

Notice of Decision and Reasons for Decision

Applicant:	'DI5'
Agency:	Department of Jobs, Precincts and Regions
Agency reference:	21-1135
Exemptions considered:	Sections 28(1)(ba), 28(1)(d), 30(1), 34(4)(a)(ii)
Citation:	'DI5' and Department of Jobs, Precincts and Regions (<i>Freedom of Information</i>) [2021] VICmr 204 (29 June 2021)

FREEDOM OF INFORMATION – ministerial briefing – infrastructure – planning – varied decision

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 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)(ba) applies to Documents 3 and 5. However, I am not satisfied sections 28(1)(d), 30(1) or 34(4)(a)(ii) applies to the remaining documents.

As it is practicable to edit Documents 1, 7 and 8 to delete irrelevant and exempt information, I have determined to grant access to those 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

28 June 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. Brief to the Minister for Tourism, Sport and Major Events, [reference] Meeting with Minister Foley and Horne Station Pier.
 2. Brief to the Minister for Tourism, Sport and Major Events, [reference], Visit Victoria Resignation of Board Members.
 3. Brief to the Minister for Tourism, Sport and Major Events, [reference], Federation Square Review.
 4. Brief to the Minister for Tourism, Sport and Major Events, [reference], CEO, Tourism and Transport Forum.
 5. Brief to the Minister for Priority Precincts, [reference], Land Utilisation Working Group.
 6. Brief to the Minister for Priority Precincts, [reference], End of Financial Year Reporting Obligations to the Treasurer.
 6. Brief to the Minister for Priority Precincts, [reference], Meeting with [named Councillor] & City of Port Phillip.
 7. Brief to the Minister for Priority Precincts, [reference], Meeting with Latrobe University ([date]).
 8. Brief to the Minister for Priority Precincts, [reference], Meeting with Latrobe University ([date]).
2. The original request was considered voluminous and was rescoped on [date] to not include attachments, provided that the attachment titles were recorded on the brief.
3. The Agency identified 8 documents falling within the terms of the Applicant's request. It decided to grant access to six documents in part and to refuse access, in full, to two documents. The Agency relied on sections 28(1)(ba), 28(1)(d), 30(1), 33(1), 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

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant indicated they are not seeking review of the information claimed exempt by the Agency under section 33(1). Documents 2, 4, and 6 were released to the Applicant with redactions under section 33(1) only. These documents are therefore not subject to review.
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 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.

Section 28(1)(ba)

14. Section 28(1)(ba) provides a document is an exempt document if it is a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
15. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which the document was prepared was to brief a Minister in relation to issues to be considered by Cabinet.² 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.³
16. The Cabinet briefing purpose must be 'immediately contemplated' when the document is created. The exemption cannot apply merely because Cabinet ultimately considered the issue.⁴
17. The word 'briefing' means a 'short accurate summary of the details of a plan or operation. The purpose...is to inform'. The document should have the character of a briefing material. A document will be of such character if it contain 'information or advice...prepared for the purpose of being read by, or explained to, a [m]inister'. It requires more than having 'placed a document before a Minister'.⁵
18. The term 'issues to be considered by Cabinet' within the meaning of section 28(1)(ba), requires that it must be more than just 'likely' that Cabinet will consider it. There must be an intention or expectation the issues will be considered by Cabinet (even if not ultimately considered). Evidence that a matter was included in the Cabinet Agenda will meet this test.⁶

¹ (2004) VCAT 2346 at [33].

² *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

³ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

⁴ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

⁵ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁶ *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996). See also *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998); *Hulls v Department of Treasury*

19. My decision in relation to section 28(1)(ba) is set out in the Schedule of Documents at **Annexure 1**.

Section 28(1)(d)

20. Section 28(1)(d) provides a document is an exempt document if 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.

21. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents at **Annexure 1**.

Section 30(1) – Internal working documents

22. 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.

23. The exemption does not apply to purely factual material in a document.⁷

24. 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.

25. 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:⁸

- (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 documents and the broader context giving rise to the creation of the documents;
- (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 documents would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
- (e) whether disclosure of the documents 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;

and Finance (No 2) (1994) 14 VAR 295 at [320–321]; reversed on other grounds by the Court of Appeal: *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331; 15 VAR 360; [1999] VSCA 117.

⁷ Section 30(3).

⁸ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (f) the impact of disclosing documents 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.

