

Notice of Decision and Reasons for Decision

Applicant:	'DM1'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	9 August 2021
Exemptions considered:	Sections 28(1)(d), 34(4)(a)(ii)
Citation:	'DM1' and Department of Jobs, Precincts and Regions (Freedom of Information) [2021] VICmr 236 (9 August 2021)

FREEDOM OF INFORMATION – Public Accounts and Estimates Committee (PAEC) – PAEC hearing – prepared responses to questions – talking points – budget – reprioritisations

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 satisfied section 28(1)(d) applies to part of Document 1. However, I am not satisfied the remainder of the documents are exempt under sections 28(1)(d) or 34(4)(a)(ii).

As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 1 with exempt information deleted, and an edited copy of Document 5 with irrelevant information deleted in accordance with section 25, access to these documents is granted in part.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

9 August 2021

Reasons for Decision

Background to review

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

DJPR [the Agency] Index List - PAEC [Public Accounts and Estimates Committee] Budget Estimates 2020-21
Coordination of Jobs, Precincts and Regions

1.01 – Departmental Savings, Efficiencies and Reprioritisations
1.03 – Departmental Performance Statement (including 2019-20 performance and MOG changes)
1.07 - Global Victoria's involvement in Hotel Quarantine
1.10 - Ministerial office costs and DJPR Machinery of Government costs
1.12 - DJPR Capital Projects (Expenditures and Variations) Trade
1.01 - Trade disruptions with China - effect on Victoria
4.02 - International Network - Victorian Government Trade and Investment (VGTI) Offices - Cost
4.03 - Trade Programs (including inbound and outbound missions) outcomes to date
2. The Agency identified eight documents falling within the terms of the Applicant's request and granted access to four documents in full and four documents in part. The Agency relied on sections 28(1)(a), 28(1)(d) and 34(4)(a)(ii) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.
3. I note in the marked-up documents and Document Transfer Form provided to OVIC by the Agency, it relies on sections 28(1)(d), 33(1) and 34(4)(a)(ii) to exempt from release certain information in the documents. This was confirmed in the Agency's written submission provided during this review.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access, except for personal affairs information in the document which the Agency exempted from release under section 33(1). Therefore, this information is not subject to review and is irrelevant information to the request.
5. I have examined copies of the documents subject to review.
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 and submissions received from the parties.
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.
9. 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.

Review of exemptions

Section 28(1) – Cabinet documents

10. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee 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” 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. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.

Section 28(1)(d) – Disclosure of any deliberation or decision of the Cabinet

13. Section 28(1)(d) provides a document is an exempt document if it is a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet is officially published.
14. A document will be exempt under section 28(1)(d) if there is evidence the Cabinet discussed various options in the document and chose between those options.²
15. A ‘decision’ means any conclusion as to a course of action the Cabinet determines to adopt, whether it is a decision as to a final strategy or how a matter is to proceed.³
16. Where a decision of the Cabinet is made public, releasing information of the decision will not disclose a decision or deliberation of the Cabinet for the purposes of section 28(1)(d).⁴
17. During the review, the Agency provided further information in relation to the application of section 28(1)(d) to the first redaction on page 2 of Document 1. Having reviewed the document and taken this information into account, I am satisfied the information discloses a deliberation or decision of a subcommittee of the Cabinet and is exempt under section 28(1)(d). However, I am not satisfied the remaining information in the document discloses a deliberation or decision of the Cabinet. Accordingly, this information is not exempt under section 28(1)(d).
18. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents at **Annexure 1**.

Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage

19. 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 the FOI Act be likely to expose the agency unreasonably to disadvantage.
20. VCAT has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.⁵ It has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.⁶

¹ (2004) VCAT 2346 at [33].

² *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

³ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

⁴ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

⁵ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

⁶ *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].

21. The provision contemplates disclosure of a document under the FOI Act may expose an agency to a certain measure of disadvantage, however, any such exposure must be unreasonable for section 34(4)(a)(ii) to apply.
22. In its decision letter, the Agency states:
- The department is engaged in activities relating to trade or commerce stemming from its functions in generating investment opportunities for the state of Victoria.
- This exemption has been applied to information concerning the department's position within a competitive trade environment. The release of this information that is otherwise not publicly available would hinder the department's ability to operate in these environments during other negotiations or commercial undertakings.
23. In relation to the application of section 34(4)(a)(ii) to Document 6, the Agency submits, in part:
- The exempt information in this document relates to engagement between the Victorian Government Trade and Investment (VGTI) and the Chinese Government on matters of international trade.
- The Victorian Government is involved in international trade relations (through the agency Global Victoria) in that their aim is to facilitate trade between private Victorian entities and international markets.
24. In summary, the Agency submits disclosure of the document would expose it unreasonably to disadvantage as:
- (a) disclosure would result in a breakdown of trust between the Agency and third parties;
 - (b) certain funding is not yet determined; and
 - (c) a business undertaking has not provided consent to reveal certain information in the document.
25. I note the Agency's submission states information included in papers prepared for a Minister's attendance at a public hearing before the Public Accounts and Estimates Committee (**PAEC**) was not necessarily intended for public disclosure at the hearing.
26. The Agency relies on section 34(4)(a)(ii) to exempt from release the following information in Documents 1, 6, 7 and 8:
- (a) general information about the Agency's budget;
 - (b) information regarding relations between Victoria and China;
 - (c) information relating to public funding for the Victorian Government Trade and Investment office network; and
 - (d) information relating to a business undertaking's involvement in a trade project.
27. I acknowledge the general financial and commercial nature of the above information, and that it relates to the Agency's role in stimulating economic activity in Victoria. In this regard, I accept the Agency provides financial assistance to the private sector to improve manufacturing, export and international trade opportunities for Victoria. However, I am not satisfied these factors demonstrates the Agency is 'engaged in trade or commerce' for the purposes of section 34(4)(a)(ii). Rather, the Agency is fulfilling a governmental function in the expenditure of public funds on behalf of the State and for a public benefit.

