

## Notice of Decision and Reasons for Decision

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Applicant:	'EY8'
Agency:	Major Transport Infrastructure Authority
Decision date:	30 December 2022
Exemptions and provision considered:	Sections 30(1), 34(4)(a)(ii), 25
Citation:	'EY8' and Major Transport Infrastructure Authority (Freedom of Information) [2022] VICmr 254 (30 December 2022)

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FREEDOM OF INFORMATION — transport infrastructure project – Fitzsimons Lane Upgrade – noise reports and assessments – consultation on design options – safety assessment – audit report – technical information – internal working documents – disclosure not contrary to the public interest – Agency acting in trade or commerce – Agency not exposed unreasonably to disadvantage – section 49N – negotiated agreement

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied the documents are exempt from release under sections 30(1) and 34(4)(a)(ii).

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

**Joanne Kummrow**  
Public Access Deputy Commissioner

30 December 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to documents relating to the Fitzsimons Lane Upgrade project.
2. The Agency notified the Applicant in accordance with section 25A(6) of its intention to refuse to process the Applicant's request on grounds processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. The Applicant was invited to consult with the Agency with a view to narrowing the terms of the request to remove the proposed grounds for refusal.
3. Although the Applicant responded to the invitation to consult, the Agency considered the grounds for refusal had not been removed and refused access to the requested documents under section 25A(1). The Agency's decision letter sets out the reasons for its decision.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I acknowledge the extensive period of time since the Applicant first made their FOI request to the Agency and the subsequent fresh decision and negotiated agreement process which has finally resulted in the Agency making a decision which is the subject of this review.

### Agency's intended fresh decision

6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On 23 February 2022, the Agency notified OVIC and the Applicant of its intention to make a fresh decision.
8. Section 49M(2) requires an agency to make its fresh decision within 28 days after notifying the applicant and the Information Commissioner of its intention to do so, unless the agency and the Information Commissioner agree to an extension of time.
9. The Agency was granted [two] extensions of time until [date] and later until [date] to make its fresh decision.
10. On [date], the Agency advised OVIC it was unable to finalise its fresh decision within the extended timeframe agreed to in accordance with section 49M(2).
11. Accordingly, I am required to resume my review based on the Agency's original decision in accordance with section 49MA(3).

### Section 49N – Negotiated agreement

12. Section 49N provides:

#### **49N Information Commissioner may facilitate a negotiated agreement**

- (1) The Information Commissioner may facilitate an agreement between the parties in relation to a decision that is the subject of a review under this Division.
- (2) The agreement must be in writing.

- (3) The Information Commissioner may make a decision on the review on the basis of the agreement.

13. On [date], an agreement between the Applicant and the Agency was reached under section 49N for the Agency to process the Applicant's request based on the following terms:

1. All traffic counts commissioned or carried out by MRPV at the following intersections:
  - (a) Williamsons Road and Foote Street;
  - (b) Fitzsimons Lane and Porter Street; and
  - (c) Fitzsimons Lane and Main Road, Eltham

(together called the Three Intersections) and the summary reports of such counts since [date]

2. Any reports or briefing notes that describe the calculation method for, and the resulting forecasts of traffic flows that were used to assess alternative intersection designs and to design the preferred intersection layout for the Eltham Roundabout.
3. The following documents prepared by MRPV and MRPV's consultants, contractors or agents and the Department of Transport in all its divisions (including the Major Transport Infrastructure Authority):
  - (a) briefing notes;
  - (b) reports; and
  - (c) plans

concerning the current and future traffic performance of all the options considered for the Three Intersections and the Bolton Street/Main Road intersection or any subset of these intersections. These reports are limited to SIDRA output in paper or electronic form.

4. Documents that report on the evaluation process undertaken by MRPV that resulted in the selection of the reference and final designs for The Intersection. These documents may include the following:
  - (a) assessments of the design for The Intersection provided by the [third party] on [date]
5. The following safety evaluations:
  - (a) external Road Safety Audits (either draft or final) and other safety reviews of any draft, reference or final design of The Intersection (and the approaches to The Intersection) and the response of MRPV to such audits/reviews;
  - (b) documents regarding the safety performance of the [named] Design or any other modifications to the design of the Eltham Roundabout which were considered, including comparisons of any of the above designs.