26. My decision in relation to section 30(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 34(4)(a)(ii) – Documents relating to trade secrets, etc

- 27. 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’.
- 28. VCAT has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.⁹ VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.¹⁰
- 29. 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.
- 30. 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

- 31. 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.
- 32. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹¹ 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 25.¹²
- 33. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

- 34. On the information available, I am satisfied section 28(1)(ba) applies to Documents 3 and 5. However, I am not satisfied sections 28(1)(d), 30(1) or 34(4)(a)(ii) apply to the documents.
- 35. As it is practicable to edit Documents 1, 7 and 8 to delete irrelevant and exempt information, I have determined to grant access to those documents in part.

⁹ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

¹⁰ *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].

¹¹ *Mickelburgh 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].

¹² *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].

Review rights

36. 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.¹³
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
39. 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.
40. 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.¹⁶

When this decision takes effect

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

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ 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	[reference] – Meeting with Minster Foley and Horne-Station Pier	4	Released in part Sections 30(1), 33(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	<p>Section 30(1): I agree the passage redacted by the Agency amounts to opinion, advice or recommendation prepared by an Agency. I also consider such advice was provided in the course of the deliberative processes of the Agency, being determining how decisions will be made regarding the future of station pier.</p> <p>However, I do not consider disclosure would be contrary to the public interest for the following reasons:</p> <ul style="list-style-type: none"> the commentary is general in nature; I do not consider such information to be sensitive as it relates to a broad consensus view

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>about the process to be undertaken;</p> <ul style="list-style-type: none"> • I consider this it is clear from the document that this is a preliminary view subject to change. In my view members of the public are capable of understanding such views are current at the time the brief was prepared and subject to change; • there is a public interest in disclosure of information relating to how decisions will be made regarding the future use of important infrastructure. <p>Section 25: The Applicant is not seeking the personal affairs exempted by the</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
						Agency under section 33(1). It is therefore irrelevant to the request.
2	[date]	[reference] – Visit Victoria Resignation of Board Members	2	Released in part Section 33(1)	Not subject to review	
3	Undated	[reference] – [name of brief]	7	Refused in full Section 28(1)(ba)	Refuse in full Section 28(1)(ba)	<p>Section 28(1)(ba): I am satisfied based on the information before me and the contents of the document that it was prepared for the purpose of briefing a minister in relation to issues to be considered by Cabinet. The document is therefore exempt under section 28(1)(b).</p> <p>Section 25: I do not consider the document can be edited to remove exempt information as the removal of such information would render the document meaningless.</p>
4	Undated	[reference] – [named person], Tourism and Transport Forum	4	Released in part	Not subject to review	

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
				Section 33(1)		
5	Undated	[reference] – [name of brief]	3	Refused in full Section 28(1)(ba)	Refuse in full Section 28(1)(ba)	Section 28(1)(ba): Based on the contents of the document and the Agency's submission, I am satisfied the document was prepared for the purpose of briefing a minister in relation to issues to be considered by a subcommittee of Cabinet. Section 25: See comments for Document 3.
6	Undated	[reference] - End of Financial Year Reporting Obligations to the Treasurer	3	Released in part Section 33(1)	Not subject to review	
7	Undated	[reference] - Meeting with [named Councillor] and [named officer], City of Port Phillip	5	Release in part Sections 28(1)(d), 30(1), 33(1)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	Section 28(1)(d): Even though the deleted passages contain some references to the Cabinet, I am not satisfied the document would involve the disclosure of any deliberation or decision of cabinet. Rather, it provides general information about

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						<p>what it considers are the views of a third party.</p> <p>Section 30(1): I agree the passage redacted by the Agency amounts to opinion, advice or recommendation prepared by an Agency. I also consider such advice was provided in the course of the deliberative processes of the Agency, being determining how decisions will be made regarding the future of station pier.</p> <p>However, while I note the information in this document is more detailed, for similar reasons to Document 1, I do not consider disclosure would be contrary to the public interest.</p> <p>Section 25: See comments for Document 3.</p>
8	Undated		5	Release in part	Release in part	Section 34(4)(a)(ii): I note the Agency's submission

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
		[reference] – Meeting with [named person], La Trobe University		Sections 33(1), 34(4)(a)(ii)	<p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p>that it is engaged in trade or commerce by ‘working with LTU [La Trobe University] to develop land and facilities’.</p> <p>Based on the limited level of detail in the document, I am not satisfied there is sufficient information for me to accept the Agency is engaged in trade or commerce for the purposes of the contents of the documents.</p> <p>However, even if I were to do so, I do not consider the Agency has demonstrated disclosure would expose either it or LTU unreasonable to disadvantage. Rather, the document describes, briefly, a potential sale that was not successful and from the information before me appears to be a finalised matter. In these circumstances therefore I can see no disadvantage to the Agency or LTU from</p>

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						disclosure, let alone unreasonable disadvantage. The information is therefore not exempt under section 34(4)(a)(ii). Section 25: See comments for Document 3.