

Notice of Decision and Reasons for Decision

Applicant:	'EQ2'
Agency:	Major Transport Infrastructure Authority
Decision date:	27 June 2022
Exemptions considered:	Sections 30(1), 35(1)(b)
Citation:	'EQ2' and Major Transport Infrastructure Authority (Freedom of Information) [2022] VICmr 174 (27 June 2022)

FREEDOM OF INFORMATION – spreadsheets – level crossing removals – safety and traffic data – internal working documents – information communicated in confidence

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 sections 30(1) and 35(1)(b). Accordingly, access to the documents is granted in full.

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

27 June 2022

Reasons for Decision

Background to review

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

‘1. The data used to select the 51st to 75th crossing removals and the overall rankings of level crossings resulting from this process;

2. The data used to select the 76th to 85th crossing removals and the overall rankings of level crossings resulting from this process; and

3. The data used to select any future crossing removals and the overall rankings of level crossings resulting from this process.

This should relate to the Site Prioritisation Framework which was used to prioritise which level crossing were to be removed. This data should include:

1. Number of trains;

2. The amount of traffic;

3. Importance of local access (there must be some objective assessment for this);

4. Safety records (incidents and deaths);

5. Safety risk (there must be an objective assessment);

6. The project interface (objective assessment); and

7. The shared rail occupations (you assume V-Line, interstate, and freight trains).’

2. The Agency identified two documents falling within the terms of the Applicant’s request and decided to refuse access to both documents in full, relying on sections 30(1) and 35(1)(b). 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 copies 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. I have considered all communications and submissions received from the parties.
7. 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.
8. 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

9. 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;
- (a) 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
- (b) disclosure of the matter would be contrary to the public interest.

10. The exemption does not apply to purely factual material in a document.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?

- 11. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.²
- 12. Having considered the content and context of the documents, I am satisfied they contain information in the nature of opinion, advice and recommendations prepared by Agency officers for the purposes of section 30(1).
- 13. However, I am not satisfied that other information in the documents is opinion, advice or recommendation. Much of the information in the documents is purely factual data relating to levels of traffic and safety incidents at the level crossing sites. Such matter is purely factual and , accordingly, is not exempt under section 30(1).

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?

- 14. 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
- 15. In *Re Waterford and Department of Treasury (No.2)*,⁴ 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.

- 16. I am satisfied the information was provided in the course of the Agency’s deliberative processes in relation to its assessment of level crossing sites in Victoria.

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].

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

17. In determining whether 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:⁵
- (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (c) 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;
 - (d) 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;
 - (e) 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
 - (f) 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.
18. On balance, I have determined disclosure of information in the documents would not be contrary to the public interest for the following reasons:
- (a) I consider that any particular sensitivity that the information in the documents may once have had has decreased, with over 58 level crossing removal projects having been completed and the progressing removal of other level crossings continue along Melbourne's rail network.
 - (b) I acknowledge the Applicant's interest in the documents as they seek to understand the reasons why certain level crossing sites were chosen for removal.
 - (c) Further, I consider there is a strong public interest in members of the public being able to evaluate and understand decisions made by government. By providing access to information that demonstrates the basis upon which decisions are made, disclosure of documents like these build community trust in government decision making processes. In this instance, the disclosure of documents would demonstrate that government agencies are using appropriate data and safety assessments to assist with their decisions on the removal of level crossings.

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

- (d) I acknowledge the Agency's submission that the information in these documents only forms part of the recommendation as to which crossings should be removed. However, I do not accept that disclosure would be likely to misinform or confuse the public or cause unnecessary debate. I am satisfied members of the public are capable of understanding that these documents may be one of a number of sources of advice contributing to the government's assessment of a project.
- (e) 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. In any case, it is arguable Agency officers are responsible for ensuring advice provided is accurate, complete and properly considered on matters central to its governmental functions.

19. I acknowledge that Document 2 appears to be an incomplete version of Document 1. Having reviewed both documents, I am satisfied that Document 2 contains the same information that is contained in Document 1. Therefore, I have concluded that it would not be contrary to the public interest to release the incomplete version.

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

Section 35(1)(b)

21. A document is exempt under section 35(1)(b) if two conditions are satisfied:

- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an Agency or Minister; and
- (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an Agency or Minister to obtain similar information in the future.

Was the information in the document obtained by the Agency in confidence?

22. When determining whether information was communicated in confidence to an agency by a third party, it is necessary to consider the position from the perspective of the communicator.⁷

23. Confidentiality may be expressed or implied from the circumstances of the matter.⁸

24. Whether information communicated by an individual was communicated in confidence is a question of fact.⁹

25. The Agency submits that certain information was provided through a non-disclosure agreement between VicTrack and a consultant engaged by the Agency. Other information was communicated to the Agency by the Office of the National Rail Safety Regulator (**ONRSR**).