The Applicant also agrees to the following regarding the scope of the request:

- exclude any documents that the Applicant has provided to MRPV in relation to 4(e);
- exclude any duplicate documents; and
- only include documents created after [date]

The Agency will process the request and provide its decision within 7 days of receiving confirmation from OVIC of the Applicant's consent to the Negotiated Agreement, with the exact date to be confirmed in the notification from OVIC.

The Applicant will have review rights, including the right to continue the review of any redacted material in the documents responsive to the request, pursuant to section 49N(3) of the FOI Act. The parties acknowledge and agree that any continuation of the review and subsequent decision made by the Information Commissioner on the application for review will be in accordance with section 49P of the FOI Act on the basis that the reference to the "original application" in section 49P(1) must be interpreted as being a reference to documents provided by the Agency in accordance with this Negotiated Agreement. The parties also agree that the Applicant will have the right to have enquiries made during the review in relation to subject matter typically involved in a complaint to OVIC such as document searches under section 61B(3) of the FOI Act. At the Applicant's request, the Information Commissioner will proceed to do so as part of review file with OVIC reference [reference number]

14. On [date], the Agency made a decision based on the FOI request terms set out in the negotiated agreement. The Agency located 36 documents, and granted access to 11 documents in full and refused access to 22 documents in full and three documents in part under sections 30(1) and 34(4)(a)(ii). The Agency also deleted irrelevant information from the documents under section 25.
15. The Agency's decision letter sets out the reasons for its decision.

### **Secondary review application**

16. As provided for in the terms of the negotiated agreement, the Applicant sought the Information Commissioner's review of the Agency's decision made under the negotiated agreement.
17. The Applicant does not seek access to the personal affairs information of third parties or review of Documents 35, 36 or 37.
18. The Agency was not able to provide copies of Documents 24 and 25 for review. It advised the information within these documents is contained within an interactive SIDRA modelling platform, which can change subject to adjustable content such as variables and inputted data. Some outputs from the program are extracted in Documents 30, 31 and 32 subject to this review. Due to the complex nature of the documents, it was not possible for OVIC staff to review the data in Documents 24 and 25.
19. The Agency located an additional document during the review and this document has been included as Document 34 in the Schedule of Documents in **Annexure 1**.
20. I have examined a copy of the documents subject to review.
21. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
22. I have considered all communications and submissions received from the parties.
23. 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.
24. 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.
25. 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'.<sup>1</sup> 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.

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

## Review of exemptions

### **Section 30(1) – Internal working documents**

26. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

27. The exemption does not apply to purely factual material in a document.<sup>2</sup>

*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?*

28. 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.

29. 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.<sup>3</sup>

30. The documents subject to review relate to the Agency's assessment of an alternative roundabout design and traffic modelling reports which underpinned a decision to remove a major roundabout and replace it with traffic lights.

31. The requested documents include reports, memorandums, design imaging, technical output and one email chain. The documents can be split into categories:

- (a) Documents 12 to 16 and 18 to 20, which are the traffic modelling reports;
- (b) Document 33, which is a road safety audit report; and
- (c) Documents 17, 21, 22, 23 and 26 to 32 and 34, which are internal assessments of an alternative roundabout design.

32. In its decision letter, the Agency states:

Whilst the documents do contain factual material, that material is so embedded in the deliberative content that it is impracticable to produce an edited document removing exempt material

33. In my view, a substantial amount of information in the documents is factual and is not intertwined with deliberative material. Therefore, this information is not exempt from release under section 30(1) by virtue of section 30(3).

34. However, I consider some of the information does constitute opinion, advice or recommendations prepared by an Agency officer.

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<sup>2</sup> Section 30(3).

<sup>3</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

*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?*

35. 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.<sup>4</sup>

36. In *Re Waterford and Department of Treasury (No.2)*,<sup>5</sup> 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.

37. I am satisfied the documents were prepared for the purpose of the Agency's deliberative processes involved in the planning and development of a major road infrastructure project under a broader program of road construction and upgrade works known as 'Victoria's Big Build'.<sup>6</sup>

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

38. 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. In doing so, I have given weight to the following relevant factors:<sup>7</sup>

- (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.

