

Notice of Decision and Reasons for Decision

Applicant: 'CQ2'
Agency: Major Transport Infrastructure Authority
Decision Date: 5 February 2021
Exemption considered: Section 30(1)
Citation: 'CQ2' and Major Transport Infrastructure Authority (*Freedom of Information*) [2021] VICmr 38 (8 February 2021)

FREEDOM OF INFORMATION – ministerial brief – Major Road Projects Victoria – transport infrastructure – Monash Freeway Upgrade – options considered – internal working document – disclosure not contrary to the public interest

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 in that I have decided to release additional information in the documents.

I am not satisfied Document 1 is exempt under section 30(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of Documents 1 and 2 with irrelevant information deleted in accordance with section 25, I have determined to grant access to these documents in part.

My decision in relation to each document is set out in the Schedule of Documents in **Annexure 1**.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
5 February 2021

Reasons for Decision

Background to review

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

Briefs, presentations, proposals and/or plans prepared by Major Road Projects Victoria and sent to the Minister for Transport Infrastructure for consideration, in specific reference to proposed noise attenuation works options related to the upgrade of [named] Road as part of the Monash Freeway Upgrade – Stage 2 (East), prepared between 1 January 2019 and the date of this request.
2. The Applicant does not seek access to personal affairs information of non-executive Agency staff and other third parties.
3. In its decision, the Agency identified two documents falling within the terms of the Applicant's request:
 - (a) Document 1, is a briefing to the Minister for Transport Infrastructure, to which access was refused in part under section 30(1); and
 - (b) Document 2 is a letter to the City of Casey to which access was refused in part with irrelevant information deleted in accordance with section 25.
4. The Agency also located three additional documents relevant to the scope of the request, however, it determined to exclude these documents from the request as the documents were provided to the Applicant in a previous FOI request regarding documents dealing with similar subject matter.
5. The Agency's decision letter sets out the reasons for its decision.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. During the course of the review, the Applicant advised they do not seek review of the names and telephone numbers of Agency officers deleted by the Agency in Document 1 on grounds they do not seek access to this information.
8. I have examined a copy of the documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties.
11. 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.
12. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that 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)

13. The Agency exempted certain information in Document 1 under section 30(1).
14. 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 in 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.
15. Section 30(3) provides purely factual information is not exempt under section 30(1).
16. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency and any person engaged by or on behalf of an agency, whether or not that person is subject to the Public Administration Act 2004 (Vic).¹

Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer or minister or in consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

17. For section 30(1) to be satisfied, a document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers. 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
18. The document is a briefing to the Minister for Transport Infrastructure regarding the Monash Freeway Upgrade. The information exempted by the Agency concerns two options considered by the Agency in response to amenity concerns raised by members of the public in relation to the upgrade of [named] Road in Berwick.
19. Having reviewed the document, I am satisfied it contains matter in the nature of advice, opinion and recommendation prepared by Agency officers and provided to and the relevant Minister. Accordingly, the first requirement of section 30(1) is met.

Was the information communicated in the course of the Agency's deliberative processes?

20. 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
21. In *Re Waterford and Department of Treasury (No.2)*,⁴ the 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.

¹ See *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services (No 2)* (1998) 14 VAR 347.

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 (1981) 1 AAR 1.

22. I am satisfied the document was provided to the relevant Minister in the course of the Agency's deliberative processes in relation to the planning and implementation of a major road and infrastructure project in Victoria. Accordingly, the second requirement of section 30(1) is met.

Would disclosure of the information be contrary to public interest?

23. Determining whether disclosure of information would be contrary to the public interest requires a 'process of the weighing against each other conflicting merits and demerits'.⁵
24. I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of government held information and documents. In doing so, I have taken the following factors into consideration:⁶
- (a) the right of every person to seek 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 making 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.
25. The Agency determined disclosure of the information it exempted under section 30(1) in Document 1 would be contrary to the public interest as:
- the options canvassed in the document relate to a sensitive matter. It is likely that release of the information would fuel unnecessary debate as to preliminary options considered, but not ultimately chosen, including stress and anxiety amongst the public regarding those options;
 - the information contained in the documents regarding those options is preliminary in nature only. Therefore, it would not provide the full detailed reasons as to why the particular option was not chosen, leading to likely confusion and misleading information amongst the public; and
 - disclosure would inhibit frankness and candour in future pre-decisional communications regarding high level and sensitive Government projects of this nature.

⁵ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

26. In support of their application for review, the Applicant submits:

The Agency has been in long-term dialogue with the residents adjoining a particular section of the road. For many months, the residents group have requested sound barriers to be installed along the section of [named] Road that would pass closely to their street (less than 5 metres). The Agency promised the residents that 'multiple options' were presented to the Minister for consideration, however would not say what they were. The Agency should, in my opinion, fully disclose ALL of the options that were presented, and in particular the reasons that dictated options one and two were not selected.

