

Notice of Decision and Reasons for Decision

Applicant:	'BL8'
Agency:	Department of Jobs, Precincts and Regions
Decision Date:	17 April 2020
Exemption considered:	Section 30(1)
Citation:	'BL8' and Department of Jobs, Precincts and Regions (<i>Freedom of Information</i>) [2020] VICmr 114 (17 April 2020)

FREEDOM OF INFORMATION – briefing documents – Public Accounts and Estimates Committee hearing – 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.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied Documents 4 and 6 are exempt under section 30(1).

As I am satisfied it is practicable to delete irrelevant information in the documents in accordance with section 25, I have determined to grant access to the documents in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
17 April 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - ...copies of the following briefings prepared for the Secretary's Public Accounts and Estimate Committee (PAEC) hearing into the 2019-2020 Budget Estimates:
 - 1.3.02 Australian Sustainable Hardwood
 - 1.3.11 Lapsing Programs
 - 1.4.01 Alcoa
 - 1.4.17 LiveTiles
 - 1.4.20 SEA Electric
 - 1.6.02 Belt and Road
 - 1.6.04 International Education
2. The Applicant did not seek access to personal information of non-executive staff, such as names and addresses and agreed to accept redacted documents with such information removed.
3. In its decision, the Agency identified all seven briefings requested and relied on section 30(1) to refuse access to parts of Documents 4 and 6. 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 exempt information in two briefing documents under section 30(1). Namely, Public Accounts and Estimate Committee (**PAEC**) briefing 4.17 LiveTiles Geelong (Document 4) and PAEC briefing 6.02 – Belt and Road (Document 6). Accordingly, this review concerns Documents 4 and 6 only.
5. The Agency's decision also relied on section 33(1) to exempt the direct contact details of Agency staff in the documents. As this review is limited to the Agency's application of section 30(1), information deleted by the Agency under section 33(1) is irrelevant and is to remain deleted under section 25.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions 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) the Agency's submission dated 12 March 2020.

PAEC

8. In undertaking this review, I have had regard to the purpose and objective of PAEC to understand the purpose for which the documents subject to review were created.
9. PAEC is a Joint Committee of the Victorian Parliament and conducts 'detailed scrutiny of the Government's annual spending and revenue (the budget estimates)'.

10. In summary, PAEC performs an important function on behalf of the Victorian Parliament, and in turn the Victorian community by scrutinising the expenditure and administration of public funds by government agencies.
11. Section 14(1) of the *Parliamentary Committees Act 2003* (Vic) prescribes PAEC's functions:
- (1) The functions of the Public Accounts and Estimates Committee are—
 - (a) if so required or permitted under this Act, to inquire into, consider and report to the Parliament on—
 - (i) any proposal, matter or thing concerned with public administration or public sector finances;
 - (ii) the annual estimates or receipts and payments and other Budget papers and any supplementary estimates of receipts or payments presented to the Assembly and the Council;
 - (iii) audit priorities for the purposes of the Audit Act 1994.
12. Information about PAEC and its work is available online.¹ The following extracts set out relevant information regarding the Committee's objectives, conduct of public hearings to 'scrutinise the expenditure and activities of ministerial portfolios including the Parliamentary Departments', and its estimates and outcomes function.²

13. The Committee's objectives are:

The Committee's budget estimates inquiry aims to benefit the Parliament and the community by:

- promoting the accountability, transparency and integrity of the executive and the public sector
- encouraging effective and efficient delivery of public services and assets
- enhancing the understanding of the budget estimates and the wider economic environment and
- assisting members of Parliament in their deliberation on the appropriation bills.

14. The Committee holds public hearings each year:

Around June, the Committee holds two weeks of public hearings with all Ministers and the Parliamentary Presiding Officers. At the hearings, the Committee asks questions about a variety of matters, including the decisions that led to the framing of the Budget, departmental performance targets, and issues of financial significance to the State. Witnesses may take some questions on notice or agree to provide the Committee with further information...

