

Notice of Decision and Reasons for Decision

Applicant:	'BC4'
Agency:	Department of Transport
Decision Date:	14 February 2020
Exemptions considered:	Sections 28(1)(ba), 28(1)(d), 30(1), 32(1)
Citation:	'BC4' and Department of Transport (<i>Freedom of Information</i>) [2020] VICmr 27 (14 February 2020)

FREEDOM OF INFORMATION – Ministerial briefs – titles of Ministerial briefs prepared by agency – briefing documents – Ministerial Briefing System (MiBS) database

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the document.

On the information before me, I am not satisfied information in the document is exempt under sections 28(1)(ba), 28(1)(d), 30(1) and 32(1).

However, I am satisfied the personal affairs information of non-executive Agency staff is irrelevant to the Applicant's request and it is practicable to delete this information in accordance with section 25.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
14 February 2020

Reasons for Decision

Background to review

1. The Applicant [a Member of Parliament] made a request to the Agency as follows:

... I request access to the following: For each Ministerial Office supported by the Department, a document listing briefs prepared by the Department from 1 January 2019 until 30 June 2019, outlining the Ministers Office for which the Brief was prepared, the title of the brief, the reference number of the brief and the date the brief was actioned by the Department for delivery to a Ministerial office. Where a discrete document does not exist, yet the information requested could be compiled in the form of a report, I request production of a document pursuant to s19 of the Act. Please note that sensitive personal information of non-executive staff, such as names and addresses, is not required and documents can be edited to redact such information...

2. In its decision, the Agency advised a discrete document was created under section 19 to meet the terms of the Applicant's request. It decided to release the document to the Applicant in part.

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 examined a copy of the document subject to review and was briefed by OVIC staff who inspected the document claimed to be exempt under section 28(1).¹
5. The document subject to review is a table containing information under the following headings: 'RegNo', 'Portfolio', 'Minister', 'Agency', 'Status', 'Purpose', 'Date Registered' and 'Date Completed'.
6. The titles of Ministerial briefs are listed under the heading, 'Purpose'.
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 received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (b) information provided with the Applicant's review application.
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 only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

10. The Agency's decision letter sets out the reasons for its decision.
11. In its decision, the Agency relied on section 28(1) as a separate exemption to sections 28(1)(ba) and 28(1)(d). In *Ryan v Department of Infrastructure*,² the Victorian Civil and Administrative Tribunal (VCAT) observed:

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

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.

12. On 29 January 2020, the Agency advised it no longer intends to rely on section 28(1).
13. Accordingly, my review will only consider the Agency’s application of the exemptions under sections 28(1)(ba), 28(1)(d), 30(1) and 32(1) to refuse access to the document in part, as I consider the Agency’s inclusion of 28(1) to be an administrative error.

Section 28(1)(ba)

14. The Agency exempted certain Ministerial brief titles listed in the document under section 28(1)(ba).
15. Section 28(1)(ba) provides a document is exempt if it is ‘prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet’.
16. In its decision, the Agency states:

Section 28(1)(ba) of the FOI Act has been applied to Brief Titles that relate to briefs created for the purpose of briefing a Minister on specific issues to be considered by Cabinet.

17. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which the document was prepared was to brief a Minister in relation to issues to be considered by Cabinet.³
18. 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.⁴
19. In its decision, the Agency described how the document came into existence, stating:

As no discrete documents exist, under s19(1) of the FOI Act the department extracted the relevant information from its Ministerial Briefing System (MiBS) database... The department extracted a list of briefs submitted to the Minister of Public Transport and created a single document from this data.

20. Section 19 provides in relation to FOI requests involving ‘the use of computers’:

- (1) Where—
 - (a) a request is duly made to an agency;
 - (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and
 - (c) the agency could produce a written document containing the information in discrete form by—
 - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
 - (ii) the making of a transcript from a sound recording held in the agency— the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

² (2004) VCAT 2346 at [33].

³ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

⁴ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

21. The document subject to review was produced in accordance with section 19 for the purpose of processing the Applicant's FOI request. Accordingly, I am not satisfied this document was prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet. In my view, this exemption would only apply to an actual Ministerial brief prepared by an agency for the purpose of briefing a Minister in relation to issues to be considered by Cabinet. Rather, than a document produced in accordance with section 19 listing Ministerial briefs.
22. Accordingly, I am not satisfied the document is exempt under section 28(1)(ba).

Section 28(1)(d)

23. The Agency exempted certain Ministerial brief titles listed in the document under section 28(1)(d).
24. Section 28(1)(d) provides a document is an exempt document if it is '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'.
25. This means the exemption will apply to a document that conveys any matter which, if it is clear from the document, conveys details about a deliberation or decision of Cabinet. For example, a decision of Cabinet or a sub-committee of Cabinet referenced in a document, such as a Ministerial brief.
26. A document will be exempt under section 28(1)(d) if there is evidence that Cabinet deliberated on matters raised in the document and made a decision in relation to those matters.⁵
27. A 'decision' means any conclusion as to the course of action the Cabinet adopts whether that are conclusions as to final strategy on a matter or conclusions about how a matter should proceed.⁶
28. Where a decision or the recommendation of Cabinet has been made public, releasing information would not disclose the Cabinet decision or deliberation.⁷
29. In the decision of *Asher v Department of Sustainability and Environment*,⁸ the Victorian Civil and Administrative Tribunal (VCAT) held that where a document, on its face, does not disclose a decision of deliberation of Cabinet, or the extent of Cabinet's interaction with the document is unclear, section 28(1)(d) will not apply.
30. In its decision, the Agency states:

Section 28(1)(d) of the FOI Act has been applied to Brief Titles that would disclose the nature and substance of a Cabinet deliberation or decision that has not been officially published.
31. I do not consider information in the document discloses a decision or deliberation by Cabinet. While the document may disclose the subject matter of a Ministerial briefing, it does not disclose any information about the subject under consideration, the options under consideration and subject to any Cabinet deliberations or decisions.
32. If section 28(1)(d) were to be accepted in this case, the mere fact that a document reflected a decision or deliberation of Cabinet (that is, not otherwise obvious on the face of the document) would mean section 28(1)(d) could apply to a vast number of documents (including public documents) that underpin a decision of Cabinet. Such an interpretation of section 28(1)(d), in my view, would not be consistent with the text and purpose of this provision.

⁵ *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

⁶ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

⁷ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

⁸ [2010] VCAT 601.

33. Accordingly, I am not satisfied the document is exempt under section 28(1)(d).

Section 30(1)

34. The Agency exempted certain Ministerial brief titles listed in the document under section 30(1).

35. 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.

36. The exemption does not apply to purely factual material in a document.⁹

37. In its decision, the Agency states:

This exemption has been applied to a Brief Title that describes a series of alternatives being provided to the Minister for consideration. Disclosure of this information would be against the public interest as these options form part of the Department's deliberative process involved in the forming a response to a specific issue, are preliminary in nature and may providing a misleading view of decision making in this instance.

38. On the face of the document, I am not satisfied the title of the briefing describes any options or a series of alternatives being provided to the Minister.¹⁰ Accordingly, I am not satisfied it discloses matter in the nature of opinion, advice or recommendation.

39. As the information does not meet the first limb of the exemption, I am not satisfied the document is exempt under section 30(1).

Section 32(1)

40. The Agency exempted one of the Ministerial brief titles listed in the document under section 32(1).

41. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.

42. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹¹

- (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
- (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or

⁹ Section 30(3).

¹⁰ *Pallas v Department of Premier and Cabinet (Review and Regulation)* [2013] VCAT 877. See, in particular, [30]-[32].

¹¹ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

- (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

43. In its decision, the Agency states:

The information that is exempt under this provision relates to legal advice provided to the department in relation to a potential legal issue, and which would be subject to legal professional privilege.

This exemption has been applied to a Brief Title that refers to a specific legal matter and is therefore exempt under this provision.

44. I am not satisfied the Ministerial brief title listed in a document, which was produced in accordance with section 19 and lists the title of the Ministerial briefs, constitutes a confidential communication between the Agency and a legal practitioner or the title discloses information subject to legal professional privilege.

45. Accordingly, I am not satisfied the document is exempt under section 32(1).

Deletion of exempt or irrelevant information

46. 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.

47. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹² 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 25.¹³

48. I have considered the information the Agency deleted from the documents as irrelevant to the scope of the Applicant's request. I agree it falls outside the scope of the request as it contains the personal affairs information of third parties who are non-executive Agency staff.

49. I have considered the effect of deleting the exempt and irrelevant material from the documents. In my view, it is practicable to delete the irrelevant information because it would not require substantial time and effort, and the edited copies would retain meaning.

Conclusion

50. On the information before me, I am not satisfied information in the document is exempt under sections 28(1)(ba), 28(1)(d), 30(1) and 32(1).

51. However, I am satisfied the personal affairs information of non-executive Agency staff is irrelevant to the Applicant's request and it is practicable to delete this information in accordance with section 25.

Review rights

52. 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.¹⁴

¹² *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].

¹³ *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].

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
55. 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.
56. 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.¹⁷

When this decision takes effect

57. 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.

¹⁵ Section 52(5).

¹⁶ Section 52(9).

¹⁷ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Undated	List of Ministerial briefs submitted to the Minister for Public Transport	1	Released in part Sections 28(1)(ba), 28(1)(d), 30(1), 32(1)	Release in part Section 25 The document is to be released except for irrelevant information deleted by the Agency in accordance with section 25.	<p>Section 28(1)(ba): I am not satisfied the document was prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet. Accordingly, I am not satisfied the document is exempt under section 28(1)(ba).</p> <p>Section 28(1)(d): I am not satisfied release of information exempted by the Agency under section 28(1)(d) would disclose a deliberation or decision of Cabinet. Accordingly, I am not satisfied the document is exempt under section 28(1)(d).</p> <p>Section 30(1): I am not satisfied release of information exempted by the Agency under section 30(1) would disclose matter in the nature of opinion, advice, recommendation, consultation or deliberation. Accordingly, I am not satisfied the document is exempt under section 30(1).</p> <p>Section 32(1): I am not satisfied the document contains a confidential communication between the Agency and a legal practitioner. Accordingly, I am not satisfied the document is exempt under section 32(1).</p> <p>Section 25: I am satisfied personal affairs information of third parties falls outside of the scope of the Applicant's request and it is practicable to delete exempt information from the document in accordance with section 25.</p>