26. The Agency consulted with the relevant agencies to obtain their views as to whether the information in the documents was communicated in confidence.¹⁰ The [ONRSR advised the information they

⁶ [2013] VCAT 869 at [25]-[27].

⁷ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

⁸ *Ibid.*

⁹ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹⁰ Section 35(1A).

communicated to the Agency was in confidence and objected to its release. VicTrack also confirmed that the information was provided to the Agency in confidence.

27. Having reviewed the information communicated by ONRSR and VicTrack to the Agency and considered the purpose for which it was communicated to the Agency, I am satisfied this information was communicated by third parties with some expectation of confidentiality. Accordingly, I will consider the second condition under section 35(1)(b).

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

28. The second condition under section 35(1)(b) requires that, if the information were to be disclosed, it would impair the Agency's ability to obtain similar information in the future. For example, others in the position of the communicator or communicators would be reasonably likely to not provide similar information to the Agency in the future.
29. I note the requirements for section 35(1)(b) will not be satisfied if the impairment in obtaining similar information would go no further than potential providers of the information being less candid than they otherwise would have been.¹¹
30. Therefore, the public interest test in section 35(1)(b) is narrow. It is directed towards the impact release would have on an agency's ability to obtain the same type of information in the future. The exemption does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the documents would be served by granting access to the documents.
31. In support of its view, the Agency submits:

In relation to the Australian Level Crossing Model (**ALCAM**) data, access is not available to those other than rail or road infrastructure owners, except by agreement. A copy of the agreement between VicTrack and a consultant working for LXP [Level Crossing Removal Project] was previously provided to OVIC as part of this review. While VicTrack in their correspondence did not specify in their consultation response whether information would be provided in the future if we broke this agreement, in our view, particularly evidenced by the requirement of a signed agreement, it would be reasonably likely that breach of the agreement would impair the ability of MTIA to get the data again should we require it. In this sense impairment may be as high as us not receiving the information but also including further restrictions on how the information is provided and/or only providing what they view as strictly necessary.

Otherwise, in relation to the ONRSR data, we rely on statements made by that body in their consultation response (also provided to OVIC) in which they stated release of Detailed Occurrence Data would impair our ability to receive like information in the future.

32. I acknowledge that certain information was provided to the Agency through a non-disclosure agreement and I accept that the Agency relies on other government agencies to provide sensitive information to assist them with making decisions and overseeing the removal of level crossings. Further, I also accept there is a public interest in the Agency being able to have open communication channels with other government agencies in relation to the assessment of level crossing sites.
33. However, I do not accept the Agency's submission that disclosure of the documents would be reasonably likely to inhibit the Agency from obtaining similar information from the relevant agencies in the future. I am of the view that these external agencies were obliged to share this information with the Agency to assist them in conducting assessments of level crossing sites. Further, I consider

¹¹ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

all government agencies who are responsible for ensuring the safety of the road and rail network are required to work together and share information.

34. Although the information in the documents is sensitive as it contains safety incident history and assessments of level crossings, I am not satisfied if it were to be disclosed it would result in ONRSR, VicTrack or others in similar positions withholding such information from the Agency in the future given the circumstances outlined above. In the circumstances of this matter, I consider it would be counterproductive for those bodies to be less open and cooperative. To do so would seem incompatible with the faithful discharge of their important public functions.
35. Therefore, I am satisfied disclosure of the documents would not be contrary to the public interest as disclosure would not impair the ability of the Agency to obtain similar information in the future.
36. Accordingly, I am not satisfied the documents are exempt under section 35(1)(b).

Conclusion

37. On the information available, I am not satisfied the documents are exempt under section 30(1) or 35(1)(b). Accordingly, access to the documents is granted in full.

Review rights

38. If the Agency to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
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 an application to VCAT is made for a review of my decision.¹⁴

Third party review rights

42. As I have determined to release documents that contain information claimed exempt under section 35(1)(b), if practicable, I am required to notify those persons who provided the information to the Agency of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁵
43. Having carefully considered notification in the circumstances of this matter, I have determined it is practicable to notify the third parties about their review rights and confirm they will be notified of my decision on the date of decision.

When this decision takes effect

44. Accordingly, my decision does not take effect until the third parties 60 day review period expires, or if an application is made to VCAT, until an appeal is finally determined.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).

¹⁵ Sections 49P(5), 50(3AB) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	LXRP2 – Planning Study- Database	Spreadsheet	Refused in full Sections 30(1) and 35(1)(b)	Release in full	Section 30(1): I am not satisfied that this document is exempt under section 30(1) for the reasons outlined in the Notice of Decision. Section 35(1)(b): I am not satisfied that information in the document is exempt under section 35(1)(b) for the reasons outlined in the Notice of Decision.
2.	[date]	LXRP2 – Planning Study- Database	Spreadsheet	Refused in full Sections 30(1) and 35(1)(b)	Release in full	Section 30(1): See comments for Document 1. Section 35(1)(b): See comments for Document 1.