

Notice of Decision and Reasons for Decision

Applicant:	'DX1'
Agency:	Department of Premier and Cabinet
Decision date:	2 December 2021
Exemptions considered:	Sections 28(1)(b), 28(1)(c), 28(1)(d), 32(1)
Citation:	'DX1' and Department of Premier and Cabinet (<i>Freedom of Information</i>) [2021] VICmr 331 (2 December 2021)

FREEDOM OF INFORMATION – COVID-19 pandemic – public health directions – legal advice – Cabinet documents

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.

I am satisfied information in the documents is exempt under sections 28(1)(b), 28(1)(c) and 32(1). However, I have decided to release a small amount of additional information in Document 1 to the Applicant.

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

2 December 2021

Reasons for Decision

Background to review

1. The Applicant made the following request:

On August 2 2020, the state government declared a state of disaster to try and restrict the spread of COVID-19. As part of this, two policies were introduced for metropolitan Melbourne and the Mitchell shire to restrict contact: a curfew from 8pm to 5am and a 5km radius for allowed movement from home. I am requesting any documents, including but not limited to memos, reports and emails, that referenced the introduction of either of those two policies in the weeks leading up to August 2.

2. On [date], the scope of the request was limited to documents between 1 July and 2 August 2020.
3. The Agency identified 20 documents falling within the terms of the Applicant's request. It decided to grant access to one document in full and one document in part, and refused access to 18 documents in full. It relied on the exemptions under 28(1)(b), 28(1)(c), 28(1)(d), 30(1), 32(1) and 33(1) to refuse access to information in the documents. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. In their submission, the Applicant indicated they do not disagree with the Agency's decision to redact the names and contact details of non-executive staff. This information, therefore, is not subject to review and is to remain deleted.
6. I have examined copies of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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

11. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
12. 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

¹ (2004) VCAT 2346 at [33].

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.

13. Notwithstanding these limitations, where a document does attract the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.
14. Under section 28(3), purely statistical, technical, or scientific information contained in a document is not exempt under section 28(1) unless it discloses deliberations or a decision of Cabinet.
15. I am satisfied the documents do not contain purely statistical, technical or scientific material. Consequently, I am satisfied the exception in section 28(3) does not apply to the documents subject to review.

Section 28(1)(b) – prepared for the purpose of submitting to Cabinet for consideration

16. Section 28(1)(b) provides a document is an exempt document if it is a document that has been prepared by a Minister or their behalf or by an agency for the purpose of submission for consideration by the Cabinet.
17. A document will only be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to Cabinet for its consideration. In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to Cabinet.²
18. My decision on the application of section 28(1)(b) is outlined in the Schedule of Documents in **Annexure 1**.

Section 28(1)(c) – copy, draft, or extracts of a document referred to in sections 28(1)(a), (b), or (ba)

19. 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).
20. A document will be a copy if it is a reproduction of the document, for example a photocopy.
21. 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’.³
22. An extract usually contains a reproduction of part of the text or material such as a quote, paraphrase, or summary. Simply referring to a Cabinet document is not sufficient.⁴
23. My decision on the application of section 28(1)(c) is outlined in the Schedule of Documents in **Annexure 1**.

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

³ *Asher v Department of Infrastructure* (2006) 25 VAR 143; [2006]

⁴ *Mildenhall v DoE* (unreported, VCAT, Glover M, 16 April 1999).

Section 28(1)(d) – disclose any deliberation or decision of cabinet

24. 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 was officially published.
25. A document will be exempt under section 28(1)(d) if there is evidence that the Cabinet discussed various options contained in the document and chose between those options.⁵
26. A ‘decision’ means any conclusion as to the course of action the Cabinet adopts whether that are conclusions as to final strategy on a matter or conclusions about how a matter should proceed.⁶
27. Where a decision or the recommendation of the Cabinet has been made public, releasing information would not disclose a decision or deliberation of the Cabinet.⁷
28. In the decision of *Asher v Department of Sustainability and Environment*,⁸ VCAT held that where a document, on its face, does not disclose a decision of deliberation of Cabinet, or the extent of Cabinet’s interaction with the document is unclear, section 28(1)(d) will not apply.
29. My decision on the application of section 28(1)(d) is outlined in the Schedule of Documents in **Annexure 1**.