39. In its decision letter, the Agency determined disclosure of the documents would be contrary to the public interest for the following reasons:

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

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

<sup>6</sup> Major Road Projects Victoria, Victoria's Big Build, 'Fitzsimons Lane Upgrade' at <https://bigbuild.vic.gov.au/projects/mrpv/fitzsimons-lane-upgrade>.

<sup>7</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- the communications were made in the course of the development of the Project. They reflect possibilities considered but not eventually adopted, and would likely lead to confusion and promote pointless and ill-informed debate about what might have happened rather than what did;
- the information in the documents is preliminary in nature and may not reflect what is or will be the ultimate design and construction of the Project. Parts of the Project remain under active construction, with works continuing into 2023, which may result in changes to certain aspects of the Project and the information contained within the documents;
- the information is of a highly technical nature, prepared by expert advisors familiar with certain technical specialised fields, such as traffic modelling or safe road design. The documents were prepared for a specific internal audience whom have an understanding of the technical field and matters considered therein. The information was not prepared for publication or for public consumption. Therefore, there are parts of the documents which would likely to be misinterpreted and misunderstood by the community at large, which would lead to confusion and misinformed debate; and
- disclosure would inhibit frankness and candour in future pre-decisional communications regarding high-level and sensitive Government infrastructure projects of this nature.

40. During the review, the Agency provided a submission in relation its reliance on section 30(1). The Agency sought to have certain aspects of this submission remain confidential, and as such I am limited in the amount of detail I can include in relation to these submissions.

41. In summary, the Agency submitted the documents would be contrary to the public interest to disclose for a range of reasons, including as:

- (a) they were prepared at a preliminary stage of the project process and canvas a number of sensitive and contentious matters;
- (b) they contain predictive modelling, where data and projections are a hypothetical, point-in time estimate of certain matters;
- (c) the traffic flow estimates relied on indicators/factors at the point in time the documents were drafted and these are subject to change;
- (d) other information in the report is also subject to change due to a range of factors, including the progression of the project, and the information in the documents may now have been superseded;
- (e) information in the documents is highly technical;
- (f) information in the documents show only part of the overall reasoning for the final decision to pursue a certain option;
- (g) Documents 17, 21-23 and 26-32 were prepared for the purpose of a community consultation process, and are not for broader public distribution; and
- (h) Document 33 is out of date as its was superseded by a set of Road Safety Audit documents which have been released to the Applicant.

42. In summary, given the nature of the documents, the Agency submits the consequences of their release may be:

- (a) Agency officers may be deterred from utilising modelling tools at a preliminary stage of the project development process, expressing their opinions with frankness and candour, or exploring all options in developing a project;

- (b) impede the effective deliberative process required for cost effective and efficient delivery of infrastructure projects; and
  - (c) those reading the information may experience confusion, be misled by the information without adequate context, or engage in unnecessary public debate.
43. The Agency also submits that the adverse consequences of release can not be mitigated by the release of contextual information, as to do so would require the release of a substantial number of additional documents, some of which would likely be subject to a Cabinet exemption under section 28(1).
44. The Agency is of the view that transparency in relation to the performance of the project is better served via review process mechanisms based on up to date and accurate analysis of the benefits of the project in 2023, not preliminary predictive modelling related to an option that was not pursued.
45. Having reviewed the documents and the Agency's submission and decision, I am satisfied disclosure of the documents would not be contrary to the public interest for the following reasons:
- (a) On the information before me, I am satisfied the project is subject to minor further works which are expected to be completed in the next few months. The roundabout has been removed in accordance with the approved design and new signaled intersections are being or have been constructed.
  - (b) Based on their review application and written submissions, I am satisfied the Applicant's purpose in seeking the documents is to better understand the consideration that was given to their alternative roundabout design proposals and the reasons for it not being selected. I am of the view release of these documents would enable the Applicant to further understand the reasons why their design was not selected.
  - (c) I acknowledge certain information in the documents is technical in nature. I also accept there are circumstances where the release of technical material that does not contain sufficient information for an uninformed audience to interpret correctly and reasonably may be contrary to the public interest.<sup>8</sup> However, on the information before me, I am satisfied the documents are able to be understood despite the technical nature of the information. I also note the Agency has already released certain technical information to the Applicant and consulted with them on some aspects of this information.
  - (d) There is a public interest in the community being better informed about the expenditure of public funds and government decision making processes. By providing access to information that demonstrates the basis upon which decisions are made, disclosure of documents such as these builds community trust in government decision-making and agency processes. I acknowledge the efforts of the Agency in conducting a robust community consultation process with the Applicants in relation to their project suggestion, and consider release of the documents prepared during this process would be a continuation of that process, and as such would serve the public interest.
  - (e) I acknowledge preparation of these documents involves a complex set of variables which, due to the nature of modelling and changes to inputted data over multiple years, can change over time. However, it appears the information available here was used to assess the Applicant's suggestion at a point in time and a decision was finalised on that basis.
  - (f) While I agree with the Agency that transparency in relation to the performance of the project will be served via release of performance data in 2023, disclosure of documents detailing the selected option for removal of the roundabout will assist the Applicant in understanding why

