

## Notice of Decision and Reasons for Decision

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Applicant:	'FR4'
Agency:	V/Line Corporation
Decision date:	25 June 2024
Exemptions and provision:	Sections 30(1), 33(1), 34(1)(b), 34(4)(a)(ii), 25
Citation:	'FR4' and V/Line Corporation (Freedom of Information) [2024] VICmr 44 (25 June 2024)

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FREEDOM OF INFORMATION – heritage gates – Heritage Victoria – permit – options assessment – public participation in decision making

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

I have decided to release four documents in full and seven documents in part.

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

Please refer to page 9 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
Acting Public Access Deputy Commissioner

25 June 2024

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Department of Transport and Planning for access to certain documents regarding the 'options assessment report on the [location] level crossing, currently advertised by Engage Victoria for public comment'. That request was transferred to the Agency as the holder of the relevant documents. Following consultation with the Applicant, the terms of the request are:
  - A copy of all written advice from all rail network experts, signaling experts and heritage consultants relied upon for the preparation of the Options Assessment Report.
  - A copy of all research upon which such advice relies, including data sets and comparative performance of swing and boom gates in relation to safety, efficiency and heritage, and all other relevant matters. (If copies of such research is considered too arduous for FOI purposes, full references, including titles, authors, publishers and year of publication, may be provided instead.)
  - A copy of the report(s) by Network Rail (without title, but twice cited in the Options Assessment Report).
  - A copy of any modelling used to rank the five options considered, including key selection criteria and any relevant weighting of criteria for ranking options.
2. The Agency identified four documents falling within the terms of the Applicant's request and:
  - (a) released one document in part; and
  - (b) refused three documents in full.
3. In making its decision, the Agency relied on sections 30(1) and 33(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.

### *Documents subject to request*

5. The documents subject to this request relate to actions taken by the Agency following an incident where a train failed to stop at [a level crossing] and collided with the replica gates that were used to manage the traffic between rail and road. The reference to Engage Victoria in the Applicant's request terms relates to the government's community consultation about whether to restore the gates to their original position as well as a number of other associated matters. Heritage Victoria is also involved as a permit is required to approve the movement and management of the gates themselves.

### *Concerns about the adequacy of document searches*

6. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches in relation to their FOI request.

7. In accordance with section 61B(3), these concerns were dealt with by this review.
8. OVIC staff made further enquiries with the Agency to address the Applicant's concerns.
9. In response to the Applicant's concerns, the Agency advised that the amended heritage permit identified by the Applicant should have formed part of the documents falling within the terms of the request. The Agency has taken steps to ensure subject matter experts are aware that all documents, whether prepared by it or any other entity, fall within the meaning of FOI requests. I note this document is available online and does not form part of this review.
10. As a result of OVIC's enquiries, additional documents were located that fall within the terms of the Applicant's request and the Agency decided to make a fresh decision as detailed below.

*Agency fresh decision*

11. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review. On [date], the Agency made a fresh decision. This is within the required 28 days under section 49M(2). As a result of the fresh decision, the Agency advised it had identified two additional documents falling within the terms of the request.
12. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.

*Additional documents located – Scope of my review*

13. Following the Agency's fresh decision and additional engagement from OVIC staff, the Agency located further documents, additional to the two referred to in the fresh decision. These are set out in the Schedule of Documents in **Annexure 1** and I have included them in my review.
14. I have examined a copy of the documents subject to review.
15. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
16. I have considered relevant communications and submissions received from the parties.
17. 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.
18. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

## Review of exemptions

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

19. To be exempt under section 30(1), three conditions must be satisfied:
- (a) the document or information is matter in the nature of:
    - (i) opinion, advice or recommendation prepared by an agency officer or a Minister; or
    - (ii) consultation or deliberation that has taken place between agency officers or Ministers; and
  - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions; and
  - (c) disclosure of the matter would be contrary to the public interest.
20. The exemption does not apply to purely factual material in a document.<sup>1</sup>
21. 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) or not.
22. I consider a substantial amount of the information in the documents does not amount to opinion, advice or recommendation, rather, it is factual. This includes for example the history of the site and the changes to its operation over the years. It also includes technical specifications, incidents, descriptions of UK rail crossing arrangements, and general information about heritage requirements, among other matters.
23. However, I am also satisfied some of the information is opinion, advice or the recommendation prepared by an agency officer as defined in paragraph 21.
24. Further, I am satisfied the information was created during the deliberative processes of the agency, being the Agency's responsibilities in managing rail services in Victoria.

