

Notice of Decision and Reasons for Decision

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| Applicant: | 'BR2' |
| Agency: | Department of Education and Training |
| Decision date: | 19 June 2020 |
| Exemption considered: | Section 28(1)(ba) |
| Citation: | 'BR2' and Department of Education and Training (<i>Freedom of Information</i>) [2020] VICmr 163 (19 June 2020) |

FREEDOM OF INFORMATION – Cabinet submissions – ministerial briefing document

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 documents to delete the exempt information in accordance with section 25, I have determined to refuse access to the documents 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:

Documents that identify action undertaken on each of the 109 recommendations and status of each recommendation (e.g. completed, underway, not yet commenced) of the Department of Education and Trainings VET Funding Review by Bruce Mackenzie published September 2015.
2. In its decision, the Agency identified two documents, comprising of 6 pages, falling within the terms of the Applicant's request. It decided to refuse access in full.
3. The Agency relied on the exemptions under sections 28(1)(ba) and 28(1)(c) 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. I have been briefed by OVIC staff who inspected the documents claimed to be exempt under sections 28(1)(ba) and 28(1)(c).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.
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;
 - (a) information provided with the Applicant's review application; and
 - (b) 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)(ba)

9. 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.
10. 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.

² (2004) VCAT 2346 at [33].

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.

11. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
12. 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.³
13. 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.⁴
14. 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’.⁵
15. Document 1 is a briefing to a Minister.
16. Document 2 is an attachment to Document 1 in the form of a table.
17. Based on an inspection of the documents and the information provided by the Agency, I am satisfied Document 1 was prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet.
18. Document 2 is an attachment to Document 1. Based on the inspection and the information provided by the Agency, I am also satisfied it was prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet.
19. Accordingly, I am satisfied Documents 1 and 2 are exempt under section 28(1)(ba).

Section 28(1)(c)

20. In light of my decision, it is not necessary for me to consider the additional exemption relied on by the Agency.

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 for the agency or Minister 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’⁶ and the effectiveness of the deletions. Where

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

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

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

⁶ *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].

deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁷

23. 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

24. On the information before me, I am satisfied the documents are exempt under section 28(1)(ba).
25. 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.

Review rights

26. 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.⁸
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
28. The Agency may apply to VCAT for a review up to 14 days, from the date it is given this Notice of Decision.¹⁰
29. 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.
30. 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.¹¹

When this decision takes effect

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 *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).