

## Notice of Decision and Reasons for Decision

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Applicant:	'DY2'
Agency:	Department of Health
Decision date:	18 March 2021
Exemptions and provisions considered:	Sections 28(1)(b), 28(1)(c), 29(1)(a), 29(1)(b), 25
Citation:	'DY2' and Department of Health (Freedom of Information) [2022] VICmr 11 (18 March 2022)

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FREEDOM OF INFORMATION – return of international students to Victoria – briefings – email threads – documents containing matter communicated by any other State – documents prepared by the Australian Health Protection Principal Committee – Cabinet documents – irrelevant information

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.

While my decision on the Applicant's request differs from the Agency's decision, my decision does not result in the release of any further information in the documents to the Applicant.

On the information before me, I am not satisfied the documents contain information that is exempt under sections 28(1)(c), 29(1)(a) or 29(1)(b). I am satisfied the exemption under section 28(1)(b) applies to the attachment to Document 3. The remaining documents fall outside of the terms of the Applicant's request and are irrelevant.

As I am not satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is refused in full.

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

18 March 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the initial request and sought access to:

All advice, memoranda, reports and briefings created by and provided by the Chief Health Officer regarding the return of international students to Victoria from [date range].

For clarity, "International student" refers to students who are studying or seek to study in Australia who are not citizens or permanent residents of Australia.

2. The Agency identified three documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 28(1)(ba), 28(1)(c), 29(1)(a) and 29(1)(b). The Agency's decision letter sets out the reasons for its decision.

### Review application

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 copies 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 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.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

### Review of exemptions

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

10. Section 29(1)(a) provides a document is exempt if:
  - (a) its disclosure under the FOI Act would be contrary to the public interest; and
  - (b) its disclosure would prejudice relations between the State and the Commonwealth or any other State or Territory.

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

11. Section 29(1)(b) provides a document is exempt if:
  - (a) its disclosure under the FOI Act would be contrary to the public interest; and
  - (b) its disclosure 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.
12. The Agency claims one page of guidelines prepared by the Australian Health Protection Principal Committee (AHPPC) is exempt under sections 29(1)(a) and (b).
13. The AHPPC is a decision-making committee for health emergencies comprised of state and territory Chief Health Officers, chaired by the Australian Chief Medical Officer.<sup>2</sup>
14. 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>3</sup>
15. AHPPC is one of the primary bodies advising the National Cabinet on the country's response to the COVID-19 pandemic.<sup>4</sup>
16. For the purposes of this decision, it is not necessary to consider the constitutional, legal or other status of the National Cabinet.

*Would disclosure under the FOI Act be contrary to the public interest?*

17. The first requirement under section 29(1)(a) and 29(1)(b) is whether disclosure of a document would be contrary to the public interest.
18. In my view, the use of the word 'would' requires certainty that an event will occur, rather than a mere possibility or likelihood.
19. The Agency submits:

There is an established understanding between the members of the AHPPC that information provided, shared or deliberated by members or produced by the AHPPC is confidential. This understanding and expectation enables members of the AHPPC to fully deliberate live issues relating to the rapidly evolving COVID-19 pandemic without concern that the information they are sharing, which may need to change or be revised as circumstances develop, may be later divulged.

The release of AHPPC documents would be likely to prejudice the willingness of member states to share information as openly in the future, which would undermine the objectives of the AHPPC and could adversely impact on National Cabinet's management and response to the pandemic, and the health and safety of the Australian public.

A number of consultations in relation to AHPPC documents and information has previously been undertaken with the Commonwealth. On every response they have made clear that information was definitely provided confidentially and would substantially and negatively impact relations between the Commonwealth and states should this type of information be released. While on this occasion consultation

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<sup>2</sup> Australian Government, 'Australian Health Protection Principal Committee (AHPPC)', (Web Page, 15 February 2022) <<https://www.health.gov.au/committees-and-groups/australian-health-protection-principal-committee-ahppc>>.

<sup>3</sup> Australian Government, 'Australian Health Protection Principal Committee', *Australian Government – Directory* (Web page, 8 February 2022) <<https://www.directory.gov.au/portfolios/health/department-health/australian-health-protection-principal-committee>>.

<sup>4</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>>.

was not specifically undertaken, the department is extremely comfortable and assured that their response would not have changed.