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<sup>8</sup> See *Ryan v Melbourne Water* [2009] VCAT 2079.



their suggested roundabout design was not selected by way of a comparison, irrespective of the fact that the documents relate to predictive modelling. In this respect, I note that decisions were made on the basis of predictive modelling.

- (g) I consider the Applicant, along with other members of the public, are capable of understanding that the documents were produced at a particular point in time and may not represent a final position or decision reached by the Agency at the conclusion of a decision making process. Consequently, I do not accept disclosure of the documents would likely cause confusion or unnecessary debate or result in misinterpretation or misunderstanding of the documents. In my view, such arguments underestimate the capacity of the public to be informed about advice received and decisions made by agencies and government. It also minimises the importance of public engagement and participation in government policy making and decision making. In any event, I consider that the question of whether debate is necessary or not should be left to the public rather than to government.
- (h) I do not accept release of the documents would affect the ability of Agency officers to provide future advice or inhibit the frankness and candour of such advice. Agency officers, as public sector employees, are required to discharge their ethical duty to provide full and frank advice given this is often a core aspect of their professional responsibilities and in line with their obligations under the *Public Administration Act 2004* (Vic) and the *Victorian Public Sector Commissioner's Code of Conduct for Victorian Public Sector Employees*.<sup>9</sup> Nor do I accept that disclosure of the opinions and advice provided by external consultants would result in external consultants, who provide such advice for a commercial fee, would temper or inhibit their provision of advice in the future.<sup>10</sup>
- (i) Further, I do not consider the Agency would be reluctant to utilise predictive modelling programs on the basis the information they produce may be publicly scrutinised or become contentious in the future.
- (j) Given the Agency has already released the subsequent Road Safety Audit materials to the Applicant, I consider they already have the context to understand any changes made between the preparation of Document 33 and the subsequent documents.

46. Accordingly, in the circumstances of this matter, I am not satisfied the documents are exempt from release under section 30(1). I consider this decision is in accordance with the beneficial object of the FOI Act and the intention of the Victorian Parliament that information should be disclosed subject to the need to protect an essential public, private or business affairs interest

47. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1).

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

48. 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;
- (b) the document contains information of a business, commercial or financial nature; and
- (c) disclosure of which would be likely to expose the agency unreasonably to disadvantage.

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<sup>9</sup> For example, see the public sector values in section 7 of the PA Act.

<sup>10</sup> *Dalla-Riva v Department of Treasury & Finance* (2005) 23 VAR 396; *Baker v Department of Education and Training* [2005] VCAT 2263; *Herington v Department of Transport Planning & Local Infrastructure* [2014] VCAT 1026.

*Is the Agency engaged in trade and commerce?*

49. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>11</sup>
50. 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’.<sup>12</sup> VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.<sup>13</sup> 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.<sup>14</sup>
51. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.<sup>15</sup>
52. While the phrase ‘trade and commerce’ may be interpreted broadly,<sup>16</sup> it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.<sup>17</sup>
53. 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).<sup>18</sup>
54. The Agency submits:

In the present circumstances, MRPV engaged in trade or commerce by entering into a tender process with one of its pre-qualified Construction panel members, to develop and plan a major infrastructure project as part of the Project Development Phase. That process included the negotiation on commercial terms of the project cost, design and resourcing costs, which ultimately concluded with the award of the Project to [business], with an approx. value of \$120 million dollars. The commercial terms of that contract are publicly available at the Tenders Vic website, and a review of those terms clearly demonstrate that when entering into a commercial tender negotiation process with the construction market, MRPV is engaging in trade or commerce.

