

Notice of Decision and Reasons for Decision

Applicant:	'BL1'
Agency:	Department of Treasury and Finance
Decision date:	7 April 2020
Exemption considered:	Section 30(1)
Citation:	'BL1' and Department of Treasury and Finance (<i>Freedom of Information</i>) [2020] VICmr 107 (7 April 2020)

FREEDOM OF INFORMATION – Ministerial briefs – titles of Ministerial briefs – briefing 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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the document.

I am not satisfied information in the document is exempt under section 30(1).

However, I am satisfied the personal affairs information of third parties, the names of Cabinet documents and the names of commercial businesses are irrelevant to the Applicant's request and it is practicable to delete this information in accordance with section 25.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

7 April 2020

Reasons for Decision

Background to review

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

For each Ministerial Office supported by the Department, a document listing briefs prepared by the Department from [date] until [date], outlining the Ministers Office for which the Brief was prepared, the title of the brief, the reference number of the brief and the date the brief was actioned by the Department for delivery to a Ministerial office.

2. Following consultation with the Agency, the Applicant amended their initial request to the following:

A document listing Ministerial briefs submitted by the Department to the Office of the Treasurer, from [date] until [date], including the title and reference number of each brief.

3. In its decision, the Agency identified one document falling within the terms of the amended Applicant's request. It decided to grant access to the document in part.
4. The Agency relied on the exemption under section 30(1) to refuse access to parts of the document. 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. The Applicant advised they only seek a review of the Agency's decision to exempt information under section 30(1).
7. I have examined copies of the documents subject to review.
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 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;
 - (c) the Agency's submission dated [date]; and
 - (d) communications between OVIC staff, the Agency and the Applicant.
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.

Review of exemptions

Section 30(1)

11. The Agency deleted certain Ministerial brief titles listed in the document under section 30(1).

12. 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;
 - (a) 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
 - (b) disclosure of the matter would be contrary to the public interest.

13. The exemption does not apply to purely factual material in a document.¹

Does the document contain information in the nature of opinion, advice, recommendation, consultation or deliberation?

14. On the face of the document, I am not satisfied the title of the briefings describes any options or a series of alternatives provided to the Minister.² Accordingly, I am not satisfied it discloses matter in the nature of opinion, advice or recommendation.

15. As the information does not meet the first limb of the exemption, I am not satisfied the document is exempt under section 30(1).

Was the information communicated in the course of Agency's deliberative processes? Would the release of the information be contrary to the public interest?

16. In its submission, the Agency stated the titles of briefings could potentially disclose the matters that were deliberated upon by the relevant officers and it would be contrary to the public interest for the material to be disclosed for the following reasons:

- (a) the high sensitivity and public profile of the issues involved;
- (b) likelihood disclosure would provide an incomplete explanation, which may cause confusion and ill-informed debate; and
- (c) the deliberations are ongoing, and disclosure would reveal options that are speculative or still being considered.

17. In any case, even if I was persuaded the first two limbs of the exemption were met, I am not satisfied the release of the titles would be contrary to the public interest.

18. In deciding whether information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:³

- (a) the right of every person to gain access to documents under the FOI Act;
- (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (b) the stage of a decision or status of policy development, or a process being undertaken at the time the communications were made;

¹ Section 30(3).

² *Pallas v Department of Premier and Cabinet (Review and Regulation)* [2013] VCAT 877. See, in particular at [30]-[32].

³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (c) 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 participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
 - (d) 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;
 - (e) 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
 - (f) 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.
19. In the circumstances of this case, I am not satisfied it would be contrary to the public interest for information in the documents to be released for the following reasons:
- (a) I acknowledge the briefing titles could be considered by the Agency to be sensitive. However, I consider the public interest weighs in favour of openness and transparency in government rather than secrecy.
 - (b) The information to be released are briefing titles which do not disclose any of the substance of the information contained in the documents or any subsequent decisions made.
 - (c) I do not accept disclosure of information in a form that an agency may not have intended be released to the public under the FOI Act 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 behalf of the community on a wide variety of issues. Arguably this function is at the core of government and disclosure of documents that evidence this will, in my view, not cause confusion or ill-informed debate amongst the public.
 - (d) In any case, it is open to the Agency to release the document with any necessary additional information to eliminate or minimise any potential 'confusion' concerning information in the document.
20. Accordingly, I am not satisfied the disclosure of the information in the document would be contrary to the public interest. Hence, I have determined the document is not exempt under section 30(1).

Deletion of exempt or irrelevant information

- 21. 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.
- 22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ and the effectiveness of the deletions. Where

⁴ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁵

23. In the course of consultation with the Agency, the Applicant agreed to exclude certain information such as personal affairs information, names of Cabinet documents and names of commercial businesses.
24. I am satisfied such information is irrelevant as it was out-scoped by the Applicant and it is practicable to delete this information in accordance with section 25 as to do so would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

25. On the information before me, I am satisfied the document is not exempt under section 30(1).
26. As I am satisfied it is practicable to delete irrelevant information in the document in accordance with section 25, as described in paragraph 23 above, I have determined to grant access to the document in part.

Review rights

27. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁶
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
30. 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.
31. 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.⁹

When this decision takes effect

32. 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.

⁵ *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].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).