

Notice of Decision and Reasons for Decision

Applicant:	'EX3'
Agency:	Department of Transport
Decision date:	21 November 2022
Exemptions considered:	Sections 25, 28(1)(ba), 28(1)(d), 29(1)(a), 30(1), 34(4)(a)(ii)
Citation:	'EX3' and Department of Transport (Freedom of Information) [2022] VICmr 240 (21 November 2022)

FREEDOM OF INFORMATION – ministerial briefings – Strategic Plan – communications with the Commonwealth government – letters to Councillors – funding requests – rail infrastructure – Clyde Rail Extension – rail infrastructure project plan – Metropolitan Partnership Integrated Transport Frameworks – preliminary business case – Baxter Electrification Preliminary Business Case

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.

I am satisfied certain information in the documents is exempt from release under section 28(1)(ba) and 30(1). I am not satisfied that any information in the documents is exempt from release under sections 28(1)(d), 29(1)(a) or 34(4)(a)(ii).

Accordingly, my decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information where I am satisfied it is not exempt from release.

As I am satisfied 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, 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

21 November 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to various briefings to the Minister for Transport Infrastructure.
2. The Agency identified seven documents falling within the terms of the Applicant's request and released each document in part. The Agency relied on the exemptions under sections 28(1)(ba), 28(1)(d), 29(1)(a), 30(1), 33(1) and 34(4)(a)(ii) to refuse access to information in the documents. 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. The Applicant does not seek review of information exempted under section 33(1).
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 exemptions

Section 28(1) – Cabinet documents

10. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of the Cabinet.
11. In *Ryan v Department of Infrastructure*,¹ the Victorian Civil and Administrative Tribunal (**VCAT**) observed:

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 to be regarded as a Cabinet document or because it has some Cabinet "aroma" around it. Rather, for a document to come within the Cabinet document exemption, "it must fit squarely within one of the four exemptions [(now five)]" in section 28(1) of the Act.
12. Purely statistical, technical or scientific material in a document is not exempt² unless its disclosure would involve the disclosure of any deliberation or decision of the Cabinet.³
13. I address the application of sections 28(1)(ba) and 28(1)(d) below.

¹ (2004) VCAT 2346 at [33].

² Section 28(3).

³ *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

Section 28(1)(ba) – Document prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet

14. Section 28(1)(ba) provides a document is exempt from release if it was prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet.
15. A document will be exempt under section 28(1)(ba) if the sole or one of the substantial purposes for which it was prepared was to brief a Minister in relation to an issue to be considered by Cabinet.⁴ In the absence of direct evidence, a document's sole or substantial purpose may be determined by examining the use of the document, including whether it was submitted to Cabinet.⁵
16. The Cabinet briefing purpose must be 'immediately contemplated' when the document is created, and the exemption will not apply merely because Cabinet ultimately considered the issue.⁶
17. The word 'briefing' means a 'short accurate summary of the details of a plan or operation.'⁷ The 'purpose...is to inform'.⁸ Therefore, the document should have the character of briefing material.⁹ A document will be of such character if it contains 'information or advice ... prepared for the purpose of being read by, or explained to, a minister'.¹⁰ It also requires more than having been merely 'placed a document before a Minister'.¹¹
18. The phrase 'issues to be considered by the Cabinet' within the meaning of section 28(1)(ba), requires it must be more than just 'likely' the Cabinet will consider the document. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if it is not ultimately considered. Evidence that a matter was included on a Cabinet meeting agenda will generally meet this test.¹²

Document 4

19. Document 4 is a briefing to the Minister for Transport Infrastructure concerning planning for an extension of the Cranbourne rail line to Clyde.
20. The Agency consulted internally with its Cabinet Services Branch who advised a specific aspect of the project, to which parts of the document relate, was to be considered by Cabinet.
21. While I am satisfied a specific aspect of the project was to be considered by Cabinet, the document itself predominantly concerns the timeline for various aspects of the project's delivery, which I consider is separate from the specific information that was intended to be considered by Cabinet.
22. Accordingly, I am satisfied that section 28(1)(ba) applies to information concerning the specific matter that was intended to be considered by the Cabinet, however, it does not apply to information concerning project delivery more generally.
23. The Agency also exempted information about courses of action that are subject to approval by the Minister. I accept that if the Minister were to approve the intended course of action outlined in the

⁴ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

⁵ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

⁶ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

⁷ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996). See also *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998); *Hulls v Department of Treasury and Finance (No 2)* (1994) 14 VAR 295 at [320]-[321]; reversed on other grounds by the Court of Appeal: *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331; 15 VAR 360; [1999] VSCA 117.

briefing, that it would be reasonably likely that the matter would be considered by Cabinet. Therefore, I accept this information is also exempt under section 28(1)(ba).

