

Notice of Decision and Reasons for Decision

Applicant:	'EZ6'
Agency:	Parks Victoria
Decision date:	16 February 2023
Exemptions considered:	Sections 30(1), 34(4)(a)(ii), 36(1)(b), 33(1)
Citation:	'EZ6' and Parks Victoria (Freedom of Information) [2023] VICmr 6 (16 February 2023)

FREEDOM OF INFORMATION – business case – internal working document – costing and analysis – external consultant report – disclosure not contrary to public interest– agency not engaged in trade or commerce – disclosure would not expose the Agency unreasonably to disadvantage

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 a document 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 determined to release additional information in the document to the Applicant.

I am satisfied section 30(1) applies to parts of the document. However, I am not satisfied any information is exempt under sections 34(4)(a)(ii) and 36(1)(b).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part.

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

A marked-up copy of the document indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner
16 February 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the Business Case for the Falls to Hotham Alpine Crossing.
2. The Agency identified one document falling within the terms of the Applicant's request and released the document in part, relying on the exemptions under sections 30(1), 33(1), 34(4)(a)(ii) and 36(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant indicated they do not seek access to personal affairs information. Accordingly, information the Agency exempted from release under section 33(1) is not subject to review.
5. I have examined a copy of the document 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.
10. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Review of exemptions

Section 30(1) – Internal working documents

11. 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; and
 - (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.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

12. The exemption does not apply to purely factual material in a document.²
13. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of the agency, a member of the agency’s staff, and any person employed by or for the agency, regardless of whether they are subject to the *Public Administration Act 2004* (Vic) apply or not.

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?

14. 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.
15. 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.³
16. The document is a Business Case prepared by [name of consultant] (**third-party consultant**), engaged by the Agency to provide an in-depth analysis of the Falls to Hotham Alpine Crossing (**the project**). I am satisfied the third-party consultant is an ‘officer’ for the purposes of the FOI Act.
17. The Agency applied section 30(1) to exempt parts of the document. The information includes estimates, financial figures, project forecasts and analysis relating to the project. I am satisfied the information amounts to opinion, advice or recommendation prepared by an officer of the Agency.

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?

18. The term ‘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.⁴
19. In *Re Waterford and Department of Treasury (No.2)*,⁵ 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.

20. I am satisfied the document was prepared in the course of, and for the purposes of, the deliberative processes involved in assessing the viability, implementation, operating costs and benefits of the project.

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

21. In deciding if release is 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.
22. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁶

² Section 30(3).

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

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

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

- (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.
23. In summary, the Agency submits disclosure would be contrary to the public interest for the following reasons:
- (a) the information is sensitive in nature and provides only a part explanation into decision-making;
 - (b) the figures were assumptions and estimates produced at a particular point in time and are now inaccurate;
 - (c) release of the information may cause confusion, unnecessary debate and may result in misinformation being spread about the project; and
 - (d) to address the issue of misinformation, the community has been actively informed and consulted about the project with information about the project published online.
24. In summary, the Applicant submits disclosure would not be contrary to the public interest for the following reasons:
- (a) the project is funded by the taxpayer and therefore it is in the public interest to release the information; and
 - (b) full disclosure of the document will allow the public to make informed decisions about the project.
25. Having reviewed the document, I am satisfied release of certain information that includes detailed costs and financials, would be contrary to the public interest as it can be used to influence future bids relating to project tenders.
26. However, where the information includes overall estimates, financial totals, project risks, projects timelines and other forecasts, I am not satisfied disclosure would be contrary to the public interest because:

- (a) I do not consider the information to be particularly sensitive or contentious. Where the information is out of date, or where possibilities have been considered but not adopted, I do not consider disclosure of the information would cause confusion and ill-informed debate given the capacity of the Applicant to understand the nature of the Agency's requirement to consider and assess potential scenarios relating to the project.
- (b) I consider disclosure of such information assists in building community trust in government and its decision making process, particularly where it relates to a large project affecting Victoria's alpine region.
- (c) There is a strong public interest in the public being informed about the potential impact and costs of large-scale development projects on the community. Responsible government calls for adequate degree of transparency to enable informed public debate. I consider disclosure of the information will increase the quality of information available to the public upon which any debates is based. If the public is informed about the underlying analysis and policies in relation to projects only after a decision is made, the ability to engage in informed and effective debate is significantly reduced.
- (d) It is open to the Agency to release the information with any necessary explanation required to eliminate or minimise any potential misunderstanding or misinterpretation concerning the information in the document.

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

27. 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'. A document is exempt 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) disclosure of which would be likely to expose the agency unreasonably to disadvantage.
28. This exemption has been applied to certain information in the document.
29. I will not consider the application of section 34(4)(a)(ii) to information I have already determined is exempt under section 30(1).

Is the Agency engaged in trade and commerce?

30. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.⁷
31. The Victorian Civil and Administrative Tribunal (**VCAT**) has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'.⁸ VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.⁹ 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.¹⁰

