



Office of the Victorian  
Information Commissioner

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## Notice of Decision and Reasons for Decision

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Applicant:	'DH3'
Agency:	Department of Health
Decision Date:	25 June 2021
Provision and exemptions considered:	Sections 25A(5), 29(1)(a), 29(1)(b)
Citation:	'DH3' and Department of Health ( <i>Freedom of Information</i> ) [2021] VICmr 193 (25 June 2021)

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FREEDOM OF INFORMATION – Australian Health Protection Principal Committee (AHPPC) – Chief Health Officer – COVID-19 – contact tracing – testing – hotel quarantine – elimination and suppression strategies – public health workforce capacity – refusal to process an FOI request

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.

I am not satisfied it is apparent from the nature of the documents, as described in the request, that all documents to which the request relates would be exempt under sections 29(1)(a) and 29(1)(b).

The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

25 June 2021

## Reasons for Decision

### Background to review

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

Australian Health Protection Principal Committee papers by or circulated to the Chief Health Officer, or their representative, between 1 May and 31 July 2020 concerning the following matters in Victoria:

- Contact tracing
- Testing approaches
- Hotel Quarantine
- Elimination/suppression strategies
- Public Health workforce capacity

2. The Agency refused to grant access to the requested documents in accordance with the Applicant's request under section 25A(5) on grounds all documents, should any exist, would be exempt under sections 29(1)(a) or 29(1)(b). In doing so, the Agency was not required to identify any documents relevant to the request. 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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties.
6. 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.
7. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and 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.

### Australian Health Protection Principal Committee

8. The Australian Health Protection Principal Committee (**AHPPC**) is a decision-making committee for health emergencies comprised of state and territory Chief Health Officers, chaired by the Australian Chief Medical Officer.
9. Victoria's Chief Health Officer has powers, duties and functions conferred or imposed upon them by the *Public Health and Wellbeing Act 2008 (Vic)* ('**PHW Act**') and other associated legislation and regulations. The Chief Health Officer's primary functions and powers are outlined in section 21 of the PHW Act. The Chief Health Officer is a representative of Victoria on number of key national bodies, including the AHPPC.<sup>1</sup>

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<sup>1</sup> Victorian Government, Health.Vic, 'About the Chief Health Officer', <https://www2.health.vic.gov.au/public-health/chief-health-officer/about>.

10. AHPPC provides advice and recommendations to the Australian Health Ministerial Advisory Council and the National Cabinet. The Department of Health (Australian Government) provides secretariat support.<sup>2</sup>
11. AHPPC is one of the primary bodies advising the National Cabinet on the country's response to the COVID-19 pandemic.<sup>3</sup>
12. For the purposes of this decision, it is not necessary to consider the constitutional, legal or other status of the National Cabinet.

### **Review of application of section 25A(5)**

13. The Agency determined any documents falling within the terms of the Applicant's request, should any exist, would be exempt from release under one or more exemptions under the FOI Act. Accordingly, the Agency refused to grant access to documents under section 25A(5) without having identified any documents relevant to the Applicant's FOI request.
14. The refusal power under section 25A(5) is 'carefully circumscribed'.<sup>4</sup> In *Knight v Corrections Victoria*,<sup>5</sup> the Supreme Court of Victoria held section 25A(5) will apply to an FOI request only where the following three elements are met:
  - (a) First, the exempt nature of the documents sought must be objectively apparent from the terms of the applicant's request. The 'nature' of a document refers to their inherent or essential quality or character.
  - (b) Second, it must be apparent from the terms of the applicant's request that all documents relevant to the request would be exempt.
  - (c) Third it must be apparent from:
    - (i) the nature of the documents, as described in an applicant's request, that no obligation would arise under section 25 for an agency to grant access to an edited copy of a document with exempt or irrelevant information deleted; or
    - (ii) an applicant's request, or through consultation with the applicant, they do not seek access to an edited copy of a document.

### ***What is the essential character of the documents requested?***

15. The Applicant requests 'Australian Health Protection Principal Committee papers by or circulated to the Chief Health Officer' concerning various matters relating to the public health response to the COVID-19 pandemic.
16. In its decision, the Agency stated:

Any relevant document captured by [the Applicant's] request would have been either provided to the department on the basis that it would remain confidential, or would be a document held by the department that would reveal the confidential discussions and deliberations of the Australian Health Protection Principal Committee (AHPPC).

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<sup>2</sup> Australian Government, 'Australian Health Protection Principal Committee', *Australian Government – Directory* (Web page, 8 April 2021) < <https://www.directory.gov.au/portfolios/health/department-health/australian-health-protection-principal-committee>>.

<sup>3</sup> Prime Minister, Minister for Health, Chief Medical Officer, 'Advice on coronavirus' (Media Release 13 March 2020) <<https://www.pm.gov.au/media/advice-coronavirus>>.

<sup>4</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

<sup>5</sup> *Knight v Corrections Victoria* [2010] VSC 338 (per Bell J).