Document 5

24. Document 5 is a briefing to three Ministers concerning the Metropolitan Partnership Integrated Transport Frameworks.
25. I am satisfied it is evident on the face of the briefing that, at paragraphs 10 and 11(d), the Ministers are being briefed on issues to be considered by a Cabinet committee. Accordingly, this information is exempt under section 28(1)(ba).
26. Paragraph 4(a) refers to matters that 'may be' considered by a Cabinet committee. As noted above, the phrase 'issues to be considered by the Cabinet' within the meaning of section 28(1)(ba) requires it must be more than just 'likely' the Cabinet will consider the document. In my view, the term 'may' does not satisfy the required threshold that it is more than likely that Cabinet will consider the matter. Accordingly, I am not satisfied the test in section 28(1)(ba) has been met.
27. The Agency also exempted Attachments 'D' and 'F' under section 28(1)(ba), which outline the key potential initiatives for the Western and inner South-east Integrated Transport Frameworks. I note some of the exempted information has been released to the Applicant elsewhere in Document 5. Nevertheless, given the information exempted under paragraph 10 of the briefing which I am satisfied is exempt under section 28(1)(ba), I am satisfied Attachments 'D' and 'F' disclose information concerning issues to be considered by a Cabinet committee. Accordingly, the attachments are exempt under section 28(1)(ba).
28. The Agency also exempted information in Attachment 'I' under the heading 'Stage 2 – [heading title]'. It is evident on the face of the document that the paragraph concerns an issue to be considered by a Cabinet committee. Accordingly, this information is exempt under section 28(1)(ba).

Document 7

29. The Agency exempted most of the *Baxter Electrification Preliminary Business Case – [date]* under section 28(1)(ba), with exception to two attachments which were released to the Applicant. This document was attached to a briefing to the Minister for Transport Infrastructure, and the briefing itself was released to the Applicant. The briefing requests the Minister to sign a letter to formally submit the Preliminary Business Case to the Federal government for consultation. The briefing states:

The Full Business Case will be submitted to the Transport and Infrastructure Committee (TIC) for endorsement. The PBC [Preliminary Business Case] is a precursor to, and will inform the full Business Case, and has been prepared for the purpose of briefing you in relation to issues to be considered by Cabinet. As such, the PBC should be treated as cabinet-in-confidence.
30. I am satisfied the Preliminary Business Case forms part of the briefing to the Minister, and it is evident, based on the above excerpt, that it was prepared for the purpose of briefing the Minister in relation to an issue to be considered by a Cabinet committee.
31. Accordingly, I am satisfied the information that the Agency exempted under section 28(1)(ba) is exempt under that section of the FOI Act.
32. My decision on section 28(1)(ba) is outlined further in the Schedule of Documents in **Annexure 1**.

33. Section 28(1)(d) provides a document is exempt from release if it would involve the disclosure of any deliberation or decision of the Cabinet other than a document by which a decision of the Cabinet was officially published.

34. In *Department of Infrastructure v Asher*¹³ (**Asher**), ‘deliberations’ was given a narrow interpretation such that it means the actual debate that takes place rather the subject matter of the debate itself:

It all depends upon the terms of the document. At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or feasible or may advance an argument for a particular point of view.¹⁴ The former would say nothing as to Cabinet’s deliberations; the latter might say a great deal.¹⁵

35. The Victorian Supreme Court of Appeal also held in *Asher*:

The deliberative process involves the weighing up or evaluating of the competing arguments or considerations that may have a bearing upon Cabinet’s course of action – its thinking processes¹⁶ - with a view to the making of a decision. It encompasses more than mere receipt of information in the Cabinet room for digestion by Cabinet ministers then or later.¹⁷

36. A document will be exempt under section 28(1)(d) if there is evidence the Cabinet discussed various options in the document and deliberated upon and/or adopted on or more of the options for its consideration.¹⁸

37. A ‘decision’ means any conclusion as to a course of action the Cabinet adopts whether it is a conclusion as to final strategy on a matter or conclusions about how a matter should proceed.¹⁹

38. Where a decision of the Cabinet is made public, the announcement in relation to the issue decided will not disclose the Cabinet’s decision or deliberation.²⁰

39. Document 3 is a briefing to the Minister for Transport Infrastructure concerning the release of funding to deliver the William Street Opportunities Plan.

