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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'BX7'
Agency:	Department of Health and Human Services
Decision date:	19 August 2020
Exemptions considered:	Sections 28(1)(c), 30(1), 34(4)(a)(ii)
Citation:	'BX7' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 227 (19 August 2020)

FREEDOM OF INFORMATION – Cabinet documents – emails – Primary Care Partnerships (PCP) – funding

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.

On the information available, I am satisfied section 28(1)(c) applies to Document 1. It is therefore exempt in full.

However, I am not satisfied sections 30(1) or 34(4)(a)(ii) apply to Documents 2, 3 or 4. As it is practicable to edit Documents 2, 3 and 4 to delete irrelevant information, I have determined to grant access to the documents in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

19 August 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. A copy of all correspondence to or from any of the 28 Victorian Primary Care Partnerships since [date] to the date of this request, including letters prepared for the Minister for Health or [their] office
 2. A copy of all final briefs or emails to the Minister for Health (or [their] office) with the phrase "Primary Care Partnerships" since [date].
 3. A summary table of all documents relating wholly or partly to Primary Care Partnerships sent to the Department of Premier and Cabinet, the Department of Treasury and Finance, the Assistant Treasurer (or [their] office), or the Minister for Women (or [their] office), from the Department of Health and Human Services (or on behalf of the Minister for Health), detailing the date, title and receiver, since [date].
 4. A copy of any evaluation, research or study by a consultant or contractor into Primary Care Partnerships since [date].
 5. A summary document detailing all grants, funding or payments to Primary Care Partnerships for the [specified year, year, year or year] calendar years.

...Personal information of non-executive staff, such as names and addresses, is not required. Accordingly, documents can be redacted to remove such information.
2. The Agency advised the Applicant that the terms of processing the first part of their request would substantially and unreasonably divert the Agency's resources.
3. The Applicant subsequently agree to the following revised terms in relation to the first part of their request:

A copy of all correspondence between any of the 28 Victorian Primary Care Partnerships and the Health and Wellbeing division of the department, since [date] to the date of this request, including letters prepared for the Minister for Health or [their] office.
4. In its decision, the Agency identified 91 pages of document falling within the terms of the Applicant's request. It decided to grant access to the documents in part. The Agency noted no documents were found in relation to points three or four of the request.
5. The Agency relied on sections 28(1)(c), 30(1) and 34(4)(a)(ii) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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) the Applicant's review application;
 - (c) the Agency's submission dated [date].
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.

Primary Care Partnerships (PCP) Program

11. The documents relate to the Primary Care Partnerships (**PCP**) Program. The PCP Program is a platform that brings together local health and other agencies to share skills and resources to find solutions to local health and wellbeing challenges. The PCPs are funded by the Agency.

Review of exemptions

Section 28(1)(c)

12. Section 28(1)(c) provides a document is an exempt document if it is a document that is a copy or a draft of, or contains extracts from, a document referred to in paragraph (a), (b) or (ba).
13. Sections 28(1)(a), (b) and (ba) refer to:
- (1) A document is an exempt document if it is—
 - (a) the official record of any deliberation or decision of the Cabinet;
 - (b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet;
 - (ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;
14. A document will be a copy if it is a reproduction of the document, for example a photocopy.
15. A draft is a 'preliminary version' of the document. A document will not be considered a draft simply because it was created before the relevant submissions or because there is information common to both sets of documents. It should be the actual document, preferably marked as draft and not documents of 'different kinds prepared by different agencies.'¹
16. The Agency applied section 28(1)(c) to Document 1. Given the nature of documents subject to section 28(1), I am limited to the amount of information I can provide about Document 1 without disclosing exempt information.
17. Having examined Document 1 I am satisfied that it constitutes drafts, or contains extracts from, a document described in paragraphs 12 and 13. I am therefore satisfied the document is exempt from disclosure under section 28(1)(c).

Section 30(1)

¹ *Asher v Department of Infrastructure* (2006) 25 VAR 143; [2006]

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; and
 - (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.²

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?

20. The Agency applied section 30(1) to parts of Document 1. However, as I am satisfied all of the information determined exempt by the Agency under either section 30(1) or 28(1)(c) in that document is exempt under section 28(1)(c), I have not further considered that document in relation to section 30(1).
21. The Agency also applied section 30(1) to future funding amounts allocated to PCPs in Document 4. In the context of this particular matter, I am satisfied this amounts to opinion, advice or recommendation prepared by an officer of the Agency.

