

Notice of Decision and Reasons for Decision

Applicant:	'BN2'
Agency:	Department of Treasury and Finance
Decision date:	6 May 2020
Exemptions considered:	Sections 28(1)(b), 28(1)(ba), 30(1)
Citation:	'BN2' and Department of Treasury and Finance (<i>Freedom of Information</i>) [2020] VICmr 127 (6 May 2020)

FREEDOM OF INFORMATION – Cabinet documents – ministerial brief – Suburban Rail Loop project - internal working documents

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 certain information in the documents is exempt under sections 28(1)(b), 28(1)(ba) and 30(1). However, I am not satisfied certain other information is exempt under section 30(1).

In relation to Document 4, I am satisfied it is practicable to delete irrelevant and exempt information in this document in accordance with section 25, and determined to grant access in part.

However, as I am not satisfied it is practicable to delete exempt information in Documents 1, 3 and 5, I have determined to refuse access to these 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

6 May 2020

Reasons for Decision

Background to review

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

Correspondence to or from Ministers and briefings provided to Ministers supported by the Department of Treasury and Finance relating to the Suburban Rail Loop.
2. Following consultation with the Agency, the Applicant amended their request to:

Ministerial briefings, event briefings and any other reports provided to [position title] by the Department of Treasury and Finance relating to the Suburban Rail Loop, dating from when the proposal was first announced by [position title] in the lead up to the [time period] election.
3. In its decision, the Agency identified five documents falling within the terms of the Applicant's request and granted access to one document in part and refused access to four documents in full.
4. The Agency relied on the exemptions under sections 28(1)(b), 28(1)(d) and 30(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

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 agreed to exclude Document 2 from the scope of the review.
7. I have examined copies of the documents subject to review and been briefed by OVIC staff who inspected the documents claimed to be exempt under section 28(1).¹ However, I am limited in the amount of information I am able to provide in relation to the documents so as to avoid disclosing exempt information.
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 communication 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 the Agency, the Applicant and OVIC.
10. 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.

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.

Review of exemptions

Section 28(1)(b)

11. Section 28(1)(b) provides a document is an exempt document if it has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by Cabinet.
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.
13. 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.

14. Section 28(7)(a) defines ‘Cabinet’ to include a committee or sub-committee of Cabinet.
15. Documents 1, 3 and 5 are Ministerial briefings with attachments.
16. Based on an inspection of the documents and information provided by the Agency, I am satisfied the attachments to Documents 1, 3 and 5 were created by or on behalf of the Agency for the purpose of submission to Cabinet for its consideration.
17. Accordingly, I am satisfied the attachments to Documents 1, 3 and 5 are exempt under section 28(1)(b).

Section 28(1)(ba)

18. Section 28(1)(ba) provides a document is an exempt document if it has been prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet.
19. A document is 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
20. The purpose of the Cabinet briefing must be ‘immediately contemplated’ at the time the document is created and will not apply merely because Cabinet ultimately considered the issue.⁴
21. The term ‘issues to be considered by Cabinet’ within the meaning of section 28(1)(ba), requires it must be more than just ‘likely’ Cabinet will consider the issue. There must be an intention or expectation the issues will be considered by Cabinet, even if they are not ultimately considered.⁵

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

⁵ *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996). See also *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998); *Hulls v Department of Treasury and Finance (No 2)* (1994) 14 VAR 295 at [320]-[321]; reversed on other grounds by the Court of Appeal: *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331; 15 VAR 360; [1999] VSCA 117.

22. The word 'briefing' means a 'short accurate summary of the details of a plan or operation. The purpose...is to inform'.⁶
23. The document should have the character of a briefing. 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'.⁷
24. Based on an inspection of the documents and information provided by the Agency, I am satisfied Documents 1, 3 and 5 are briefings prepared for the purpose of briefing a Minister in relation to the issues considered in the attachments to Documents 1, 3 and 5, which I am satisfied were prepared for the purpose of submission to Cabinet for its consideration.
25. Accordingly, I am satisfied Documents 1, 3 and 5 are exempt under section 28(1)(ba).

