

Notice of Decision and Reasons for Decision

Applicant:	'AH1'
Agency:	Department of Education and Training
Decision Date:	16 July 2019
Exemption considered:	Section 28(1)(b)
Citation:	'AH1' and Department of Education and Training (<i>Freedom of Information</i>) [2019] VICmr 64 (16 July 2019)

FREEDOM OF INFORMATION – Cabinet in confidence – document prepared for the purpose of a submission to Cabinet

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 is the same as the Agency's decision in that I have decided to refuse access to the document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

16 July 2019

Reasons for Decision

Background to review

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

all documentation and records of consultation sought by DET with the cleaning industry (including Contractors, Companies, Organisational Bodies) on the introduction of the new DET Area Based Cleaning model announced 11 August 2017 & implemented 1 July 2018. The documentation and records sought will be prior to 11 August 2017.
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to the document in full.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. By email dated 6 June 2019, the Agency informed OVIC it no longer seeks to rely on the exemption in section 28(1)(ba) to refuse access to the document. However, the Agency maintains its decision to refuse access to the document in full, advising it now seeks to rely on the exemption in section 28(1)(b) to refuse access.
6. On 7 June 2019, OVIC staff wrote to the Applicant [to inform them] of the Agency's decision to withdraw its reliance on section 28(1)(ba) and invited him to make a written submission in response to the Agency's application of the exemption in section 28(1)(b) to the document.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated 30 April 2019 and information provided with the Applicant's review application;
 - (c) the Agency's submissions dated 20 March 2019 and 6 June 2019; and
 - (d) publicly available information regarding the school cleaning contract model.
8. I have been briefed by OVIC staff who inspected the document claimed to be exempt under section 28(1)(b).
9. 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.

Submissions

10. The Applicant submitted that information regarding the reform to state school cleaning operations should not be a matter of secrecy. As the topic has been discussed widely in the media, it would not be contrary to the public interest to release. The Applicant further noted, information will not be exempt if the Cabinet deliberations or decision has already been disclosed.

11. The Agency submitted the following in relation to its application of section 28(1)(b) to the document:
 - (a) The document was commissioned by the Agency in response to a request from the Government for advice in relation to the implementation of a 'zoned cleaning model.'
 - (b) The implementation of the model was a significant policy change, which involved a large expenditure of public funds.
 - (c) KPMG was engaged to provide a report to the Agency.
 - (d) The report formed part of a submission to the Policy, Strategy and Budget Sub-Committee of Cabinet (**PSBC**) on School Cleaning Reform.
 - (e) The report, the subject of review, supported the eventual Cabinet briefing, which was approved by the Cabinet in 2017, leading to the government's stated cleaning reforms.

Review of exemptions

12. The Agency relied on the exemption in section 28(1)(b) to refuse access to the document in full.

Section 28(1) – Cabinet documents

13. Section 28(1) provides:

- (1) A document is an exempt document if it is—
...
 - (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;
- (3) Sub section (1) does not apply to a document referred to in a paragraph of that sub section to the extent that the document contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.

14. Section 28(7)(a) defines 'Cabinet' to include a committee or sub-committee of Cabinet.

15. In *Ryan v Department of Infrastructure*,¹ the Victorian Civil and Administrative Tribunal (**VCAT**) observed:

It has been said that a document is not exempt merely because it has some connection with Cabinet, or is perceived by departmental officers or others as being of a character that they believe ought to be regarded as a Cabinet document or because it has some Cabinet "aroma" around it. Rather, for a document to come within the Cabinet document exemption, "it must fit squarely within one of the four exemptions [(now five)]" in section 28(1) of the Act.

16. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.
17. VCAT has recognised section 28(1)(b) turns upon the purpose for which the document was created and it is not necessary to show that the document was actually submitted to Cabinet.² Nor is it necessary to prove Cabinet actually considered the document to satisfy the exemption in section 28(1)(b).³

¹ [2004] VCAT 2346 at [33].

² *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34].

³ *Ibid.*

18. A document will only be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes for which the document was prepared, was for the document to be submitted to the Cabinet for consideration.⁴

Was the document prepared by a Minister, or on their behalf by an agency?

19. The document is a market engagement report concerning the Government's initiative to introduce 'Area-Based Cleaning Models' for schools in the Melbourne metropolitan area. The document has been prepared by KPMG, a private audit and assurance company, at the request of the Agency.
20. A report prepared by an external consultant is a document prepared by an 'agency' for the purposes of section 28(1)(b).⁵
21. In the context of considering reports prepared by an external consultant, the exemption is not contingent upon the author of the reports being made aware of their ultimate use, but rather the purpose for which the documents were 'commissioned by those who commissioned it.'⁶

Was the document prepared for the purpose of submission for consideration by the Cabinet?

22. According to the Agency's submissions, the 'market engagement report' was commissioned as part of the Victorian Government's strategic process of developing and implementing policy change, which required the ultimate approval of Cabinet. In the case of a 'zoned cleaning model' it involved a submission to the PSBC before a final briefing to Cabinet.
23. Having considered all the information before me, I am satisfied the document was prepared for the purpose of submission for consideration by the Cabinet and in this case, the document was attached to the submission and was in fact considered by a sub-committee of Cabinet.
24. Consequently, I am satisfied the creation of the document was for the sole or substantial purpose of consideration by a committee of Cabinet.

Does the document contain purely statistical, technical or scientific material?

25. Having been briefed by OVIC staff who inspected the document and the submission to PSBC, I am satisfied there is no material of a purely statistical, technical or scientific nature to authorise disclosure of this information in the document. Consequently, I am satisfied that the exception in section 28(3) does not apply.

Conclusion

27. On the information available, I am satisfied the exemption in section 28(1)(b) applies and I have determined to refuse access to the document in full.

Review rights

28. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸

⁴ Ibid.

⁵ See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

⁶ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 453; [2004] VCAT 1657 at [28]; *Asher v Department of Premier & Cabinet* [2008] VCAT 450 at [43], [74].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
31. 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.
32. 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.¹⁰

When this decision takes effect

33. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).