

Notice of Decision and Reasons for Decision

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| Applicant: | 'AU9' |
| Agency: | Department of Premier and Cabinet |
| Decision Date: | 5 December 2019 |
| Exemptions considered: | Sections 28(1)(b) and 28(1)(ba) |
| Citation: | 'AU9' and Department of Premier and Cabinet (<i>Freedom of Information</i>) [2019] VICmr 190 (5 December 2019) |

FREEDOM OF INFORMATION – Cabinet documents – document prepared for the purpose of submission for consideration by the Cabinet – report – document prepared for the purpose of briefing a Minister in relation to issues to be considered 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.

I am satisfied the Document is exempt in full under sections 28(1)(b) and 28(1)(ba).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
5 December 2019

Reasons for Decision

Background to review

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

... the summary document that outlines how much was spent on external consultants by the government and the summary of the spending by company and project. I would also like the summary document that outlines what should be done to reduce this spend.
2. Following consultation with the Agency, the Applicant narrowed the scope of their initial request.
3. The narrowed scope was for access to the following documents:
 - The memo sent out to the government/bureaucracy that effectively froze the use of external advisors/consultants across the government/bureaucracy
 - Any briefing(s) for ministers/premier/senior bureaucrats around the level of spending on external advisors throughout the bureaucracy/government
 - Any briefing(s) around what could be done to reign this in.

These would have been prepared in [financial year].
4. The Agency identified six documents falling within the terms of the Applicant's request. It decided to grant access to two documents in part and refuse access to four documents in full.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have been briefed by OVIC staff who inspected the documents exempted by the Agency under section 28(1).¹
7. On 30 October 2019, the Applicant reduced the scope of their review to 'the final report produced into consultant use' (the **Document**). I note the Document was an attachment to two documents originally subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) the Agency's submissions dated 9 September and 2 December 2019.
10. 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.

¹ Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

Review of exemptions

11. The Agency relied on the exemptions under sections 28(1)(b) and 28(1)(d) to refuse access to the document subject to review. The Agency's decision letter sets out the reasons for its decision.

Section 28(1) – Cabinet documents

12. 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;
- (ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;

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

15. Based on submissions provided by the Agency, I accept the Document is a final report that was prepared by the Agency on behalf of a Minister.

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

16. Having considered the other extrinsic information inspected by OVIC staff, as well as the Agency's submissions, I am satisfied the Document was prepared for the dominant purpose of submission for consideration by the Cabinet. Additionally, based on enquiries made with the Agency, I am satisfied the Document was submitted to the Cabinet for its consideration.
17. I am constrained in providing any further description and detail regarding the Document so as not to disclose any exempt information in the Document.

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

18. Section 28(3) provides:

Subsection (1) does not apply to a document referred to in a paragraph of that subsection 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.

² [2004] VCAT 2346 at [33].

19. Having been briefed by OVIC staff who inspected the document claimed to be exempt, I am satisfied it contains more than purely statistical, technical or scientific material.
20. Insofar as the Document contains statistical information, I am satisfied such information is intertwined with information submitted for consideration by Cabinet such that it does fall within the exception provided for in section 28(3).
21. Accordingly, I am satisfied the Document is exempt under section 28(1)(b).

Other matters

22. As stated above, the Document is an attachment to [two documents]. I confirm [one of those documents] is a document that was expressly prepared for the purposes of briefing a Minister in relation to an issue to be considered by a sub-committee of Cabinet.
23. Accordingly, I am satisfied the Document is also exempt under section 28(1)(ba).

Section 25 – Deletion of exempt or irrelevant information

24. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receive such a copy.
25. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’³ 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 25.⁴
26. In my view, it is not practicable to provide the Applicant with an edited copy of the Document with exempt information deleted in accordance with section 25, as to do so would render the Document meaningless.

Section 28(1)(d)

27. As I have determined the Document is exempt in full under sections 28(1)(b) and 28(1)(ba), it is not necessary for me to consider the Agency’s application of the exemption under section 28(1)(d).

Conclusion

28. On the information before me, I am satisfied the Document is exempt under sections 28(1)(b) and 28(1)(ba).
29. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the Document with exempt information deleted in accordance with section 25, I have determined the Document is exempt in full.

³ *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].

⁴ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

Review rights

30. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁵
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
33. 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.
34. 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.⁸

When this decision takes effect

35. 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.

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).