20. In determining whether disclosure would be contrary to the public interest, I have had regard to the following factors that were accepted by the Victorian Civil and Administrative Tribunal (**VCAT**) in *Millar v Department of Premier and Cabinet*:<sup>5</sup>
- (a) protecting uninhibited exchanges between the governments of Australia; and
  - (b) encouraging cooperative Federalism within Australia; and
  - (c) protecting processes that contribute to high quality policy development by the governments of Australia; and
  - (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy; and
  - (e) protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision—making process.
21. Based on the information before me, I am not satisfied disclosure of the document would be contrary to the public interest for the following reasons:
- (a) The document is watermarked with ‘draft’ and the version history is incomplete. Considering this, the Applicant, [details of the Applicant’s employment], along with members of the public, are capable of understanding that the document was produced at a particular point in time and may not represent the final views of the AHPPC.
  - (b) Page one of the document, which is an introduction and appears before the table of contents, does not contain substantive information or detail about the matters discussed in the document. Accordingly, I do not accept the matters raised in the Agency’s submission are relevant to this page of the document.
  - (c) There is a public interest in ensuring public sector transparency and accountability in relation to how the Agency communicated with the Commonwealth regarding responses to the COVID-19 pandemic.
22. As I have decided disclosure would not be contrary to the public interest, I have not further considered the remaining requirements of sections 29(1)(a) or (b).
23. Accordingly, the document is not exempt under section 29(1)(a) or (b). I will further consider whether page 1 of the document, which was exempted by the Agency under section 29(1), is relevant to the terms of the Applicant’s request, in my discussion of section 25 below.
24. The Schedule of Documents in **Annexure 1** sets out my decision on section 29(1)(a) and (b) to the relevant document.

**Section 28(1)(c) – A copy, draft or extract from a Cabinet document**

25. 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).
26. Sections 28(1)(a), (b) and (ba) provides a document is exempt if it is:
- (a) the official record of any deliberation or decision of the Cabinet;

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<sup>5</sup> [2011] VCAT 1230 at [62].

- (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;

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27. In *Ryan v Department of Infrastructure*,<sup>6</sup> 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.

28. The Agency, in its decision, exempted the attachment to Document 3 under section 28(1)(c) on the basis that it contains a draft Cabinet submission. In its submission, the Agency states the document is a copy of a submission to a Cabinet Committee, and that the original submission is exempt under section 28(1)(b).

29. 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’.<sup>7</sup>

30. A document will be a copy if it is a reproduction of the document, for example, a photocopy.

31. During the review, OVIC sought further information from the Agency about the final document which the Agency considers the review document to be a draft or copy of, so that OVIC could be satisfied, firstly, that the final document is an exempt document under section 28(1)(b), and secondly, that the document subject to review is a draft or a copy of that final document.

32. The Agency submitted in response:

...for the purposes of sections 28(1)(b), and in turn section 28(1)(c), it is not necessary to actually prove that the exempted document was submitted to a Cabinet Committee; see *Ryan v Department of Infrastructure* (2004) 22 VAR 226 at [34]. The exemption turns on the **purpose** for which the document was prepared, rather than the actual outcome.

The department submits that the purpose of this submission to be considered by a Cabinet Committee is clear from the face of the document, supported by the mention that the submission [redacted], confirming that the issues were considered by Cabinet.

33. The Agency did not provide a copy of the document, which the document subject to review is claimed to be a draft or copy of, nor any of the information requested by OVIC staff.

34. As the Agency did not provide a copy of the document which the document subject to review is claimed to be a copy of, there is insufficient information before me to be satisfied the document subject to review is a copy of a document referred to in section 28(1)(b). For the same reason, I am unable to confirm the document is a draft of another document.

35. Accordingly, there is no information before me to be satisfied that the document subject to review is an exempt document under section 28(1)(c) on that basis that it is a draft or copy of a document referred

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<sup>6</sup> [2004] VCAT 2346 at [33].

<sup>7</sup> *Asher v Department of Infrastructure* (2006) 25 VAR 143; [2006] VCAT 1375.

to in sections 28(1)(a), (b) or (ba). As such, I am not satisfied the document is exempt under section 28(1)(c).

36. The Schedule of Documents in **Annexure 1** sets out my decision on section 28(1)(c) to the relevant document.

**Section 28(1)(b) – Document prepared for purpose of submission for consideration by the Cabinet**

37. Although the Agency did not apply the exemption under section 28(1)(b) to the document, I have determined it is a relevant exemption to consider.
38. Section 28(1)(b) provides a document is exempt if it 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.
39. A document will 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 the 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 the Cabinet.<sup>8</sup>
40. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
41. VCAT has recognised section 28(1)(b) turns on the purpose for which a document was created, and it is not necessary to show the document was submitted to Cabinet.<sup>9</sup>
42. It is clear on the face of the document that it was prepared by a Minister, or on their behalf, for the sole or substantial purpose of submission for consideration by a Cabinet Committee.
43. Accordingly, I am satisfied the attachment to Document 3 is exempt under section 28(1)(b). My decision on this document is set out in the Schedule of Documents in **Annexure 1**.

**Section 25 – Deletion of exempt or irrelevant information**

44. 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.
45. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>10</sup> 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.<sup>11</sup>
46. In its decision, the Agency exempted two pages of the attachment to Document 1 under section 28(1)(ba) and refused access to the remaining pages on the basis that it is irrelevant information. During the review, the Agency submitted the entirety of attachment to Document 1 is irrelevant to the terms of the Applicant’s request. The Agency submits the Chief Health Officer (**CHO**) did not provide or create the document and the document does not contain advice provided by the CHO on the topic of international students, and therefore, the document falls outside of the terms of the Applicant’s request.
47. The document is a briefing to a Minister and does not specifically concern the topic of the return of international students to Victoria, however, I am satisfied it contains brief information referring to the return of international students to Victoria. Nevertheless, I am satisfied the briefing was not created by

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<sup>8</sup> *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

<sup>9</sup> *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34].