28. In any case, I have considered whether disclosure of the relevant information would be likely to expose the Agency unreasonably to disadvantage. In doing so, I have carefully considered the documents subject to review and the Agency's submission.
29. For the following reasons, I am not satisfied disclosure of the relevant information would expose the Agency unreasonably to disadvantage:
- (a) the information is general in nature;
 - (b) members of the community can understand that such funding arrangements can change; and
 - (c) while I accept the Agency may be subject to a certain measure of disadvantage, I do not consider the relevant information about the business undertaking is specific enough for its disclosure to affect its relationship with the Agency, particularly where the undertaking benefits from its relationship with the Agency and may be the recipient of public funding.
30. Accordingly, I am not satisfied the relevant information in the documents is exempt under section 34(4)(a)(ii).
31. My decision in relation to section 34(4)(a)(ii) is set out in the Schedule of Documents at **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

32. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
33. 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 a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁸
34. I have considered the effect of deleting irrelevant and exempt information from the documents in accordance with section 25. I am satisfied it is practicable to delete the irrelevant and exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

35. On the information before me, I am satisfied certain information in Document 1 is exempt from release under section 28(1)(d). However, I am not satisfied the remainder of the documents are exempt under sections 28(1)(d) or 34(4)(a)(ii).
36. As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 1 with exempt information deleted, and an edited copy of Document 5 with irrelevant information deleted in accordance with section 25, access to these documents is granted in part.

⁷ *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].

⁸ *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].

Review rights

37. 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
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
40. 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.
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.¹²

When this decision takes effect

42. My decision does not take effect until the Agency's 14 day review period expires.
43. 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	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated	1.01 – Departmental Savings, Efficiencies and Reprioritisations	2	Released in part Sections 28(1)(d), 34(4)(a)(ii)	<p>Release in part</p> <p>Sections 28(1)(d), 25</p> <p>The document is to be released with exempt information deleted in accordance with section 25 as follows:</p> <ul style="list-style-type: none"> the first redaction under section 34(4)(a)(ii) on page 2 is exempt under section 28(1)(d) and is to remain deleted. 	<p>Section 28(1)(d): Based on the information before me, I am not satisfied the table on page 1 under the heading ‘reprioritisations’ is exempt from release under section 28(1)(d).</p> <p>During the review, the Agency advised the first redaction on page 2 is exempt from release under section 28(1)(d). I accept the Agency’s advice that this matter was subject to the deliberation or a decision of a subcommittee of the Cabinet. Accordingly, I am satisfied this information is exempt under section 28(1)(d).</p> <p>Section 34(4)(a)(ii): I am not satisfied the information in the second redaction on page 2 is exempt under section 34(4)(a)(ii) for the reasons set out in the Notice of Decision above.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
2.	Undated	1.03 – Departmental Performance Statement (including 2019-20 performance and MOG changes)	5	Released in full	Not subject to review	
3.	Undated	1.07 - Global Victoria's involvement in Hotel Quarantine	1	Released in full	Not subject to review	
4.	Undated	1.10 - Ministerial office costs and DJPR Machinery of Government costs	3	Released in full	Not subject to review	
5.	Undated	1.12 - DJPR Capital Projects (Expenditures and Variations) Trade	3	Released in part Section 33(1)	<p>Release in part</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25 as follows:</p> <ul style="list-style-type: none"> the names and telephone numbers on page 3. 	<p>Section 25: The Agency exempted from release names and telephone numbers under section 33(1). As the Applicant no longer seeks this information, it is irrelevant information for the purpose of section 25 and is to be deleted.</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
6.	Undated	1.01 - Trade disruptions with China - effect on Victoria	7	Released in part Section 34(4)(a)(ii)	Release in full	Section 34(4)(a)(ii): I note the Agency no longer relies on section 34(4)(a)(ii) to exempt from release the first dot point on page 2. For the remainder of the document, see comments for Document 1.
7.	Undated	4.02 - International Network - Victorian Government Trade and Investment (VGTI) Offices – Cost	2	Released in part Sections 28(1)(d), 34(4)(a)(ii)	Release in full	Section 28(1)(d): There is no information before me to demonstrate the information redacted by the Agency contains a deliberation or decision of the Cabinet. Accordingly, I am not satisfied this information is exempt under section 28(1)(d). Section 34(4)(a)(ii): See comments for Document 1.
8.	Undated	4.03 - Trade Programs (including inbound and outbound missions) outcomes to date	4	Released in part Section 34(4)(a)(ii)	Release in full	Section 34(4)(a)(ii): See comments for Document 1.