

Notice of Decision and Reasons for Decision

Applicant:	'AP9'
Agency:	Department of Education and Training
Decision Date:	18 October 2019
Exemption considered:	Section 28(1)(d)
Citation	'AP9' and Department of Education and Training (<i>Freedom of Information</i>) [2019] VICmr 144 (18 October 2019)

FREEDOM OF INFORMATION – Public Accounts and Estimates Committee inquiry – Secretary's briefing folder – record of decision or deliberation of 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.

During the course of the review, the Agency agreed to release additional information to the Applicant. My review relates to the remaining information in the documents the Agency seeks to exempt.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided to release the documents in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

18 October 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents.
2. Following consultation with the Agency, the Applicant amended their initial request to the following five chapters of a PAEC briefing folder used by the Secretary of the Agency when appearing before a PAEC inquiry into the 2016-17 Financial and Performance Outcomes:
 - 1) 1.28 Lapsing Program – All portfolios
 - 2) 1.34 Unspent Appropriations
 - 3) 4.21 RTO Closures
 - 4) 4.24 Skills First Overview and Performance
 - 5) 4.35 Training, Higher Education and Skills expenditure variances including reductions and reinvestment.
3. The Applicant's FOI request did not seek access to the personal affairs information of non-executive Agency officers.
4. In its decision, the Agency identified five documents falling within the terms of the Applicant's request. It decided to grant access to those documents in part.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. On [date], the Applicant's representative indicated they did not seek a review of the Agency's decision to exempt executive Agency officers' work telephone numbers under section 33(1). Accordingly, I consider such information is not subject to review.
7. I have examined copies of the documents subject to review and I have been briefed by OVIC staff who inspected the documents claimed to be exempt under sections 28(1).¹
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;
 - (c) the Agency's submission dated 18 September 2019 and letter dated 3 October 2019; and
 - (d) communications between OVIC staff, the Applicant and the Agency.
10. On [date], the Agency advised OVIC it no longer relies on the exemptions under sections 32(1) and 34(4)(a)(ii) to refuse access to information in the documents.

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.

11. On [date], the Agency advised OVIC it no longer relies on the exemption under section 30(1) and agrees to release additional information in the documents to the Applicant. Accordingly, Document 3 is no longer subject to review as there is no exempt information in the document subject to review. That is, the only remaining information deleted in the document is irrelevant information which is to remain deleted in accordance with section 25.
12. As a result of the Agency's above advice, my review is limited to considering the Agency's application of section 28(1)(d) to parts of Documents 1 and 4.
13. 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

14. The Agency relies on the exemption under section 28(1)(d) to refuse access to parts of Documents 1 and 4. The Agency's decision letter sets out the reasons for its decision.

Section 28(1)(d)

15. Section 28(1)(d) provides:

28 Cabinet documents

- (1) A document is an exempt document if it is –

...

- (d) a document the disclosure of which 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.

16. The definition of 'Cabinet' in section 28(7) includes a sub-committee of Cabinet.
17. 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" 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.
18. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.
19. OVIC staff reviewed the information claimed to be exempt under section 28(1)(d) including an extrinsic document relating to a briefing to a sub-committee of Cabinet.
20. I am satisfied the relevant information in Documents 1 and 4 is exempt under section 28(1)(d), for the following reasons:
 - (a) the information in Document 1 is also summarised in the extrinsic document that was submitted to the sub-committee of Cabinet for its consideration. I am satisfied the release of this information would disclose Cabinet deliberations; and

² (2004) VCAT 2346 at [33].

(b) the information in Document 4 is a direct summary of a Cabinet decision.

21. Accordingly, I am satisfied the relevant information is exempt under section 28(1)(d) as its disclosure would disclose a decision or the deliberations of Cabinet.

Deletion of exempt or irrelevant information

22. 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.
23. 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
24. I have considered the effect of deleting irrelevant and exempt information from the documents. I am satisfied it is practicable to delete such information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

25. On the information before me, I am satisfied the relevant parts of Documents 1 and 4 are exempt under section 28(1)(d) correctly applies to. I have decided to grant access to the documents in part.
26. The Schedule of Documents in **Annexure 1** provides further details of my decision.

Review rights

27. 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
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
30. 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.
31. 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

32. 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.

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 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

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).

Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Chapter 1.28 Lapsing Programs – All portfolios	6	Released in part Sections 28(1)(d), 33(1)	<p>Release in part Sections 28(1)(d), 25</p> <p>I have determined:</p> <ul style="list-style-type: none"> - the parts of the document exempted by the Agency under section 28(1)(d) are exempt and should remain deleted; and - the personal affairs information is irrelevant and is to remain deleted in accordance with section 25. 	<p>Section 28(1)(d): I am satisfied the release of this information would disclose Cabinet deliberations. Accordingly, this information is exempt under section 28(1)(d).</p> <p>Section 25: On [date], the Applicant's representative excluded the work telephone numbers of executive Agency officers from the scope of the review. Accordingly, this information is irrelevant and is to be deleted in accordance with section 25.</p>
2.	Chapter 1.34 Unspent Appropriations	2	Released in part Section 33(1)	Not subject to review	Section 25: See comments in Document 1.
3.	Chapter 4.21 RTO Closures	8	Released in part Sections 30(1), 33(1)	<p>Release in part Sections 25</p> <p>The document is to be released to the Applicant with exception to personal affairs information which is to remain deleted in accordance with section 25 as it is irrelevant.</p>	<p>On [date], the Agency advised it no longer claimed the exemption under section 30(1) and did not seek to redact this information from the document.</p> <p>Section 25: See comments in Document 1.</p>

Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
4.	Chapter 4.24 Skills First Overview and Performance	10	Released in part Sections 28(1)(d), 33(1)	<p>Release in part Sections 28(1)(d), 25</p> <p>I have determined:</p> <ul style="list-style-type: none"> - the parts of the document exempted by the Agency under section 28(1)(d) are exempt and should remain deleted; and - the personal affairs information is irrelevant and is to remain deleted in accordance with section 25. 	<p>Section 28(1)(d): I am satisfied the release of this information would disclose a Cabinet decision. Accordingly, this information is exempt under section 28(1)(d).</p> <p>Section 25: See comments in Document 1.</p>
5.	Chapter 4.35 Training, Higher Education and Skills expenditure variances including reductions and reinvestment	4	Released in part Section 33(1)	Not subject to review	Section 25: See comments in Document 1.