

## Notice of Decision and Reasons for Decision

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Applicant:	'B18'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	25 March 2020
Exemption considered:	Section 28(1)(b)
Citation:	'B18' and Department of Jobs, Precincts and Regions ( <i>Freedom of Information</i> ) [2020] VICmr 86 (25 March 2020)

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FREEDOM OF INFORMATION – Cabinet documents – 'report back' documents – Metropolitan Partnerships – recommendations to government – 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.

I am satisfied the documents are exempt under section 28(1)(b).

As it is not practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I have determined the documents are exempt in full under section 28(1)(b).

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

25 March 2020

## Reasons for Decision

### Background to review

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

A copy of all recommendations to government from the Metropolitan Partnerships.
2. In its decision, the Agency identified six documents falling within the terms of the Applicant's request. It decided to refuse access to all documents in full.
3. The Agency relied on the exemptions in sections 28(1)(b), 28(1)(ba) and 28(1)(c) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have been briefed by OVIC staff who inspected the documents claimed to be exempt under sections 28(1).<sup>1</sup>
6. During the review, the Agency advised it no longer sought to rely on section 28(1)(c) to refuse access to the documents.

### Adequacy of Agency document searches

7. During the review, the Applicant raised concerns regarding the review documents and the adequacy of the Agency's document searches.
8. Section 49KA provides, if I reasonably believe an agency has failed to undertake an adequate search for documents, I may give notice to the agency for it to undertake a further search for documents.
9. In its response, the Agency provided the following contextual information regarding the Metropolitan Partnership and the Agency's role with respect to the scheme:

...the Metropolitan Partnerships were established as government advisory boards under the *Public Administration Act 2003*. They are accountable to the Minister for Suburban Development and Special Minister of State. As per the Terms of Reference (which have been provided to the Applicant), over the year the Partnerships undertake planning and community engagement activities. At the end of the year, in order to formulate the recommendations that will be put to government, each Partnership holds an Annual Assembly to discuss various options.

...

The only departmental documents about the recommendations are the Report Back documents.

10. OVIC staff made inquiries with the Agency regarding the Applicant's concerns. A summary of the Agency's responses received by OVIC were provided to the Applicant.
11. After carefully considering information provided by the Applicant and the Agency, I have decided it is not necessary to direct the Agency to undertake a further search for documents in accordance with section 49KA(2)(b) as I am satisfied the Agency conducted a thorough and diligent search for documents in response to the request.

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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.

12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application;
  - (c) documents supporting the exemptions claimed that were provided by the Agency for inspection by OVIC staff; and
  - (d) all communications between OVIC, the Applicant and the Agency.
14. 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**

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

15. The Agency relies on section 28(1)(b) to refuse access to the documents in full.
16. 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.
17. 'Cabinet' is defined in section 28(7)(a) and includes a committee or sub-committee of Cabinet.
18. In *Ryan v Department of Infrastructure*,<sup>2</sup> 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. 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>
20. 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 establish Cabinet considered the document to satisfy the requirements of section 28(1)(b).<sup>5</sup>

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

<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.*

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

21. The documents are the Agency's 'Report Back' documents. From the documents sighted by OVIC staff, and inquiries made with the Agency, I am satisfied these documents were prepared by the Agency.

*Was the document prepared for the purpose of submission to Cabinet?*

22. As outlined above, a key requirement of section 28(1)(b) is whether, at the time a document was created, the sole or a substantial purpose for which it was prepared was for submission for consideration by Cabinet.
23. 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 necessary to establish to satisfy the requirements of section 28(1)(b), I accept the documents were, in fact, considered by Cabinet.

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

24. 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).
25. I note the Applicant raised a number of public interest factors in support of release in their review application. However, the exemptions under section 28(1) do not allow me to take account of any public interest considerations in determining whether an exemption applies. As such, my consideration is confined to whether the legal requirements of the relevant exemption are satisfied.
26. Accordingly, I am satisfied the document is exempt under section 28(1)(b).

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

27. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
28. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</sup> 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.<sup>7</sup>
29. Having regard to the information before me and the nature of the documents subject to review, which I have determined are exempt under section 28(1)(b), I am not satisfied it would be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25.
30. Accordingly, I am satisfied the documents are exempt in full under section 28(1)(b).

***Section 28(1)(ba)***

31. As I have determined the documents are exempt in full under section 28(1)(b), it is not necessary for me to consider the exemption under section 28(1)(ba).

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<sup>6</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>7</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].

### **Conclusion**

32. On the information before me, I am satisfied the documents are exempt under section 28(1)(b).
33. As I am not satisfied it would be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I have determined the documents are exempt in full under section 28(1)(b).

### **Review rights**

34. 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>8</sup>
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
37. 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.
38. 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>11</sup>

### **When this decision takes effect**

39. 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.

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<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).