. I am satisfied the documents were communicated in the course of the Agency's deliberative functions in relation to planning, environmental management and emergency management.

Would disclosure of the matter be contrary to public interest?

22. In deciding whether disclosure of the information exempted by the Agency would be contrary to the public interest I have given weight to the following factors.
- (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.
23. In relation to Documents 1 and 3, the Agency submits disclosure would be contrary to the public interest for the following reasons:

I engaged in an informal consultation with [another Victorian government agency] with respect to the release of draft reports provided by the [another Victorian government agency] to DELWP for the purposes of feedback. I was advised that the [another Victorian government agency] intend to release the final versions of these documents to the public for the purposes of community engagement.

To date, Document 1 has been updated numerous times and to my knowledge, it is up to version 5 now. The final version of Document 3, which is different to the version that was captured by this request, has been publicly published.

... Given that the [project] is still in preliminary stages with many aspects of the project still being determined as the matter progresses, it is not in the public interest to disclose these preliminary plans as it would undermine the decision making-process involved with the project. The [project] has a community engagement process, of which the applicant is a party to. The applicant has already been afforded the opportunity to provide feedback to Document 3 and will be given the same opportunity to Document 1 when it is eventually released. Releasing these documents in their current form would provide an inaccurate reflection of the final proposed actions intended to be undertaken by an agency.

... The Tribunal has held that draft documents are generally inappropriate for release and that decision makers should be judged on the final decision and their reasons for it, not on what might have been considered or recommended by others in preliminary or draft internal working documents.

24. Further, in relation to Document 2, the Agency submits:

Two paragraphs were redacted under section 30 of the FOI Act as they comprised of opinion and advice from a departmental officer in relation to sensitive subject matters...

... Given that Document 1 is still in draft form and has yet to be finally approved, these matters are still subject to change and therefore, do not represent a fixed or final departmental position in respect of these subject matters.

25. Having considered the information before me, I am not satisfied disclosure of the opinion, advice and recommendations in the documents would be contrary to the public interest for the following reasons:

- (a) The Agency submits certain information in Document 3 relates to opinion and advice from Agency officers in relation to the use of Aboriginal naming conventions for the project. While I accept there is sensitivity around the consideration of Aboriginal naming conventions, I consider there is a strong public interest in the community, including the Aboriginal community, who may be affected by such decisions and would be better served through transparency rather than secrecy around government decision making and processes.
- (b) I note the Agency's submission that a final version of Document 3 was publicly released, and a final version of Document 1 will be available in the future. I am of the view members of the public are capable of understanding the difference between documents in draft form and any final versions that may be publicly released in the future. In any case, I consider disclosure of these documents will assist members of the public in gaining a further understanding of the information in the documents and how it relates to the current status of the project.
- (c) I am not satisfied the disclosure of these documents will impair government decision making or discourage the provision of advice by Agency officers to government decision makers in the future. In this matter, one of the documents was prepared by an external consultant, engaged by the [another Victorian government agency], for a commercial fee using public funds. Accordingly, consultants engaged by a government agency are under a contractual obligation to provide considered, professional and accurate advice.
- (d) In relation to all information the Agency determined to be exempt, I note the decision in *Graze v Commissioner of State Revenue*,³ which considered the role of public scrutiny in improving the quality of advice provided to government decision makers, as follows:

As I have in frequently observed Freedom of Information determinations over the years, the possibility of public scrutiny may improve the quality of advice that is given to administrative decision-makers. The provision of advice that is superficial or the result of insufficient analysis or might be thought to be slanted to a particular political view would be deterred by the prospect that such advice might come to light under the Freedom of Information system. The fact that Parliament has left the public interest issues relative to internal working documents at large indicates, to my mind, that it contemplates that the public interest may cut both ways.⁴

In this case, I am of the view disclosure of the documents would serve the public interest by promoting public sector transparency and accountability with regards to the performance of the Agency's functions.

- (e) I do not accept disclosure of information in a form that an agency may not have intended be released to the public under the FOI Act will necessarily cause 'ill-informed debate'. Rather, I consider the public has the capacity to understand the nature of government's role in considering issues and making decisions on behalf of the community on a wide variety of

³ [2013] VCAT 869.

⁴ Ibid at [26].

issues. I am of the view disclosure of these documents will only increase the level of community understanding about government projects and decision making.

26. Accordingly, I am satisfied disclosure of the documents would not be contrary to the public interest and, therefore, the documents are not exempt under section 30(1).

Deletion of exempt or irrelevant information

27. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
28. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁶
29. As per the decision letter of the Agency dated 29 May 2020, the Applicant has agreed to the removal of all personal identifiers and business 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.
30. Accordingly, I am satisfied the personal identifiers and business information contained in the documents can be deleted under section 25.

Conclusion

31. On the information before me, I am not satisfied the documents are exempt under section 30(1).
32. As I am satisfied it is practicable to provide the Applicant with an edited copy of Documents 1 and 2 with irrelevant personal and business affairs information deleted in accordance with section 25, I have granted access in part. In relation to Document 3, I have granted access in full.
33. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

34. If the Agency is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁷
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
36. 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.
37. 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.⁹

⁵ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁶ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

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

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).

When this decision takes effect

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

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated	[named] Project Communications and Engagement Plan	25	Refused in full Section 30(1)	Release in part Section 25 The document is to be released with the third party's name on page 21 deleted in accordance with section 25.	<p>Section 30(1): I am satisfied the document contains information in the nature of opinion, advice or recommendation that was provided in connection with the deliberative processes of the Agency. For the reasons outlined above, I am not satisfied it would be contrary to the public interest to release the opinion, advice or recommendations in the document. Accordingly, this information is not exempt under section 30(1).</p> <p>I am also satisfied the document contains information that is factual in nature and, by virtue of section 30(3), is not exempt.</p> <p>Section 25: I am satisfied it is practicable to release an edited copy of the document with irrelevant information, being personal identifiers of third parties deleted in accordance with section 25.</p>
2.	[date]	Emails	2	Released in part Sections 30(1), 25	Release in part Section 25 The document is to be released with information the Agency determined to be irrelevant deleted in accordance with section 25.	<p>Section 30(1): I am satisfied the document contains information in the nature of opinion, advice or recommendation that was provided in connection with the deliberative processes of the Agency. For the reasons outlined above, I am not satisfied it would be contrary to the public interest to release the opinion, advice or recommendations in the document.</p> <p>Section 25: See comments for Document 1</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
3.	Undated	Concept [project] Alignment	5	Refused in full Section 30(1)	Release in Full	Section 30(1): See comments for Document 1