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Notice of Decision and Reasons for Decision

| | |
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| Applicant: | 'DF6' |
| Agency: | Department of Justice and Community Safety |
| Agency Reference: | 82635 |
| Exemptions considered: | Sections 28(1)(d), 30(1) |
| Other legislation considered: | Section 70 of the <i>Audit Act 1994</i> (Vic) |
| Citation: | 'DF6' and <i>Department of Justice and Community Safety (Freedom of Information)</i> [2021] VICmr 178 (18 June 2021) |

FREEDOM OF INFORMATION – agency board of management – meeting agenda – meeting minutes – COVID-19 pandemic – *Audit Act 1994* (Vic)

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 certain documents are exempt under section 28(1)(d), and certain information in the documents is excluded from the application of the FOI Act under section 70 of the *Audit Act 1994* (Vic) (**Audit Act**).

I am not satisfied the documents are exempt under sections 30(1) or 31(1)(a).

As I am 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, I have determined to grant access to the documents 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

18 June 2021

Reasons for Decision

Background to review

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

The Agendas and Minutes of the DJCS [the Agency's] Executive Committee meetings since [date].
2. The Agency identified 38 pages falling within the terms of the Applicant's request and relied on sections 28(1)(d), 30(1) of the FOI Act, and section 70 of the Audit Act to refuse access to parts of the documents.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant seeks review of the Agency's application of sections 28(1)(d), 30(1) and section 70 of the Audit Act.
5. During the review, the Agency withdrew its reliance on section 30(1) to exempt from release certain parts of the document.
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 the 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.

¹ (2004) VCAT 2346 at [33].

Section 28(1)(d)

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 was officially published.
14. 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.²
15. 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.³
16. 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.⁴
17. 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

18. 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;
 - (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.
19. The exemption does not apply to purely factual material in a document.⁵
20. In determining if disclosure of a document would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
21. I have given weight to the following relevant factors in the context of this matter:⁶
 - (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

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 Section 30(3).

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

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;
- (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.

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

Section 31(1)(a) – Law enforcement documents

23. Section 31 provides that a document is an exempt document if its disclosure under the FOI Act 'would, or would be reasonably likely to prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance'.

24. I note the Agency does not rely on section 31(1)(a) to refuse access to the documents. Given I am satisfied the documents are not exempt under section 31(1)(a), I have not sought further submissions from the Applicant on the application of this exemption.

25. My decision in relation to section 31(1)(a) is set out in the Schedule of Documents at **Annexure 1**.

Section 70 of the Audit Act

26. Section 70 of the Audit Act provides:

70 Exemption from *Freedom of Information Act 1982*

- (1) The Freedom of Information Act 1982 does not apply to a document of an agency to the extent to which the document discloses information about—
 - (a) an audit or assurance review that is, has been or is to be, conducted under this or any other Act; and
 - (b) a report of an audit or assurance review conducted under this or any other Act; and
 - (c) a function of an agency that is, has been or is to be carried out under the Gambling Regulation Act 2003.
- (2) In subsection (1) agency means—
 - (a) the Auditor-General; or
 - (b) the Victorian Auditor-General's Office

27. My decision in relation to section 70 of the Audit Act is set out in the Schedule of Documents at **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

28. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
29. 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
30. As the Applicant does not seek access to personal affairs information, this information is considered as irrelevant information for the purpose of section 25.
31. I have considered the effect of deleting irrelevant and exempt information from the documents. I am satisfied it is practicable to delete irrelevant and exempt information in accordance with section 25, as to do so would not require substantial time and effort, and the edited documents would retain meaning.
32. My decision in relation to section 25 is set out in the Schedule of Documents at **Annexure 1**.

Conclusion

33. On the information before me, I am satisfied certain documents are exempt under section 28(1)(d), and certain information in the documents is excluded from the application of the FOI Act under section 70 of the Audit Act.
34. I am not satisfied the documents are exempt under sections 30(1) or 31(1)(a).
35. As I am 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, I have determined to grant access to the documents in part.
36. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

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.

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].

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

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.

¹² Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

| Doc. No. | Date of Document | Document Description | No. of Pages | Agency Decision | OVIC Decision | OVIC Comments |
|----------|------------------|-------------------------------------|--------------|--|---|--|
| 1. | [date] | Agenda – Agency Board of Management | 2 | Release in part Sections 28(1)(d), 30(1), 33(1) | <p>Release in part Section 25</p> <p>The document is to be released in part with the following irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the Agency officer name deleted on page 1. | <p>Section 28(1)(d): The Agency’s submits a term used in the document is exempt under section 28(1)(d). In my view, this is a generic term and the document itself does not reveal a deliberation or decision of the Cabinet or sub-committee of the Cabinet. Therefore, I am not satisfied the document is exempt under section 28(1)(d).</p> <p>Section 30(1): The Agency submits a reference in the document refers to an Agency initiative that is sensitive and did not proceed. I consider the information is largely factual as it relates to the name of a program and does not reveal its contents. Section 30(1) does not exempt information of this nature by virtue of section 30(3). Nor does the information exempted by the Agency disclose any opinion, advice or recommendation. Further, in my view there is limited information recorded in the minutes such that its disclosure would divulge detailed sensitive information that would undermine future discussion and deliberation by the Board of Management regarding agency issues. Accordingly, I am not satisfied the document is exempt under section 30(1).</p> <p>Section 25: The Applicant does not seek review of information exempted by the Agency under section 33(1). Therefore, this information is irrelevant information for the</p> |