Section 30(1)

26. The Agency relied on section 30(1) to exempt parts of Document 4, which is a briefing to the Treasurer in relation to a meeting [they] attended with senior representatives from [an external agency] concerning the Suburban Rail Loop project (the **Meeting**).
27. 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;
 - (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.
28. The exemption does not apply to purely factual material in a document.⁸

Does the document 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?

29. The document is a brief for the Treasurer provided in advance of and in preparation for the Meeting.
30. I am satisfied the document contains matter in the nature of opinion, advice or recommendation prepared by an Agency officer.

Was the document 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?

31. I am satisfied the document was made in course of the Agency's deliberative processes concerning the Suburban Rail Loop project and relates to the functions of the Agency.

⁶ [Ryan v Department of Infrastructure (2004) VCAT 2346 at [41]].

⁷ Ryan v Department of Infrastructure (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁸ Section 30(3).

Would disclosure of the document be contrary to the public interest?

32. In deciding if release would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
33. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁹
 - (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the document and the broader context giving rise to the creation of the document;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the document would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
 - (e) whether disclosure of the document would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the agency would not otherwise be able to explain upon disclosure of the documents;
 - (f) the impact of disclosing a document in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the agency at the conclusion of a decision or process; and
 - (g) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
34. In its decision letter, the Agency states the release of information in the document would be contrary to the public interest due to:
 - (a) the sensitivities of the issues under consideration; and
 - (b) the likelihood disclosure of the information would only provide part of an explanation rather than a full explanation, which may cause confusion and result in ill-informed debate.
35. In its submission dated [date], the Agency advised the information it exempted under section 30(1) reflects its approach, opinions and recommendations, as well as communicating information to the Minister about a third party that could be considered incomplete or speculative in nature.
36. Having carefully reviewed the exempt material in Document 4, I have broadly distinguished the following two categories of information:
 - (a) advice, opinion or recommendations provided by Agency officers to the Treasurer in relation to information concerning the Agency and its negotiations with respect to the project; and

⁹ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (b) deliberative briefing material prepared by Agency officers that summarises [an external agency's] position or other considerations with respect to the project.

37. Having carefully reviewed Document 4, I am not satisfied it would be contrary to the public interest for information concerning the Agency and its negotiations in respect to the project to be disclosed for the following reasons:

- (a) I acknowledge the document could be considered sensitive, as it relates to a briefing to the Treasurer in relation to a future major public transport infrastructure project. However, I consider any such sensitivity is better addressed by promoting transparency, rather than by maintaining secrecy. Providing access to information in relation to government decision making, particularly in relation to the expenditure of public funds, serves the public interest and promotes openness and accountability in the public sector.
- (b) I do not accept disclosure of information in the document will necessarily cause 'ill-informed debate' given the capacity of the public to understand the nature of government's role in considering issues and making decisions on its behalf on a wide variety of issues and future projects. Arguably, this function is at the core of government and disclosure of documents that evidence government fulfilling this role, in my view, will not cause confusion or ill-informed public debate.
- (c) In any case, it is open to the Agency to release the document with any necessary explanation required to eliminate or minimise any potential misunderstanding or misinterpretation concerning information in the document.

38. However, I am satisfied it would be contrary to the public interest for information relating to deliberative briefing material prepared by Agency officers that summarises [the external agency's] position or other considerations with respect to the project for the following reasons:

- (a) In my view, information of this nature is the Agency's interpretation or analysis of [the external agency's] views or position in relation to the project. The purpose of the information in the document is to brief the Treasurer prior to [their] meeting with [the external agency].

I consider it would be contrary to the public interest for this information to be disclosed as it may not accurately represent [the external agency's] position in relation to the project.

I distinguish this factor from my previous considerations in paragraph 37 as it is open to the Agency to provide additional information to the Applicant to mitigate the risk of any potential misunderstanding or misinterpretation in relation to its own information. However, with this category of information, it would not be appropriate or possible for the Agency to do so with respect to information relating to [the external Agency].

- (b) The document was created to brief the Treasurer in preparation for a meeting attended by the Treasurer and senior representatives from [the external agency] to discuss commercially sensitive issues concerning a future major project.

I accept there is a public interest in the Agency's officers being able to brief the Treasurer in writing with their views and sufficient information to allow [them] to meaningfully participate in the relevant meeting.