27. In the circumstances of this matter, I have determined disclosure of exempted information in Document 1 would not be contrary to the public interest for the following reasons:

- (a) I acknowledge the Agency's submission regarding its view on the sensitivity of the document. However, I consider any sensitivity associated with the road project would be better addressed by promoting transparency rather than by maintaining secrecy.

The information exempted by the Agency relates to a road project that directly affects members of the public. I consider there is a public interest in persons, who may have been affected by the project, being better informed about the options considered by the government, regardless of whether those options were ultimately adopted. Accordingly, I am of the view, disclosure of the documents will promote transparency and accountability in government decision making.

- (b) While I acknowledge the information exempted by the Agency reflects options considered that were not ultimately adopted, I am not persuaded disclosure of other options considered at a point in time would be likely to misinform or confuse the public or cause unnecessary debate.

In my view, the Agency's view underestimates the capacity of the public to be informed about and understand advice received and decisions made by government. In addition, it also minimises the importance of public engagement and participation in government policy and decision making. In any event, I consider whether or not disclosure of the documents would 'fuel unnecessary [public] debate' is an issue best left to the public to determine rather than government.

Nevertheless, it is open for the Agency to release the documents with any necessary additional information explaining the basis of any decision made to eliminate or minimise any potential for confusion or misunderstanding concerning the documents.

- (c) I am not satisfied disclosure of this information would negatively impact upon the nature or quality of advice and recommendations prepared by Agency officers for future or similar projects. I take the view greater transparency can improve the quality of advice provided to decision makers and, in turn, strengthens government decision making in relation to major infrastructure projects.
- (d) In any case, Agency officers, as public servants, are required to discharge their duty to provide impartial and fulsome advice to decision makers, and stakeholders, given this requirement is a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic).⁷ I am not persuaded Agency officers would be deterred from discharging their professional and ethical obligations should the documents be disclosed under the FOI Act, particularly in relation to the discussion of matters of significance to the Agency.

⁷ For example, see public sector values in section 7(1) of the *Public Administration Act 2004* (Vic) (including Responsiveness, Integrity and Impartiality) and the Victorian Public Service Commission, *Code of Conduct for Victorian Public Sector Employees*.

- (e) In the decision of *Graze v Commissioner for State Revenue*,⁸ the Victorian Civil and Administrative Tribunal (VCAT) considered the possibility of public scrutiny, in some circumstances, will provide for better administrative decision making in the best interests of the public:

As I have in frequently observed Freedom of Information determinations over the years, the possibility of public scrutiny may improve the quality of advice that is given to administrative decision-makers. The provision of advice that is superficial or the result of insufficient analysis or might be thought to be slanted to a particular political view would be deterred by the prospect that such advice might come to light under the Freedom of Information system. The fact that Parliament has left the public interest issues relative to internal working documents at large indicates, to my mind, that it contemplates that the public interest may cut both ways.⁹

28. Accordingly, I am satisfied disclosure of Document 1 under the FOI Act would not be contrary to the public interest, and the document is not exempt under section 30(1).
29. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

30. The Agency deleted personal affairs information in Documents 1 and 2 in accordance with section 25.
31. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information in the document and the applicant agrees to receiving such a copy.
32. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making any deletions ‘from a resources point of view’¹⁰ and the effectiveness of any deletions. Where deletions would render a document meaningless, they are not ‘practicable’, and release of the document is not required under section 25.¹¹
33. I have considered information the Agency deleted on grounds it is the personal affairs information of Agency officers and as irrelevant to the terms of the Applicant’s request. I agree the information deleted in the document falls outside the scope of the Applicant’s request as it consists of the names and telephone numbers of executive and non-executive Agency officers and third parties.
34. I am satisfied it is practicable to delete this irrelevant information in accordance with section 25, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

35. On the information before me, I am not satisfied Document 1 is exempt under section 30(1).
36. As I am satisfied it is practicable to provide the Applicant with an edited copy of Documents 1 and 2 with irrelevant information deleted in accordance with section 25, I have determined to grant access to these documents in part.
37. My decision in relation to each document is set out in the Schedule of Documents in **Annexure 1**.

⁸ [2013] VCAT 869.

⁹ Ibid at [26].

¹⁰ *Mickelburgh 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].

¹¹ *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].

Review rights

- 38. If the Agency 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 either party applies to VCAT for a review of my decision.¹⁴

When this decision takes effect

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

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).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Ministerial briefing	32	Released in part Sections 30(1), 35(1)(b)	Release in part Section 25 The document is to be released except for the irrelevant information which is to be deleted in accordance with section 25.	Section 30(1): I am not satisfied the document is exempt under section 30(1) for the reasons in the Notice of Decision above. Section 25: I am satisfied information the Agency determined is 'not relevant' is irrelevant to the terms of the Applicant's request and it is practicable delete this information in accordance with section 25.
2.	[date]	Letter to City of Casey	2	Released in part Section 25	Release in part Section 25 The document is to be released except for the irrelevant information which is to be deleted in accordance with section 25.	Section 25: I am satisfied information the Agency determined is 'not relevant' is irrelevant to the terms of the Applicant's request and it is practicable delete this information in accordance with section 25.