

Notice of Decision and Reasons for Decision

Applicant: 'EV7'
Agency: Major Transport Infrastructure Authority
Decision date: 13 October 2022
Exemptions considered: Sections 28(1)(b), 30(1), 25
Citation: 'EV7' and Major Transport Infrastructure Authority (Freedom of Information) [2022] VICmr 225 (13 October 2022)

FREEDOM OF INFORMATION – transport – major infrastructure project – Level Crossing Removal Project – noise reports and assessments – hydrogeological reports – ecology and groundwater – options appraisal – consultation on design options – internal working documents – disclosure 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 fresh 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 satisfied Document 1 is exempt from release in full under section 28(1)(b).

However, I am not satisfied Documents 2 to 6 are exempt from release under section 30(1) and these documents are to be released with irrelevant information deleted in accordance with section 25.

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
13 October 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents regarding level crossing removal projects in Surrey Hills and Mont Albert.
2. By email dated [date], the Agency wrote to the Applicant in accordance with section 25A(6) notifying of its intention to refuse to grant access to the documents sought under section 25A(1), on the grounds it considered the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
3. The Applicant was invited to consult with the Agency with a view to removing the proposed grounds for refusal by refining the scope of their request. While the Applicant engaged in consultation with the Agency, no agreement was reached regarding removal of the grounds for refusal.
4. On [date], the Agency notified the Applicant of its decision to refuse to grant access to documents in accordance with the request under section 25A(1). The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. Following consultation with the Agency and OVIC, the Applicant amended the terms of their request to the following documents:
 - 1) An Options Appraisal Report (matching part 1 of the request);
 - 2) Hydrological and geotechnical reports matching part 3 of the request; and
 - 3) Parts 2 and 4 of the request.
7. Parts 2 and 4 of the request are:
 2. Reports or assessments of all and any consultation with relevant local councils and communities regarding design options,
 4. Sound and vibration attenuation studies, overshadowing impacts on neighbouring properties and assessments of required vegetation removal relating to the announced preferred design.
8. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
9. On [date], the Agency made a fresh decision to process the Applicant's refined request. The Agency identified 13 documents falling within the terms of the request, and refused access to seven documents in part under section 33(1) and six documents in full under sections 28(1)(b) and 30(1). The Agency's fresh decision letter sets out the reasons for its decision.
10. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
11. The Applicant advised they do not seek review of personal affairs information under section 33(1).
12. I have examined a copy of the documents subject to review.
13. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

14. I have considered all communications and submissions received from the parties.
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.

Review of exemptions

Section 30(1) – Internal working documents

17. 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.
18. Section 30(3) provides purely factual information is not exempt under section 30(1).

Do the documents 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?

19. 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.
20. 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.¹
21. Considered broadly, I am satisfied the documents contain information in the nature of opinion, advice and recommendations prepared by Agency officers relating to noise assessment and modelling of proposed rail infrastructure at particular locations.

Were the documents 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?

22. 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.²
23. In *Re Waterford and Department of Treasury (No.2)*,³ the former Victorian Administrative Appeals Tribunal held:

¹ *Mildenhall v Department of Education* (1998) 14 VAR 87.

² *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208], citing *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 at [606].

³ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

... “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.

24. I accept the documents were prepared for the deliberative processes involved in the functions of the Agency prior to the commencement of a particular stage of its Level Crossing Removal Project.

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

25. In determining if 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. In doing so, I have given weight to the following relevant factors:⁴
- (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.
26. In relation to whether disclosure of the requested documents would be contrary to the public interest, the Agency’s decision letter states:
- The communications were made in the course of the development of policy. They reflect possibilities considered but not eventually adopted, and would likely lead to confusion and promote pointless and ill-informed debate about what might have happened rather than what did. In particular this relates to the noise information which is still in the process of investigation and review.
- ..
27. Having reviewed the documents, I am satisfied disclosure of the relevant information would not be contrary to the public interest for the following reasons:
- (a) Opinion, advice and recommendations provided by an agency officer to a Minister are not automatically exempt from release under section 30(1). Rather, each document must be

⁴ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

considered in terms of its content and context, and an agency must demonstrate disclosure of the document would be contrary to the public interest.