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

25. 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:<sup>2</sup>
- (a) the right of every person to gain access to documents under the Act;
  - (b) the sensitivity of the issues involved and the broader context of how the documents were created;

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<sup>1</sup> Section 30(3).

<sup>2</sup> See [OVIC FOI Guidelines – Section 30\(1\)](#)

- (c) the stage of a decision or policy development at the time the communications were made;
  - (d) whether disclosure of the documents would be likely to inhibit communications between agency officers that are essential for the agency to make an informed and well-considered decision or for those officers to properly participate in a process of the agency's functions (such as an audit or investigation, regulatory or law enforcement function);
  - (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, but only where 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 accurately representing a final decision by an agency or Minister;
  - (g) the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions;
  - (h) the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes;
  - (i) the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process and building the community's trust in government and its decision making processes;
  - (j) whether there is controversy or impropriety around the decision or the decision-making process.
26. The Agency submits the disclosure of the documents subject to review would be contrary to the public interest as they are actively being considered by Heritage Victoria in support of a permit that has yet to be decided.
27. I have decided it would not be contrary to the public interest to disclose the information in the documents for the following reasons:
- (a) A significant amount of information in the documents is not sensitive.
  - (b) Some of the information is publicly known, particularly as it relates to public infrastructure, publicly reported information (including much of the community consultation report), and other descriptive information.
  - (c) I also note a version of the Australian Transport Safety Bureau (**ATSB**) report on the incident regarding the heritage gates at [location] has been published on the internet.<sup>3</sup> While the published version looks the same as the document subject to review I cannot in the time available state that it is exactly the same. However, I note the publicly available ATSB report contains significant technical detail regarding the incident including

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<sup>3</sup> [footnote omitted].

its views of the causes and advice to the Agency. The report notes that ‘the initial public version of these safety issues and actions are provided separately on the ATSB website, to facilitate monitoring by interested parties’.

- (d) I also note attachments in Document 12 produced by the Office of the National Rail Safety Regulator are published online.
- (e) Each of the documents appear to be in their final form.
- (f) In relation to the more detailed information that is more technical and detailed, I consider that, consistent with the reasons for publishing the ATSB report described above, the public interest weighs in favour of disclosure in order to hold the Agency and related agencies to account for their decisions and the safe management of the level crossing.
- (g) I note that Document 5 contains a list of incidents relating to signaling at [location] and that this is more sensitive information. However, I do not consider this information rises to the level that its disclosure would be contrary to the public interest. Rather, it provides contextual information considered by the Agency in making its recommendations regarding the level crossing.
- (h) While I note that further action may be pending by Heritage Victoria, I do not consider disclosure would have any impact on its decision making. Rather, the public interest weighs in favour of disclosure to promote public participation in decision making around the heritage gates and the management of the level crossing.

28. The documents are therefore not exempt under section 30(1).

***Section 33(1)– Documents affecting personal privacy of third parties***

29. A document or information is exempt under section 33(1) if two conditions are satisfied:
- (a) the document or information relates to the ‘personal affairs’ of a natural person (living or deceased); and
  - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.

*Do the documents contain personal affairs information of individuals other than the Applicant?*

30. The documents contain the names, position titles and email addresses of third parties. This information is personal affairs information.
31. Document 4 also contains information obtained by Engage Victoria from members of the public. It appears to be verbatim commentary with names or other identifying information deleted. I do not consider this information to be detailed enough to allow for the people who

made those comments to be reidentified and have determined it is not personal affairs information. This information is therefore not exempt from release.

*Would disclosure of the personal affairs information be unreasonable?*

32. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:<sup>4</sup>
- (a) the nature of the personal affairs information;
  - (b) the circumstances in which the information was obtained;
  - (c) the extent to which the information is available to the public;
  - (d) the applicant's interest in the information;
  - (e) whether any public or important interest would be promoted by release of the information;
  - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;
  - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person;<sup>5</sup>
33. I have determined it would be unreasonable to release the personal affairs information in the document for the following reasons:
- (a) It is not apparent that any of those individuals mentioned have decision making responsibilities in relation to the matter.
  - (b) The release of those names and details would not add to a further understanding of the documents.
  - (c) The applicant's request is predominantly for the information considered by the Agency in making its recommendations in relation to the management of the [location] crossing.
  - (d) As those persons are mostly non-senior agency officers, or other third parties, I consider their privacy outweighs other considerations in this matter.
34. The names, position titles and email addresses that appear in the documents are therefore exempt under section 33(1).

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<sup>4</sup> OVIC FOI Guidelines – Section 33(1)

<sup>5</sup> Section 33(2A).