⁷ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

⁸ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

⁹ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

¹⁰ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

32. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.¹¹
33. While the phrase ‘trade and commerce’ may be interpreted broadly,¹² it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.¹³
34. The fact an agency’s predominant activities may be described as ‘governmental’ does not preclude it from relying on the exemption under section 34(4)(a)(ii).¹⁴
35. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself or part of its operations, in a manner similar to a commercial entity.
36. The Agency submits:
- Parks Victoria plays a key role in tourism and works closely with the industry, government, and community to facilitate appropriate sustainable and positive visitor experiences across our parks estate. Under section 27D(1) of the *National Parks Act 1975*, Parks Victoria will issue licences to Licenced Tour Operators (LTOs) who currently have tourism products registered in the Alpine National Park as part of the delivery of the FHAC [Falls to Hotham alpine Crossing] Project. Therefore, Parks Victoria is engaged in trade or commerce, as it issues tourism licenses which are of a trading or commercial character.
37. I accept the Agency may be engaged in commercial activity insofar as it issues tourism licenses, for, or in connection with, carrying out its functions and powers under the *National Parks Act 1975*. However, having considered the information subject to review, as well as the Agency’s submission, I am not satisfied that the essential character or core activity undertaken by the Agency in this instance is that of ‘trade or commerce’. Therefore, I do not accept the Agency is engaged in trade and commerce in this particular case.
38. Nonetheless, and for completeness, I have considered whether, should the Agency be engaged in trade or commerce, disclosure of the document would expose it unreasonably to disadvantage.
39. The Agency submits disclosure of the document would expose it unreasonably to disadvantage in the following ways:
- The exempted information contains information of a business commercial or financial nature since it provides details of Parks Victoria’s financial forecast information, estimated operational costs, and specific details of funding proposals that were prepared as part of the FHAC PCG decision-making process. Disclosure of this information would be likely to expose Parks Victoria unreasonably to disadvantage as it reveals the agency’s strategy regarding commercial-in-confidence matters and would provide LTOs access to the types of internal and commercial considerations that are front-of-mind for Parks Victoria’s decision-makers. The Business Case also contains financial information at a specific point in time, which taken out of context, is likely to create unfounded speculation in the market about Parks Victoria’s funding status and commercial strategies in dealing with LTOs.
40. I am not satisfied that disclosure of the document would expose the Agency unreasonably to disadvantage. I am not persuaded by the Agency’s submission regarding any perceived exposure to disadvantage, as no substantive information was provided as to how this information could be used by a competitor resulting in the Agency being exposed unreasonably to disadvantage.
41. Accordingly, I am not satisfied section 34(4)(a)(ii) applies to the information exempted by the Agency.

¹¹ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

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

¹³ *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].

¹⁴ *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].

Section 36(1)(b) – Disclosure contrary to public interest

42. Section 36(1)(b) provides a document is an exempt document if:

in the case of documents of a department or prescribed authority its disclosure under this Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided for the use or guidance of, officers of an agency on the procedures to be followed or the criteria to be applied in negotiation, including financial, commercial and labour negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to the financial property or personnel management and assessment interests of the Crown or of an agency.

43. I will not consider the application of section 36(1)(b) to information I have already determined is exempt under section 30(1).

44. The Agency submits:

The exempted sections under section 36(1)(b) of the FOI Act, contain information that was prepared to assist in financial and labour negotiations in the execution of contracts necessary to complete the FHAC Project in the Alpine National Park, which is considered Crown Land. Disclosure would be contrary to the public interest as sections of the Business Case contain speculative instructions to be considered by the Capital Projects team.

... disclosure of this information would be contrary to the public interest since there is a genuine concern that if the exempted information is released and taken out of context it could lead to a misinformation campaign which may undermine the future of the project.

45. I am not satisfied the document, which concerns the FHAC project, falls within the scope of this exemption. Although I accept the information may be considered as disclosing procedures to be followed or the criteria to be applied in financial negotiations relating to the FHAC project, I am not satisfied that disclosure would be contrary to the public interest in that it would undermine the Victoria economy or weaken the bargaining position of the Agency in future commercial negotiations.

46. Accordingly, I am not satisfied parts of the document are exempt from release under section 36(1)(b) as I do not consider the information is of a kind contemplated by the exemption in the circumstances.

Other exemptions

47. As the Applicant does not seek access to personal affairs information, I have not considered the application of section 33(1).

Section 25 – Deletion of exempt or irrelevant information

48. 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.

49. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁵ 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 25.¹⁶

¹⁵ *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].

¹⁶ *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], [155].

50. As the Applicant does not seek a review of the personal affairs information exempted from release under section 33(1), that information is to remain deleted from the document in accordance with section 25 as it is irrelevant information for the purposes of this review.
51. 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 from the document, because it would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

52. On the information before me, I am satisfied certain information in the document is exempt from release under section 30(1). However, I have decided to release further information where I am satisfied it is not exempt from release under sections 30(1), 34(4)(a)(ii) and 36(1)(b).
53. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.
54. A marked-up copy of the document indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

Review rights

55. 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.¹⁷
56. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
57. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
58. 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.
59. 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.²⁰

When this decision takes effect

60. 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.

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

²⁰ 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.	[date]	Falls to Hotham Alpine Crossing Business Case	200	<p>Released in part Sections 30(1), 34(4)(a)(ii), 36(1)(b), 33(1)</p>	<p>Release in part Sections 30(1), 25</p> <p>The document is to be released with exempt and irrelevant information deleted in accordance with section 25. My decision is set out in the marked-up copy of the Document provided to the Agency with the Notice of Decision.</p>	<p>Section 30(1): I am satisfied certain information is exempt from release under section 30(1) for the reasons provided in the Notice of Decision, above.</p> <p>Section 34(4)(a)(ii): On the information before me, I am not satisfied the Agency is engaged in trade or commerce in relation to the project. However, even if I had determined the Agency was engaged in trade or commerce, I am not satisfied that disclosure would expose the Agency unreasonable to disadvantage for the reasons set out above in the Notice of Decision. The document is therefore not exempt under section 34(4)(a)(ii).</p> <p>Section 36(1)(b): For the reasons set out above in the notice of decision, I am not satisfied the documents contains information of the kind contemplated by the exemption. Accordingly, the</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>document is not exempt under section 36(1)(b).</p> <p>Section 25: Personal affairs information is not sought by the Applicant and is irrelevant to my review. I am satisfied it is practicable to delete the irrelevant information in the document (being names, telephone numbers, an email address and position titles) in accordance with section 25.</p>