40. The Agency exempted letters from the Treasurer to Councillors, which were attached to another briefing that was provided to the Minister for Transport Infrastructure in relation to the West Gate Tunnel Project – City of Melbourne Initiatives.

41. The Agency consulted with the Department of Treasury and Finance in relation to the status of the letters and were advised that the letters contained information that was “fed into” a submission to a Cabinet committee. The Agency itself submits the letters would reveal how the subject matter was treated by the Cabinet committee and the factors weighed up as part of the decision making process.

42. With respect to the second letter, the issues discussed directly relate to a Future Melbourne Committee meeting and information in the committee’s report in relation to a particular meeting.

43. Some of the issues discussed in the letters concern courses of action that have now been undertaken and certain information about these matters are publicly available.

¹³ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [6].

¹⁴ *Smith v Department of Environment and Sustainability* [2006] VCAT 1228.

¹⁵ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [8].

¹⁶ *Re Waterford and the Department of the Treasury (No 2)* [1984] AATA 67; (1984) 1 AAR 1.

¹⁷ *Re Birrell and Department of the Premier and Cabinet* (1986) 1 VAR 230; *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [58].

¹⁸ *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

¹⁹ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

²⁰ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

44. As mentioned above, an exemption under section 28 cannot be claimed merely because it has some connection with Cabinet or a Cabinet 'aroma', as the document must fit squarely into one of the exemptions under section 28.²¹
45. On the information before me, I am not satisfied the letters reveal how the Cabinet committee considered or discussed the various issues addressed in the letters. It also would not reveal whether the cabinet committee deliberated on the issues discussed, or the nature of any deliberations that may have occurred, or decision made in relation to the issues. Rather, the letters reveal, in general terms, issues that were being considered at a local government level in the context of the Westgate Tunnel project.
46. Therefore, on the information before me, I am not satisfied the letters are exempt under section 28(1)(d). I will therefore consider the application of section 30(1), below.
47. My decision in relation to section 28(1)(d) is outlined further in the Schedule of Documents in **Annexure 1**.

Sections 29(1)(a) – Documents containing matter communicated by any other State

48. Section 29(1)(a) provides a document is exempt if its disclosure under the FOI would be contrary to the public interest and disclosure would prejudice relations between the State and Commonwealth or any other State or Territory.
49. The first requirement under section 29(1)(a) is whether disclosure of a document would be contrary to the public interest.
50. In determining whether disclosure would be contrary to the public interest, I have had regard to the following factors that were accepted by the Victorian Civil and Administrative Tribunal (VCAT) in *Millar v Department of Premier and Cabinet (Millar)*:²²
 - (a) protecting uninhibited exchanges between the governments of Australia;
 - (b) encouraging cooperative Federalism within Australia;
 - (c) protecting processes that contribute to high quality policy development by the governments of Australia;
 - (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy; and
 - (e) protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision-making process.
51. The Agency applied this exemption to information in Document 2, which is a briefing to the Minister for Transport Infrastructure about correspondence with the Commonwealth Government in relation to the National Partnership Agreement on Land Infrastructure Projects.

²¹ *Birnbaumer v Department of Industry Technology and Resources* (1986) 1 VAR 279 at 286; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* (2004) 21 VAR 68; [2004] VCAT 924 at [71].

²² [2011] VCAT 1230 at [62].

