

Notice of Decision and Reasons for Decision

Applicant:	'DX2'
Agency:	Safer Care Victoria
Decision date:	14 December 2021
Exemption considered:	Section 28(1)(c)
Citation:	'DX2' and Safer Care Victoria (<i>Freedom of Information</i>) [2021] VICmr 332 (14 December 2021)

FREEDOM OF INFORMATION – COVID-19 pandemic – COVID-19 Quarantine Victoria – Hotel Quarantine Program – infection protocols – Cabinet documents – copy of a Cabinet document – draft Cabinet document

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 FOI request is the same as the Agency's decision.

I am satisfied the documents are exempt in full under section 28(1)(c).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

14 December 2021

Reasons for Decision

Background to review

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

All documents relating to the Safer Care Victoria's investigation into the adequacy of the infection protocols of COVID-19 Quarantine Victoria's (CQV) Hotel Quarantine Program, specifically including any identified areas of concern as of [date].

2. The Applicant subsequently clarified the terms of their request to:

A copy of the interim and final report(s) where inadequate infection control protocols were identified by the Safer Care Victoria audits of the COVID-19 Quarantine Victoria's (CQV) Hotel Quarantine Program.

3. The Agency identified two documents falling within the terms of the Applicant's request and refused access in full. The Agency relied on the exemptions under sections 28(1)(c), 30(1), 33(1) and 35(1)(b) to refuse access to the documents.
4. The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined a copy 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

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

¹ (2004) VCAT 2346 at [33].

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.

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

13. 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 section 28(1)(a), 28(1)(b) or 28(1)(ba).
14. Relevantly, section 28(1)(b) provides a document is an exempt document if it is ‘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’.
15. The Agency’s decision letter indicates the final report is exempt in full under section 28(1)(c) and states ‘COVID-19 Quarantine Victoria (CQV) have advised that the report is considered an extract from a document that was prepared on behalf of a Minister for the purpose of submission for consideration by the Cabinet’.
16. During the review, the Agency submitted the interim report is also exempt under section 28(1)(c).
17. Accordingly, I have considered the application of section 28(1)(c) to both the final and interim reports.
18. I am limited in the amount of information I can provide about these documents without disclosing exempt information.

Final report

19. The Agency submits the final report was attached to a document that was prepared on behalf of a Minister for the purpose of submission to a committee of Cabinet. Accordingly, I must consider whether the document to which the final report was attached, and the final report, would be exempt under section 28(1)(b).
20. Section 28(1)(b) provides a document is an exempt document if it was prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet.
21. A document will be exempt under section 28(1)(b) only if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to the Cabinet for its consideration.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 the Cabinet.³
22. Section 28(1)(b) turns on the purpose for which a document was created, and it is not necessary to show a document was submitted to the Cabinet⁴ or to prove the Cabinet considered the document to satisfy the requirements of section 28(1)(b).⁵
23. The Agency provided extrinsic information with its submission in support of its view the final report is an extract of a document that would be exempt under section 28(1)(b). Having carefully considered this information, I am satisfied it was prepared on behalf of a Minister for the sole, or substantial

² *Ryan v Department of Infrastructure* [2004] VCAT 2346; (2004) VAR 226 at [34]; *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11 at [13] and [24]; *Asher v Department of Premier and Cabinet (General)* [2008] VCAT 450 at [55].

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

⁴ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34]; *Asher v Department of Premier and Cabinet (General)* [2008] VCAT 450 at [22].

⁵ *Pullen v Alpine Resorts Commission* (unreported, AAT of Vic, Macnamara DP, 23 August 1996); *Wilson v Department of Premier and Cabinet* [2001] VCAT 663; (2001) 16 VAR 455; *Olexander v Department of Premier & Cabinet* [2002] VCAT 497 at [28]; *Asher v Department of Premier and Cabinet* [2002] VCAT 499 at [9]; *Stewart v Australian Grand Prix Corporation (General)* [2008] VCAT 167 at [30]-[31].

purpose, for submission for consideration by a committee of the Cabinet. Accordingly, the document, including its attachment, would be an exempt document under section 28(1)(b).