55. The Agency acknowledges the similarity in circumstances between the present circumstances and the circumstances considered in *Pallas v Roads Corporation*<sup>19</sup> (**Pallas decision**), but considers the present matter is distinguishable. In the Pallas decision, Judge McNamara held:

In carrying out its road building functions the Corporation engages in Governmental activities rather than in trade or commerce...

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is. A consumer who purchases a consumer item from a department store is not, for that reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.<sup>20</sup>

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<sup>11</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

<sup>12</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

<sup>13</sup> *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].

<sup>14</sup> *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

<sup>15</sup> *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

<sup>16</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

<sup>17</sup> *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].

<sup>18</sup> *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].

<sup>19</sup> (Review and Regulation) [2013] VCAT 1967.

<sup>20</sup> *Ibid* at [57]-[58].

56. The Agency submits:

in *Pallas* the information related to consultants reports about proposed upcoming road projects, whereas the current information relates to ongoing commercial negotiations taking place as part of the tender process for the Project with an estimated investment value of \$120 million.

MRPV further notes the Tribunal's finding in *Pallas* has not since been endorsed in any other Tribunal decision or superior Court and submits that it is an unduly narrow interpretation of the intent of the FOI Act, which if applied would arguably result in no government Agency ever being considered to be 'engaged in trade or commerce', therefore defeating the intention of Parliament when enacting the provision.

For these reasons, MRPV prefer the view adopted in other cases on the matter, including:

- The recent decision of the Victorian Civil and Administrative Tribunal of *Davis v Major Transport Infrastructure Authority (Review and Regulation)* [2022] VCAT 894 in which it was noted at [72] that it was not in dispute that the MTIA's activities were in trade or commerce.
- The decision of the Tribunal in *CityLink Melbourne Limited v Department of Transport*<sup>21</sup>. In that case, the Tribunal was satisfied that the Department of Transport, when carrying out its road functions in relation to the road tolls concerning the CityLink road project, was in fact engaged in trade or commerce.

57. In my view, whether information is governmental or relates to an agency engaging in trade and commerce depends on the specific document and the nature and purpose of that engagement.

58. I am satisfied the documents subject to review were prepared in the Project Development Phase (PDP) of the project. The Agency's submissions indicate this occurs following a competitive tender process open to a number of pre-qualified construction panel members, and prior to entering a contract for the delivery of the project with the relevant entity.

59. The Agency submits the circumstances here are similar to '*EF7*' and *Major Transport Infrastructure Authority (Freedom of Information)*,<sup>22</sup> where it was agreed the Agency was engaged in trade or commerce as part of an ongoing competitive tender process.

60. In the circumstances of this matter, I am satisfied that at the time of my decision, based on my review of the documents and the evidence provided by the Agency, that it is engaged in trade or commerce given its involvement in a current competitive tender process with the private sector for the procurement of the construction of a transport infrastructure project.

*Does the document contain information of a business, commercial or financial nature?*

61. The phrase 'information of a business, commercial or financial nature' is not defined in the FOI Act.

62. The words 'business, commercial or financial nature' should be given their ordinary meaning.<sup>23</sup>

63. Broadly speaking, I accept the documents contain information of a business, commercial and financial nature.

*Would disclosure of the documents be likely to expose the Agency unreasonably to disadvantage?*

64. 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.

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<sup>21</sup> [2020] VCAT 1078.

<sup>22</sup> [2022] VICmr 80.

<sup>23</sup> *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

65. 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.

66. The Agency submits:

in line with its role and functions as a dedicated government project office charged with the planning and delivery of major road projects, it is required to regularly interact with the construction market for the purpose of engaging contractors to carry out the design and construction of major road projects

...

information deleted from the documents is sensitive commercial information for internal audiences only. It is information that is not publicly available and is not made available to the construction market, even once the Project contract is awarded. Whilst the information has been shared with the participants in the Project Development Phase tender process, the process was closed to the preferred pre-qualified Construction panel member only, who were required to abide by confidentiality obligations when participating in the Development Phase, including assisting MRPV with assessing the alternative roundabout design, with those commercial obligations of confidentiality continuing to remain in place.

