



Office of the Victorian
Information Commissioner

t 1300 00 6842
e enquiries@ovic.vic.gov.au
w ovic.vic.gov.au

PO Box 24274
Melbourne Victoria 3001

Notice of Decision and Reasons for Decision

| | |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------|
| Applicant: | 'CJ1' |
| Agency: | Department of Health and Human Services |
| Decision date: | 25 November 2020 |
| Exemption considered: | Section 28(1)(b) |
| Citation: | 'CJ1' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 330 (25 November 2020) |

FREEDOM OF INFORMATION – Cabinet Submission – Cabinet in Confidence – Approval in Principle – Bill at Cabinet – prepared for the sole or substantial purpose of submission to the Cabinet – risk assessment documents – social impact assessment – medically supervised injecting room

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 in that I am satisfied the documents are exempt under section 28(1)(b).

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

25 November 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 - risk assessment documents including risk framework (and any supporting or reference document therein (where reasonable)) completed by the State Government prior to the announcement of the trial of the medically supervised injecting room, including the mitigations and controls;
 - social impact assessment (and any supporting or referenced document therein (where reasonable)) completed by the State Government prior to the announcement of the trial of the medically supervised injecting room. Including any documents submitted by [named other agencies] (where reasonable).
2. In its decision, the Agency identified two documents, comprising 17 pages, falling within the terms of the Applicant's request. The Agency refused access to both documents in full relying on the exemption under section 28(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. I note Parliament's intention that the FOI Act must be interpreted so as to further the object of the Act and that any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 28(1)(b) – Cabinet documents

9. Section 28(1)(b) provides a document is an exempt document if it was prepared by a Minister or on his or her behalf, or by an agency, for the purpose of submission for consideration by the Cabinet.
10. The exemption in section 28(1)(b) will not apply to a document to the extent it contains purely statistical, technical or scientific material, unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.

11. In *Ryan v Department of Infrastructure*,¹ 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” about it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exceptions [(now five)]” in section 28(1) of the Act.

12. A document will be exempt under section 28(1)(b) only if the sole purpose for which it was prepared, or one of the substantial purposes, was for submission for consideration by the Cabinet. In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of a document, including whether it was submitted to the Cabinet.²

13. The Agency provided the following information in its submission:

Document 1 is a formal Joint Approval in Principle and Bill at Cabinet (Joint AIP/BAC) legislation proposal...The document is in the form of a formal Cabinet submission, has been allocated a Cabinet submission reference number and has been marked ‘Cabinet in Confidence’.

Document 2 is an attachment to Document 1...

...the department submits that Document 1 and Document 2, have clearly been prepared for the purposes of submission for consideration by Cabinet and are exempt in full under section 28(1)(b).

Were the documents prepared by a Minister, or on their behalf by an agency?

14. Having inspected Documents 1 and 2, I am satisfied each have been prepared by officers of the Agency.

Were the documents prepared for the purposes of submission for consideration by the Cabinet?

15. As outlined above, the key considerations under section 28(1)(b) is whether, at the time a document was created the sole or substantial purpose for which it was prepared was for submission for consideration by the Cabinet.
16. According to the Victorian Government’s *Cabinet Handbook*, legislation proposals come to Cabinet in at least two stages. First, submission to Cabinet for Approval in Principle (**AIP**) for the drafting of the Bill and second, approval of the Bill by the Cabinet (**BAC**), prior to its introduction to Parliament.³
17. On the information before me and based on my review of the documents, I am satisfied Documents 1 and 2, which concern legislative matters, were prepared for the sole, or for the substantial purpose of submission for the consideration by the Cabinet.

Do the documents contain purely statistical, technical or scientific material?

18. I am satisfied the documents do not contain purely statistical, technical or scientific material that could be disclosed without also disclosing any deliberation or decision of the Cabinet. Consequently, I am satisfied the exception in section 28(3) does not apply to the documents in the circumstances.

¹ [2004] VCAT 2346 at [33].

² *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

³ Victorian Government, *Cabinet Handbook* at <https://www.vic.gov.au/cabinet-handbook>.

19. Accordingly, on the information before me, I am satisfied Documents 1 and 2 are exempt under section 28(1)(b).

Deletion of exempt or irrelevant information

20. 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.
21. In this case, I am satisfied Documents 1 and 2 are exempt in full under section 28(1)(b). As such, no obligation arises to provide the Applicant with an edited copy of the documents in accordance with section 25.

Conclusion

22. On the information before me, I am satisfied Documents 1 and 2 are exempt in full under section 28(1)(b) and no obligation arises to provide the Applicant with an edited copy of the documents in accordance with section 25.

Review rights

23. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁴ The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
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.⁶

⁴ Section 50(1)(b).

⁵ Section 52(5).

⁶ Sections 50(3F) and (3FA).