- (b) I do not consider the information recorded in the documents is particularly sensitive or controversial.
- (c) The assessment memos and design advice are finalised documents in that they record issues, results and topics to be considered and briefly record any action to be taken.
- (d) For the most part, the documents do not disclose detailed deliberations or debate.
- (e) 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 such as these builds community trust in government and its decision making processes.
- (f) I consider there is a public interest in the public, who may be affected by infrastructure-related decisions, being better informed about the options considered by the Agency, regardless of whether an option was ultimately adopted or a decision made. Further, there is nothing controversial about government explaining the reasons for a decision made, particularly in the context of major transport infrastructure projects using public funds.
- (g) I am not satisfied disclosure of the relevant information in the documents 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*,⁵ which observed the possibility of public scrutiny in some circumstances would provide for better administrative decision making.
- (h) When performing their official duties in providing advice to government, public sector agency officers are responsible for ensuring the advice they provide is accurate, complete and properly considered on matters central to an agency's governmental functions. As such, Agency officers are required to discharge their duty to provide impartial and fulsome advice to decision makers. These requirements of their roles within the Victorian public sector are a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic).⁶ I am not persuaded Agency officers or consultants would be deterred from discharging their professional and ethical obligations should the documents be disclosed under the FOI Act.

28. Accordingly, I am satisfied disclosure of the documents would not be contrary to the public interest. Rather, the public interest will be served by disclosure of the documents which will allow for greater transparency and public scrutiny of the Agency's infrastructure project team responsible for the governance and future development of the Level Crossing Removal Project.

29. Accordingly, I am not satisfied the documents are exempt from release under section 30(1).

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

Section 28(1)(b) – Document prepared for the purpose of submission for consideration by the Cabinet

31. 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 be

⁵ [2013] VCAT 869 at [25]-[27].

⁶ For example, see the Public Sector Values in section 7(1) of the *Public Administration Act 2004* (Vic) (including Responsiveness, Integrity and Impartiality) and the Victorian Public Service Commission, *Code of Conduct for Victorian Public Sector Employees*.

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.⁷

32. A document will be exempt from release under section 28(1)(b) if it is a document that was prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet.
33. The Cabinet includes a committee or sub-committee of the Cabinet.⁸
34. A document will be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to the Cabinet for its consideration.
35. In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to the Cabinet.⁹
36. The Victorian Civil and Administrative Tribunal (**VCAT**) has held section 28(1)(b) turns upon the purpose for which a document was created, and it is not necessary to show the document was submitted to the Cabinet.¹⁰ Nor is it necessary to prove the Cabinet considered the document to satisfy the requirements of section 28(1)(b).¹¹
37. In *Ryan v Department of Infrastructure*, former VCAT President Justice Morris held:¹²

It is important to observe that section 28(1)(b) of the Act does not extend to a document merely because the document has been prepared for the purpose of submission to the Cabinet. Rather the purpose of the preparation of the document must be for submission for consideration by the Cabinet. Hence documents will not fall within the exemption in section 28(1)(b) of the Act just because they were prepared with the intention of physically placing them before the Cabinet. Rather it is necessary to ask whether, at the time a document was prepared, the only purpose, or one of the substantial purposes, for the preparation of the document was for the purpose of submission for *consideration by* the Cabinet.

38. The purpose of briefing the Cabinet must be ‘immediately contemplated’ when a document is created. The exemption will not apply merely because the Cabinet ultimately considered an issue.¹³
39. The Agency relied on section 28(1)(b) to refuse access to Document 1, which is an ‘Options Appraisal’ for level crossing removals at Union Road, Surrey Hills and Mont Albert Road, Mont Albert.
40. Recently on 8 August 2022, VCAT Vice President Judge Marks held an ‘Options Appraisal’ document for three different level crossing removal locations were exempt from release under section 28(1)(b),¹⁴ having accepted sworn evidence provided to the Tribunal by senior Agency officers that the documents were prepared as part of a process involving the documents being submitted for consideration to the Cabinet.
41. Cabinet documents are not exempt as a class of documents. Therefore, it is necessary to consider each document in its own context.