*Sections 34(1)(b) and 34(4)(a)(ii) – documents of a business, financial or commercial nature*

35. For completeness, I have considered whether sections 34(1)(b) or 34(4)(a)(ii) apply to Document 2.
36. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking and:
- (a) the information relates to other matters of a business, commercial or financial nature; and
  - (b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
37. 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.
38. Document 2 contains a water mark ‘commercial in confidence’. While the Agency has not claimed either of the above exemptions, in making my fresh decision I have further considered whether they apply.
39. In my view, Document 2 does not contain information obtained from a business undertaking and the document is therefore not exempt under section 34(1)(b).
40. I have also considered whether the document contains information that indicates the Agency is engaged in trade or commerce. In my view, it does not contain such information. While the Agency is assessing the safety of a particular rail crossing, and depending on the options taken the assessment will have financial implications, I do not consider this function entails the Agency being engaged in trade of commerce. The document is therefore not exempt under section 34(4)(a)(ii).

*Section 25 – Deletion of exempt or irrelevant information*

41. 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.
42. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>6</sup> and the effectiveness of the deletions.

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<sup>6</sup> *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].



Where deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.<sup>7</sup>

43. I am satisfied it is practicable to delete information exempt under section 33(1) from the documents as that information appears in several pages of the documents, and has already been identified by the Agency.

### Conclusion

44. On the information before me, I am satisfied certain information in the documents is exempt from release under section 33(1). However, I am not satisfied section 30(1) applies to the documents.
45. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted in part.
46. My decision in relation to each document is set out in the Schedule of Documents at **Annexure 1**.

### Timeframe to seek a review of my decision

47. 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.<sup>8</sup>
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
50. 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.
51. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>11</sup>

### When this decision takes effect

52. 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.

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<sup>7</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division* (Review and Regulation) [2013] VCAT 1267 at [140], [155].

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

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

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

<sup>11</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
1	No date	Copy of Heritage Permit	6	Released in full	<b>Not subject to review</b>
2	No date	SFAIRP Demonstration	27	Refused in full Sections 30(1) and 33(1)	<b>Release in part</b> Sections 33(1), 25  The document is to be released with names, position titles and email addresses in the document that appear on pages 25 to 27 deleted in accordance with section 25.
3	[Date]	Network Rail [location] level crossing technical support	39	Refused in full Sections 30(1) and 33(1)	<b>Release in part</b> Sections 33(1), 25  The document is to be released with names that appear on page 38 deleted in accordance with section 25.
4	No date	Appendices for Application of Heritage Permit to Heritage Victoria A: [name] B: Network rail report (same as Document 3)	321	Refused in full Sections 30(1) and 33(1)	<b>Release in full</b>

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision
		C: [name] D: Community consultation report (same as Document 6) E: [name] F: SFAIRP report (same as Document 2)			
5	No date	[Location] Technical Options Assessment	118	Refused in full Sections 30(1) and 33(1)	<b>Release in part</b> Sections 33(1), 25  The document is to be released with names and position titles on pages 1 and 2 deleted in accordance with section 25.
6	No date	[Location] Level Crossing Community Consultation Summary Report	91	Refused in full Section 30(1)	<b>Release in full</b>
The below documents were located following the Agency's fresh decision					
7	[Date]	VHR H0902 [location] Railway complex	1	Agency submits: Release in part, section 33(1)	<b>Release in part</b> Sections 33(1), 25  The document is to be released with the information identified by the Agency deleted in

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision
					accordance with section 25.
8	[Date]	Attachment to Document 7	3	Agency submits: Release in part, section 33(1)	<p><b>Release in part</b> Sections 33(1), 25</p> <p>The document is to be released with the information identified by the Agency deleted in accordance with section 25.</p>
9	[Date]	Attachment to Document 7	2	Agency submits: Release in part, section 33(1)	<p><b>Release in part</b> Sections 33(1), 25</p> <p>The document is to be released with the information identified by the Agency deleted in accordance with section 25.</p>
10	[Date]	20230707 VHR H0902 [location] Railway Complex P34664 - Condition 11 Letter	1	Agency submits: Refuse in part, sections 30(1), 33(1)	<p><b>Release in part</b> Sections 33(1), 25</p>

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Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision
					The document is to be released with the information identified by the Agency exempted under section 33(1) deleted in accordance with section 25.
11	[Date]	20230707 Options Analysis_FINAL	68	Agency submits: Refuse in full, section 30(1)	<b>Release in full</b>
12	[Date]	20231221_Addendum to Options Analysis	111	Agency submits: Refuse in full, section 30(1)	<b>Release in full</b>