Section 32(1) – Documents affecting legal proceedings

30. Section 32(1) provides a document is an exempt document ‘if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege’ (**legal privilege**).
31. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:⁹
 - (a) between the client (or the client’s agent) and the client’s professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation; or
 - (b) between the client’s professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (c) between the client (or the client’s agent) and third parties that was made for the purpose of obtaining information to be submitted to the client’s professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.
32. The High Court of Australia has held the purpose of legal professional privilege or client privilege ensures a client can openly and candidly discuss legal matters with their legal representative and seek legal advice:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret

⁵ *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

⁶ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

⁷ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

⁸ [2010] VCAT 601.

⁹ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.¹⁰

33. The dominant purpose for which a confidential communication was made will determine whether the exemption applies.¹¹
34. The purpose a document is brought into existence is a question of fact.¹² While it is necessary to consider the intentions of the person involved in deciding to create and use the document, the intention of the author or person who authorised the document is not conclusive.
35. Legal professional privilege extends to communications between government agencies and their legal officers.¹³
36. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client’s express or implied consent (**waiver of privilege**).¹⁴

Document 2

37. Document 2 is an email chain containing a summary of legal advice obtained by a public sector agency. The advice was exchanged between multiple persons within the public service across government agencies.
38. The email chain does not contain the actual communication between a lawyer and their client. Rather, the originating email within the email thread contains a record of the legal advice provided to an agency (the client).
39. A document prepared by a client that records or summarises legal advice, even if that summary has been prepared by a non-lawyer, can be privileged.¹⁵
40. In my view, disclosure of the originating email would directly reveal the content and substance of confidential legal advice.
41. I am satisfied the document attracts legal professional privilege, such that it contains details of a confidential communication between a client and a lawyer that was made for the dominant purpose of providing legal advice.
42. In *Woollahra Municipal Council v Minister for Local Government*,¹⁶ the Land and Environment Court of New South Wales considered whether legal professional privilege had been waived by the Department of Premier and Cabinet of New South Wales (**DPC NSW**) when an agency officer sent emails, containing legal advice provided to the Agency, to delegates of the Departmental Chief Executive Office of Local Government (**DCEOLG**). The Minister argued that ‘the client’ for the purposes of the definition in section 117 of the *Evidence Act 1995* was the State, and that the two departments were parts of that one client of the State, such that legal advice provided to one department could be communicated to another without waiving privilege. The Court accepted that there was no waiver of privilege by DPC NSW by disclosing the legal advice to the delegate of the DCEOLG.

¹⁰ *Grant v Downs* (1976) 135 CLR 674 at [19].

¹¹ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

¹² *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] VSCA 59 at [14].

¹³ *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; 59 ALJR 749; [1985] HCA 60 at 510, 521–522 and 530–531 (CLR); *Waterford v Commonwealth* (1987) 163 CLR 54; 61 ALJR 350; [1987] HCA 25 at 62 and 81–82

¹⁴ Sections 122(2) and (3) of the *Evidence Act 2008* (Vic).

¹⁵ *Standard Chartered Bank of Australia v Antico* (1993) 36 NSWLR 87 at [93].

¹⁶ [2016] NSWLEC 44 at [11]-[14].

43. I agree with this reasoning and consider the client in this instance is the State of Victoria. Therefore, on the information before me, there is no information to indicate privilege has been waived by disclosure of the legal advice between government agencies and ministers.

Other documents exempted under section 32(1)

44. Having carefully reviewed the documents, I am satisfied they contain confidential communications between lawyers of Victorian government agencies that were made for the dominant purpose of providing legal advice with respect to public health directions.
45. My decision on the application of section 32(1) to those documents is outlined in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

46. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
47. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁷ 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 25.¹⁸
48. I have considered the effect of deleting irrelevant and exempt information from the documents.
49. I am satisfied it is practicable to provide the Applicant with edited copies of Documents 1 and 20.
50. I am satisfied it is not practicable for the Agency to delete the irrelevant and exempt information from the remaining documents, because the remaining non-exempt information would be minimal and limited in meaning, given the majority of the information in the documents is exempt.

Conclusion

51. On the information available, I am satisfied the exemptions in sections 28(1)(b), 28(1)(c) and 32(1) apply to information in the documents.
52. Given my decision on the application of sections 28(1)(b), 28(1)(c), 32(1) to information in the documents, it is unnecessary to consider the application of sections 30(1) or 33(1) to the documents.
53. My decision on each document is provided in the Schedule of Documents in **Annexure 1**.

