

Notice of Decision and Reasons for Decision

Applicant:	'BA1'
Agency:	Department of Premier and Cabinet
Decision Date:	16 January 2020
Exemptions considered:	Sections 28(1)(b), 28(1)(d)
Citation:	'BA1' and Department of Premier and Cabinet (<i>Freedom of Information</i>) [2020] VICmr 5 (16 January 2020)

FREEDOM OF INFORMATION – Legislative Impact Assessment – Cabinet in confidence – deliberations of Cabinet – external report – prepared for the sole or substantial purpose for 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.

I am satisfied Document 2 is exempt under section 28(1)(d) and Document 3 is exempt under section 28(1)(b).

As I have determined no obligation arises to provide the Applicant with an edited copy of the documents in accordance with section 25, I am satisfied the documents are exempt in full.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

16 January 2020

Reasons for Decision

Background to review

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

...documents (other than emails) provided to the former Department of Economic Development, Jobs, Transport and Resources by [consultants] as part of the following consultancy projects:

 - (1) “Labour Hire Licensing Scheme Scoping Study”
 - (2) “Legislative Impact Assessment and Regulatory Impact Assessment – Victorian Owner Drivers and Forestry Contractors Act and Regulations”.
2. The Applicant agreed to exclude draft documents from the scope of their request.
3. According to the Victorian Government’s *Cabinet Handbook*, a Legislative Impact Assessment must be undertaken and attached to a submission for legislative proposals submitted to Cabinet for Approval in Principal (**AIP**) as part of the legislative drafting process.¹ The documents subject to review concern a Legislative Impact Assessment process.
4. In its decision, the Agency identified three documents falling within the terms of the Applicant’s request. The Agency granted access to Document 1 in full and refused access to Documents 2 and 3 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 sections 28(1)(b) and 28(1)(d) and made inquiries with Agency staff present at the inspection and with knowledge of the documents.²
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. 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;
 - (c) the Agency’s submission dated 3 October 2019 and 3 December 2019;
 - (d) publicly available information regarding Cabinet process; and
 - (e) supporting documents provide by the Agency for inspection on 26 November 2019.
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

¹ Victorian Government, *Cabinet Handbook* at <https://www.vic.gov.au/cabinet-handbook>.

² Section 63D provides the production of a document claimed to be exempt under section 28(1) may only be inspected at the premises of the agency or Minister.

only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

10. The Agency relies on the exemptions in sections 28(1)(b), 28(1)(d) and 30(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Document 2 – Scoping study report

Section 28(1)(d) – disclosure of deliberation or decision of Cabinet

11. Section 28(1)(d) provides a document will be exempt if its disclosure would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
12. A document will be exempt under section 28(1)(d) if there is evidence Cabinet discussed various options in a document and deliberated on or decided between those options.³
13. In *Department of Infrastructure v Asher*,⁴ the Victorian Court of Appeal states:

At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or feasible or may advance an argument for a particular point of view. The former would say nothing as to Cabinet's deliberations, the latter might say a great deal.
14. 'Decision' means any conclusion as to the course of action Cabinet adopts, whether they are conclusions as to a final strategy on a matter or conclusions about how a matter should proceed.⁵
15. Where a Cabinet decision or recommendation is made public, releasing information arising from that decision or recommendation will not disclose a Cabinet decision or deliberation for the purpose of section 28(1)(d).⁶
16. Section 28(1) does not apply to the extent a 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.⁷
17. The Agency relies on section 28(1)(d) to refuse access to Document 2 in full. From inquiries made with the Agency and documents sighted by OVIC staff, I am satisfied the Agency commissioned an external consultant to prepare the document on its behalf.
18. I note the following information provided by the Agency:

The scoping work undertaken by [consultants] was proposed as a way of developing advice, determining critical aspects of the legislative scheme, informing the LIA and informing Cabinet for the Bill framework...The Final Report of the scoping study (document 2) was prepared with the view that it would inform deliberations of the minister and Cabinet in determining the form of the statutory licensing scheme.

³ *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

⁴ [2007] VSCA 272 at [8].

⁵ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

⁶ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

⁷ Section 28(3).