...

if this information was disclosed, it is likely that it would be seen by the construction market at large, resulting in MRPV's contractual and commercial positions and associated matters, including the manner in which MRPV conducts its internal Delivery Phase assessment to ensure value for money outcomes on projects of this nature becoming known within the construction market. This would significantly impede its ability to commercially negotiate the best value for money position for future major road project contracts, which would result in a significant financial disadvantage to MRPV, and thereby the State of Victoria, especially on projects of such a significant financial value; and

...

If this commercial and financial information was to become known to the wider construction market, it is likely that future tender participants in the PDA model on upcoming MRPV projects would have an unfair advantage to MRPV's determinant in terms of negotiating position, and therefore would insist on being provided similar commercial terms or acquiesces from MRPV. Given MRPV has a number of Projects currently in development for future tender, the impact of this likely outcome would have an enormous financial impact on MRPV and the State of Victoria's financial position when engaging and negotiating with the construction market for major road and infrastructure projects.

67. I am not satisfied disclosure of the documents would expose the Agency unreasonably to disadvantage for the following reasons:

- (a) The Agency has now entered into an agreement with the relevant business undertaking in relation to delivery of the project.<sup>24</sup>
- (b) The documents are specific to this project and their disclosure would not assist the wider construction market to gain an advantage in future similar negotiations.
- (c) As the primary body responsible for managing road projects in Victoria, the Agency is not subject to the same market forces or competition as a commercial entity. As such, I consider it would be reasonably likely to overcome any exposure to disadvantage arising from disclosure of the document.
- (d) In general terms, any contract depends on 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 in the provision of services. In this case, I am not satisfied there is sufficient evidence before me to support the view that disclosure would impact the ability of the State government to attract future offers from private sector companies, or from

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<sup>24</sup> See Buying for Victoria, Contract - CONS-1119 at <https://www.tenders.vic.gov.au/contract/view?id=190796>.

continuing to enter into future negotiations in good faith, because the terms in which it did business would become publicly known. Ultimately, 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.

68. Accordingly, I am not satisfied the documents are exempt under section 34(4)(a)(ii).
69. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1).

### **Section 25 – Deletion of exempt or irrelevant information**

70. 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.
71. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>25</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>26</sup>
72. I have considered the effect of deleting personal affairs information, which is irrelevant to the review, from the documents. In my view, it is practicable to delete the irrelevant information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

73. On the information before me, I am not satisfied information in the documents is exempt from release under sections 30(1) and 34(4)(a)(ii).
74. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents containing irrelevant information deleted in accordance with section 25, access to these documents is granted in part.
75. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

76. 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>27</sup>
77. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>28</sup>
78. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>29</sup>
79. 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>25</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>26</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>27</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>28</sup> Section 52(5).

<sup>29</sup> Section 52(9).

80. 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>30</sup>

***When this decision takes effect***

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

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<sup>30</sup> Sections 50(3F) and 50(3FA).

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	[business name] Fitzsimons Lane survey - intersection count [date]	2	Released in full	Not subject to review	
2.	[date]	[business name] Fitzsimons Lane survey - intersection count [date]	2	Released in full	Not subject to review	
3.	[date]	[business name] Traffic and Transport Data Fitzsimons Lane north of Foote Street [date]	9	Released in full	Not subject to review	
4.	[date]	[business name] Traffic and Transport Data Fitzsimons Lane south of Porter Street [date]	9	Released in full	Not subject to review	
5.	[date]	[business name] Traffic and Transport Data Fitzsimons Lane south of Main Road [date]	9	Released in full	Not subject to review	
6.	[date]	[business name] Traffic and Transport Data Fitzsimons Lane north of Porter Street [date]	9	Released in full	Not subject to review	
7.	[date]	[business name] Traffic and	12	Released in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Transport Data Foote Street [date]				
8.	[date]	[business name] Traffic and Transport Data Foote Street [date]	12	Released in full	Not subject to review	
9.	[date]	[business name] Traffic and Transport Data Main Road [date]	14	Released in full	Not subject to review	
10.	[date]	[business name] Traffic and Transport Data Main Road [date]	14	Released in full	Not subject to review	
11.	Undated	Comparison of [year] vs [year] roundabout turning movements and peak hour traffic count at Fitzsimons Lane - Main Road	1	Released in full	Not subject to review	
12.	[date]	Design for a better future / Major Road Projects Authority Suburban Roads Upgrade Northern Package Fitzsimons Lane Upgrade Traffic Analysis Report by WSP dated [date]	95	Refused in full Section 30(1)	Release in part Section 25 The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being:	Section 30(1): I am not satisfied the document is exempt from release under section 30(1) for the reasons provided in the Notice of Decision, above. Section 25: I am satisfied the document contains



Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>the personal affairs information in the document.</li> </ul>	information that is irrelevant to the request, being the personal affairs information of third parties. I am satisfied it is practicable to provide the Applicant with an edited copy of the document irrelevant information deleted in accordance with section 25.
13.	[date]	[business name] Memo dated [date] Scenario Analysis Main Road / Fitzsimons Lane Intersection	182	Refused in full Section 30(1)	<p><b>Release in part</b> Section 25</p> <p>The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being:</p> <ul style="list-style-type: none"> <li>the personal affairs information in the document</li> </ul>	Sections 30(1) and 25: See comments for Document 12.
14.	[date]	[business name] Memo dated [date] Fitzsimons Lane SIDRA Analysis for Existing Intersection Layouts	25	Refused in full Section 30(1)	<p><b>Release in part</b> Section 25</p> <p>The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being:</p>	Sections 30(1) and 25: See comments for Document 12.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>the personal affairs information in the document</li> </ul>	
15.	Undated	[business name] output results for Fitzsimons Lane/ Main Rd	10	Refused in full Section 30(1)	Release in full	Section 30(1): I am satisfied the information in this document is factual in nature and, by virtue of section 30(3) is not exempt from release under section 30(1).
16.	[date]	[business name] draft Site Observation File Note date [date]SRU Fitzsimons Lane	4	Refused in full Section 30(1)	<p>Release in part Section 25</p> <p>The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being:</p> <ul style="list-style-type: none"> <li>the personal affairs information in the document</li> </ul>	<p>Section 30(1): See comments for Document 12.</p> <p>Section 25: See comments for Document 12.</p>
17.	[date]	[business name] draft Technical Note dated [date] MRPV Fitzsimons Lane Bypass Lane Concept Feasibility Modelling	9	Refused in full Section 30(1)	<p>Release in part Section 25</p> <p>The document is to be released except for information that is irrelevant, which is to be deleted</p>	Sections 30(1) and 25: See comments for Document 12.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					in accordance with section 25, being: <ul style="list-style-type: none"> <li>the personal affairs information in the document</li> </ul>	
18.	Undated	Fitzsimons Lane Upgrade corridor routes and time saving	5	Refused in full Section 30(1)	Release in full	Section 30(1): See comments for Document 12.
19.	[date]	[business name] Memo dated [date] Fitzsimons Lane Reference Design Travel Time Assessment	19	Refused in full Section 30(1)	Release in part Section 25  The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being: <ul style="list-style-type: none"> <li>the personal affairs information in the document</li> </ul>	Sections 30(1) and 25: See comments for Document 12.
20.	Undated	[business name] route travel times	2	Refused in full Section 30(1)	Release in full	Section 30(1): See comments for Document 12.
21.	[date]	[business name] Email dated [date]	8	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in part Section 25  The document is to be released except for information that is	Sections 30(1) and 25: See comments for Document 12.  Section 34(4)(a)(ii): I am not satisfied the document is

