

## Notice of Decision and Reasons for Decision

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Applicant:	'BD4'
Agency:	Department of Jobs, Precincts and Regions
Decision Date:	25 February 2020
Exemption considered:	Section 28(1)(b)
Citation:	'BD4' and Department of Jobs, Precincts and Regions ( <i>Freedom of Information</i> ) [2020] VICmr 37 (25 February 2020)

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FREEDOM OF INFORMATION – Evaluation industry fund – documents prepared for submission to Cabinet – Cabinet in confidence

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 in that I am satisfied the document 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.

Sven Bluemmel  
Information Commissioner

25 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 copy of the evaluation of the Future Industries Fund.

2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse 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. I have been briefed by OVIC staff who inspected the document claimed to be exempt under section 28(1)(b).<sup>1</sup>
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Applicant's review application; and
  - (c) supporting documents provided for inspection by the Agency on 23 January 2020.
7. 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

8. The Agency relied on the exemption in section 28(1)(b) to refuse access to the document in full. The Agency's decision letter sets out the reasons for its decision.

### ***Section 28(1)(b) – Cabinet documents***

9. 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.
10. 'Cabinet' is defined in section 28(7)(a) and includes a committee or sub-committee of Cabinet.
11. In *Ryan v Department of Infrastructure*,<sup>2</sup> the Victorian Civil and Administrative Tribunal (**VCAT**) observed:

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<sup>1</sup> 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.

<sup>2</sup> (2004) VCAT 2346 at [33].

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.

12. 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.<sup>3</sup>
13. 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,<sup>4</sup> or to prove Cabinet considered the document to satisfy the requirements of section 28(1)(b).<sup>5</sup>
14. 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).<sup>6</sup>
15. 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’.<sup>7</sup>
16. The Agency relies on section 28(1)(b) to refuse access to the document in full.

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

17. The document is an economic assessment report. From the document sighted by OVIC staff, and inquiries made with the Agency, I am satisfied the document has been prepared by an external consultant, at the request of the Department of Economic Development, Jobs, Transport and Resources, the predecessor of the Agency.

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

18. 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.
19. I note the following information provided by the Agency:

The purpose of the report was to assess the performance and administration of the FIF in order to inform future budget bids. It was created to accompany a Cabinet submission to the [sub-committee of Cabinet] with a request for further funding for the program.
20. From inquiries made with the Agency and the document sighted by OVIC staff, I am satisfied the document was prepared for the purpose of submission for consideration by Cabinet. Although not a necessary requirement to make out the exemption under section 28(1)(b), I note in this matter the document was, in fact, considered by a sub-committee of Cabinet.

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<sup>3</sup> *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

<sup>4</sup> *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34].

<sup>5</sup> *Ibid.*

<sup>6</sup> See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

<sup>7</sup> *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 453; [2004] VCAT 1657 at [28]; *Asher v Department of Premier and Cabinet* [2008] VCAT 450 at [43] and [74].

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

21. Having been briefed by OVIC staff, who inspected the document, I am satisfied it contains more than purely statistical, technical or scientific material for the purposes of section 28(3).
22. Accordingly, I am satisfied the document is exempt under section 28(1)(b).

***Deletion of exempt or irrelevant information***

23. 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.
24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>8</sup> 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.<sup>9</sup>
25. I have considered whether it would be practicable to provide the Applicant with an edited copy of the document with exempt information deleted. However, I am satisfied it is not practicable to do so given the application of sections 28(1)(b) to the document. Accordingly, no obligation arises to provide the Applicant with an edited copy of the document under section 25, consequently the document is exempt in full.

***Conclusion***

26. On the information before me, I am satisfied the document is exempt under section 28(1)(b).
27. As I have determined no obligation arises to provide the Applicant with an edited copy of the document in accordance with section 25, I am satisfied the document is exempt in full.

***Review rights***

28. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>10</sup>
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
31. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
32. 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.<sup>13</sup>

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<sup>8</sup> *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].

<sup>9</sup> *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].

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

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).

***When this decision takes effect***

33. 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.