

Notice of Decision and Reasons for Decision

Applicant: 'EU7'
Agency: Department of Environment, Land, Water and Planning
Decision date: 31 August 2022
Exemption considered: Section 30(1)

Citation: 'EU7' and Department of Environment, Land, Water and Planning
(Freedom of Information) [2022] VICmr 216 (31 August 2022)

FREEDOM OF INFORMATION – internal working documents – Ministerial briefings – *Planning and Environment Act 1987* (Vic) – planning scheme amendment – Environmental Audit Overlay – environmental amendment – agency recommendations to Minister – Planning Minister – statutory decision making

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 satisfied the documents are exempt from release under section 30(1). However, I have decided to release further information in Document 2 where I am satisfied it is not exempt from release.

Accordingly, access to Document 1 is refused in full and access to Document 2 is granted in part 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

31 August 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to:
 - ... the Recommendation Report for the Hon. Minister of Planning, [Name], regarding the recommendation and assessment of Environmental Amendment [reference] and specifically the recommendation of an imposition of Environmental Overlay on [description of land].
[Further contextual information redacted]
2. The Agency identified two documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 30(1), 32(1), 33(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 two 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 exemption

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;
 - (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.
10. The exemption does not apply to purely factual material in a document.¹

¹ Section 30(3).

11. 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?

12. 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.
13. 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
14. The documents are an Amendment Officer Report and a briefing to the Minister for Planning concerning a planning scheme amendment prepared by [another Victorian government agency].
15. The proposed amendment seeks to apply an Environmental Audit Overlay (**EAO**) to land known as [description of land] and adjoining land. As part of the approval process, the amendment was exhibited publicly at an Ordinary Meeting of the [another Victorian government agency] on [date], where submissions were considered.
16. Following the exhibition of the amendment, a planning panel was appointed under the *Planning and Environment Act 1987* (Vic) (**Planning and Environment Act**) to determine whether the application of the EAO was appropriate. The Panel recommended that the proposed amendment be adopted as exhibited, subject to one condition.
17. For the proposed amendment to proceed, it must be adopted by the planning authority and then sent to the Minister for determination under section 35 of the Planning and Environment Act.
18. Having reviewed the documents subject to review, 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?

19. The term ‘deliberative process’ is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, a Minister or government.³
20. 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.

21. I am satisfied the documents were made in the course of a deliberative process in relation to the requirement for the Planning Minister to make a determination on the proposed planning scheme amendment under section 35 of the Planning and Environment Act.

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?

22. 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.
23. In doing so, 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;
 - (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.
24. The Agency submits:
- The brief is currently being considered by the Minister for Planning and a decision on whether to approve and adopt the amendment has not been made. The documents are therefore preliminary in nature and it would be contrary to the public interest to release the documents prior to the Minister making his decision.
25. A key aspect of the planning scheme is the provision of planning information to the community and public consultation on proposed planning projects and amendments to planning schemes given the important impact they have on the community.⁶
26. Accordingly, there is a public interest in members of the public, who may be affected by a proposed planning scheme amendment, being informed about a proposed amendment and the nature of the proposal presented to the Minister for determination under the Planning and Environment Act.
27. Following a number of public steps in the planning scheme amendment process, the Minister is now required to exercise their statutory functions under the Planning and Environment Act by making a determination on the proposed planning scheme amendment.

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

⁶ Department of Environment, Land, Water and Planning website, 'Making planning documents available to the public', Planning Practice Note 74 (January 2022) at https://www.planning.vic.gov.au/_data/assets/pdf_file/0027/97335/PPN74-making-planning-documents-available-to-the-public.pdf.

28. I accept the Agency's submission that a brief is currently being prepared or before the Planning Minister on the proposed planning scheme amendment and is still subject to deliberation by the Minister under the Planning and Environment Act.
29. Where a Minister is in the process of exercising a legislative function, as is the case here, I am of the view there is also a public interest in allowing for a proper statutory decision making process to be completed without the premature disclosure of decision making documents prepared by the relevant agency prior to the Minister considering the agency's recommendations and making a final decision.
30. Ensuring the integrity of a statutory decision making process, is essential for the Minister to make an informed and well-considered final decision in accordance with their statutory obligations under the Planning and Environment Act.
31. As with most statutory decisions, the Minister will be required to provide reasons for their decision and upon which the merits of their decision will be subject to public transparency and scrutiny. In this way, the Minister will be accountable for the exercise of their Ministerial powers and functions under the Planning and Environment Act.
32. I note there is publicly available information in relation to the process for this planning scheme amendment, including the explanatory report, instruction sheet, planning panel report and maps of the area.⁷ As Document 2 contains the explanatory report, instruction sheet and map which are publicly available, I am not satisfied disclosure of these documents would be contrary to the public interest and are not exempt under section 30(1).
33. Accordingly, I am satisfied the documents are exempt from release under section 30(1), except for information in Document 2 that is publicly available.
34. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

Sections 32(1) and 33(1)

35. As I am satisfied the documents are exempt from release under section 30(1), it is not necessary for me to consider the application of sections 32(1) and 33(1).

Section 25 – Deletion of exempt or irrelevant information

36. 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.
37. 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 a document meaningless, they are not 'practicable' and release of the document is not required under section 25.⁹
38. I have considered the effect of deleting exempt information from the documents. In relation to Document 1, I am satisfied it is not practicable to do so as it would render the document meaningless. However, I am satisfied it would be practicable to delete the exempt information from Document 2, as the document would retain its meaning.

⁷ Department of Environment, Land, Water and Planning website, 'Amendment Summary' <https://planning-schemes.app.planning.vic.gov.au/All%20schemes/amendments/C212brim?schemeCode=brim>.

⁸ *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].

⁹ *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].

39. My decision in relation to section 25 is set out in the Schedule of Documents in **Annexure 1**.

Conclusion

40. On the information before me, I am satisfied the documents are exempt from release under section 30(1). However, I have decided to release further information in Document 2 where I am satisfied it is not exempt from release.

41. Accordingly, access to Document 1 is refused in full and access to Document 2 is granted in part in accordance with section 25.

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

Review rights

43. 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

44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹

45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²

46. 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.

47. 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

48. My decision does not take effect until the Agency's 14 day review period expires.

49. 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 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated	Amendment Officer Report	14	Refused in full Sections 30(1), 32(1), 33(1)	Refused in full Section 30(1)	<p>Section 30(1): For the reasons outlined in the Notice of Decision, I am satisfied the document is exempt from release under section 30(1).</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25. Accordingly, access to the document is refused in full.</p>
2.	Undated	Ministerial Brief	40	Refused in full Sections 30(1), 32(1), 33(1)	<p>Release in part</p> <p>Sections 30(1), 25</p> <p>The document is exempt from release with the exception of pages 20 to 27 which are to be released to the Applicant.</p>	<p>Section 30(1): For the reasons outlined in the Notice of Decision, I am satisfied certain information in the document is exempt from release under section 30(1). However, I consider the disclosure of publicly available information on pages 20 to 27 would not be contrary to the public interest and is not exempt from release under section 30(1).</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25. Accordingly, access to the document is granted in part.</p>