15. The Committee's estimates and outcomes function involves:

During May the Committee holds public hearings to scrutinise the expenditure and activities of ministerial portfolios including the Parliamentary Departments. All Ministers and senior departmental officers appear before the Committee and are questioned on the proposed expenditure of departments for the next financial year. Before the Budget is brought down by the Treasurer, the Committee forwards a questionnaire to all departments, seeking information to supplement details that will be contained in the Budget papers. The evidence given at the public hearings is reviewed and where the

¹ See <https://www.parliament.vic.gov.au/paec>.

² See https://www.parliament.vic.gov.au/images/stories/committees/paec/PAEC_Briefing_Paper_Introduction_to_the_PAEC_.pdf and https://www.parliament.vic.gov.au/images/stories/committees/paec/About_the_Committee/PAEC_Briefing_paper_Budget_Estimates_process.pdf.

Committee considers necessary, further information may be sought. The Budget Estimates report is tabled in the following spring session of Parliament (September or October).

The Committee's objective in its scrutiny of the budget estimates in the 58th Parliament was to:

- assist Members of Parliament in their deliberation on the appropriation bills
- make recommendations which promote clear and full disclosure of the information contained in the budget papers
- provide Members of Parliament and the Victorian community with an improved understanding of the budget
- provide feedback on the performance measures that the Government proposes to discontinue
- encourage economical, efficient and effective government administration.

16. Finally, the Committee has recently resumed conducting a review of budget outcomes:

Upon completion of the financial year, the Committee reviews the budget outcomes. This process aims to improve the accountability of Victorian government departments and agencies, and provide Parliament and the community with more meaningful information about the results achieved in the preceding financial year. The intention of the outcomes process is to complement the Committee's initial review of the Budget Estimates.

17. In undertaking my review, I have also 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 30(1)

18. 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.

19. The exemption does not apply to purely factual material in a document.³

20. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.

³ Section 30(3).

Do the documents 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?

21. In its submission, the Agency stated the paragraph it exempted in Document 4:

... discloses the deliberative process involved in relation to a Research and Development (R&D) tax incentive being sought by LiveTiles. This is a Commonwealth Government incentive; however, the deliberation and consultation that occurred around this issue involved the function of the Minister for Regional Development, who has responsibility for the project. The department submits that the first two limbs of the above test are satisfied.

22. Similarly, in respect of Document 6, the Agency's submission stated:

The exemption has been applied to information in this document that discloses advice and opinion, as well as the consultative process that took place in relation to the advice raised. The advice was provided in the course of the agency's functions in relation to its role in creating trade, job and investment opportunities for the people of Victoria. The department submits that the first two limbs of the test are satisfied.

23. Having reviewed the documents subject to review, I am satisfied the information exempted by the Agency was prepared by an Agency officer and discloses matter in the nature of opinion, advice or recommendation.

Were the documents prepared 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?

24. I am satisfied the documents were prepared in the course of the deliberative processes of the Agency, in that these briefings were prepared for the Secretary of the Department of Jobs, Precincts and Regions in preparation for his appearance before a PAEC public hearing.

25. However, in my view, certain information exempted by the Agency in the documents constitutes factual information. I acknowledge the Agency may consider the selection and inclusion of such information in the documents forms part of its deliberative processes. However, keeping the object of the FOI Act and Parliament's intention that the Act be interpreted so as to further that object, and noting other information of a factual nature that has already been released by the Agency, I am satisfied such information is not exempt by virtue of section 30(3).

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

26. I must also be satisfied releasing this information is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁴

27. In deciding if disclosure 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. I have also had regard to the detailed submissions provided by the Agency.

28. In *McIntosh v Department of Premier and Cabinet*,⁵ the Victorian Civil and Administrative Tribunal (VCAT) held:

Under the principles, the application of the public interest in s 30(1)(b) involves a balancing of various considerations. The starting point is the object of the Act in s 3(1), which emphatically recognises the right of the community to access information, limited only by exemptions which protect essential public

⁴ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁵ [2009] VCAT 1528 at [18]-[19] (per Justice Bell, VCAT President).

interests. Those purposes are always directly relevant when considering the public interest, but may be especially strong, and outweigh other aspects of the public interest, where access to the information is necessary to address questions that have acquired a particular importance in the mind of the community.