Was the document 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?

22. I am satisfied Document 4 was prepared for the deliberative purposes of the Agency, that of allocating funding to PCPs.

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

23. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
24. 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:³
- (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 document and the broader context giving rise to the creation of the document;
 - (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 document would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or

² Section 30(3).

³ *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 document 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 document 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.

25. In its decision letter, the Agency advised:

This section has also been used to exempt from disclosure budget figures relating to forecasted funding to individual Primary Care Partnerships agencies, as this funding is subject to variation or cessation within an agreed period of notification with the parties.

26. I am not satisfied disclosure of this information would be contrary to the public interest because:

- (a) The amounts are provided in total only and there is no information before me that such general information is sensitive.
- (b) Information in the document relates to local community partnerships dedicated to improving population health and well-being that directly affects members of the community. I consider the public has a substantial interest in the information regarding the PCP program.
- (c) I consider the Applicant, who is a Member of Parliament, along with members of the public, are capable of understanding the document was produced at a particular point in time and may not represent the Agency's final views on the allocation of funds. Further, I consider members of the public are capable of understanding that such funding arrangements are subject to change, including that it could be discontinued.
- (d) Disclosure of the document serves the public interest by promoting public sector transparency and accountability, including in the performance of the Agency's functions and the expenditure of public funds on PCP programs. This is particularly important, in circumstances where the PCP framework is currently in a state of uncertainty and disclosure of the information can assist the community to participate in any future decisions made about PCPs.

27. The information is therefore not exempt under section 30(1).

Section 34(4)(a)(ii)

28. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, 'in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage'.

29. The Victorian Civil and Administrative Tribunal (**VCAT**) has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.⁴ VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.⁵
30. The provision contemplates that disclosure of a document under the FOI Act may expose the agency to a certain measure of disadvantage, and that any such exposure must be unreasonable.
31. In correspondence with OVIC, the Agency provided the following information about the application of section 34(4)(1)(ii):

Trade and commerce is to be given a wide meaning and will depend on the specifics facts and circumstances, however, it must be more than simply delivering government services or functions.

In relation to the ‘trade and commerce’ function of the department in documents 2, 3 and 4, the specific circumstances go beyond the mere provision government services or functions that it is required to undertake.

The department provide distinct funding to each of the 28 PCPs in Victoria. The PCPs support the delivery of over twenty Victorian government strategies, actively implementing and embedding government policy and reform in local communities through more than 150 distinct initiatives. The department needs to consider the funding benefits to each of the PCPs and negotiate depending on the outcomes able to be provided through the PCP in their communities and the integration of health services partnerships and coordination of such to implement initiatives. This is more than the department simply rolling out funding to a service to undertake a departmental service or function on its behalf. It is about weighing up and considering the community health benefits and outcomes of funding PCPs, all of who provide different functions, capabilities and partnerships, that are detailed to a certain degree within the documents.

We submit that the PCP funding amounts that are forecast and applied should be clearly considered ‘trade and commerce’ and not merely the implementation of a departmental function or obligation. The forecasted amounts are also subject to variation or cessation within agreed period of notification and parameters with the parties.

The PCP funding model also involves a degree of negotiation between the department and the 28 PCPs, and the forecasted amounts that have been deemed exempt are subject to variation due to budgetary and policy changes that are being considered. Should the amounts proposed for each PCP be disclosed, it will negatively impact the department’s negotiating position when funding is being allocated. It would also negatively impact the relationship between the department and PCPs should specific amounts be released.

This would likely reduce the department’s capacity to negotiate future funding for these commercially beneficial contracts, that assist with health prevention programs through community initiatives and limit the reliance of people on primary health care services such as remote hospitals.

In addition, the release of these amounts would expose the department to unreasonable disadvantage in the circumstances, given that the PCP model and associated funding is currently under review. There would likely be detrimental ramifications were the forecasted amounts be disclosed. This could be:

- Breakdown of departmental and PCP relationships
- Weakened negotiating position for the department in the future, particularly in the current review of PCPs environment
- Due to the potential re-modelling of PCP funding and duplication, the forecasted funding may substantially change or be separated into different components, such as transitioning some PCPs to a proposed new model of providing services.

