

Notice of Decision and Reasons for Decision

Applicant:	'EQ9'
Agency:	Department of Environment, Land, Water and Planning
Decision date:	29 June 2022
Exemption considered:	Section 30(1)
Citation:	'EQ9' and Department of Environment, Land, Water and Planning (Freedom of Information) [2022] VICmr 181 (29 June 2022)

FREEDOM OF INFORMATION – internal working documents – planning scheme amendment – development proposals – Minister's authorisation – Ministerial briefings

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 the documents with irrelevant information deleted in accordance with section 25, access to documents is granted in part.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

29 June 2022

Reasons for Decision

Background to review

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

A copy of the officer's report and brief, including any attachments, to the Minister for Planning, recommending authorisation of [another Victorian Government Agency] Planning Scheme Amendment [reference].
2. During the processing of their request, the Applicant advised they do not seek access to the personal affairs information of third parties.
3. The Agency identified four documents falling within the terms of the Applicant's request and decided to grant access to two documents in part and refused access to two documents in full relying on the exemption under section 30(1) to refuse access to information. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
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.

Review of exemption

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
 - (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.¹
12. The term ‘officer of an agency’ is defined in section 5(1). It includes a member of an agency’s staff and any person employed or engaged by or on behalf of an agency, regardless of whether they are subject to the *Public Administration Act 2004* (Vic).

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?

13. 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.
14. 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
15. Having reviewed the documents, I am satisfied they contain information in the nature of opinion, advice or recommendation prepared by 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?

16. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, a Minister or government.³
17. In *Re Waterford and Department of Treasury (No.2)*,⁴ 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.

18. I am satisfied the documents were made in the course of the Agency’s deliberative processes relating to the consideration of planning scheme amendments.

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

19. In determining if disclosure of a 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.
20. In determining whether the information exempted from release by the Agency would be contrary to the public interest, I have given weight to the following relevant 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;

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 1 at [58].

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

- (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.
21. The Agency decision states the exempted information comprises of options that the Agency presented to the Minister for Planning that were not adopted. It considers the information represents the views of the authors which are preliminary in nature and do not reflect the views of the Minister. It considers disclosure would be contrary to the public interest because it would misrepresent the final decision.
22. On 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) I consider there is a public interest in persons, who may be affected by the planning scheme amendment, being better informed about the options considered by the government, regardless of whether those options were ultimately adopted. Accordingly, I am of the view that disclosure of the documents in this instance will promote transparency and accountability in government decision making with respect to this planning amendment.
 - (b) I note the Minister was exercising their functions under the *Planning and Environment Act 1987* (Vic) in relation to the authorisation of planning scheme amendments. Where a Minister is exercising a legislative function, I am of the view they should be able to explain the merits of their decision and be accountable for the exercise of the powers and functions of their office. I consider disclosure of these documents will assist in providing context in relation to the Minister's decision.
 - (c) While I acknowledge the information exempted by the Agency reflects options considered that were not ultimately adopted, I am not persuaded disclosure of other options considered at a point in time would be likely to misinform or confuse the public or cause unnecessary debate. In my view, this underestimates the capacity of the public to be informed about and understand advice received and decisions made by government. Nevertheless, it is open for the Agency to release the documents with any necessary additional information explaining the basis of any decision made to eliminate or minimise any potential for confusion or misunderstanding concerning the documents.
 - (d) 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*,⁶ which observed the possibility of public scrutiny in some circumstances would provide for better administrative decision making.

- (e) In any case, Agency officers performing their official duties are responsible for ensuring advice provided is accurate, complete and properly considered on matters central to the Agency's governmental functions. Agency officers, as public servants, are required to discharge their duty to provide impartial and fulsome advice to decision makers, and stakeholders, given this requirement is a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic).⁷ I am not persuaded Agency officers would be deterred from discharging their professional and ethical obligations should the documents be disclosed under the FOI Act, particularly in relation to the discussion of matters of significance to the Agency.
- (f) The documents contain briefings to the Minister for Planning and an officer's report in relation to a planning scheme amendment prepared by [another Victorian Government Agency]. Whilst I acknowledge the documents may be considered sensitive due to the effect of the planning scheme amendment on the local community and businesses, I note there is already publicly available information in relation to the process for this planning scheme amendment.
- (g) Certain information in Document 1 was created by the Applicant in relation to their planning permit application and similar information was released by the Agency in Documents 2 and 3. Accordingly, as this information is known to the Applicant, I do not consider this information to be sensitive or confidential in the circumstances.

23. Accordingly, I am not satisfied that the documents are exempt under section 30(1).

24. My decision in relation to section 30(1) is outlined in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

- 25. 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.
- 26. 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
- 27. As noted above, the Applicant does not seek access to the personal affairs information of third parties and this information is therefore irrelevant information for the purposes of this review.
- 28. The Agency deleted certain information in Documents 2 and 3 as irrelevant information in accordance with section 25, as it was duplicate information. However, as the Applicant did not explicitly exclude duplicate information from the terms of their request, I am satisfied the information is relevant information.

⁶ [2013] VCAT 869 at [25]-[27].

⁷ For example, see 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*.

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].

29. I have considered the effect of deleting irrelevant 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.

Conclusion

30. On the information before me, I am not satisfied the documents are exempt under section 30(1).
31. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant information deleted in accordance with section 25, access is granted in part.

Review rights

32. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
35. 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.
36. 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

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

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

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Brief	136	<p>Refused in full</p> <p>Section 30(1)</p>	<p>Release in part</p> <p>Sections 25</p> <p>The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.</p>	<p>Section 30(1): I am not satisfied the document is exempt under section 30(1) for the reasons outlined in the Notice of Decision, above.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25.</p>
2.	[date]	Brief	124	<p>Released in part</p> <p>Section 30(1)</p>	<p>Release in part</p> <p>Sections 25</p> <p>The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.</p>	<p>Section 30(1): See comments for Document 1.</p> <p>Section 25: The Agency deleted certain information in the document as irrelevant information in accordance with section 25, as it was duplicate information. However, as the Applicant did not explicitly exclude duplicate information from the terms of their request, I am satisfied the information is relevant information.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant personal affairs</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						information deleted in accordance with section 25.
3.	[date]	Brief	161	Released in part Section 30(1)	Release in part Sections 25 The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 2.
4.	[date]	Amendment authorisation report	18	Refused in full Section 30(1)	Release in part Sections 25 The document is to be released except for the irrelevant personal affairs information which is to be deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.