Other relevant considerations have been identified in such authorities as *Re Howard and Treasurer of Commonwealth of Australia* and *Re Hulls and Victorian Casino and Gaming Authority*, details of which are set out in *Re Wells and Department of Premier and Cabinet*. Among those considerations are the purposes of the exemption in s 30. In the words of Maxwell P, these “include the efficient and economical conduct of government, protection of the deliberative processes of government, particularly at high levels of government and in relation to sensitive issues, and the preservation of confidentiality so as to promote the giving of full and frank advice.” [Footnotes omitted]

29. The Agency submitted the following regarding the application of section 30(1) to Document 4 and 6 respectively:

Funding for the project is dependent on various milestones being met. The department submits that release of the information is contrary to the public interest having regard to the following factors:

- Details regarding the project are sensitive, especially considering the delays to date. Release of the information may adversely impact on the project, which is ongoing;
- The information relates to a possible action at a point in time that may or may not be undertaken. The department is unable to provide further clarification regarding the matter as that information would also be subject to exemption under the FOI Act. Given this, there is a high possibility the information will mislead or otherwise create mischief that the department is not in a position to correct; and
- Any public interest in the information is satisfied by release of the remaining information contained in the document, along with the information that is already publicly known.

...

Release of the information was considered contrary to the public interest having regard to:

- The sensitive nature of the information, which was provided at a very preliminary stage.
- The fact that since the time of writing the brief, there has been a significant amount of information about this topic which is in the public domain. The department submits that any public interest in the material is satisfied by the publicly available information, which supersedes the information in the brief.
- The detrimental impact release of the information would have with stakeholder groups involved in the project.

30. 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:⁶

- (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 documents and the broader context giving rise to the creation of the documents;
- (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between agency officers, essential for the Agency to make an informed and well-considered decision or

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;

- (e) whether disclosure of the documents 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 documents 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.

31. On balance, I am not satisfied it would be contrary to the public interest to disclose the information exempted by the Agency for the following reasons:

- (a) As set out above, the broader context giving rise to the creation of the documents involves the preparation of briefings for the Secretary of the Department to assist him in his appearance before a PAEC public hearing. As PAEC's objective is to scrutinise budget estimates, there is a public interest in disclosure of information where it further serves to provide additional transparency and accountability in respect to an agency carrying out of its governmental functions and associated expenditure of public funds.
- (b) Much of the information was selected for inclusion by Agency officers with the knowledge it may be disclosed or could be drawn upon by the Secretary during a public PAEC hearing.
- (c) Having reviewed the documents, much of the information exempted by the Agency does not appear to be contentious. In my view, most of the information could reasonably be described as advice or opinion that comprises broad and generic statements.
- (d) It is unlikely disclosure of the information exempted by the Agency would have a detrimental impact on the preparation of future briefings by Agency officers given the role of PAEC and its conduct of public hearings at which senior departmental officers must appear and provide evidence on budget estimates and outcomes.
- (e) I do not consider it is reasonably likely disclosure of the documents would have a detrimental impact on stakeholder groups involved in the relevant project given public reports about its progress. Nor do I consider its disclosure would create mischief or mislead the public in circumstances where the information is generic in nature and was prepared with the expectation it may be disclosed or drawn upon by the Secretary of the Department during a PAEC public hearing.
- (f) The fact the information may not have been disclosed during a PAEC hearing, for example, in response to a question by a PAEC member, does not in my view, weigh in favour of the information remaining undisclosed when sought by an applicant under the FOI Act.

32. Accordingly, I am not satisfied the information exempted by the Agency in Documents 4 and 6 is exempt under section 30(1).

Deletion of exempt or irrelevant information

33. 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.

34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸
35. I have considered the effect of deleting irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable for the Agency to delete the irrelevant information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

36. On the information before me, I am not satisfied Documents 4 and 6 are exempt under section 30(1).
37. As I am satisfied it is practicable to delete irrelevant information in the documents in accordance with section 25, I have determined to grant access to the documents in part.

Review rights

38. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
41. 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.
42. 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.¹²

When this decision takes effect

43. 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.

⁷ *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].

⁸ *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].

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).