Review rights

54. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁹
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰

¹⁷ *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].

¹⁸ *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].

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁰ Section 52(5).

56. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²¹
57. 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.
58. 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.²²

When this decision takes effect

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

²¹ Section 52(9).

²² Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Email with three attachments	35	<p>Refused in full</p> <p>Sections 28(1)(b), 28(1)(d), 28(1)(c)</p>	<p>Release in part</p> <p>Sections 28(1)(b), 25</p> <p>The email is to be released, except for the name printed at the top of the email, which is irrelevant information.</p> <p>The three attachments are refused in full under section 28(1)(b).</p>	<p>Section 28(1)(b): This document is an email between Agency officers and three attachments. The attachments are a submission proposal to a subcommittee of Cabinet and two attachments referred to in the submission proposal.</p> <p>Having carefully considered each of the attachments, on the face of the attachments, I am satisfied they were created for the sole, dominant or substantial purpose of being submitted to the subcommittee of Cabinet for its consideration.</p> <p>Accordingly, each attachment is exempt under section 28(1)(b).</p> <p>Section 28(1)(c): As I am satisfied the attachment the Agency exempted under section 28(1)(c) is exempt under section 28(1)(b), it is not necessary to consider the application of section 28(1)(c) to the attachment.</p> <p>Section 28(1)(d): I am not satisfied the email discloses a decision or deliberation of the subcommittee of Cabinet. While the document may disclose the broad subject matter of the deliberations due to the titles of the attachments, it does not disclose the substance of what was to be deliberated by the subcommittee of Cabinet. Accordingly, I am not satisfied it is exempt under section 28(1)(d).</p>

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						<p>Section 25: I am satisfied it is practicable to edit the email to remove irrelevant information, as the document will retain meaning.</p> <p>In my view, it is not practicable for the Agency to delete the irrelevant and exempt information from the three attachments, because the remaining non-exempt information would be minimal and limited in meaning, given the majority of the information in the documents is exempt.</p>
2.	[Date]	Email thread	3	<p>Refused in full</p> <p>Sections 30(1), 32(1), 33(1)</p>	<p>Refuse in full</p> <p>Section 32(1)</p>	<p>Section 32(1): I am satisfied the document is exempt under section 32(1) for the reasons provided in the Notice of Decision, above.</p> <p>As I am satisfied the document is exempt in full under section 32(1), it is unnecessary to consider the application of the additional exemptions applied by the Agency.</p> <p>Section 25: I have considered the effect of deleting irrelevant and exempt information from the document. In my view, it is not practicable for the Agency to delete the irrelevant and exempt information, because the remaining non-exempt information would be minimal and limited in meaning, given the majority of the information in the documents is exempt.</p> <p>Accordingly, access to the document is refused in full.</p>

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3.	[Date]	Email thread and an attachment	17	<p>Refused in full</p> <p>Sections 28(1)(c), 28(1)(d), 30(1), 33(1)</p>	<p>Refuse in full</p> <p>Sections 28(1)(c), 32(1)</p>	<p>This is an email thread sent to a lawyer. The email thread includes an attachment, which is an annotated copy of an attachment to Document 1, above. The email thread contains information concerning the attachment.</p> <p>Section 28(1)(c): The attachment to this email thread is an annotated copy of Attachment A in Document 1. Given it contains a copy of an attachment I have found to be exempt under section 28(1)(b), I am satisfied the attachment to this email thread is therefore exempt under section 28(1)(c).</p> <p>Section 28(1)(d): I am not satisfied the title of the attachment is exempt under section 28(1)(d) as it does not disclose the content of deliberations by the subcommittee of Cabinet.</p> <p>Section 32(1): Although the Agency did not rely on the exemption under section 32(1), I consider the email thread and the attachment were provided to a lawyer, which in my view, was for the purpose of obtaining the lawyer's legal opinion. Accordingly, I am satisfied the document is exempt under section 32(1).</p> <p>Section 25: See comments for Document 2.</p>

