

Notice of Decision and Reasons for Decision

Applicant:	'FL8'
Agency:	Department of Treasury and Finance
Decision date:	27 December 2023
Sections considered:	Sections 25A(5), 28(1)
Citation:	'FL8' and Department of Treasury and Finance (Freedom of Information) [2023] VICmr 111 (27 December 2023)

FREEDOM OF INFORMATION – funding – value capture – Suburban Rail Loop Project – project funding – Cabinet exemptions – obligation to provide edited copies of documents

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 that the requirements for the application of section 25A(5) are met. The effect of my decision is that the Agency is required to search for the requested documents and, should any exist, assess those documents in accordance with the FOI Act.

This decision will take effect when the Agency's 14 day review period expires.

My reasons for decision follow.

Please refer to the end of this decision for information about further review rights through the Victorian Civil and Administrative Tribunal.

Joanne Kummrow
Acting Information Commissioner

27 December 2023

Reasons for Decision

Background to review

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

I am seeking access to documents held by the Department of Treasury and Finance relating to the ability of the Suburban Rail Loop [SRL] Project to raise a third of its costs through Value Capture. The SRL East business case says that value capture will contribute around one-third of the project's costs (IE. around 11.5 billion of the 34.5 billion total).

I am seeking access to any documents held by the Department of Treasury and Finance that relate to:

1. whether or not this target is likely to be achieved
2. what mechanisms would be required to achieve it
3. if it is not likely to be achieved, the size of the forecast shortfall
4. what options the project has to cover this expected funding shortfall

This search should include letters, emails, email attachments, briefs and reports, meeting records, memos, maps and illustrations, and other relevant documents held by the DTF.

The search should exclude any documents prepared for Cabinet or to brief a Minister in relation to a minister to be considered by the cabinet.

The search is for documents created between[date range].

5. The Agency refused access to the requested documents under section 25A(5), as it considered the requested documents, should any exist, would be exempt in full under section 28(1) and that there would be no obligation to provide the Applicant with an edited copy of one or more documents.

Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

Initial view and enquiries

8. On [date], OVIC staff provided an initial view to the Agency that, if the matter were to progress to a formal decision, that it would be determined that the requirements of section 25A(5) are not met. This view was based on the broad terms of the request and that the Applicant had excluded any documents prepared for the Cabinet or to brief a Minister in relation to a matter to be considered by the Cabinet from the scope of their request.
9. On [date], the Agency notified OVIC and the Applicant of its intention to make a fresh decision.
10. On [date], the Agency was granted an extension of time under section 49M(2) to make its fresh decision by [date].

11. On [date], the Agency wrote to the Applicant to notify them that it considered the work involved in processing the request in its current form would substantially and unreasonably divert the resources of the Agency from its other operations. The Agency explained that over 400 documents would fall within the scope of the request and that it would take 35 days to collate and assess the documents. Accordingly, the Agency advised the Applicant that their request may be refused under section 25A(1) and they were invited to consult with the Agency with a view to removing the proposed grounds for refusal.
12. The due date to make a fresh decision expired before an extension of time was granted to the Agency.
13. Accordingly, following sufficient time to allow the Agency to make a further submission, a review of the Agency's original decision recommenced.
14. I have considered all communications and submissions received from the parties.
15. 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.
16. 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.
17. 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 section 25A(5)

18. Section 25A(5) provides an agency may refuse to grant access to documents without having identified the documents falling within the terms of the request if it is apparent from the nature of the request that all the requested documents would be exempt from release under the FOI Act, and there is no obligation to provide the applicant with partial access to one or more documents in accordance with section 25.
19. The power in section 25A(5) is carefully circumscribed.² A decision maker must be satisfied of the following three elements, which operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.

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

² *Knight v Corrections Victoria* [2010] VSC 338 at [37].

- (b) Second, it must be apparent all documents in the request are exempt.
- (c) Third, it must be apparent from:
 - (a) the nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document; or
 - (b) the request or through consultation with the applicant that the person would not wish to have access to an edited copy of the document.³

First element – what is the essential character of the requested documents?

