

Notice of Decision and Reasons for Decision

Applicant:	'BB3'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	3 February 2020
Exemptions considered:	Sections 28(1)(d), 30(1)
Citation:	'BB3' and Department of Jobs, Precincts and Regions (<i>Freedom of Information</i>) [2020] VICmr 17 (3 February 2020)

FREEDOM OF INFORMATION – Victorian Industry Participation Policy (VIIPP) – Local Jobs First Policy – name of planned subjects of audits – audits not undertaken

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 differs from the Agency's decision.

I am satisfied the document is exempt in part under section 28(1)(d). However, I am not satisfied the document is exempt under section 30(1).

As I am satisfied it is practicable to delete irrelevant and exempt information in the document, I have determined to grant access to the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

3 February 2020

Reasons for Decision

Background to review

1. The Applicant, [a Member of Parliament], made a request to the Agency for access to the following documents:

A list of all audits conducted by the Local Jobs first Commissioner or the Department of Jobs, Precincts and Regions, or its predecessor the Department of Economic Development, Jobs, Transport and Resources, into compliance with the ViPP [Victorian Industry Participation Policy] or MSPG [Major Projects Skills Guarantee] between 1 January 2015 and the date of this request. This list should include: Name of the Audit Status (planned, ongoing, completed) Strategic Projects included in the Audit. Whether there was non-compliance with the ViPP? If applicable, whether there was non-compliance with the MSPG? Please see attached document for an example of how the information may be displayed.

2. In its decision, the Agency identified one 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. The Applicant indicated they do not seek the personal affairs information of non-executive Agency officers in the documents.
5. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Agency's submissions dated 27 November and 2 December 2019 and subsequent communications with OVIC; and
 - (c) the Applicant's review application.
8. 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

9. The Agency relied on the exemptions in sections 28(1)(d), 30(1), 31(1)(a) and 33(1) to refuse access to the document in full. The Agency's decision letter sets out the reasons for its decision.

10. During the review, the Agency decided certain information in the document was not exempt. The Agency also advised it no longer relies on section 31(1)(a) to exempt part of the document.
11. I note background information provided by the Agency, including:

The exemption applies to suggestions on projects to be audited for compliance under the VIPP that were made by non-executive staff in the preliminary stages of developing an audit program for compliance with the Local Jobs First Policy recently enacted in August 2018.

The recommended projects were not audited or planned to be audited by the department. The department has exempt projects not recommended as well as it will evident what projects were considered given that the table is copied from a publicly available document (VIPP Annual Report 2018-19) as disclosed in the document.

Context in which the recommendations were made

The recommendations should be considered in light of the circumstances for its provision. At that time the department was establishing the support for the newly established Local Jobs First Policy and other implementation activities of the Local Jobs First Act 2003.

On 15 August 2018, two months prior to the date of the recommendations in the document, the *Victorian Industry Participation Policy Act 2003* was amended by the *Victorian Industry Participation Policy (Local Jobs First) Amendment Act 2018* and renamed the *Local Jobs First Act 2003* (LJF Act). The amendment introduced the following significant functions and enforcement role:

- Additional requirement for compliance with the Major Projects Skill Guarantee policy (MPSG), together with the Victorian Industry Participation Policy (VIPP) renamed the Local Job First Policy (LJF Policy)
- Establishment of the role of the Local Jobs First Commissioner
- Provision of new enforcement and monitoring powers and related functions to the Commissioner in enforcing the LJF Policy.

Under the LJF Act, the department is tasked with supporting the LJF Commissioner, appointed in October 2018, and furthering the purposes of the LJF Act, including the development of resources to assist agencies and third parties with compliance.

Section 28(1) – Cabinet documents

12. The Agency exempted the third line of text in the body of the email under section 28(1)(d).
13. Section 28(1)(d) provides a document is an exempt document 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.
14. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
15. A ‘decision’ means any conclusion as to the course of action the Cabinet adopts whether it is a conclusion to a final strategy on a matter or conclusions about how a matter should proceed.¹

¹ *Dalla-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

16. A document will be exempt under section 28(1)(d) if there is evidence Cabinet discussed various options in a document and made a decision in relation to the matter under consideration.²
17. Where a decision or the recommendation of Cabinet has been made public, releasing information would not disclose the Cabinet decision or deliberation.³
18. In *Ryan v Department of Infrastructure*,⁴ 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.

19. I agree disclosure of this information would involve the disclosure of a deliberation or decision of Cabinet. Further, based on the information before me, I accept this decision has not been officially published. It is therefore exempt under section 28(1)(d).

