

7 March 2022

Our Ref: CLM21-232 (FOIREQ21-19)

The Hon David Davis MP
c/- Mr Brett Barton
Level 1, 670 Chapel Street
SOUTH YARRA VIC 3141

Dear Mr Davis

I refer to your amended request made under the *Freedom of Information Act 1982* (**FOI Act**) to the following:

Any recommendations or communications by VicTrack to other areas of government that relate to the redevelopment of Mont Alvert and Surrey Hills Railway Stations, the level crossing removals at Surrey Hills and Mont Albert, the Lorne Parade Reserve and any assessments of design options for the new station to be located in Lorne Parade Reserve since 1 January 2018.

Thank you for agreeing to exclude from the scope of your request information falling within s 33(9) of the FOI Act, except those in relation to public officers above VPS 6 or equivalent level and for non-public servants, “senior officers” has been interpreted as decision-makers of communications with VicTrack.

After conducting a thorough and diligent search, VicTrack has located documents falling within the scope of your amended request.

I am authorised under s 26 of the FOI Act to make decisions on behalf of VicTrack, in relation to requests for access to documents made under the FOI Act.

In making the decision set out below, VicTrack has taken into account all relevant considerations including:

- the documents sought and how they came to be created by VicTrack;
- VicTrack’s knowledge and understanding of the FOI Act; and
- the views of individuals and third parties whose personal and other organisational information appear in the documents.

NOTICE OF DECISION AND STATEMENT OF REASONS

I have determined to release some pages of documents to you in part. The pages which are withheld in full, or being disclosed to you in part, contain information in them that is exempt from disclosure under one of more of ss 28(1)(c), 30(1) and 33(1) of the FOI Act for the reasons set out below.

Material exempt under s 28(1)(c) of the FOI Act

Section 28(1)(c) provides that a document is exempt from disclosure under the FOI Act if it is a copy or draft of, or contains extracts from, an official record of any deliberation or decision of the Cabinet. I have been informed by the government agency that authored those documents that a table on page 5 and parts of page 25 contain information and/or diagrams or drawings that were extracted from a Cabinet document.

That material is therefore exempt from disclosure under s 28(1)(c) of the FOI Act.

Material exempt under s 30 of the FOI Act

Section 30(1) of the FOI Act provides that a document is exempt from disclosure if it contains:

- (a) matters 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) that material was prepared 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 that material would be contrary to the public interest.

The documents and parts of them withheld under this exemption of the FOI Act comprise discussions which contain recommendations which were not necessarily authorised or endorsed or adopted, including:

- partial summaries of various options canvassed which do not show all of the reasoning behind why particular options were summarised and others not;
- options and assessments of them that are taken out of context;
- analyses that assess various options and raise others; and
- comments on stakeholder views which are set out in summarised form without context.

Another document (appearing from pages 31-115) is a draft document created by a team external to VicTrack, located in another government agency, that advises on technical issues around network planning requirements. That document examines the technical impacts and requirements of various options canvassed by the government as part of the level crossing removal at the sites the subject of your FOI request.

All of the above material comprise analyses and deliberations exchanged between, and prepared for the purpose of the deliberative processes involved in the functions of the government.

Disclosure of that material would be contrary to the public interest for the following reasons:

- the options canvassed within the material reflects the input of different government agencies at a particular point in time and does not reflect the ultimate decision-making process or final position adopted by the government, and that final position is now a matter of public record. Disclosing these analyses and options, which were not necessarily adopted or approved, in a situation where the government can be judged for the decision it did ultimately make and the reasons for which it made them,

is misleading and gives undue weight to options which do not reflect the government's decision-making process.

- Much of the material to which this exemption applies has been superseded by the final position which is now endorsed and published by the government as the position ultimately adopted. The government should be judged on positions it adopts and endorses, rather than the preliminary and superseded views and opinions of officers engaging in the deliberative functions of the government to assist it to arrive at the ultimate position it chooses to take. Disclosure of parts of recommendations do not disclose the full picture as to the government's overall deliberative processes. VicTrack was not the only agency involved in the subject matter of your FOI request and is not in possession of all the documents that led to the government ultimately making the decision it did to remove the two train stations. This means that disclosing the partial and superseded options described in the materials would be misleading and cause confusion about how those options were considered by the government in arriving at its final decision.
- The deliberative process of government requires options to be canvassed and advice to be prepared by officers who are not the ultimate decision-makers, without fear that their unfinalised and indeterminate advice prepared for consideration purposes only, would make them the target of fear and speculation based on options that have not yet been approved or finalised. This is particularly the case in present circumstances where project officers involved in carrying out tasks related to the merger of the 2 train stations report being harassed by stakeholders who have particular views about the position taken by the government. Officers who do not make ultimate decisions should be free to be candid and frank in their assessments and work in preparing advice, without fear that people with particular views who disagree with their thoughts will attack them for their frank and fearless advice to the government in its deliberative processes.

Finally, in relation to the draft document setting out technical network planning analyses, as noted it was not prepared by VicTrack and is one of many variations prepared by the government agency which authored it. However, it was the only relevant document in VicTrack's possession which was captured by your request. In relation to that document, an additional reason for which disclosure would be contrary to the public interest is because it is one document among many and disclosure of this particular document would misrepresent the nature of decision-making involved in the various projects and options canvassed in that document.

Material exempt under s 33(1) of the FOI Act

Each of the documents contain the personal affairs information of many individuals including their names, positions, titles, email addresses, physical addresses, work phone numbers and mobile phone numbers.