52. The National Partnership Agreement on Land Infrastructure Projects is an agreement between the Commonwealth government and state and territory governments that supports the delivery of transport infrastructure projects with funding from the Commonwealth government.²³
53. The information exempted in point 6(c) of Document 2 contains an opinion in relation to the recommended approach in point 6. In my view, the exempted information contains strategic information in relation to Victoria's bargaining power with the Commonwealth Government. I am satisfied disclosure would be contrary to the public interest of Victorians, however, not for the reasons set out in the Millar decision excerpted above. In my view, the appropriate exemption to consider is section 30(1), which will be discussed below.
54. The remaining information exempted under section 29(1)(a) appears in a letter from the Prime Minister of Australia to the Premier of Victoria. The Agency consulted with the Department of Prime Minister and Cabinet who advised the letter was communicated in confidence and disclosure would undermine the confidentiality of the communication. It also considers disclosure would impede frank discussion and negotiations between two governments, both at a ministerial and official level, which would invite caution when recording discussions. It considers protecting uninhibited exchanges between the Commonwealth and state government is critical to ensuring robust negotiations to achieve best outcomes for the public.
55. Having carefully reviewed the exempted information, I consider it is unlikely disclosure of the information would hinder future negotiations between the Commonwealth and Victorian governments or the recording of similar information in the future. While it discloses the subject matter of a discussion between the Ministers, it does not divulge anything particularly sensitive or confidential in nature. Having considered the factors that were accepted by VCAT in Millar, above, I am not satisfied disclosure would be contrary to the public interest.
56. As such, Document 2 does not contain information that is exempt from release under section 29(1)(a).
57. The Schedule of Documents in **Annexure 1** sets out my decision on section 29(1)(a) to the relevant document.

Section 30(1) – Internal working documents

58. 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.
59. The exemption does not apply to purely factual material in a document.²⁴
60. 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.

²³ Land Transport Infrastructure Projects (2019-2024), available at <<https://federalfinancialrelations.gov.au/agreements/land-transport-infrastructure-projects-2019-2024>>.

²⁴ Section 30(3).

61. 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.²⁵
62. Section 30(3) provides purely factual information is not exempt under section 30(1).
63. ‘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.²⁶
64. In *Re Waterford and Department of Treasury (No.2)*,²⁷ 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.
65. 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. In doing so, I have given weight to the following relevant factors:²⁸
- (a) the right of every person to gain access to documents under the FOI Act;
 - (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (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.

Document 1

66. Document 1 is a briefing to the Minister for Transport Infrastructure concerning the Agency’s Strategic Plan and its approach to releasing the plan. The purpose of the briefing was to inform the Minister of the Strategic Plan and release approach.

²⁵ *Mildenhall v Department of Education* (1998) 14 VAR 87.

²⁶ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

²⁷ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

²⁸ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

67. The information exempted under section 30(1) is a communications plan that was prepared for the release of the Strategic Plan to internal and external stakeholders.
68. The Agency submits the communications plan was not intended to be a publicly available document, and that it is unapproved and incomplete. It considers disclosure would be contrary to the public interest as it is likely to be misleading, inaccurate and depicts a course of action that has not been endorsed. The Agency undertook searches for a final version of the plan, however, it determined it either does not exist or could not be located.
69. I am not satisfied disclosure would be contrary to the public interest because:
- (a) The document subject to review is clearly identifiable as a draft, as it is watermarked with the term 'DRAFT' on the front page and footer of the document.
 - (b) Draft documents are not an exempt class of documents.
 - (c) Despite the document being labelled as a draft, it is likely that it is the final version of the communications plan that was considered by the Minister, given the subject matter of the briefing to which it was attached.
 - (d) The Applicant and the wider community can understand the status of draft documents, and that the communications strategy may not have eventuated as planned in the draft communications plan.
 - (e) The document concerns communication of a Strategic Plan that is now publicly available on the Agency's website.²⁹
 - (f) I acknowledge the document contains a small amount of information the Agency considers sensitive, however I consider given the time that has passed, any sensitivity has likely subsided.
70. As such, I am not satisfied information in Document 1 is exempt under section 30(1).

Document 2

71. As noted above, the Agency exempted paragraph 6(c) in a briefing to the Minister for Transport Infrastructure under sections 30(1) and 29(1)(a) and contains strategic information about the Victorian Government's bargaining power with the Commonwealth Government with respect to funding.
72. I am satisfied it is matter in the nature of opinion and was communicated for the purposes of the Minister's deliberations with respect to the National Partnership Agreement on Land Infrastructure Projects.
73. I am satisfied disclosure could impact Victoria's bargaining power with the Commonwealth and impacting funding outcomes.
74. Therefore, I am satisfied paragraph 6(c) is exempt under section 30(1).

