

Notice of Decision and Reasons for Decision

Applicant:	'BR1'
Agency:	Department of Education and Training
Decision date:	19 June 2020
Exemption considered:	Section 28(1)(b)
Citation:	'BR1' and Department of Education and Training (<i>Freedom of Information</i>) [2020] VICmr 162 (19 June 2020)

FREEDOM OF INFORMATION – Cabinet document – Skills First Evaluation

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 is the same as the Agency's decision.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

19 June 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 the final report of the Skills First Evaluation conducted by [named business undertaking] that was commissioned to provide an independent evaluation of the Skills First Reforms.
2. In its decision, the Agency identified one document, comprising of 230 pages, falling within the terms of the Applicant's request. It decided to refuse access in full.
3. The Agency relied on the exemption under section 28(1)(b) to refuse access to the document. 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 section 28(1)(b).¹ However, I am limited in the amount of information I am able to provide in relation to the document so as to avoid disclosing exempt information.
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 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.
8. 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)

9. 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.
10. 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.
11. In *Ryan v Department of Infrastructure*,² the Victorian Civil and Administrative Tribunal (**VCAT**) observed:

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.

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.

12. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
13. The document is an attachment to a submission to a sub-committee of Cabinet.
14. Based on an inspection of the document and the information provided by the Agency, I am satisfied the two attachments to the submission (one of which is the document subject to review) were created by or on behalf of the Agency for the purpose of submission to Cabinet for consideration.
15. As such, I am satisfied the document is exempt under section 28(1)(b).

Deletion of exempt or irrelevant information

16. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
17. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’³ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not ‘practicable’ and release of the document is not required under section 25.⁴
18. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the documents meaningless.

Conclusion

19. On the information before me, I am satisfied the document is exempt under section 28(1)(b).
20. As I am satisfied it is not practicable to edit the document to delete exempt information in accordance with section 25, I have determined to refuse access to the document in full.

Review rights

21. 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.⁵
22. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
23. The Agency may apply to VCAT for a review up to 14 days, from the date it is given this Notice of Decision.⁷

² (2004) VCAT 2346 at [33].

³ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁴ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

24. 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.
25. 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.⁸

When this decision takes effect

26. 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].

⁸ Sections 50(3F) and (3FA).