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Notice of Decision and Reasons for Decision

Applicant: Lower Our Tracks Incorporated
Agency: Major Transport Infrastructure Authority
Decision date: 26 June 2020
Exemption considered: Section 30(1)
Citation: *'Lower Our Tracks Incorporated' and Major Transport Infrastructure Authority (Freedom of Information)* [2020] VICmr 179 (26 June 2020)

FREEDOM OF INFORMATION – rail infrastructure – preliminary designs – future 3rd and 4th track alignment
Caulfield to Dandenong – design report – tender documents

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 more information to the Applicant.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

26 June 2020

Reasons for Decision

Background to review

1. On [date], the Department of Economic Development, Jobs, Transport and Resources transferred the Applicant's request to the Level Crossing Removal Authority (**LXRA**).
2. Following consultation with the LXRA, the Applicant clarified their request to:

Reports and plans for additional tracks 3 and 4, and any further additional tracks, for the Caulfield to Dandenong rail corridor.
3. On 1 January 2019, the Major Transport Infrastructure Authority (the **Agency**) was established to oversee all major transport projects in Victoria. The functions of the LXRA were transferred to the Agency, including all yet to be determined FOI requests. This change does not affect the decision of the Agency nor my review of that decision. Any reference made to LXRA in this decision should be understood as applying to the Agency, as the current agency with responsibility for the handling of the Applicant's request and responding to this review.
4. In its decision, the Agency identified three documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full.
5. The Agency relied on the exemptions under sections 30(1), 33(1) and 34(1)(b) to refuse access to the documents in full. The Agency's decision letter sets out the 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. The Applicant also made a complaint about the adequacy of the document searches. The complaint was resolved informally in [month, year].
8. The Applicant advised they do not seek access to personal affairs information as part of this review. Accordingly, this information is irrelevant to the review and should remain deleted in accordance with section 25 of the FOI Act.
9. I have examined copies of the documents subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated [date] and information provided with the Applicant's review application; and
 - (c) the Agency's submissions dated [date] and [date].
12. 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.

Preliminary view

13. My preliminary view on this matter was provided to the Agency on [date]. My preliminary view was that Documents 1 and 3 are likely exempt from disclosure under section 30(1), however I was not satisfied that Document 2 was exempt under section 30(1) in full.
14. The Agency responded on [date] advising that in its view certain information in Document 2 was not exempt, however identified certain information it maintained is exempt from release under section 30(1). This review therefore includes consideration of whether certain sections of Document 2 are exempt from release under section 30(1).

Review of exemptions

Section 30(1)

15. 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; and
 - (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.
16. The exemption does not apply to purely factual material in a document.¹
17. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not. The concept of 'officer' has been held to extend to consultants or independent contractors.²

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?

18. The documents claimed exempt by the Agency under section 30(1) in its decision are:
 - (a) a design package comprised of detailed drawings and maps (**Document 1**); and
 - (b) a report which canvasses the details of future track alignment (**Document 2**).
19. Document 1 consists of a 'design package' for the future track works for the Caulfield to Dandenong rail corridor. It is intended to be read with Document 2. It contains drawings in support of the proposed designs outlined in Document 2.
20. Document 2 is a report that describes potential future works along the Caulfield to Dandenong rail corridor, including an assessment of existing conditions, descriptions of the proposed designs and other supporting information.

¹ Section 30(3).

² See *Borg v Department of Premier and Cabinet* (1989) 3 VAR 201; *Mildenhall v VicRoads* (1996) 9 VAR 262; *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services* (No 2) (1998) 14 VAR 347.

