

## Notice of Decision and Reasons for Decision

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Applicant:	'BK4'
Agency:	Department of Treasury and Finance
Decision date:	31 March 2020
Exemptions considered:	Sections 28(1)(b), 28(1)(ba) and 28(1)(c)
Citation:	'BK4' and Department of Treasury and Finance ( <i>Freedom of Information</i> ) [2020] VICmr 101 (31 March 2020)

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FREEDOM OF INFORMATION – Cabinet submissions – ministerial briefing document – mental health tax/levy

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 to the extent I have decided to apply a different exemption to certain of the documents.

I am satisfied the documents are exempt under sections 28(1)(ba) and 28(1)(c).

As I am satisfied it is not practicable to edit the documents to delete exempt information in accordance with section 25, I have determined to refuse access to the documents in full.

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

31 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 briefings, advice, submissions and modelling, relating to the Government proposed Mental Health tax/levy as referred to in media reports at: [website] from [date] to the date of this request. A copy of all correspondence with the Department of Health and Human Service Royal Commissioners unit from [date] to the date of this request.

2. In its decision, the Agency identified seven 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 under sections 28(1)(b) and 28(1)(ba) 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. On [date], the Applicant advised they do not seek review of Documents 1, 2 and 3. Accordingly, this review relates to the remaining documents.
6. OVIC staff inspected and briefed me on documents claimed to be exempt under section 28.<sup>1</sup>
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;
  - (b) information provided with the Applicant's review application; and
  - (c) communications between OVIC staff, the Agency and the Applicant.
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

#### **Section 28(1)(b)**

10. Section 28(1)(b) provides a document is an exempt document if it is a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet.
11. 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.

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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. 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.

13. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
14. While Documents 1, 2 and 3 have been excluded from the scope of this review, my assessment of the remaining documents are dependent on whether these documents are exempt under section 28(1).
15. On the information before me, I am satisfied Documents 1, 2 and 3 were created by or on behalf of the Agency for the purpose of submission to Cabinet for consideration.
16. Accordingly, I am satisfied the documents are exempt under section 28(1)(b).

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

17. Section 28(1)(ba) provides a document is an exempt document if it was prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet.
18. 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.<sup>3</sup>
19. The purpose for which a Cabinet briefing was created must be ‘immediately contemplated’ at the time the document is created. The exemption will not apply merely because Cabinet ultimately considered the issue.<sup>4</sup>
20. The word ‘briefing’ means a ‘short accurate summary of the details of a plan or operation. The purpose...is to inform’. The document should have the character of briefing material. For example, a document will be of such character if it contains ‘information or advice...prepared for the purpose of being read by, or explained to, a [m]inister’. It requires more than having ‘placed a document before a Minister’.<sup>5</sup>
21. On the information before me, I am satisfied Document 4 is a ministerial briefing prepared for the purpose of briefing a Minister in relation to the issues considered in Document 1, which I am satisfied was prepared for the purpose of submission to Cabinet for consideration.
22. Accordingly, I am satisfied Document 4 is exempt under section 28(1)(ba).

### **Section 28(1)(c)**

23. Section 28(1)(c) provides a document is an exempt document if it is a copy or a draft of, or contains extracts from, a document referred to in sections 28(1)(a), 28(1)(b) or 28(1)(ba).

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

<sup>3</sup> *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34].

<sup>4</sup> *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

<sup>5</sup> *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

24. Documents 5 and 6 are a Minister's speaking notes. I am satisfied these documents contain extracts from Document 1.
25. As I have determined Document 1 is exempt under section 28(1)(b), I am satisfied Documents 5 and 6 are exempt under section 28(1)(c).
26. A draft is a 'preliminary version' of a document. I am satisfied Document 7 is a draft version of Document 2.
27. As I have determined Document 2 is exempt under section 28(1)(b), I am satisfied Document 7 is exempt under section 28(1)(c).

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

28. 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.
29. 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>
30. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is not practicable for the Agency to delete such information as to do so would render the documents meaningless.

#### ***Conclusion***

31. On the information before me, I am satisfied the documents are exempt under sections 28(1)(ba) and 28(1)(c).
32. As I am satisfied it is not practicable to edit the documents to delete exempt information in accordance with section 25, I have determined to refuse access to the documents in full.
33. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

#### ***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>

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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].

<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).

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>11</sup> 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	[Description of] Submission	35	Refuse in full Section 28(1)(b)	Not subject to review	On [date], the Applicant excluded this document from the scope of the review. However, for the purposes of this review, I am satisfied this document is exempt under section 28(1)(b).
2	[Description of] Submission - Attachment 1	21	Refuse in full Section 28(1)(b)	Not subject to review	See comment for Document 1.
3	[Description of] Submission - Attachment 2	1	Refuse in full Section 28(1)(b)	Not subject to review	See comment for Document 1.
4	Ministerial Brief	5	Refuse in full Section 28(1)(ba)	Refuse in full Section 28(1)(ba)	<b>Section 28(1)(ba):</b> I am satisfied this document was created for the purpose of briefing a minister in relation to Document 1 which I am satisfied is a document that was created for the purposes of submission for consideration by Cabinet.
5	Speaking Notes	1	Refuse in full Section 28(1)(b)	Refuse in full Section 28(1)(c)	<b>Section 28(1)(c):</b> I am satisfied this document contains extracts of Document 1 which is a document I am satisfied is exempt under section 28(1)(b).
6	[Description] – Speaking notes	1	Refuse in full Section 28(1)(b)	Refuse in full Section 28(1)(c)	See comment for Document 5.
7	Key considerations	12	Refuse in full Section 28(1)(ba)	Refuse in full Section 28(1)(c)	<b>Section 28(1)(c):</b> I am satisfied this document is a draft version of Document 2 which is a document I am

**Annexure 1 – Schedule of Documents**

<b>Document No.</b>	<b>Document Description</b>	<b>Number of Pages</b>	<b>Agency's Decision</b>	<b>OVIC Decision</b>	<b>OVIC Comments</b>
					satisfied is exempt under section 28(1)(b).