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| | | | | | | <p>purpose of section 25.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25.</p> |
| 2. | [date] | Minutes of Meeting – Agency Board of Management | 4 | <p>Release in part</p> <p>Sections 25, 28(1)(d), 30(1), 33(1)</p> | <p>Release in part</p> <p>Section 25</p> <p>The document is to be released with the following irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the Agency officer’s name deleted on page 1; and dot point 1 on page 1. | <p>Section 28(1)(d): See comments for Document 1.</p> <p>Section 30(1): I accept the document contains matter in the nature of opinion, advice and recommendation prepared for the deliberative processes of the Agency.</p> <p>While I note further detail is provided in this document, and I acknowledge the Agency’s view it is sensitive in nature, I do not consider disclosure of this information would be contrary to the public interest, in part, given the passage of time that has passed since the document was created. Further, in my view there is limited information recorded in the minutes such that its disclosure would divulge detailed sensitive information that would undermine future discussion and deliberation by the Board of Management of agency issues. Accordingly, I am not satisfied the document is exempt under section 30(1).</p> <p>Section 25: I agree the information deleted from the document by the Agency is irrelevant to the terms of the Applicant’s</p> |

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| | | | | | | request. See comments for Document 1. |
| 3. | [date] | Agenda – Agency Board of Management | 1 | Release in part Section 33(1) | Release in part Section 25 The document is to be released with the following irrelevant information deleted in accordance section 25: <ul style="list-style-type: none"> the names and position title of the Agency officer deleted on page 1. | Section 25: See comments for Document 1. |
| 4. | [date] | Minutes of Meeting – Agency Board of Management | 3 | Release in part Sections 28(1)(d), 30(1) | Release in full | Section 28(1)(d): The Agency submits certain information in point 3 is exempt under section 28(1)(d), as it discloses the deliberations of a sub-committee of the Cabinet. I am not satisfied the information is exempt under section 28(1)(d) as: <ul style="list-style-type: none"> it does not refer to the Cabinet or a sub-committee of the Cabinet, nor is it marked, 'Cabinet in confidence'; it refers to detailed operational information, rather than high level deliberations of the Cabinet; and there is no information before me to demonstrate the specific, detailed |

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| | | | | | | operational matters were discussed by the Cabinet. Section 30(1): The Agency no longer relies on this exemption to exempt information under section 30(1). |
| 5. | [date] | Agenda – Agency Board of Management | 2 | Release in part Section 33(1) | Release in part Section 25 The document is to be released in part with the following irrelevant information deleted in accordance with section 25: <ul style="list-style-type: none"> the Agency officer’s name deleted on page 1. | Section 25: See comments for Document 1. |
| 6. | [date] | Minutes of Meeting – Agency Board of Management | 5 | Release in part Sections 28(1)(d), 30(1), 33(1), 33(1)(a), and section 70 of the Audit Act | Release in part Sections 28(1)(d), 25 The document is to be released in part with the following and irrelevant information deleted in accordance with section 25: <ul style="list-style-type: none"> the information identified by the Agency under point 3 that is exempt under | Section 28(1)(d): I am satisfied the information identified by the Agency discloses deliberations and decisions of the Cabinet and is therefore, exempt under section 28(1)(d). Section 30(1): The document contains matter in the nature of opinion, advice and recommendation prepared for the deliberative processes of the Agency. In summary, the Agency submits the information is sensitive, it is not final, and |

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| | | | | | <p>section 28(1)(d); and</p> <ul style="list-style-type: none"> the Agency officer’s name deleted on page 1. | <p>could be misinterpreted if disclosed.</p> <p>I have determined it would not be contrary to the public interest to disclose the information for the following reasons:</p> <ul style="list-style-type: none"> the information is largely general in nature; in my view there is limited information recorded in the minutes such that its disclosure would divulge detailed sensitive information that would undermine future discussion and deliberation by the Board of Management of agency issues; members of the community are capable of understanding the impacts on government agencies caused by the COVID-19 pandemic and are capable of understanding the Government’s response is continually evolving to a rapidly changing environment; and there is a public interest in disclosure of deliberative information that informs the public about government decision making and its response to COVID-19 pandemic in the justice sector. <p>Section 70 of the Audit Act: The information identified by the Agency does not refer to such an audit or assurance review, as described by section 70 of the Audit Act. Accordingly, I am not satisfied the</p> |