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					irrelevant, which is to be deleted in accordance with section 25, being: <ul style="list-style-type: none"> <li>the personal affairs information in the document.</li> </ul>	exempt from release under section 34(4)(a)(ii) for the reasons outlined in the Notice of Decision, above.
22.	[date]	[business name] final draft Review of community concepts [date] Fitzsimons Lane, Eltham and Templestowe	18	Refused in full Sections 30(1), 34(4)(a)(ii)	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being:</p> <ul style="list-style-type: none"> <li>the personal affairs information in the document</li> </ul>	<p><b>Sections 30(1) and 25:</b> See comments for Document 12.</p> <p><b>Section 34(4)(a)(ii):</b> See comments for Document 21.</p>
23.	[date]	[business name] draft Memo dated [date] Rapid Traffic Assessment (Main Road Roundabout)	7	Refused in full Sections 30(1), 34(4)(a)(ii)	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being:</p>	<p><b>Sections 30(1) and 25:</b> See comments for Document 12.</p> <p><b>Section 34(4)(a)(ii):</b> See comments for Document 21.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>the personal affairs information in the document</li> </ul>	
24	Unknown	Roundabout Options (SIDRA 8).sip8 <sup>31</sup>	unknown	Refused in full Sections 30(1), 34(4)(a)(ii)	Not subject to review	
25	Unknown	Roundabout Options (SIDRA 9).sip9 <sup>32</sup>	unknown	Refused in full Sections 30(1), 34(4)(a)(ii)	Not subject to review	
26.	[date]	ROUNDABOUT - median limits.pdf	1	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in full	Sections 30(1) and 25: See comments for Document 12. Section 34(4)(a)(ii): See comments for Document 21.
27.	[date]	ROUNDABOUT-1.pdf	1	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in full	Section 30(1): See comments for Document 15. Section 34(4)(a)(ii): See comments for Document 21.

<sup>31</sup> The information in this document is contained within an interactive SIDRA modelling platform, which can change subject to adjustable content such as variables and inputted data. Some outputs from the program are extracted in Document 30, 31 and 32 subject to this review. Due to the complex nature of the documents, it was not possible for OVIC staff to review all data contained within the documents during this review.

<sup>32</sup> The information in this document is contained within an interactive SIDRA modelling platform, which can change subject to adjustable content such as variables and inputted data. Some outputs from the program are extracted in Document 30, 31 and 32 subject to this review. Due to the complex nature of the documents, it was not possible for OVIC staff to review all data contained within the documents during this review.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
28.	[date]	ROUNDABOUT-2.pdf	1	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in full	Section 30(1): See comments for Document 15. Section 34(4)(a)(ii): See comments for Document 21.
29.	Undated	Value Engineering Design Alignment draft	6	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in part Section 25 The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being: <ul style="list-style-type: none"><li>the personal affairs information in the document</li></ul>	Section 30(1): See comments for Document 15. Section 34(4)(a)(ii): See comments for Document 21. Section 25: See comments for Document 12.
30.	[date]	Attachment 1 to Document 23	16	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in full	Section 30(1): See comments for Document 15. Section 34(4)(a)(ii): See comments for Document 21.
31.	[date]	Attachment 2 to Document 23	12	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in full	Section 30(1): See comments for Document 15. Section 34(4)(a)(ii): See comments for Document 21.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
32.	[date]	Attachment 3 to Document 23	16	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in full	Section 30(1): See comments for Document 15. Section 34(4)(a)(ii): See comments for Document 21.
33.	[date]	[business name] Suburban Road Upgrade Site 51 Fitzsimons Lane Stage 1 Road Safety Audit Report dated [date]	34	Refused in full Section 30(1)	Release in part Section 25  The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being:  <ul style="list-style-type: none"> <li>the personal affairs information in the document</li> </ul>	Sections 30(1) and 25: See comments for Document 12.
34.	[date]	Email	2	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in part Section 25  The document is to be released except for information that is irrelevant, which is to be deleted in accordance with section 25, being:  <ul style="list-style-type: none"> <li>the personal affairs information in the document; and</li> </ul>	Section 30(1): See comments for Document 12. Section 34(4)(a)(ii): See comments for Document 21. Section 25: I am satisfied the document contains information that is irrelevant to the request, being the personal affairs information of third parties and an email which falls outside the scope of the Applicant's request as

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>the first email in the chain.</li> </ul>	it relates to administration of the Applicant's FOI request. I am satisfied it is practicable to provide the Applicant with an edited copy of the document irrelevant information deleted in accordance with section 25.
35.	[date]	[business name] Fitzsimons Lane Upgrade Project, Main Road Intersection, Detailed Design Stage Road Safety Audit Report dated [date]	18	Released in part Section 25	Not subject to review	
36.	[date]	[business name] Road Safety Audit Report Fitzsimons Lane dated [date]	15	Released in part Section 25	Not subject to review	
37.	[date]	[business name] Fitzsimons Lane Reference Design Safe System Assessment dated [date]	45	Released in part Section 25 (irrelevant information has been removed)	Not subject to review	