



Australian Government

**Department of Infrastructure, Transport,
Regional Development and Communications**

FOI reference number: FOI 20-146

Mr Lucas Baird
Through the Right to Know website
Via email: foi-request-6388-a8dcf560@righttoknow.org.au

Dear Mr Baird

Decision made under the Freedom of Information Act 1982 – Exempt in full

I refer to your request to the Department of Infrastructure, Transport, Regional Development and Communications (the department) received on 11 June 2020, for access to documents under the *Freedom of Information Act 1982 (FOI Act)*. You requested the following documents:

any internal reports, and/or internal reports and briefs created by EY on the financials of Virgin for the Department, and the report produced by the department on the bailout for the airline

Authority

I am an officer authorised by the Secretary to make decisions about access to documents in the possession of the department in accordance with s 23(1) of the FOI Act.

Documents subject to this request

The department has undertaken a search of its records and has identified 12 documents that fall within the scope of your request. The documents are listed in Schedule 1, together with applicable exemption provisions.

Decision

I have made a decision not to release any documents subject to your request on the basis that the information in the documents was obtained in confidence. All documents are therefore exempt pursuant to sections 34 and 45 of the Freedom of Information Act 1982 (the FOI Act).

I have decided not to impose a charge for processing your FOI request.

Reasons for decision

In accordance with section 26(1)(a) of the FOI Act, the findings on any material question of fact, referring to the material on which those findings were based and the reasons for my decision to refuse access to the documents follows.

I have taken the following material into account in making my decision:

- the content of the documents that fall within the scope of your request;
- sections 3, 11 and 11A of the FOI Act which give the Australian community a legally enforceable right to obtain access to information held by the Government of the Commonwealth.
- the following provisions of the FOI Act relevant to my decision:
 - section 11B public interest exemption – factors

- section 22 access to edited copies with exempt or irrelevant material deleted
- section 34 cabinet
- section 45 material obtained in confidence
- the FOI Guidelines issued by the Australian Information Commissioner.

Statement of reasons

I have decided to refuse access to document within the scope of your request in accordance with the following exemptions in the FOI Act:

Cabinet documents (section 34)

The Cabinet exemption in section 34 of the FOI Act is designed to protect the confidentiality of the Cabinet process and to ensure that the principle of collective ministerial responsibility (fundamental to the Cabinet system) is not undermined. This exemption is not subject to the public interest test.

Section 34 of the FOI Act explains that:

- (1) *A document is an exempt document if:*
 - (a) *both of the following are satisfied:*
 - (i) *it has been submitted to the Cabinet for its consideration, or is or was proposed by a Minister to be so submitted;*
 - (ii) *it was brought into existence for the dominant purpose of submission for consideration by the Cabinet; or*
 - (b) *it is an official record of the Cabinet; or*
 - (c) *it was brought into existence for the dominant purpose of briefing a Minister on a document to which paragraph (a) applies; or*
 - (d) *it is a draft of a document to which paragraph (a), (b) or (c) applies.*
- (2) *A document is an exempt document to the extent that it is a copy or part of, or contains an extract from, a document to which subsection (1) applies.*
- (3) *A document is an exempt document to the extent that it contains information the disclosure of which would reveal a Cabinet deliberation or decision, unless the existence of the deliberation or decision has been officially disclosed.*

Documents marked as exempt or partially under this provision include a draft Cabinet submission as well as drafts of attachments that were ultimately submitted to Cabinet for consideration and debate. Therefore, I am satisfied that these documents are exempt in full or part in accordance with section 34(1)(d) of the FOI Act.

Further, documents relevant to the request include information which, if disclosed, would reveal Cabinet deliberations or decisions, including the timings of Cabinet's consideration. The documents in question provides insight to Cabinet processes, deliberation and discussions.

During the processing of your request, the department sought advice from Department of the Prime Minister and Cabinet (PM&C) on the release of these documents. PM&C confirmed material contained within the documents would, if disclosed, reveal Cabinet deliberations or decisions, including the timing of Cabinet's consideration.

I am satisfied there has been no official disclosure of the Cabinet deliberations with the meaning of sections 34(3) or 34(6) of the FOI Act.

Taking the above into consideration, I am satisfied that content contained within the documents are exempt in accordance with section 34 of the FOI Act.

Documents containing material obtained in confidence (section 45)

Section 45(1) provides that:

a document is an exempt document if its disclosure would found an action by a person... for breach of confidence. In other words, the exemption is available where the person who provided the confidential information would be able to bring an action under the general law for a breach of confidence to prevent disclosure, or to seek compensation for loss or damage arising from disclosure.¹

To found an action for breach of confidence (meaning s45 would apply), the OAIC have outlined the following five (5) criteria that must be satisfied in relation to the information:

- it must be specifically identified;
- it must have the necessary quality of confidentiality;
- it must have been communicated and received on the basis of a mutual understanding of confidence;
- it must have been disclosed or threatened to be disclosed, without authority; and
- unauthorised disclosure of the information has or will cause detriment.²

The reports and communications developed by EY for the department pertain to a financial assessment and analysis of Virgin Airlines in a broader context. These reports and communications were developed as part of an agreement with the department to provide services in connection with the assessment and analysis of potential government support for the broader Airline Industry. EY was requested to provide strategic advice and detailed financial analysis to enable the department and government to consider a response to request from industry for assistance during the COVID 19 crisis. These reports were provided only to the department for the purposes of recommending what assistance may be achievable or appropriate in unprecedented circumstances.

The reports and analysis were provided to the department under contractual arrangements that contain confidentiality clauses acknowledging the very commercially sensitive nature of the information.

