



Written Submission to the Fishermans Bend Planning Review Panel in relation to redactions in documents submitted pursuant to direction of the Panel

Submitted by: Transport for Victoria

Date of document: 18 March 2018

1. Pursuant to a direction of the Fishermans Bend Planning Review Panel made on 9 March 2018 under s 161 of the *Planning and Environment Act 1987*, documents have been provided to the Panel by the Minister for Planning as background documents.
2. These documents include the following two documents which have been produced in redacted form:
 - 2.1 *Improving connectivity in Fishermans Bend Study – Report Covering Work Phases 1 and 2 by Jacobs (2016-17)*;
 - 2.2 *Fishermans Bend Public Transport, Active Mode Link and Connectivity Study- Report covering Phase 3 by Jacobs (2016-17)*.
3. Noting that that a panel may require the production of documents relating to any matter being considered by the panel "which it reasonably requires", the purpose of this submission is to explain why these documents have been produced in redacted form.¹ It is submitted that it is not reasonable to require the production of information contrary to the statutory structure set down for the production of information.²

¹ By way of completeness, we also note that although under s 169 of the *Planning and Environment Act 1987*, it is an offence if a person 'without lawful excuse disobeys a direction of a panel', inherent in this submission is the proposition that: (1) although it is the view of Transport for Victoria that it has assisted the Minister for Planning in complying with the direction of the Panel in producing the two redacted documents; (2) it is also the case that the redactions in the two documents have been made with 'lawful excuse'.

² Transport Victoria notes that the information in these submissions is provided so as to assist the Panel. It is however a preliminary view. Transport for Victoria gives notice that on a proper consideration of the material in the context of a formal application under the FOI Act or other judicial process that it may identify further grounds for the exemption of material contained within the relevant documents.

Access to documents outside of summons/subpoena

4. Outside of judicial and quasi-judicial proceedings which may employ coercive powers of the court in the form of summons and subpoena, the production of documents in the possession of government is subject to the provisions of the *Freedom of Information Act 1982 (the Act)*.
5. The object of the Act is to 'extend as far as possible the right of the community to information in the possession of the Government of Victoria' with any discretions conferred by this Act to be 'exercised as far as possible so as to facilitate and promote...the disclosure of information'. However, the general right of access prescribed by the Act is limited by
 - 'exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies'.³
6. To facilitate the provision of information even in circumstances where an exemption will apply to prevent the release of information, the Act nevertheless prescribes a situation by which a version of a document may be released with exempt material deleted, if "practicable". Section 25 relevantly states:
 - Where—
 - ...
 - (b) it is practicable for the agency or Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document or a document that would not disclose such information (as the case requires); and
 - (c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy—the agency or Minister shall grant access to such a copy of the document.
7. In relation to the two above referred to documents, Transport for Victoria has decided that although exemptions apply to parts of both documents that versions of the documents are capable of being provided to the Panel with the sections of the documents subject to exemptions redacted.
8. By way of explanation of the deletions appearing in the documents Transport for Victoria refers to the following exemptions under the Act and the relevant principles which are applicable to those sections.

³ *Freedom of Information Act 1982*, s 3.

Internal working documents exemption - Section 30(1)

9. A document is an exempt document under section 30(1) of the Act if it:

(a) would 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, 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

(b) would be contrary to the public interest

10. The section applies to the broad definition of 'officer' in s 5 of the Act such that it will extend to any person employed by the agency outside of the Public Administration Act. The section does not apply to a document by reason only of purely factual material contained in the document. The section has frequently been held to apply to the deliberations and advice of independent consultants to agencies and ministers.⁴

11. In *Penhalluriack v Department of Labour and Industry*,⁵ in an often referred to passage Lazarus J explained the purpose of the exemption as follows:

It is sufficiently apparent that the purpose of this provision is to protect the deliberative processes of government and to ensure that measure of confidentiality which will enable policy and the like decisions to be taken after the frankest possible interchange of views and ideas between officers of the public service and between them and their Minister, as well as between members of the ministry. Such an exemption is very wide indeed...