The release of any relevant documents would be likely to prejudice the willingness of other member states to share information in the future and consequently, could adversely affect the outcomes of the work of the AHPPC.

17. Given no search has been conducted and there is no information before me as to the types of documents that may be found in relation to the request, I am not satisfied the essential character of the documents can be identified from the terms of the Applicant's request.
18. While I am not satisfied the essential character of the documents requested can be identified from the terms of the request, I have in any event considered whether all such documents would be exempt under section 29(1)(a) or (b).

***Would all the documents requested, as described by the Applicant in their request, be exempt?***

19. In refusing access to the requested documents under section 25A(5), the Agency submits any documents, should they exist, would be exempt under sections 29(1)(a) or (b).

*Sections 29(1)(a) and 29(1)(b) – Documents containing matter communicated by any other State*

20. Section 29(1) provides a document is an exempt document if disclosure under the FOI Act would be contrary to the public interest and disclosure:
  - (a) would prejudice relations between the State and the Commonwealth or any other State or Territory; or
  - (b) would divulge any information or matter communicated in confidence by or on behalf of the government of another country or of the Commonwealth or of any other State or Territory to the government of the State or Territory or a person receiving a communication on behalf of that government.
21. In accordance with section 29(2), the Agency sought the views of the AHPPC as to whether the documents should be disclosed. The AHPPC member advised the Agency that all AHPPC papers are deemed to have been communicated in confidence regardless of their content.

*Would disclosure be contrary to the public interest?*

22. As referenced at paragraph 16, the Agency's decision letter highlighted its view that disclosure would likely reduce information-sharing and consequently negatively affect the outcomes of AHPPC's work. Noting the current and topical nature of the request, OVIC asked the Agency to provide further information about how disclosure of the information would be contrary to public interest. The Agency did not provide any further information in response.
23. Based on the information before me, I am not satisfied it is apparent that disclosure of all documents, should they exist, would be contrary to the public interest for the following reasons:
  - (a) disclosure of the documents in this instance, if they exist, may serve the public interest by promoting public sector transparency and accountability in relation to how the Agency communicated with the Commonwealth regarding the COVID-19 pandemic;
  - (b) the Applicant, who is a member of the media, along with members of the public, are capable of understanding that particular documents are produced at a particular point in time and may not represent the final views of the Agency, or that of AHPPC;
  - (c) there may be a strong public interest in the disclosure of such information for the following reasons:

- (i) so that members of the public can make decisions about their own safety based on accurate information;
  - (ii) to create greater transparency about the reasons for decisions made by government that in the current circumstances have a significant impact on the community; and
  - (iii) to assist members of the public to hold government to account for its decisions about the management of COVID-19 and related matters.
24. As I have decided it is not apparent, based on the information before me, that disclosure of all documents subject to the Applicant's request would be contrary to the public interest, I have not further considered the remaining requirements of sections 29(1)(a) or (b).
25. It is therefore not apparent the documents, should they exist, would all be exempt under section 29(1)(a) or (b).

***Is there scope to provide an edited copy of the requested documents?***

26. Section 25 requires an agency to grant access to an edited copy of a document containing exempt or irrelevant information if it is practicable for the agency to delete that information, and if the applicant is agreeable to receiving such a copy.
27. Determining what is 'practicable' requires consideration of the effort involved in making the deletions 'from a resources point of view',<sup>6</sup> and the effectiveness of the deletions – that is, whether editing a document would render it meaningless.<sup>7</sup>
28. During the course of the review, the Applicant advised they agreed to receiving copies of documents with exempt or irrelevant information deleted.
29. Having considered the particular circumstances of this matter, I am satisfied there may be scope to provide the Applicant with an edited copy the requested documents, should any exist, with any exempt information deleted in accordance with section 25. I am also satisfied it may be practicable to do so as it would not necessarily require substantial time and effort, and the edited documents would likely retain some meaning.
30. Accordingly, I am not satisfied the requirement under section 25A(5) for there to be no scope to provide the Applicant with edited copies of any of the documents is met in this case.
31. I have therefore determined section 25A(5) does not apply to the request.

**Conclusion**

32. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.
33. Having considered the provision in section 25A(5) and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant's request that all documents relevant to the request would be exempt under sections 29(1)(a) or 29(1)(b).
34. I am also satisfied it would be practicable to provide an edited copy of documents to the Applicant in accordance with section 25 should they exist.

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<sup>6</sup> *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].

<sup>7</sup> *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].

35. Accordingly, I am not satisfied each of the requirements of section 25A(5) are met such that the Applicant's request for access to the requested documents can be categorically refused.
36. The effect of my decision is the Agency is required to search for and identify documents relevant to the terms of the Applicant's request and assess those documents in accordance the FOI Act.

### **Review rights**

37. 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.<sup>8</sup>
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
40. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
41. 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.<sup>11</sup>

### **When this decision takes effect**

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

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

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).