

Notice of Decision and Reasons for Decision

Applicant:	'EU9'
Agency:	Yarra City Council
Decision date:	15 September 2022
Exemption considered:	Section 30(1)
Citation:	'EU9' and Yarra City Council (Freedom of Information) [2022] VICmr 218 (15 September 2022)

FREEDOM OF INFORMATION – council documents – local government – infrastructure costing and analysis – external consultant report – option analysis – internal working document – release not contrary to the 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 in that I have decided to release additional information in the documents to the Applicant.

I am not satisfied that any information in the documents is exempt under section 30(1).

As I am satisfied it is practicable to edit the documents to remove irrelevant information, I have determined to grant access to certain documents in part and one document 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

15 September 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to:

Copy of documents (reports) that the City of Yarra has received from external consultants regarding [suburb]. - Built Form Framework Review ([consultancy firm]) – Parking Controls Review ([consultancy firm]) - Planning Review ([consultancy firm]) - Streets and Movement Strategy ([consultancy firm])
2. The Agency identified four documents falling within the terms of the Applicant's request and granted access to one document in full and refused access to three documents in full under section 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 documents 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. During the review, the Applicant advised they do not seek access to the personal affairs information of third parties. Accordingly, this information is irrelevant and will not be reviewed.
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.

Preliminary view provided to Agency

10. During the review, the Agency was provided with a preliminary view on the Agency's decision that it was not apparent from the nature of the documents, as described on the face of the Applicant's request, that each document would be exempt in full under section 30(1). The Agency was invited to provide a further submission or consider making a fresh decision under section 49M.
11. In response to my preliminary view, the Agency declined to make a fresh decision and provided further written submissions to substantiate the application of section 30(1) to the documents in full.

Review of exemptions

Section 30(1) – internal working documents

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 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 material in a document.¹

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

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's staff, and any person engaged by or on behalf of an agency, whether or not that person is subject to the *Public Administration Act 2004* (Vic).
15. The documents were prepared by an external consultant that was commissioned on behalf of the Agency to provide advice in relation to the planning and development strategy for the Cremorne area.
16. I am satisfied the external consultants are Agency 'officers' in that they were engaged by the Agency.

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

17. 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.
18. 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.²
19. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant material deleted, where it is practicable to do so.
20. I am satisfied the documents contain information in the nature of opinion, advice and recommendation.

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

21. 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.³
22. In *Re Waterford and Department of Treasury (No.2)*,⁴ the 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.
23. I am satisfied the documents were made in the course of, and for the purpose of, the Agency's deliberative processes in relation to the planning and development of the [suburb] area.

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

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

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1at [58].

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

24. 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.
25. The Agency submits that disclosure of the documents would be contrary to the public interest on the basis that the information, opinion, advice or recommendations may not be used in the Officer's Report to the Council.
26. In determining if disclosure would be contrary to the public interest, I must consider all relevant factors 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 factors:⁵
 - (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.
27. Having reviewed the documents and considered the Agency's submissions, I have determined that disclosure of the documents would not be contrary to the public interest for the following reasons:
 - (a) Documents 2 and 3 are marked as being the final version and there is no information before me to suggest Document 4 is not the final version.
 - (b) I note it has generally been accepted by VCAT that it may be contrary to the public interest to prematurely release the preliminary views and recommendations provided as part of a deliberative function of an agency. However, I do not find this argument persuasive in the circumstances of this matter. Speculation about the future development of this area will occur regardless of whether the documents are disclosed or not. Whether such speculation can be properly characterised as one that is 'misleading' will often be a matter of subjective judgement.

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (c) I am of the view members of the public are capable of understanding that these documents may contain information that will be subject to change. I consider the Agency, in releasing the documents, will be able to provide any further explanatory information to assist the public in understanding the information in the documents given the current status of the project or further information that has become available since the documents were created.
- (d) I do not accept disclosure of the documents would affect the quality of advice prepared by the Agency's officers in the future. In this matter, the information was prepared by an external consultant engaged by the Agency for a fee and which had contractual and professional obligations to provide accurate advice to the Agency.
- (e) I also note the views of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Graze v Commissioner for State Revenue*,⁶ which observed the possibility of public scrutiny in some circumstances provides for better administrative decision making.
- (f) There is a strong public interest in the public being informed about the potential impact of infrastructure projects on the community. Responsible government calls for an adequate degree of transparency to enable informed public debate. I consider disclosure of the documents will increase the quality of information available to the public upon which any debate is based. If the public is informed about the underlying analysis and policies in relation to projects only after a decision is made, the ability of the public to engage in informed and effective debate is significantly reduced.

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

29. The Schedule of Documents in **Annexure 1** outlines my decision on section 30(1) to each document.

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'⁷ 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 25.⁸

32. As noted above, the Applicant does not seek access to the personal affairs information of third parties. Accordingly, I am satisfied this information is irrelevant.

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

⁶ [2013] VCAT 869.

⁷ *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].

⁸ *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

34. On the information before me, I am not satisfied the documents are exempt from release under section 30(1).
35. As I am satisfied it is practicable to edit certain documents to remove irrelevant information, I have determined to grant access to certain documents in part and one document in full.
36. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

37. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
40. 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.
41. 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.¹²

When this decision takes effect

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

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² 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]	Parking Controls Review	87	Released in full	Not subject to review	
2.	[date]	Planning Controls Review	91	Refused in full Section 30(1)	Release in part Section 25 The document is to be released with the irrelevant personal affairs information deleted in accordance with section 25.	Section 30(1): I am satisfied the document is not exempt from release under section 30(1) for the reasons outlined above in this Notice of Decision. Section 25: I am satisfied it is practicable to delete the irrelevant personal affairs information from the document in accordance with section 25.
3.	[date]	Street & Movement Strategy	67	Refused in full Section 30(1)	Release in full	Section 30(1): See comments for Document 2.
4.	[date]	Built Form Review	94	Refused in full Section 30(1)	Release in part Section 25 The document is to be released with the irrelevant personal affairs information deleted in accordance with section 25.	Section 30(1): See comments for Document 2. Section 25: See comments for Document 2.