

Notice of Decision and Reasons for Decision

Applicant:	'AJ8'
Agency:	Department of Health and Human Services
Decision date:	30 August 2019
Exemption considered:	Section 28(1)(b)
Citation:	'AJ8' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 89 (30 August 2019)

FREEDOM OF INFORMATION – business case – Cabinet in confidence – document prepared for the purpose of submission for consideration by the 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 that same as the Agency's decision in that I have decided to refuse access to the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 August 2019

Reasons for Decision

Background to review

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

I am requesting a copy of the detailed Business Case prepared by [an external consultant] for the Royal Victorian Eye and Ear Hospital (**RVEEH**) redevelopment project... I only require that section of the above Business Case report that deals with the assessment of RVEEH's old infrastructure, engineering, building space and environment. I do not require that part of the Business Case which looks at the redevelopment, financing etc.'

2. By letter dated 27 May 2019, the Agency notified the Applicant it had identified one document, totalling 294 pages, falling within the terms of the Applicant's request (the **Document**). The Agency refused 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. I have been briefed by OVIC staff who inspected the Document as it was claimed to be exempt under section 28(1)(b).¹
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated 27 May 2019;
 - (b) the Applicant's request for review, dated 15 June 2019;
 - (c) the Agency's submission, dated 9 July 2019; and
 - (d) consultation between OVIC staff with the Applicant and Agency.
7. 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.

Review of exemptions

8. The Agency relied on the exemption in section 28(1)(b) to refuse access to the Document. The Agency's decision letter sets out the reasons for its decision.

Section 28(1)(b) – Cabinet documents

9. Section 28(1) provides a document is an exempt document if it is a document that was prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet.

¹ Section 63D provides such documents, including those exempted by an Agency under section 28(1), may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

10. Section 28(7)(a) provides that 'Cabinet' includes a committee or sub-committee of Cabinet.
11. In *Ryan v Department of Infrastructure*,² 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" about it. Rather, for a document to come within the Cabinet document exemption, "it must fit squarely within one of the four exceptions [(now five)]" in section 28(1) of the Act.

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

12. The Document is a report prepared by an external consultant, who was first engaged by the Agency in [year].
13. A report prepared by an external consultant engaged by an Agency is a document prepared by an 'agency' for the purposes of section 28(1)(b).³
14. 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'.⁴

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

15. I am satisfied the Document was prepared for the purpose of it being submitted to a committee of Cabinet for its consideration. While it is not necessary for the committee of Cabinet to have considered the document, in this case I am satisfied the document was in fact considered by the committee of Cabinet.
16. I am also satisfied the committee of Cabinet is properly constituted and is a committee of Cabinet for the purposes of section 28(1), having regard to section 28(7).
17. Therefore, I am satisfied the Document was created for the purpose of submission for consideration by the committee of Cabinet and is exempt in under section 28(1)(b).

Deletion of exempt or irrelevant information

18. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
19. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁶

² [2004] VCAT 2346 at [33].

³ See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

⁴ *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] and [74].

⁵ *Mickelborough 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].

⁶ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

20. In the circumstances, I have determined it is not practicable to provide the Applicant with an edited copy of the document featuring the information [they seek] as the Document is exempt in full under section 28(1)(b).

Conclusion

21. My decision on the Applicant's request is that same as the Agency's decision in that I have decided to refuse access to the document under section 28(1)(b) in full.

Review rights

22. 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.⁷
23. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
24. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
25. 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.
26. 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

27. 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.

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

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).