19. From inquiries made with the Agency and documents sighted by OVIC staff, I am satisfied disclosure of Document 2 would involve the disclosure of deliberations or a decision of Cabinet.

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

20. Having been briefed by OVIC staff, who inspected Document 2, I am satisfied it does not contain purely statistical, technical or scientific material for the purposes of section 28(3).
21. Accordingly, I am satisfied Document 2 is exempt under section 28(1)(d).

Document 3 – Legislative Impact Assessment

Section 28(1)(b) – document prepared for submission to Cabinet for consideration

22. Section 28(1)(b) provides a document will be exempt if it 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.
23. ‘Cabinet’ is defined in section 28(7)(a) and includes a committee or sub-committee of Cabinet
24. In *Ryan v Department of Infrastructure*,⁸ 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.

25. A document will only be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to Cabinet for its consideration. In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to Cabinet.⁹
26. However, section 28(1)(b) turns upon the purpose for which a document was created. As such, it is not necessary to show a document was submitted to Cabinet,¹⁰ or to prove Cabinet considered the document to satisfy the requirements of section 28(1)(b).¹¹
27. A report prepared by an external consultant is taken to be a document prepared by an agency for the purposes of section 28(1)(b).¹²
28. In the context of considering a document prepared by an external consultant, the exemption is not contingent upon the author of the document being made aware of the ultimate use of the document, but rather the purpose for which the document was ‘commissioned by those who commissioned it’.¹³
29. The Agency relies on section 28(1)(b) to refuse access to Document 3 in full.

⁸ (2004) VCAT 2346 at [33].

⁹ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

¹⁰ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34].

¹¹ *Ibid.*

¹² See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

¹³ *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].

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

30. Document 3 is a Legislative Impact Assessment. From inquiries made with the Agency and documents sighted by OVIC staff, I am satisfied the Agency commissioned an external consultant to prepare the document on its behalf.

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

31. As outlined above, the key consideration under section 28(1)(b) is whether, at the time a document was created, the sole or a substantial purpose for which the document was prepared was for submission for consideration by Cabinet.
32. From inquiries made with the Agency and documents sighted by OVIC staff, I am satisfied Document 3 was prepared for the purpose of submission for consideration by Cabinet. It is clear from the document, which is a Legislative Impact Assessment, and the Victorian Government's *Cabinet Handbook*, that legislative matters to be considered by the Cabinet must first obtain 'Approval in Principle', which is sought by way of a submission to Cabinet. Relevantly, the *Cabinet Handbook* states:

If there are significant business or competition impacts associated with the proposed legislation, a Legislative Impact Assessment (LIA) should be undertaken and attached to the AIP submission.

33. Although not a necessary requirement to make out the exemption, I am satisfied Document 3 was submitted to Cabinet for its consideration.

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

34. Having been briefed by OVIC staff, who inspected Document 3, I am satisfied it does not contain purely statistical, technical or scientific material for the purposes of section 28(3).
35. Accordingly, I am satisfied Document 3 is exempt under section 28(1)(b).

Deletion of exempt or irrelevant information

36. 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.
37. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
38. I have considered whether it would be practicable to provide the Applicant with an edited copy of the documents with exempt information deleted. However, I am satisfied it is not practicable to do so given the application of sections 28(1)(b) and 28(1)(d) to the documents. Accordingly, no obligation arises to provide the Applicant with an edited copy of the documents under section 25, and they are exempt in full.

¹⁴ *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].

¹⁵ *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].

Other exemptions relied on by Agency

39. As I have determined Document 2 is exempt in full under section 28(1)(d) and Document 3 is exempt in full under sections 28(1)(b), it is not necessary for me to consider the application of sections 28(1)(d) and 30(1) to Document 3 and section 30(1) to Document 2.

Conclusion

40. On the information before me, I am satisfied Document 2 is exempt under section 28(1)(d) and Document 3 is exempt under section 28(1)(b).
41. As I have determined no obligation arises to provide the Applicant with an edited copy of the documents in accordance with section 25, I am satisfied the documents are exempt in full.

Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.¹⁶
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
45. 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.
46. 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.¹⁹

When this decision takes effect

47. 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.

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and (3FA).