21. In its submission dated [date], the Agency advised the documents are the preliminary design for future track works along the Caulfield to Dandenong rail corridor, and such preliminary designs form part of the future infrastructure contemplated by the project requirements for the 'Caulfield to Dandenong Package'.
22. The Agency submits the documents were prepared for the purpose of seeking internal views about the preliminary concept design for the potential future track works to the rail corridor and 'expressly contemplates future consultation, further analysis and refinement'.
23. I accept the documents describe the preliminary concept design for potential future infrastructure contemplated by the project requirements for the Caulfield to Dandenong rail corridor. It is evident the scope and purpose for which the documents were created is to provide a preliminary concept design for potential future works for consideration.
24. While there is factual information contained in the documents, I note the approach of the Administrative Appeals Tribunal, which considered that where a report contains text, tables and graphs contained in paragraphs described as 'potential' or 'recommended', in such circumstances the document may represent an expression of opinion or advice.³
25. In its submission dated [date], the Agency also claimed the tender drawings and designs in **Document 3** are exempt under section 30(1).
26. Document 3 is a set of drawings submitted to the Agency during a tendering process for the Caulfield to Dandenong rail corridor project. The plans subject to review are those submitted by the successful tender proponent that entered into a contract with the Agency to undertake the works.
27. Having viewed Document 3, I am satisfied they are preliminary designs intended for consideration as part of the tender process. It is clear on the face of the designs that they were not intended to be for construction. Accordingly, I am satisfied the documents were intended to be deliberated upon and considered by the Agency during the tender process.
28. Accordingly, I am satisfied the documents, as a whole, contain information in the nature of opinion, advice, recommendation or consultation between Agency officers.

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?

29. I am satisfied the documents were created for the purpose of the Agency's deliberative processes in planning and considering future works on the Caulfield to Dandenong rail corridor, as part of the Agency's functions in undertaking system upgrades and removing level crossings across the metropolitan Melbourne rail network.

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

30. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
31. In my view, the information subject to this review falls within two categories:
 - (a) the plans, designs and descriptions of planning decisions in Documents 1, 3 and parts of Document 2 that are very specific in nature and relate to sensitive matters; and

³ *Pullen v Alpine Resorts Commission* (unreported, AAT of Vic, Macnamara DP, 23 August 1996). See also *Tilly v VicRoads* [2010] VCAT 483 at [91]; *Herrington v Department of Transport Planning and Local Infrastructure* [2014] VCAT 1026 at [52]-[54].

- (b) the remainder of Document 2, as it details more general matters, including less specific design decisions for the potential project.

32. In deciding whether release of the documents would be contrary to the public interest, I have also given weight to the following relevant factors:⁴

- (c) The right of every person to gain access to documents under the FOI Act and 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

There is a strong public interest in the community being informed about the potential impacts of infrastructure projects. Responsible government calls for an adequate degree of transparency to enable informed public debate. If the public is informed about the analysis and underpinnings of policies and projects only after a decision is made by government, the ability of the public to genuinely engage in effective debate is significantly reduced.

Accordingly, I consider this factor weighs in favour of disclosure.

- (d) The degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents

In its submission, the Applicant states:

With regards to the documents themselves, we contend that the documents are decision documents with various decisions made on the basis of the documentation, including the alignment of tracks one and two. Their release would provide improved clarity on decisions made and help to resolve confusion. The construction of tracks one and two has been completed and sensitivity of the issues has diminished significantly as previously noted by OVIC.

In its submission dated [date], the Agency states:

...there is a high degree of sensitivity involved in the deliberations regarding the Potential Project, which is at very early stage. This sensitivity is much more than '*general discomfort about making information available to those who might wish to criticise a government decision*'.⁵ This is because the documents canvass matters that are not known in the community and, if implemented, may have significant and far-reaching effects... Given these works are speculative and may not eventuate, the potential for unnecessary confusion, ill-informed debate and misrepresentation in the community is significant.

The train stations and sections of rail between Caulfield to Dandenong have been completed following a decision to use an elevated rail design. As such, while that project was sensitive, I consider the issue of elevated rail between Caulfield to Dandenong is no longer sensitive, as noted by the Applicant in its submission, because at the time of my decision, the building work is now completed and operational.

However, the documents subject to review do not relate to the completed project, rather they relate to potential future works in relation to which a decision is yet to be determined. Given the previous sensitivity regarding elevated rail designs, I consider the prospect of future work on the Caulfield to Dandenong rail corridor remains a sensitive issue.