The first of the five elements that must be fulfilled for this exemption to be satisfied is that it is not sufficient for the confidential information to be identified in global terms but it must be identified specifically. I am satisfied in this matter that the reports and the financial information contained in those reports, as they pertain to Virgin Australia, is specifically identifiable, therefore meeting this element.

The Guidelines also outline that the information must have the necessary quality of confidentiality. The information must be secret or only known to a limited number of parties. Any information which is common knowledge or in the public domain will not have the sufficient quality of confidentiality. I am of the opinion that the information in the reports meets this criteria. The financial information in the reports is only known to specific number of parties being Virgin executive, the relevant staff within EY tasked with working on the project and a small number of departmental staff. The information is highly commercially sensitive and I am satisfied that it is not in the public domain, nor has it been distributed more widely

The third element of this exemption is that the information must have been communicated and received on the basis of a clear understanding of confidence. As discussed above, at paragraph 12, the information was provided to EY by Virgin at the request of the department and was done so via a virtual data room on the clear understanding that EY would treat the data confidentially. Further, the contractual agreements in place with the department and EY contain strict clauses pertaining to the protection of sensitive information and EY staff, working directly on the project, were further required to execute non-disclosure deeds. I am therefore satisfied that the information was communicated with the requisite understanding of confidence.

The fourth element that must be satisfied is that the information must have been or been threatened to be disclosed without authority. There is no evidence suggesting that Virgin have consented to the information being released, further to what was shared between parties under the terms of a contractual agreement. Any disclosure of the information outside these nominated parties would be therefore be unauthorised.

¹ *Guidelines*, [5.155].

² *Guidelines*, [5.159].

Lastly, the fifth element to be satisfied is that release of the information has, or will cause detriment to the parties that provided the information. The FOI Guidelines as well as the Administrative Appeals Tribunal (AAT) have disused the concept of detriment in a number of cases. In a recent 2019 matter the AAT confirmed earlier discussions and applications of the notion of detriment and found that:

The nature of the detriment is also a matter of debate, however, it is tolerably clear that the detriment contemplated by Gummow J is not limited to financial detriment, but is of much broader import and can include embarrassment, distress, public ridicule or public criticism.

I am of the opinion that release of the information provided to EY by Virgin or the analysis provided by EY, could be reasonably expected to cause reputational or financial harm to Virgin as well as EY. None of this information is known publicly and release could be reasonably be expected to be detrimental to the commercial operations of Virgin. Further, if the information were to be released I consider there may be a detrimental reputational harm caused to EY as other clients may question their own information and the ability of a large firm, such as EY to maintain confidentiality over sensitive commercial information.

For the reasons outlined above I am satisfied that the documents listed as exempt in full in Schedule 1 meet the criteria for exemption under section 45 of the FOI Act.

Your rights of review

If you wish to seek an internal review, you must apply to the Department within **30 days** after the day you are notified of this decision. An application for internal review must be made in writing by post to the FOI Officer or email to FOI@infrastructure.gov.au.

Alternatively, you may apply directly to the Office of the Australian Information Commissioner (OAIC) to review my decision. An application for review by the Information Commissioner must be made in writing within **60 days** after the day you are notified of this decision. You can also make a complaint to the Information Commissioner if you have concerns about how the Department handled your request. You can find information about requesting a review, making a complaint, and other information about FOI on the OAIC website www.oaic.gov.au or phone the OAIC on 1300 363 992.

Contacts

If you wish to discuss this matter, please contact the Department's FOI Coordinator on (02) 6274 7393 or via email at FOI@infrastructure.gov.au.

Yours sincerely



Oliver Richards
Assistant Secretary
Strategic Policy, COVID Action Portfolio Coordination and Policy
22 July 2020



Schedule of documents

Applicant: Lucas Baird

Decision date: July 2020

FOI reference number: 20-146

Documents: Documents prepared by EY regarding the financial situation of Virgin Airlines

| Document reference | Date of document | Author | Recipient | Document description | Decision | Exemption provision |
|--------------------|------------------|-----------------|------------|--|----------------|------------------------------|
| 1 | 3 April 2020 | Ernst and Young | Department | Project Pegasus – VA Considerations – DRAFT | Exempt in full | s34(3) and s45 |
| 2 | 5 April 2020 | Ernst and Young | Department | Project Pegasus – Status Update – Draft | Exempt in full | s45 |
| 3 | 9 April 2020 | Ernst and Young | Department | Project Pegasus – Observations on Forecast Draft | Exempt in full | s34(1)(d), s34(3) and s45 |
| 4 | 9 April 2020 | Ernst and Young | Department | Project Pegasus – Options Summary | Exempt in full | S45 |
| 5 | 9 April 2020 | Ernst and Young | Department | Project Pegasus – Databook – Cash flow (Excel) | Exempt in full | S45 |

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| 6 | 10 April 2020 | Ernst and Young | Department | Project Pegasus – Databook CF Model Comparison (Excel) | Exempt in full | s45 |
| 7 | 14 April 2020 | Ernst and Young | Department | Project Pegasus – Commonwealth Support Request – Draft – DITRDC | Exempt in full | s45 |
| 8 | 14 April 2020 | Ernst and Young | Department | Project Pegasus – Briefing on Financial Liquidity | Exempt in full | s34(3) and s45 |
| 9 | 14 April 2020 | Ernst and Young | Department | Project Pegasus – Observations on cash balance – draft | Exempt in full | s34(1)(d) and s45 |
| 10 | 15 April 2020 | Ernst and Young | Department | Virgin Australia – Cash balance forecast | Exempt in full | s34(1)(d) and s45 |
| 11 | 16 April 2020 | Ernst and Young | Department | Possible Government strategies for Virgin Australia | Exempt in full | s34(1)(d) and s45 |
| 12 | April 2020 | Department | Cabinet | Cabinet Submission | Exempt in full | s34(1)(d) and s45 |