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| | | | | | | document is subject to section 70 and is subject to the FOI Act. Section 31(1)(a): I note in its submissions, the Agency seeks to rely on section 31(1)(a) in conjunction with section 70 of the Audit Act. However, there is no information before me to persuade me that disclosure of the relevant information would be reasonably likely to prejudice the application of the Audit Act. Rather, the information is limited in detail and general in nature. Therefore, I am not satisfied it is exempt under section 31(1)(a). Section 25: See comments for Document 1. |
| 7. | [date] | Agenda – Agency Board of Management | 2 | Release in part Section 33(1) | Release in part Section 25 The document is to be released in part with the following irrelevant information deleted in accordance with section 25: <ul style="list-style-type: none"> the Agency officer’s name deleted on page 1. | Section 25: See comments for Document 1. |
| 8. | [date] | Minutes of Meeting – Agency Board of | 6 | Release in part Sections 28(1)(d), | Release in part Sections 28(1)(d), 25, and | Section 28(1)(d): I am not satisfied all the information identified by the agency under point 3 discloses deliberations or decisions |

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| | | Management | | 30(1), 33(1), and section 70 of the Audit Act in conjunction with section 31(1)(a) | <p>section 70 of the Audit Act</p> <p>The document is to be released in part with the following and irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> • the second, third and fourth sentences of the first dot point in point 3 that is exempt under section 28(1)(d); • the information identified by the Agency under point 5 that is not subject to the FOI Act; and • the Agency officer’s name deleted on page 1. | <p>of the Cabinet and it is therefore not exempt under section 28(1)(d). See comments for Document 4.</p> <p>However, I am satisfied the second, third and fourth sentences of the first dot point under point 3 discloses such deliberations. It is therefore exempt under section 28(1)(d).</p> <p>I am not satisfied the information under point 4 is exempt under 28(1)(d). See comments for Document 4.</p> <p>Section 30(1): The document contains matter in the nature of opinion, advice and recommendation prepared for the deliberative processes of the Agency, namely, responding to the COVID-19 pandemic.</p> <p>I note this document contains more sensitive information than the documents subject to section 30(1) above. However, on balance, I have determined the public interest weighs in favour of disclosure.</p> <p>In my view, the document describes important high level factors affecting decision making in the public sector and members of the public are entitled to understand such factors. Disclosure would provide important transparency around government agency decision making that affects the community. See also comments</p> |

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| | | | | | | <p>for Document 6.</p> <p>Section 70 of the Audit Act: I accept the information identified by the Agency is of a kind described in section 70 of the Audit Act. Therefore, it is excluded from the application of the FOI Act. This information is to be deleted in accordance with section 25.</p> <p>Section 25: See comments for Document 1.</p> |
| 9. | [date] | Agenda – Agency Board of Management | 2 | Release in part Section 33(1) | <p>Release in part</p> <p>Section 25</p> <p>The document is to be released in part with the following irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the Agency officer’s name deleted on page 1. | Section 25: See comments for Document 1. |
| 10. | [date] | Minutes of Meeting – Agency Board of Management | 3 | Release in part Sections 28(1)(d), 30(1), 33(1) | <p>Release in part</p> <p>Section 25</p> <p>The document is to be released in part with the following irrelevant information deleted in</p> | <p>Section 28(1)(d): I am not satisfied the information identified by the Agency is specific enough to identify a deliberation or decision of the Cabinet. Rather, the document refers to general budget matters. Accordingly, I am not satisfied the document is exempt under section 28(1)(d).</p> <p>Section 30(1): I note the Agency submits</p> |

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| | | | | | <p>accordance with section 25:</p> <ul style="list-style-type: none"> • the Agency officer’s name deleted on page 1. <p>I have determined the following information is exempt under section 30(1) and is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> • under point 2, the seventh dot point, the second sentence; and • under point 2, the eight dot point. | <p>a statement in the document could be misconstrued as it is not clear who made the statement. While I agree it is not clear, there is no information before me to suggest the document is not an accurate reflection of statements made at the Board of Agency meeting. Accordingly, I am not satisfied all information identified by the Agency in the document is exempt under section 30(1). See comments for Document 8.</p> <p>However, I am satisfied certain information is exempt under section 30(1) as it relates to sensitive information that I accept is preliminary in nature. I consider the disclosure of this information would not clearly or accurately represent a final position or decision reached by the Agency at the conclusion of a decision making or deliberative process.</p> <p>Section 25: See comments for Document 1.</p> |
| 11. | [date] | Agenda – Agency Board of Management | 2 | Release in part Section 33(1) | <p>Release in part</p> <p>Section 25</p> <p>The document is to be released in part with the following irrelevant information deleted in accordance with section 25:</p> | <p>Section 25: See comments for Document 1.</p> |

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| | | | | | <ul style="list-style-type: none"> the Agency officer's name deleted on page 1. | |
| 12. | [date] | Minutes of Meeting – Agency Board of Management | 3 | Release in part Sections 30(1), 33(1) | <p>Release in part</p> <p>Section 25</p> <p>The document is to be released in part with the following irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the Agency officer's name deleted on page 1. | <p>Section 30(1): See comments for Document 6.</p> <p>Section 25: See comments for Document 1.</p> |
| 13. | v | Agenda – Agency Board of Management | 2 | Release in part Section 33(1) | <p>Release in part</p> <p>Section 25</p> <p>The document is to be released in part with the following irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the Agency officer's name deleted on page 1. | <p>Section 33(1): See comments in Document 1.</p> <p>Section 25: See comments for Document 1.</p> |