- 20. The Applicant is seeking access to documents relating to the funding for the Suburban Rail Loop Project as referred to in a Business Case indicating that one third of its funding would be obtained via value capture. The Applicant is seeking access to documents that concern funding via value capture specifically in relation to whether the targeted funding will be achieved, how to achieve the funding target, the size of forecast shortfall if the target is not likely to be achieved, and options to cover any shortfalls.
- 21. I am satisfied the nature of the requested documents is objectively apparent from the specific terms of the Applicant’s request. Accordingly, I am satisfied the first limb of section 25A(5) is met.

Second element – would all documents, as described in the request, be exempt?

- 22. The Agency submits the requested documents, should any exist, would be exempt from release under section 28(1).
- 23. Section 28(1) provides that a document is exempt from release if it is:
 - (a) the official record of any deliberation or decision of the Cabinet;
 - (b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet;
 - (ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;
 - (c) a document that is a copy or draft of, or contains extracts from, a document referred to in sections 28(1)(a), 28(1)(b) or 28(1)(ba); or
 - (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

- 21. The Agency submits:

³ Ibid.

...the relevant team within the Department are of the view that all documents, if they existed, would be developed to support Cabinet decisions and considerations. Therefore, these documents would be treated as either documents that have been prepared by a Minister or by an agency for the purpose of preparing a submission for consideration by the Cabinet. Or alternatively prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet. (Attachment 2).

As such, it would objectively apparent that if these documents existed, they would all be exempted under this section 28(1) of the FOI Act. If, however, access was allowed to these documents, this would be akin to providing access to Cabinet submissions which would directly contradict the intention of section 28(1) of the FOI Act.

22. The attachment referred to in the Agency's decision is an email from a senior Agency officer, who was provided with the terms of two FOI requests, including the Applicant's request, and advised the FOI Unit that they considered all documents prepared on the topic of the requests 'are Cabinet in confidence, as they have all been developed to support Cabinet decisions and considerations, so are outside the scope of this request'.
23. For the following reasons, I am not satisfied that all documents falling within the scope of the Applicant's request, should any exist, would be exempt from release under section 28(1):
 - (a) the date range of the requested documents covers an 18 month period;
 - (b) the Agency estimates that over 400 documents fall within the scope of the request;
 - (c) noting the scope and significance of the Suburban Rail Loop Project, it is unlikely that each of the 400 documents were created for the purpose of consideration by the Cabinet, or to brief a Minister of issues to be considered by the Cabinet, or would reveal a decision or deliberation by the Cabinet; and
 - (d) the Applicant has excluded from the scope of their request any documents prepared for the Cabinet or to brief a Minister in relation to a matter to be considered by the Cabinet.
24. Accordingly, I am not satisfied that on the face of the Applicant's request that all requested documents, should any exist, would be exempt from release under section 28(1) and therefore, the second limb of section 25A(5) is not met.

Third requirement – would there be scope for the Agency to provide an edited copy of any of the documents?

25. 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.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵

⁴ *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].

⁵ *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].

27. Having considered the broad scope of the request, I am satisfied there would likely be scope to provide the Applicant with an edited copy of at least one or more of the requested documents with exempt information deleted in accordance with section 25. I am also satisfied it would be practicable to do so, as it would likely not require substantial time and effort, and the edited documents would likely retain sufficient meaning.
28. Accordingly, I am satisfied there is likely to be scope to provide an edited copy of at least one of the requested documents to the Applicant in accordance with section 25 and the obligation would arise for the Agency to grant access to an edited copy of one or more documents with exempt information deleted.

Conclusion

29. On the information before me, I am not satisfied that each of the requirements for section 25A(5) are met in relation to the Applicant's request.
30. The effect of my decision is that the Agency is required to search for the requested documents and, should any exist, assess those documents in accordance with the FOI Act.

Timeframe to seek a review of my decision

24. 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.⁶
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
27. 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.
28. 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.⁹

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and 50(3FA).