The personal affairs information (as defined by s 33(9) of the FOI Act) of any individuals at VPS6 level (or equivalent) or below, has been removed as being not sought and therefore irrelevant, to your request. They are labelled accordingly on the documents to be released to you following our receipt of the access charges set out below.

As required under s 33 of the FOI Act, VicTrack consulted with the remaining individuals over their personal affairs information as captured in the documents you seek.

Material determined to be released to you but where consent was not given or could not be obtained in time

In relation to some individuals, consent to disclosure could not be obtained before a decision was due on your request, but VicTrack has nevertheless determined that information relating to their personal affairs is not exempt under s 33(1) of the FOI Act due to their seniority within an organisation. Therefore, although I have determined to disclose that information to you, I am required by the FOI Act to provide them with review rights to seek review of my decision to disclose. The FOI Act gives those individuals 60 days from the day on which you and they are notified of my decision to release information relating to their personal affairs, to seek that review by making an application to the VCAT.

As you are already aware from being an experienced FOI applicant, this means I cannot give you the information relating to their personal affairs until the 60 period expires. If no application is made by them at the VCAT, I will provide you a further set of documents containing the personal affairs information relating to them which I have already determined to disclose to you.

Material determined to be exempt under s 33(1) of the FOI Act

In relation to other individuals, they provided consent to having their name, position and involvement in the deliberative processes disclosed. However, they did not want their personal mobile phone numbers, email addresses or other information disclosed.

In my view, the balance between personal privacy and government transparency and accountability is struck by me disclosing their names, positions or titles, and involvement in the deliberative processes. Given that disclosure under the FOI Act is unconstrained and in effect, to 'the world at large', and that some have received abusive or harassing communications in relation to the subject matter of your FOI request, I agree that it is unreasonable in all the circumstances to disclose under FOI their phone numbers or other information relating to them (e.g. direct phone numbers or email addresses) where you have the rest of the information about them, including their name and position and involvement in the documents.

Some individuals did not consent to having their personal affairs information disclosed as they were only copied into correspondence by others and were not otherwise involved in signing off, or actively participating in the processes disclosed by the documents. In my view, given the peripheral nature with which they appear in the documents and their expressed desire not to have their information released under FOI in this context, and the fact that I have determined to disclose to you the names of other senior staff, including in circumstances where we have not been able to obtain their consent to disclose information to you, it is unreasonable in all the circumstances to disclose the information relating to this group of people.

A small number of individuals have previously been harassed or otherwise contacted by members of the public and community groups over various issues in a way that causes them fear or anxiety for their personal safety. Where such concerns have been raised, and for the reasons set out earlier, I have also determined that it would be unreasonable in all the circumstances to disclose information relating to their personal affairs.

Finally, a small number of individuals no longer work at VicTrack nor in the Victorian public service, so VicTrack was unable to notify them or consult with them about their views in relation to potential disclosure of information relating to them, to you under the FOI Act. Given they were unable to be afforded their consultation rights under the FOI Act, I have also determined it is unreasonable in all circumstances to disclose information about them to you.

ACCESS CHARGES PAYABLE

Pursuant to s 20(1)(b) of the FOI Act, you will be given access to the documents edited in accordance with this decision, upon payment of the access charges payable pursuant to the FOI Act and the *Freedom of Information (Access Charges) Regulations 2014* ("**Regulations**"). As previously noted, despite not agreeing with the Information Commissioner's method for calculating those access charges, VicTrack has on this occasion and for this request agreed to use those methods for calculating the access charges applicable to this request.

The estimated charge is \$85.00 which has been calculated by me in accordance with the Regulations as follows:

Providing copies of the documents @ \$85.00 per hour x 1	\$85.00
Other charges not payable - s 22(1)(h)(ii)	\$ 0.00
TOTAL PAYABLE	\$85.00

Payment can be made by either:

- making a cheque to VicTrack and posted to:

The Freedom of Information Officer
VicTrack
GPO Box 1681
Melbourne VIC 3001; or

- direct deposit to VicTrack as follows:

Bank: The Commonwealth Bank
BSB: 063010
Account: 10478664
Ref: D Davis Station Amalgamation

If payment is made by direct credit, please confirm accordingly so that we can follow up promptly.

REVIEW RIGHTS

Application of exemptions

If you are not satisfied with my decision in relation to the application of exemption provisions in the FOI Act to some of the material in the documents, you may seek review from the Information Commissioner who can be contacted at:

Information Commissioner
PO Box 24274
MELBOURNE VIC 3001
Telephone: 1300 842 364.
Email
Web: www.ovic.vic.gov.au

If you wish to make a review application to the Information Commissioner, you must make that application within 28 days of receiving this notice. Further information about how the role of the Victorian Information Commissioner when they conduct reviews is also available at their website here: <https://ovic.vic.gov.au/freedom-of-information/apply-for-a-review/>.

Imposition or calculation of access charges

If you are not satisfied with my calculation or imposition of the access charges, you may seek review by writing within 60 days of receiving this letter to the Victorian Civil and Administrative Tribunal which can be contacted at 55 King Street, Melbourne VIC 3000 (www.vcat.vic.gov.au).

Please note that the Tribunal will only consider the matter if the Information Commissioner has first certified that the matter is one of sufficient importance for the Tribunal to consider. If you would like to seek that certification, you can contact the Commissioner at the contact details previously set out above.

Yours sincerely

Olivia Jones
Group Manager Legal and Freedom of Information Officer