12. However, although the exemption appears very wide, it is also required that disclosure would be contrary to the public interest.

13. The usual factors relevant to the applicability of the public interest criterion include:⁶

13.1. the state of policy development processes at which the communication was made (disclosure of communications made in the course of the development and consequent promulgation of policy tends not to be in the public interest);

⁴ *Perton v Department of Premier & Cabinet* (1992) 5 VAR 290; *Dalla Riva v Department of Treasury & Finance* (2007) 27 VAR 115; [2007] VCAT 1301 at [54]; *Herington v Department of Transport Planning & Local Infrastructure* [2014] VCAT 1026;

⁵ Unreported, County Court, Vic, Lazarus J, 19 December 1983), p 29; see also *Johnson v Cancer Council of Victoria* [2016] VCAT 1596 at [215].

⁶ *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483, at 488; *Re Howard and Treasurer of the Commonwealth* (1985) 3 AAR 169, at 178.

- 13.2. the degree of sensitivity of the issues involved in the consideration (the more sensitive the issues involved in the communication, the more likely it will be that the communication should not be disclosed);
 - 13.3. whether disclosure would lead to confusion or unnecessary debate resulting from possibilities considered (such disclosure tends not to be in the public interest);
 - 13.4. whether disclosure would give only a part explanation for making a particular decision (disclosure of documents which do not fairly disclose the reasons for a decision made subsequently may be unfair to a decision-maker and may prejudice the integrity of the decision-making process); and
 - 13.5. whether the disclosure would be likely to inhibit frankness and candour in the making of communication (disclosure which will inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest).
14. Accordingly, as stated by Judge Hampel in *Friends of Mallocoota Inc v Department of Planning and Community Development*:⁷

Regard must be had to both the nature of the information and the nature of the document.

The more sensitive or contentious the issues involved in the communication, the more likely it is that the communication should not be disclosed.

Draft internal working documents or preliminary advices and opinions are more generally than not be inappropriate for release. That is particularly so when the final version of the document has been made public.

It is contrary to the public interest to disclose documents reflecting possibilities considered but not eventually adopted, as such disclosure would be likely to lead to confusion and ill informed debate, to give a spurious standing to such documents or promote pointless and captious debate about what might have happened rather than what did.

Decision-makers should be judged on the final decision and their reasons for it, not on what might have been considered or recommended by others in preliminary or draft internal working documents.

It is contrary to the public interest to disclose documents that would have an adverse effect on the integrity or effectiveness of a decision-making, investigative or other process.

⁷ [2011] VCAT 1889 [51]

15. The two documents referred to above comprise the submissions of consultants to the Minister setting out advice and recommendations. The two documents are draft documents. The sections redacted in those documents comprise graphical depictions of the potential transport options to service Fishermans Bend. None of these options have been determined and the release of this information would prejudice the decision making process and cause confusion amongst local land owners who might be concerned about the impact on their properties.
16. Similarly, the release of potential costing for the construction of transport infrastructure may prejudice the ability of the State to competitively tender for these works.

Applications for documents under the Act

17. In conclusion, Transport for Victoria notes that through the Act the Parliament has prescribed the procedures by which the decisions can be made to release a document to an applicant or to claim an exemption. The Act also sets out timelines to allow for the proper consideration of the decision making process with the minimum period of 30 days being a period which can be extended.⁸
18. In cases where applicants are not satisfied with decisions made under the Act, the Act also prescribes review procedures both to the Office of Victorian Information Commissioner and to the Victorian Civil and Administrative Tribunal (**VCAT**). Decisions of VCAT can also be appealed to the Supreme Court on questions of law.
19. It is submitted that if access is sought to un-redacted versions of documents produced to the Panel that the procedures prescribed under the Act are the appropriate mechanisms to be pursued by an applicant.



Garry Button

A/Deputy Secretary Network Planning and Strategy

Transport for Victoria

18 / 5 / 2018

⁸ *Freedom of Information Act 1982*, s 21.