<sup>10</sup> *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].

<sup>11</sup> *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].

the CHO nor provided by the CHO to the relevant Minister, rather the CHO was involved for feedback purposes only. As such, I consider the attachment to Document 1 is outside of the scope of the Applicant's request. Accordingly, I have not considered the application of section 28(1)(ba) to this document.

48. I have considered the information the Agency deleted from the documents as irrelevant, which I note is a significant amount of information in the documents, as outlined in the Schedule of Documents in **Annexure 1**. I agree that all such information falls outside the terms of the Applicant's request as it does not contain information about the return of international students to Victoria.
49. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is not practicable for the Agency to delete the irrelevant and exempt information, because it would render the documents meaningless.
50. My decision on section 25 is set out in the Schedule of Documents in **Annexure 1** for each document.

### **Conclusion**

51. On the information before me, I am not satisfied the documents contain information that is exempt under sections 28(1)(c), 29(1)(a) or 29(1)(b). I am satisfied the exemption under section 28(1)(b) applies to the attachment to Document 3. The remaining documents fall outside of the terms of the Applicant's request.
52. As I am not satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is refused in full.
53. My decision on each document is set out 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.<sup>12</sup>
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
56. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
57. 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.
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.<sup>15</sup>

### **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.

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<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> 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.	[date]	Email thread	2	Refused in full Sections 28(1)(c), 33(1) 25	Refused in full Section 25	<p>The Agency applied section 25 to the entirety of the document on grounds it is irrelevant, however, certain information was also exempted under sections 28(1)(c) and 33(1).</p> <p><b>Section 25:</b> This document does not contain any information that falls within the scope of the Applicant’s request as it does not contain advice, reports or briefing that were created or provided by the CHO regarding the return of international students to Victoria.</p> <p>Accordingly, access is refused in full on grounds it is irrelevant. Therefore, it is unnecessary to consider the application of sections 28(1)(c) and 33(1).</p>
1a.	[date]	Attachment to Document 1 – Briefing	6	Refused in full Sections 28(1)(ba), 25	Refused in full Section 25	<p><b>Section 25:</b> The Agency only claimed the cover page and final page of this document to be exempt under section 28(1)(ba) and considered the remaining pages to be irrelevant.</p>



Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
2.	[date]	Email thread	2	<b>Refused in full</b>  Section 25	<b>Refused in full</b>  Section 25	<p>Following further inquiries by OVIC staff in regard to the Agency's application of section 28(1)(ba) to those pages, the Agency submitted it considers the entirety of the document is irrelevant.</p> <p>For the reasons provided in the Notice of Decision above, I consider this document falls outside of the terms of the Applicant's request. Accordingly, access to the document is refused on grounds it is irrelevant.</p> <p>The Agency applied section 25 to the entirety of the document under on grounds it is irrelevant.</p> <p><b>Section 25:</b> This document does not contain any information that falls within the scope of the Applicant's request as it does not contain advice, reports or briefing that were created or provided by the CHO regarding the return of international students to Victoria. Accordingly, access to the document is refused on grounds it is irrelevant.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
2a.	[date]	First attachment to Document 2	6	Refused in full Section 25	Refused in full Section 25	Section 25: See comments for Document 2.
2b.	Undated	Second attachment to Document 2	35	Refused in full Sections 29(1)(a), 29(1)(b), 25	Refused in full Section 25	Section 29(1)(a) and (b): I am not satisfied the document is exempt under section 28(1)(a) or (b) for the reasons provided in the Notice of Decision, above.  Section 25: I am satisfied the document, including the page to which the Agency exempted under section 29(1), does not concern the return of international students in Victoria. Accordingly, the document does not fall within the terms of the Applicant's request and access is refused in full on grounds it is irrelevant.
3.	[date]	Email thread	2	Refused in full Sections 28(1)(c), 33(1), 25	Refused in full Section 25	The Agency applied section 25 to the entirety of the document on grounds it is irrelevant, however it also exempted certain information under sections 28(1)(c) and 33(1).  Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
3a.		Attachment to Document 3	14	Refused in full Section 28(1)(c), 25	Refuse in full Sections 28(1)(b), 25	<p><b>Section 28(1)(c):</b> I am not satisfied the document is exempt under section 28(1)(c) for the reasons outlined in the Notice of Decision, above.</p> <p><b>Section 28(1)(b):</b> The Agency did not claim the document is exempt under this provision.</p> <p>I am satisfied that this document is exempt under section 28(1)(b) as it is evident on the face of the document that it was prepared for the sole or substantial purpose of submission to a Cabinet Committee for its consideration. Accordingly, the document is exempt under section 28(1)(b).</p> <p><b>Section 25:</b> Most of this document contains information that falls outside of the scope of the Applicant's request, except for information in pages 6 and 11.</p> <p>I am satisfied it is not practicable to edit this document to delete exempt and irrelevant information in accordance with section 25 as it would render the document</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						meaningless. Access is therefore refused in full.