24. Therefore, I must consider whether the final report contains extracts from that document.
25. An extract of a document usually contains a reproduction or part of the text or material, such as a quote or paraphrase.⁶
26. A document cannot contain an extract from a Cabinet document if it was created before the preparation of a Cabinet document.⁷
27. Whether a document contains extracts from a Cabinet document needs to be determined by reference to all of the evidence.⁸
28. On the information before me, I consider the final report was prepared before the document to which the final report was attached and does not contain information that was extracted from that document. Therefore, I am not satisfied the final report is exempt on grounds it contains an extract from a document referred to in section 28(1)(b).
29. However, I have considered whether the final report is a copy of a document referred to in section 28(1)(b).
30. A document will be a copy if it is a reproduction of the document, for example, a photocopy or a printed copy.
31. The final report was prepared by the Agency, whereas the document to which the final report was attached was prepared by another agency.
32. Having compared the final report the subject of review with the version attached to the document prepared by another agency on behalf of a Minister, I am satisfied the attached document is a copy of the final report prepared by the Agency. As the documents are duplicates, I am satisfied the final report is also a copy of the attached version.
33. Accordingly, I am satisfied the final report is a copy of a document that would be exempt under section 28(1)(b) and is therefore exempt under section 28(1)(c).

Interim report

34. I have considered whether the interim report is a draft of the report that was attached to the document that was prepared on behalf of a Minister for the purpose of submission for consideration by a committee of Cabinet.
35. 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 submission or because there is information common to both documents. It should be the actual document, preferably marked as draft and not documents of 'different kinds prepared by different agencies'.⁹
36. I have compared the interim report with the final report and considered the Agency's submission about the preparation of both versions of the report. On the information before me, I am satisfied

⁶ *Mildenhall v Department of Education* (unreported, VCAT, Glover M, 16 April 1999); *Honeywood v Department of Human Services* (2006) 25 VAR 286; [2006] VCAT 2048 at [19].

⁷ *Asher v Department of Infrastructure* [2006] VCAT 1375; 25 VAR 143 at [42]; *Smith v Department of Sustainability and Environment* [2006] VCAT 1228; (2006) 25 VAR 65 at [28]; *Honeywood v Department of Human Services* [2006] VCAT 2048; 25 VAR 286 at [19].

⁸ *Honeywood v Department of Human Services* (2006) 25 VAR 286; [2006] VCAT 2048 at [19].

⁹ *Asher v Department of Infrastructure* [2006] VCAT 1375; 25 VAR 143 at [43].

the interim report is a draft of the final report, containing essentially the same content with relatively minor changes.

37. Accordingly, as I am satisfied the attached version of the final report is exempt under section 28(1)(b), and the interim report is a draft of a document that would be exempt under section 28(1)(b), it is exempt under section 28(1)(c).

Do the documents contain purely statistical, technical or scientific material?

38. Section 28(3) provides the exemption in section 28(1) does not apply to a document to the extent it contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.¹⁰
39. Insofar as the final and interim reports contain statistical, technical or scientific information, I am satisfied such information is intertwined with information submitted for consideration by a committee of Cabinet such that it does fall within the exception under section 28(3).
40. Accordingly, on the information before me, I am satisfied the documents are exempt under section 28(1)(c).

Section 25 – Deletion of exempt or irrelevant information

41. 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.
42. 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 a document meaningless, they are not ‘practicable’, and release of the document is not required under section 25.¹²
43. I have considered the nature of the documents and whether it would be practicable to provide an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to do so as the entirety of the documents are exempt under section 28(1)(c).

Conclusion

44. On the information before me, I am satisfied the documents are exempt in full under section 28(1)(c).
45. In light of my decision, it is not necessary for me to consider the additional exemptions relied on by the Agency.
46. Accordingly, access to the documents is refused in full.

Review rights

47. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³

¹⁰ *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

¹¹ *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].

¹² *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].

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

48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
49. 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.
50. 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.¹⁵

¹⁴ Section 52(5).

¹⁵ Sections 50(3F) and (3FA).