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

⁵ *Secretary to the Department of Justice v Osland* [2007] VSCA 96 at [56].

As set out above, I consider some of the information in the documents less sensitive. For example, some of the report is general or procedural in nature or only relates to public assets or infrastructure – changes to which should be subject to public debate.

My decision therefore weighs the specific nature of the information, and the sensitivity of each document, in deciding whether disclosure would be contrary to the public interest.

- (e) The stage of a decision or status of policy development or a process being undertaken at the time the communications were made

In its submission dated [date], the Agency states:

No decision has been made at this stage by government as to whether the Potential Project will be delivered... However, it is premature to conclude that the Potential Project would proceed in the proposed form and preliminary design as set out in Documents 1 and 2...

I am satisfied the documents, which were created more than two years ago, are preliminary in nature in that decisions as to whether to construct additional tracks along the Caulfield to Dandenong rail corridor are yet to be considered and determined.

However, it is clear from the documents that the designs were not intended to be progressed further in the near future and were not to be constructed during the Caulfield to Dandenong elevated rail project, which has since been completed. Rather, the designs were completed for future consideration should further tracks need to be constructed, and at that time would be subject to further analysis, assessments of the design and public consultation.

I therefore consider the preliminary nature of the documents can weigh both in favour of and against disclosure, depending on the specific information considered. For example, where the documents contain information or recommendations about specific parcels of land currently held privately, their disclosure could have significant impacts on members of the community or the viability of any future project as a result of speculative land purchases, I consider the public interest weighs against disclosure. However, where plans are general in nature, or likely to only affect public land or infrastructure, the public interest weighs in favour of disclosure so that the community can participate in the planning process, however far into the future that may be.

- (f) 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

In its submission dated [date], the Agency states:

The free exchange of concepts and ideas during the deliberative process is essential. LXP submits that '*the giving of high level, independent, frank and fearless advice*'⁶ would be inhibited by the disclosure of preliminary design concepts. Officers must feel free to test and challenge assumptions and consider all possibilities. It is undesirable to discourage officers from committing ideas to written reports and plans when considering potential options.

I do not consider release of the documents would affect the ability of Agency officers to provide future advice of a similar nature or inhibit the frankness and candour of such advice. Agency officers, as public servants, are required to discharge their duty to provide full and

⁶ *Secretary to the Department of Justice v Osland* [2007] VSCA 96 at [59].

frank advice given this is often a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004 (Vic)*.⁷

This factor does not weigh against disclosure.

- (g) 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 document

In its submission dated [date], the Agency states:

Neither Document 1 or 2 provide a complete assessment of all the options available to design and construct the two additional tracks. They are preliminary internal documents, that do not reflect a complete assessment or final settled view. As such, Documents 1 and 2 demonstrate only one possible solution and not multiple options.

...the government has not decided on whether it will progress with the construction of the two additional tracks. Extensive planning and design would need to be undertaken to provide a complete assessment of the options available prior to any decision being reached by the government. No further work, including planning and design, is currently planned to be undertaken by the LXR in relation to the construction of the Potential Project.

In my view, the majority of the report comprising Document 2 demonstrates the Agency taking a careful and considered approach to new rail infrastructure that may be required in the future. The report also clearly describes the designs are preliminary only. The report, therefore, provides context for the information outlined in it, and demonstrates the expertise and thoroughness of agency planning processes. In relation to the report, I consider this factor weighs in favour of disclosure.

However, in relation to the drawings in Documents 1 and 3 and parts of Document 2, I consider this factor weighs against disclosure. The drawings considered without the report could be taken to be final. Given these plans relate to sensitive matters, particularly regarding the potential future use of privately held land and buildings, I consider this factor does not weight against disclosure.

- (h) 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

In its submission dated [date], the Agency states:

Given these works are speculative and may not eventuate, the potential for unnecessary confusion, ill-informed debate and misrepresentation in the community is significant.