Section 30(1)

20. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
21. The exemption does not apply to purely factual material in a document.⁵
22. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of the agency, a member of the agency’s staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
23. I must also be satisfied releasing this information is not contrary to the public interest. This requires a ‘process of the weighing against each other conflicting merits and demerits’.⁶
24. The document is an email from an agency officer to another agency officer regarding a compliance audit program. I note that following the request for review, the agency decided certain information in the document is not exempt, being the number of audits undertaken, and the number of audits remaining to be undertaken, and the names of two projects, that

² *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65 [2006] VCAT 1228 at [23].

³ *Honeywood v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

⁴ (2004) VCAT 2346 at [33].

⁵ Section 30(3).

⁶ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

appear in the table from the annual report referred to above, where the audits have been completed.

25. The information the Agency now submits is exempt under section 30(1) is:
- (a) the names of two projects the author of the email suggests be audited;
 - (b) the remaining projects listed in the table from the annual report, including certain projects that have been highlighted, indicating which projects the author of the email was considering for audit.

Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

26. The document discloses matter in the nature of opinion, advice or recommendation prepared by an officer. Being an officer's recommendation about which projects to audit under a particular policy.

Was the document made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?

27. The document was made for the deliberative processes of the Agency, being the process of deciding which projects the Agency would audit in accordance with the *Local Jobs First Act 2003 (Vic) (Local Jobs First Act)*.

Would disclosure of the document be contrary to the public interest?

28. In deciding if release would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
29. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁷
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a

⁷ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

process, which the agency would not otherwise be able to explain upon disclosure of the documents;

- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.

30. In its submission to OVIC, the Agency advised it would be contrary to the public interest to disclose the document for the following reasons:

- (a) disclosure is likely to infer the proposed audits have or will be undertaken on the basis there was an issue with the project, contractor or Agency;
- (b) disclosure would give rise to undue speculation as to why certain projects were not audited;
- (c) some of the 'completed projects' are in fact 'project stages' and relate to projects currently underway;
- (d) disclosure would be detrimental to the Agency's audit function;
- (e) the Agency relies on cooperation from agencies and contractors to provide information to it to ensure compliance with the Local Jobs First policy; and
- (f) the public interest in disclosure is outweighed by the detriment disclosure would cause to the Agency's audit function.

31. I am not satisfied it would be contrary to the public interest to release the document for the following reasons:

- (a) Noting the table in question is publicly available, and so the Applicant would know of the eight projects from which the Agency's officer was selecting for audit, the only information in contention is the names of those projects recommended for audit by an Agency officer at a particular time. In my view, this information is not particularly sensitive and its disclosure would not be contrary to the public interest.
- (b) It is open to the Agency to provide additional information to explain or provide context to why those audits did or did not proceed in accordance with the recommendations in the document.
- (c) In any case, in my view the public interest in this matter weighs in favour of disclosure. The Agency and the Jobs First Commissioner are charged with a duty under the Local Jobs First Act to conduct compliance activities, and the disclosure of this document describes, in a small way, how the Agency is responding to its obligations.
- (d) The disclosure of this small amount of information is important when the legislation is now over a year old and there is scant information about these audits that is publicly available.

- (e) I do not agree disclosure of the document will have a detrimental effect on the Agency's ability to conduct such audits where they are specifically provided for under the law and where participants in the projects (whether government agencies or contractors) are required to participate in such audits.
 - (f) Further, I consider contractors, or other such parties, would have a reasonable expectation that they will be subject to additional scrutiny when dealing with government and receiving public money for the provision of services.
32. Accordingly, I am not persuaded disclosure of the document would be contrary to the public interest, and the document is not exempt under section 30(1).

Section 25

33. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁹
35. The Agency exempted the names of two Agency staff, a position title, their email addresses and telephone numbers under section 33(1). I note the two Agency officers are not executive level staff. As the Applicant is not seeking access to this information, I am satisfied it is not relevant to the request.
36. Further, I am satisfied other information the Agency deleted in accordance with section 25 is irrelevant to the Applicant's request, namely:
- (a) the name in the top left hand corner of page 1 – as it is the name of the person who printed the email for the purposes of the processing the FOI request and is therefore not relevant to the request; and
 - (b) the information in the first two lines of the email, as it does not fall within scope of the request.

Conclusion

37. On the information before me, I am satisfied the document is exempt in part under section 28(1)(d). However, I am not satisfied the document is exempt under section 30(1).
38. As I am satisfied it is practicable to delete irrelevant and exempt information in the document, I have determined to grant access to the document in part.

⁸ *Mickelburgh 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].

⁹ *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

39. 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.¹⁰
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
42. 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.
43. 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.¹³

When this decision takes effect

44. 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.

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).