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						<p>Given my decision on the application of sections 28(1)(c) and 32(1) to this document, it is not necessary to consider the application of the additional exemptions applied by the Agency.</p> <p>Note on the attachments: The attachment to the email dated [date] is a duplicate of the attachment to the email dated [date].</p>
4.	[Date]	Email chain	5	<p>Refused in full</p> <p>Sections 28(1)(d), 30(1), 32(1), 33(1)</p>	<p>Refuse in full</p> <p>Section 32(1)</p>	<p>Section 32(1): I am satisfied the document contains a confidential communication between an Agency officer and lawyers of Victorian government agencies, that was made for the dominant purpose of obtaining legal advice. It also includes confidential communications between lawyers made for the dominant purpose of providing legal advice.</p> <p>I am satisfied the document is exempt in full under section 32(1). Therefore, it is unnecessary to consider the additional exemptions applied by the Agency.</p> <p>Section 25: See comments for Document 2.</p> <p>Note on the attachment: During the review, the Agency provided a copy of the attachment to the email dated [date], which it claims is exempt under sections 30(1) and 32(1).</p> <p>I am satisfied the document is exempt under section 32(1) for the reasons described above.</p>

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5.	[Date]	Email thread	6	Refused in full Sections 28(1)(d), 30(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 4. Given my decision on section 32(1), it is unnecessary to consider the additional exemptions applied by the Agency. Section 25: See comments for Document 2.
6.	[Date]	Email thread	2	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 4. Given my decision on section 32(1), it is unnecessary to consider the additional exemptions applied by the Agency. Section 25: See comments for Document 2.
7.	[Date]	Email thread	2	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 4. Given my decision on section 32(1), it is unnecessary to consider the additional exemptions applied by the Agency. Section 25: See comments for Document 2.
8.	[Date]	Email and an attachment	2	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): I am satisfied the document contains a confidential communication between lawyers of Victorian government agencies made for the dominant purpose of providing legal

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						<p>advice. I am satisfied it is exempt in full under section 32(1).</p> <p>Given my decision on section 32(1), it is unnecessary to consider the additional exemptions applied by the Agency.</p> <p>Section 25: See comments for Document 2.</p>
9.	[Date]	Email	1	<p>Refused in full</p> <p>Sections 30(1), 32(1), 33(1)</p>	<p>Refuse in full</p> <p>Section 32(1)</p>	<p>Section 32(1): See comments for Document 8.</p> <p>Section 25: See comments for Document 2.</p>
10.	[Date]	Email	1	<p>Refused in full</p> <p>Sections 30(1), 32(1), 33(1)</p>	<p>Refuse in full</p> <p>Section 32(1)</p>	<p>Section 32(1): This is an email exchanged between an officer from a Minister's office and a government agency. Lawyers are copied into the email.</p> <p>Having considered the professional role of the recipients of the email and the content of the email, I am satisfied it is a confidential communication made for the dominant purpose of obtaining legal advice. Therefore, I am satisfied it is exempt under section 32(1).</p> <p>Given my decision on section 32(1), it is unnecessary to consider the additional exemptions applied by the Agency.</p> <p>Section 25: See comments for Document 2.</p>

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11.	[Date]	Email thread	3	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 8. Section 25: See comments for Document 2.
12.	[Date]	Email thread	4	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 8. Section 25: See comments for Document 2. Note on the attachment: The attachment to the email dated [date] is a duplicate of an attachment assessed above.
13.	[Date]	Email thread	1	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 8. Section 25: See comments for Document 1.
14.	[Date]	Email thread	1	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 8. Section 25: See comments for Document 2.
15.	[Date]	Email thread	1	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 8. Section 25: See comments for Document 2.

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC Decision	OVIC Comments
16.	[Date]	Email thread and attachment	21	Refused in full Sections 30(1), 32(1), 33(1)	Refused in full Section 32(1)	Section 32(1): See comments for Document 8. Section 25: See comments for Document 2.
17.	[Date]	Email thread and attachment	22	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 8. Section 25: See comments for Document 2.
18.	[Date]	Email thread	1	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 8. Section 25: See comments for Document 2.
19.	[Date]	Email	3	Released in full	Not subject to review	
20.	[Date]	Email	3	Released in part Section 33(1)	Release in part Section 25 The information exempted by the Agency under section 33(1) is to remain deleted.	Section 25: The information exempted under section 33(1) is to remain deleted, as it contains personal affairs information that is irrelevant information for the purposes of this review.