39. In conclusion, I am not satisfied it would be contrary to the public interest to disclose opinion, advice and recommendations provided by Agency officers to the Treasurer in relation to information concerning the Agency and its negotiations with respect to the project. Accordingly, I have determined such information is not exempt under section 30(1).

40. However, I am satisfied it would be contrary to the public interest to disclose deliberative briefing material prepared by Agency officers that summarises [the external agency's] position or other related considerations with respect to the project. Accordingly, I have determined such information is exempt under section 30(1).
41. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Deletion of exempt or irrelevant information

42. 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.
43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
44. The Applicant excluded personal affairs information from the scope of their request. Accordingly, this information is irrelevant.
45. I have considered the effect of deleting irrelevant and exempt information from the documents in accordance with section 25. I am satisfied it is practicable to delete the irrelevant information as to do so would not require substantial time and effort, and the edited documents would retain meaning. However, I am not satisfied it is practicable to do so for exempt information as the documents would be rendered meaningless.

Conclusion

46. On the information before me, I am satisfied certain information in the documents is exempt under sections 28(1)(b), 28(1)(ba) and 30(1). However, I am not satisfied certain other information is exempt under section 30(1).
47. In relation to Document 4, I am satisfied it is practicable to delete irrelevant and exempt information in this document in accordance with section 25, and determined to grant access in part.
48. However, as I am not satisfied it is practicable to delete exempt information in Documents 1, 3 and 5, I have determined to refuse access to these documents in full.
49. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

50. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²
51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³

¹⁰ *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].

¹¹ *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].

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
53. 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.
54. 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.¹⁵

When this decision takes effect

55. My decision does not take effect until the relevant review period (stated above at paragraph 46) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Agency's Decision	OVIC Decision	OVIC Comments
1	[date]	Ministerial Brief	Refused in full Section 28(1)(b)	Refuse in full Sections 28(1)(b), 28(1)(ba)	<p>Section 28(1)(ba): I am satisfied this document was created for the purpose of briefing a Minister in relation to issues to be considered by Cabinet.</p> <p>Section 28(1)(b): I am satisfied the attachments to this document were created for the purpose of submission to Cabinet for its consideration.</p>
2	[date]	Ministerial Brief	Refused in full Section 28(1)(d)	Not subject to review	On [date], the Applicant agreed to exclude this document from the scope of the review.
3	[date]	Ministerial Brief	Refused in full Section 28(1)(b)	Refuse in full Sections 28(1)(b), 28(1)(ba)	Sections 28(1)(b) and 28(1)(ba): See comments for Document 1.
4	[date]	Meeting brief	Released in part Section 30(1)	<p>Release in part Sections 30(1), 25</p> <p>The following information is not exempt under section 30(1) and it is to be released to the Applicant:</p> <ul style="list-style-type: none"> - page 3, Suburban Rail Loop, Dot points 1, 3 and 4; and - all information on Page 5. <p>The following information is exempt under section 30(1) and it</p>	<p>Section 30(1): Having carefully reviewed the information exempted by the Agency, I am not satisfied it would be contrary to the public interest for the Agency to release the information that concerns the Agency. Accordingly, this information is not exempt under section 30(1).</p> <p>However, I am satisfied it would be contrary to the public interest for the Agency to release the information that concerns [the external agency]. Accordingly, this information is exempt under section 30(1).</p> <p>Section 25: The Applicant agreed to exclude</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Agency's Decision	OVIC Decision	OVIC Comments
				<p>is to be deleted:</p> <ul style="list-style-type: none"> - Page 3, Suburban Rail Loop, Dot points 5, 6 and 7; - Page 4, continuation of Suburban Rail Loop, Dot points 8 and 9; and - Page 4, Investment, Dot point 2. <p>Personal affairs information, which is irrelevant, is to be deleted in accordance with section 25.</p>	<p>personal affairs information from the scope of their request. Therefore, this information is irrelevant and I am satisfied it is practicable to delete it from the document in accordance with section 25.</p>
5	[date]	Ministerial Brief	Refused in full Section 28(1)(b)	Refuse in full Sections 28(1)(b) ,28(1)(ba)	Sections 28(1)(b) and 28(1)(ba): See comments for Document 1.