

## Notice of Decision and Reasons for Decision

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Applicant: 'DL5'  
Agency: Department of Transport  
Decision date: 6 August 2021  
Exemption considered: Section 28(1)(b)  
Citation: 'DL5' and Department of Transport (Freedom of Information) [2021]  
VICmr 231 (6 August 2021)

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FREEDOM OF INFORMATION – submission proposal – cabinet-in-confidence – business case – attachment to cabinet submission

All reference 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 is the same as the Agency's decision.

I am satisfied the document is exempt from release under section 28(1)(b).

As I am satisfied it is not practicable to provide an edited copy the document with exempt information deleted in accordance with section 25, I have refused access to the document in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

6 August 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the business case for the Mernda Rail Extension (**MRE**).
2. The Agency identified the business case falling within the terms of the Applicant's request. It decided to refuse access to the document in full. The Agency relied on section 28(1)(b) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

### Review

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 28(1) – Cabinet documents**

9. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
10. In *Ryan v Department of Infrastructure*,<sup>1</sup> 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.

#### **Section 28(1)(b)**

11. Section 28(1)(b) provides a document is an exempt document if it is a document that has been prepared by a Minister or on his or her behalf, or by an agency, for the purpose of submission for consideration by the Cabinet.

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<sup>1</sup> (2004) VCAT 2346 at [33].

12. A document will be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to the Cabinet for its consideration. In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to the Cabinet.<sup>2</sup>
13. Section 28(3) provides the exemption in section 28(1) does not apply to a document to the extent it contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.<sup>3</sup>
14. Further, section 28(3) has been held not to apply in the following circumstances:

In relation to the exception contained in section 28(3) of the Act, an examination of the business plan and its annexures satisfies me that there is no material of a purely statistical, technical or scientific nature such that the exemption would apply. I agree with the opinion of Mr Oulton that it does not contain any purely technical, scientific or statistical information. Statistical, scientific and technical information in the business case appears by way of argument, evaluation, proposals and modelling relating to the Project, based on subjective assumptions by, or inputs from, the relevant authors, experts or consultants.<sup>4</sup>

15. In its submission to OVIC, the Agency provided the following background information:

The Government made an election commitment to extend metropolitan rail services from South Morang Station to Mernda on 25 September 2014, ahead of the November 2014 State election.

During 2015, the former Public Transport Victoria (PTV) was responsible for preparing the Mernda Rail Extension Project Business Case (**the business case**) ...

16. The Agency also advised:
  - (a) the business case was submitted to a subcommittee of the Cabinet and was registered with a submission number in December 2015;
  - (b) the subcommittee covering sheet was provided to OVIC; and
  - (c) the business case was prepared by the former Public Transport Development Authority (also known as Public Transport Victoria) for the sole or dominant purpose of submission for consideration by the Cabinet.
17. In their review application, the Applicant submits in summary:
  - (a) Business cases for major government projects are routinely publicly released.
  - (b) Governments often refer to business cases, which is not the case for other documents submitted to the Cabinet.
  - (c) Governments often refer to business cases in ways that suggest that an important purpose of preparing these documents is both to ensure projects are well planned and well justified and for the public to see that such planning and scrutiny has taken place.
  - (d) Business cases often formalise political decisions already announced.

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<sup>2</sup> *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

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

<sup>4</sup> *Donnellan v Linking Melbourne Authority (Revised) (Review and Regulation)* [2014] VCAT 1027 at [63].

- (e) A business case is a type of document that has a widely understood and relatively consistent form and function, which is in important part about due diligence in government investment decision making. That is, in general, documents in this category are typically prepared for important purposes other than consideration by the Cabinet, in addition to the purpose of consideration by the Cabinet.
  - (f) While some parts of this content may be considered by the Cabinet, other parts are not. For instance, the problem, benefits, options, preferred option and sometimes even implementation, are often publicly canvassed before a business case has been prepared, and so it is unlikely that the Cabinet has genuinely considered these matters.
  - (g) What is publicly known about this business case suggests its preparation cannot be said to have been for the sole or dominant purpose of consideration by the Cabinet. As the document was being prepared, the Government made extensive reference to it in the context of it being an important tool for good planning and design, but not as a means of assisting the Cabinet to consider whether the project would proceed.
  - (h) Under section 28(3), purely statistical, technical, or scientific information in a document is not exempt unless it discloses deliberations or a decision of the Cabinet. Much of the content of a business case, in particular, the economic evaluation, which is a social scientific tool for assessing the costs and benefits of a project, is purely technical. The release of this portion of the business case would not disclose a decision of the Cabinet to proceed with the project, since this is public information already.
18. From the information before me, I am satisfied the document was prepared for the dominant purpose of submission for consideration by the Cabinet based on the following factors:
- (a) The document appears as an attachment to a submission to a subcommittee of the Cabinet.
  - (b) The document is a business case prepared by Public Transport Victoria and is marked 'cabinet-in-confidence'.
  - (c) The purpose of the document is described as seeking capital funding for a project with a significant cost. I consider it is likely such projects would be subject to the Cabinet consideration and approval based on the high expenditure value and could not be approved by the relevant Minister or Department.
  - (d) In relation to section 28(3), I do not consider the document contains purely statistical, technical or scientific information, as described by the Applicant or otherwise. Rather, as stated above, the document can be described as containing information which has been prepared by technical experts based on the application of their knowledge and expert knowledge, rather than merely stating facts and quoting technical data devoid of any analysis or deliberation.
  - (e) I acknowledge the Applicant's view the document could serve additional purposes besides submission to the Cabinet for its consideration, and the Government's public statements about the business case being for 'planning and preparation'<sup>5</sup> of the project. However, I accept the Agency's advice that the dominant purpose for which the document was prepared was for consideration by a subcommittee of the Cabinet.

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<sup>5</sup> Media release, Premier of Victoria, *Biggest Public Transport Investment In Victoria's History* (15 May 2015) at <https://www.premier.vic.gov.au/biggest-public-transport-investment-victorias-history>.

- (f) The exemption in section 28(1)(b) requires I consider whether the document was created for the purpose of submission for consideration by the Cabinet only. It does not require that the purpose for which the document was created was for the Cabinet to make a particular decision or agree to a proposal.
- (g) The public reporting of the existence or funding of the business case is also not a factor I can consider in determining whether the document is exempt under section 28(1)(b).

19. According, I am satisfied the document is exempt from release under section 28(1)(b).

#### ***Deletion of exempt or irrelevant information***

- 20. 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.
- 21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</sup> 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.<sup>7</sup>
- 22. I have considered the effect of deleting exempt information in the document in accordance with section 25. I am satisfied it is not practicable to do so given it would render the document meaningless.

#### **Conclusion**

- 23. On the information before me, I am satisfied the document is exempt from release under section 28(1)(b).
- 24. As I am satisfied it is not practicable to provide an edited copy the document with exempt information deleted in accordance with section 25, I have refused access to the document in full.

#### **Review rights**

- 25. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>8</sup>
- 26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
- 27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
- 28. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.

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<sup>6</sup> *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].

<sup>7</sup> *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].

<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

29. 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.<sup>11</sup>

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<sup>11</sup> Sections 50(3F) and (3FA).