Document 3

75. As explained above, Document 3 is a briefing to the Minister for Transport Infrastructure concerning the release of funding to deliver the William Street Opportunities Plan.

²⁹ Department of Transport, *Our Strategic Plan 2019-23*, available at <<https://transport.vic.gov.au/-/media/tfv-documents/planning/dot-strategic-plan---simple-connected-journeys-2019-23.pdf?la=en&hash=B730521269D4AEE4BADCEDF2460FA845>>.

76. The Agency exempted part of the *Westgate Tunnel Early Works Register* under the section 30(1), which is also referred to in the briefing as the *Draft Pipeline of initiatives that are being developed*. The specific information exempted is the funding sought for each initiative.
77. I accept the status of the document is a draft, and therefore, the amounts of funding may no longer be relevant, or reflect the amount of funding that was sought. However, in my view, the monetary amounts in the column titles 'Approx. funding sought' is factual in nature as it concerns either a final decision on the amount of funding sought, or the amount that was intended to be sought, at the time in which the document was created. While the document was provided to the Minister 'for information', I am not satisfied it was provided to the Minister for the purpose of consultation or deliberation in relation to the initiatives by the Minister. Accordingly, I am not satisfied the funding amounts reflect advice, recommendation, opinion, or consultation or deliberation that has taken place between Agency officers, for the purposes of section 30(1).
78. As explained above, I am not satisfied the letters in Document 3 are exempt under section 28(1)(d). Accordingly, I have considered the application of section 30(1). I am satisfied the letters are communications between a Minister and Councilors made for the dominant purpose of consultation and deliberation by the relevant local Council. The letters were communicated for the Council's deliberative processes, specifically, its Council Plan Strategies.
79. I am satisfied there is some information in the second letter that is more sensitive in nature, as it contains planning related information that if prematurely released, could lead to speculation. However, in my view, speculation about the matter will occur regardless of whether the document is disclosed or not.
80. Given certain information is in the public domain with respect to the matters discussed in the letters, as outlined above with respect to section 28(1)(d), I am not satisfied there is much sensitivity with respect to the specific issues discussed. While the matters may have been sensitive in [year] when the letters were created, I consider it is reasonably likely that the sensitivity of the issues has diminished over time.
81. I also consider it unlikely disclosure would lead to the inhibition of similar communications in future, particularly as the second letter was intended to address matters to be discussed at the local Council's Future Melbourne Committee meeting, and information about the meeting is publicly available.
82. On balance therefore, I am not satisfied disclosure would be contrary to the public interest.
83. Accordingly, the figures exempted in Document 3 are not exempt under section 30(1).

Document 4

84. As explained above, Document 4 is a briefing to the Minister for Transport Infrastructure concerning planning for an extension of the Cranbourne rail line to Clyde, to which I am satisfied contains exempt information under section 28(1)(ba). Accordingly, I have considered the application of section 30(1) only to the remaining information exempted by the Agency.
85. The government has announced that it is planning to extend the Cranbourne Line to Clyde.³⁰ While the document may be considered sensitive as it relates to a major rail infrastructure project that directly affects the local community, I consider any such sensitivity is better addressed by promoting transparency in government decision making rather than by maintaining secrecy. I consider members of the community benefit from access to such publicly funded project planning and development

³⁰ <https://bigbuild.vic.gov.au/library/level-crossing-removal-project/rail/clu/fact-sheets/cranbourne-line-upgrade-community-update-september-2019>

information to allow for greater transparency of and participation in government decision making and promotes accountability of the public sector in relation to the expenditure of public funds.

86. I note the Agency's concern that there may be information in the document that may be subject to change. In my view, having carefully considered the contents of the document, it is evident on its face that it represents early considerations with respect to the Clyde Rail Extension, and the matters discussed would be reasonably likely to be subject to change. In my view, disclosure would not mislead the public in relation to the current status of the project, as it was clearly created at an early stage.
87. Accordingly, I am not satisfied the remaining exempted information is exempt under section 30(1).
88. My decision on section 30(1) is outlined further in the Schedule of Documents in **Annexure 1**.

Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage

89. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, 'in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage'.
90. Therefore, a document will be exempt from release under section 34(4)(a)(ii) if:
- (a) the agency is engaged in trade or commerce;
 - (a) the document contains information of a business, commercial or financial nature; and
 - (b) its disclosure of which would be likely to expose the agency unreasonably to disadvantage.

Is the Agency engaged in trade and commerce?

91. Whether an agency is engaged in trade or commerce depends on the facts and circumstances in each case.³¹
92. VCAT has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'.³²
93. VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.³³
94. An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency's other functions.³⁴
95. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.³⁵
96. While the phrase 'trade and commerce' may be interpreted broadly,³⁶ it has been held trade and commerce must 'of their nature, bear a trading or commercial character'.³⁷

³¹ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

³² *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

³³ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society Ltd (No 12)* (1978) 22 ALR 621 at [649].

³⁴ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

³⁵ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

³⁶ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

³⁷ *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

97. The fact an agency's main activities may be described as 'governmental' does not preclude it from relying on the exemption under section 34(4)(a)(ii).³⁸
98. In Document 3, the Agency exempted part of the *Westgate Tunnel Early Works Register* under section 34(4)(a)(ii), which is also referred to in the briefing as the *Draft Pipeline of initiatives that are being developed*. The specific information exempted is the funding sought for each initiative. The Agency submits the estimated funding amounts are commercially sensitive as it would reveal the budgeted amount to potential contractors for specific capital works and would therefore prejudice any market tenders and increase the propensity for price fixing amongst bidders.
99. Having considered the description of each initiative, I am not satisfied the essential character or core activity undertaken by the State Government in these instances is that of trade and commerce. Rather, the initiatives concern the delivery of publicly funded planning projects on behalf of the community and the government's core functions.
100. While the first limb of the exemption has not been met, I will consider the remaining limbs for completeness.

Do the documents contain information of a business, commercial or financial nature?

101. I am satisfied the funding amounts is financial information.

Would disclosure be likely to expose the Agency unreasonably to disadvantage?

102. Whether disclosure is likely to expose an agency *unreasonably* to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that are likely to follow from disclosure of the information.
103. The provision contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage, and that any such exposure must be unreasonable.
104. As mentioned above, the Agency submits disclosure would prejudice market tenders.
105. I consider, in general terms, that any contract negotiations will be influenced by a number of factors including the subject of the contract, the bargaining power of the contracting parties and the existence of competitive pressures to obtain the benefit of the contract. I consider government agencies have considerable bargaining strength. Businesses will more likely than not be prepared to do business with government agencies where they consider it is in their commercial interests to do so.
106. In this particular matter, the potential scope of work for a tender in relation to each of the initiatives is not established in detail in the document. The document only outlines a brief description of each initiative under a column headed 'initiative name'. I am not satisfied potential tenderers could use the funding amounts in conjunction with the description of the initiative that would lead to higher bids for services. Accordingly, I am not satisfied the document discloses information that would undermine the Agency's ability to enter into contractual agreements at a fair and reasonable costs.
107. Additionally, I am of the view transparency and accountability in the expenditure of public funds outweighs any potential disadvantage to which the Agency may be exposed if the document is disclosed.
108. Therefore, I am not satisfied the information the Agency exempted under section 34(4)(a)(ii) is exempt under section 34(4)(a)(ii).

³⁸ *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

109. My decision on section 34(4)(a)(ii) is set out further in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

110. 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.

111. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’³⁹ 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 25.⁴⁰

112. As the Applicant does not seek review of information exempted under section 33(1), the information that the Agency exempted under section 33(1) is irrelevant information for the purposes of this review and is to remain deleted in accordance with section 25.

113. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning. Accordingly, access to the documents is granted in part.

Conclusion

114. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 28(1)(ba) and 30(1). I am not satisfied information from the documents is exempt from release under sections 28(1)(d), 29(1)(a) or 34(4)(a)(ii).

115. Accordingly, my decision on the Applicant’s request differs from the Agency’s decision in that I have decided to release additional information where I am satisfied it is not exempt from release.

116. As I am satisfied 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, access to documents is granted in part.

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

Review rights

118. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁴¹

119. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴²

120. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁴³

121. 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.

³⁹ *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].

⁴⁰ *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].

⁴¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁴² Section 52(5).

⁴³ Section 52(9).