⁴ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

⁵ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

32. In order for the exemption to apply, the Agency must be engaged in trade or commerce. I take the view described in *Pallas v Roads Corporation* that a government agency engaged in meeting its public functions it not engaged in trade or commerce, for example in relation to VicRoads:

In carrying out its road building functions the Corporation engages in Governmental activities rather than in trade or commerce...

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is. A consumer who purchases a consumer item from a department store is not, for that reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.⁶

33. In my view, the financial information referred to by the Agency does not indicate it is engaged in trade or commerce, rather it is carrying out its ordinary responsibilities in delivering community health funding.
34. However, even if I were to consider the Agency was engaged in trade or commerce, I do not consider disclosure would expose it unreasonably to disadvantage. In my view, being the only entity capable of managing and engaging with the broad range of community and health organisations to deliver such programs means that it is not subject to the same market forces or competition as any other entity. I also consider that in any case it has significant purchasing power that would overcome any such disadvantage from disclosure.
35. I note the Agency's view regarding its ability to negotiate with such entities in the future, however I also note the Agency's comments regarding the broad range of services and initiatives and that the PCPs 'provide different functions, capabilities and partnerships'. In this environment, where such entities are not in direct competition with each other, but rather exist to provide benefits to their communities, I do not consider disclosure would expose the Agency unreasonably to disadvantage.
36. Accordingly, I have decided the information the Agency identified is not exempt under section 34(4)(a)(ii).

Deletion of exempt or irrelevant information

37. 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.
38. 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 the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁸
39. In relation to Document 1, I have decided it is not practicable for the Agency to delete the exempt information because the document would not retain meaning.

⁶ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [57-58].

⁷ *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].

⁸ *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].

40. In relation to the remaining documents, I am satisfied such deletions can be made as the documents will retain the meaning.

Conclusion

41. On the information available, I am satisfied section 28(1)(c) applies to Document 1. It is therefore exempt in full.
42. However, I am not satisfied sections 30(1) or 34(4)(a)(ii) applies to Documents 2, 3 or 4. As it is practicable to edit Documents 2, 3 and 4 to delete irrelevant information, I have determined to grant access to the documents in part.

Review rights

43. 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
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
46. 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.
47. 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

48. My decision does not take effect until the 14-day review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date] to [date] & undated	Emails and draft documents	60	Refused in full Section 28(1)(c)	Refused in full Section 28(1)(c)	<p>Section 28(1)(c): I am satisfied the document is exempt in full under section 28(1)(c) for the reasons set out above.</p> <p>Section 30(1): The Agency applied section 30(1) to parts of Document 1. However, as I am satisfied all of the information determined exempt by the Agency under either section 30(1) or 28(1)(c) in this document is exempt under section 28(1)(c), I have not further considered that document in relation to section 30(1).</p> <p>Section 25: I am satisfied the document cannot be edited to remove exempt information without rendering the remainder of the document meaningless.</p>
2.	[date]	Emails and attachments	5	Released in part Section 34(1)(a)(ii)	Release in part Section 25 The document is to be released with irrelevant information deleted.	<p>Section 34(1)(a)(ii): The information exempted by the Agency under this section is the [financial year] funding amounts of PCPs. I have decided this information is not exempt from release for the reasons set out above.</p> <p>Section 25: I agree the information deleted from the document as</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						irrelevant is outside the terms of the Applicant's request, being the personal affairs of non-executive Agency officers.
3.	[date]	Emails and attachments	3	Released in part Section 34(1)(a)(ii)	Release in part Section 25 The document is to be released with irrelevant information deleted.	Section 34(1)(a)(ii): See Document 2. Section 25: See Document 2.
4.	[date]	Emails and attachments	13	Released in part Sections 30(1), 34(4)(a)(ii)	Release in part Section 25 The document is to be released with irrelevant information deleted.	Section 30(1): The Agency applied section 30(1) to the funding amounts of each PCP for the [year/year, year/year] and [year/year] financial years. I have decided this information is not exempt for the reasons set out above. Section 34(4)(a)(ii): The Agency applied section 34(4)(a)(ii) to the funding of PCPs for the [year/year] financial year. I have decided this information is not exempt from release. See Document 2. Section 25: The information deleted from the documents is the personal affairs of non-executive Agency officers or other information outside the scope of the Applicant's request. It is therefore outside the scope of the request.