⁷ *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.

⁸ Section 28(7).

⁹ *Secretary to the Department of Treasury and Finance v Dalla Riva* [2007] VSCA 11 at [15].

¹⁰ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34], citing *Asher v Department of Premier and Cabinet* [2002] VCAT 499, at [9]; *Wilson v Department of Premier and Cabinet* [2001] VCAT 663; (2001) 16 VAR 455 at [459].

¹¹ *Ibid.*

¹² [2004] VCAT 2346 at [36].

¹³ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

¹⁴ *Davis v Major Transport Infrastructure Authority (Review and Regulation)* [2022] VCAT 894.

42. Having carefully reviewed Document 1 and based on the information before me, I am satisfied the document forms part of a suite of documents that were prepared by the Agency as part of a process that contemplated the document would be submitted to the Cabinet for its consideration.
43. Accordingly, I am satisfied information in Document 1 is exempt from release under section 28(1)(b).

Section 25 – Deletion of exempt or irrelevant information

44. 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.
45. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁵ 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 25.¹⁶
46. I am satisfied the personal affairs information of third parties, to which the Agency refused access under section 33(1) is irrelevant information for the purpose of section 25, as the Applicant does not seek access to personal affairs information.
47. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents 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 documents would retain meaning.

Conclusion

48. On the information before me, I am satisfied Document 1 is exempt from release in full under section 28(1)(b). However, I am not satisfied Documents 2 to 6 are exempt from release under section 30(1) and are to be released with irrelevant information deleted in accordance with section 25.
49. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

50. 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.¹⁷
51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
53. 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.

¹⁵ *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].

¹⁶ *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].

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

54. 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.²⁰

When this decision takes effect

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

²⁰ 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]	Options Analysis	65	Refused in full Sections 28(1)(b), 30(1)	Refuse in full Section 28(1)(b)	<p>Section 28(1)(b): For the reasons outlined in the Notice of Decision above, I am satisfied the information to which the Agency refused access is exempt from release under section 28(1)(b).</p> <p>Section 25: As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, accordingly, access to the document is refused in full.</p>
2.	Not known	Noise contour Plot – Future (Day)	5	Refused in full Section 30(1)	Release in full	Section 30(1): I am not satisfied disclosure of the information to which the Agency refused access under section 30(1) in its fresh decision would be contrary to the public interest for the reasons set out in the Notice of Decision above. Accordingly, this information is to be released to the Applicant.
3.	Not known	Noise contour Plot – Future (Max)	5	Refused in full Section 30(1)	Release in full	Section 30(1): See comments for Document 2.
4.	Not known	Noise contour Plot – Future (Night)	5	Refused in full Section 30(1)	Release in full	Section 30(1): See comments for Document 2.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
5.	[Date]	Noise Assessment Memo	2	Refused in full Section 30(1)	Release in full Section 25	<p>Section 30(1): See comments for Document 2.</p> <p>Section 25: I am satisfied the personal affairs information in the document, being names and contact details, is irrelevant information for the purpose of section 25 as the Applicant does not seek access to this information.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25.</p>
6.	[Date]	Acoustic Design Advice	13	Refused in full Section 30(1)	Release in full Section 25	<p>Section 30(1): See comments for Document 2.</p> <p>Section 25: See comments for Document 5.</p>
7.	[Date]	Geotechnical Factual Report	953	Released in part Section 33(1)	Not subject to review	
8.	[Date]	Preliminary Groundwater Assessment	17	Released in part Section 33(1)	Not subject to review	
9.	[Date]	Hydrogeological Factual Report	450	Released in part Section 33(1)	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
10.	[Date]	Groundwater Conceptual & Numerical Model	60	Released in part Section 33(1)	Not subject to review	
11.	[Date]	Geotechnical Interpretive Report	73	Released in part Section 33(1)	Not subject to review	
12.	[Date]	Consultation Report	296	Released in part Section 33(1)	Not subject to review	
13.	[Date]	Ecology Assessment	56	Released in part Section 33(1)	Not subject to review	