122. 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.⁴⁴

When this decision takes effect

123. 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.

⁴⁴ 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.	5/08/2019	BMIN19003967 Ministerial Briefing	41	Released in part Sections 30(1), 33(1)	Release in part Section 25 The document is to be released except for the information the Agency exempted under section 33(1) that is to be deleted in accordance with section 25.	Section 30(1): I am not satisfied the document contains information that is exempt under section 30(1) for the reasons provided in the Notice of Decision, above. Section 33(1): The Applicant does not seek review of the information exempted under section 33(1). Therefore, the information the Agency exempted under section 33(1) is to remain deleted. Section 25: 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.
2.	9/09/2019	BMIN19004559 Ministerial Briefing	12	Released in part Sections 29(1)(a), 30(1), 33(1)	Release in part Sections 30(1), 25 The document is to be released except for the information the Agency exempted under section 33(1) and paragraph 6(c) which is to	Section 29(1)(a): I am not satisfied the document contains information that is exempt from release under section 29(1)(a) for the reasons provided in the Notice of Decision, above. Section 30(1): I am satisfied paragraph 6(c) is exempt

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					be deleted in accordance with section 25.	under section 30(1) for the reasons provided in the Notice of Decision above. Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.
3.	19/09/2019	BMIN19004569 Ministerial Briefing	22	Released in part Sections 28(1)(d), 30(1), 33(1), 34(4)(a)(ii)	Release in part The document is to be released except for the information the Agency exempted under section 33(1) that is to be deleted in accordance with section 25.	Section 28(1)(d): I am not satisfied the document is exempt under section 28(1)(d) for the reasons provided in the Notice of Decision above. Section 30(1): See comments for Document 2. Section 33(1): See comments for Document 1. Section 34(4)(a)(ii): I am not satisfied information in the document is exempt under section 34(4)(a)(ii) for the reasons provided in the Notice of Decision above. Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	12/09/2019	BMIN19004647 Ministerial Briefing	6	Released in part Sections 28(1)(ba), 30(1), 33(1)	Release in part Sections 28(1)(ba), 25 The document is to be released, except for the following information which is to remain deleted in accordance with section 25: (a) the information the Agency exempted under section 33(1), which is irrelevant information for the purposes of this review; (b) on page 1, the second sentence under the heading 'Core message', which is exempt under section 28(1)(ba); (c) on page 2, points (b) and (c) which are exempt under section 28(1)(ba); (d) on page 3, points 2(a) to 2(f) under the heading 'Key information', which is exempt under section 28(1)(ba) (the bolded two-	Section 28(1)(ba): I am satisfied certain information in the document is exempt under section 28(1)(ba), for the reasons outlined in the Notice of Decision above. Section 30(1): See comments for Document 1. Section 33(1): See comments for Document 1. 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.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>line title of point 2 itself is to be released);</p> <p>(e) on page 4, all of point 3, which is exempt under section 28(1)(ba);</p> <p>(f) on page 5, all information in the third and fourth columns, which is exempt under section 28(1)(ba); and</p> <p>(g) page 6, which is exempt under section 28(1)(ba).</p>	
5.	4/11/2019	BMIN19004849 Ministerial Briefing	127	Released in part Sections 28(1)(ba), 30(1), 33(1)	Released in part Sections 28(1)(ba), 25 The information exempted by the Agency is to remain deleted, except for paragraph 4(a) which is to be released.	<p>Section 28(1)(ba): See comments for Document 4.</p> <p>Section 30(1): Given my decision on section 28(1)(ba), it is unnecessary to consider the application of section 30(1) to the same information.</p> <p>Section 33(1): See comments for Document 1.</p> <p>Section 25: See comments for Document 4.</p>
6.	8/10/2019	BMIN19004878 Ministerial Briefing	30	Released in part Section 33(1)	Not subject to review	Sections 33(1): See comments for Document 1. Accordingly,

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						this document is not subject to review.
7.	22/10/2019	BMIN19004947 Ministerial Briefing	209	Released in part Sections 28(1)(ba), 30(1), 33(1)	Release in part Sections 28(1)(ba), 25 No further information is to be released.	Section 28(1)(ba): See comments for Document 4. Section 30(1): See comments for Document 5. Section 25: See comments for Document 4.