The documents do not reveal a final course of action by LXR or government, or LXR's reasons for any associated decisions. When government makes a decision as to whether the Potential Project will proceed, the final design will be announced publicly in due course. LXR submits that providing explanations at the time of releasing these preliminary documents would not have any impact in terms of reducing the confusion and mischief caused.

As set out above, my concern is that disclosure of some of the documents, where they relate to specific matters, could be misinterpreted were they to be taken out of context. The disclosure of this information could have significant impacts on local residents and businesses if those planning decisions were considered to be likely to take place, even if it is recognised

⁷ For example, see the public sector values in section 7 of the PA Act.

construction is not yet planned. In my view, disclosure of this information would be contrary to the public interest as it would have the potential to give rise to, and be likely to cause, unnecessary concerns from members of the public.

In forming this view, I have considered the fact that, once a document is disclosed under the FOI Act, its distribution is unrestricted. I am concerned the distribution of some of this material could reasonably be expected to cause unjustified community concern. I also acknowledge that if such works were to be constructed, they would be subject to further public consultation which could markedly change those plans.

This factor weighs against disclosure.

33. My decision in relation to each document is set out in the Schedule of Documents at **Annexure 1**.

Deletion of exempt or irrelevant information

34. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
35. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁹
36. My decision in relation to section 25 is set out in the Schedule of Documents at **Annexure 1**.

Conclusion

37. On the information available, I am satisfied the documents are exempt under section 30(1).
38. As it is not practicable to edit Documents 1 and 3 to delete the exempt information, I have determined to refuse access to those documents in full.
39. However, I am satisfied that Document 2 can be edited to remove the exempt and irrelevant information. Therefore, I have determined that Document 2 should be released in part to the Applicant.

Review rights

40. 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.¹⁰
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²

⁸ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁹ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

43. 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.
44. 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.¹³

When this decision takes effect

45. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	[date]	Future Track Design Package Plans – preliminary design	72	Refused in full Sections 30(1) and 33(1)	Refuse in full Section 30(1)	<p>Section 30(1): The document is exempt under section 30(1) for the reasons set out above.</p> <p>As I consider the document is exempt in full under section 30(1), I have not further considered the application of section 33(1) to this document.</p> <p>Section 25: I note the document contains a variety of detailed drawings and maps, the disclosure of which would be contrary to the public interest. In my view, given the level of detail in the document, I do not consider it practicable to delete the irrelevant or exempt information from the document so that it could be released in part. I also consider that once exempt information is removed, little practical information would remain. For this reason, access to the document is refused in full.</p>
2	[date]	Future 3 rd and 4 th track alignment – design report	73	Refused in full Sections 30(1) and 33(1)	<p>Release in part Sections 30(1), 25</p> <p>The document is to be released to the Applicant with the following information deleted:</p> <ul style="list-style-type: none"> irrelevant information which is outside the scope of this review; the sentence and Figure 3-1 that appears directly below the table on 	<p>Section 30(1): Parts of the document are exempt under section 30(1) for the reasons set out above. The remainder of the document is not exempt from release.</p> <p>Section 25: The Applicant is not seeking personal affairs information. The names, RIW numbers and signatures are therefore irrelevant to the request and should be deleted in accordance with</p>

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>page 11;</p> <ul style="list-style-type: none"> • beneath Figure 3-1 on page 11, the second capitalised heading (labelled 'sheet 01 to 14') and the two paragraphs beneath; • the second dot point under the heading '3.7 Changes since previous submission'; • the first, seventh and ninth entry in table 4-1 under 'Description'; • the first sentence under the heading 4.2.3 Drainage and flood management; and • the text in the cell 'reviewer comment' at line 25 and 27 in the Design Review Comments Register appearing from page 40 onwards. 	section 25.
3	[date]	Tender drawings and designs	10	Refused in full Sections 30(1) and 34(1)(b)	Refuse in full Section 30(1)	<p>Section 30(1): The document is exempt under section 30(1) for the reasons set out above.</p> <p>As I consider the document is exempt in full under section 30(1), I have not further considered the application of section 34(1)(b) to this document.</p> <p>Section 25: See my comments for Document 1.</p>