

## Notice of Decision and Reasons for Decision

---

Applicant: 'ED4'  
Agency: Department of Jobs, Precincts and Regions  
Decision date: 13 May 2022  
Exemptions considered: Sections 28(1)(ba), 28(1)(d), 30(1), 33(1)  
  
Citation: 'ED4' and Department of Jobs, Precincts and Regions (Freedom of Information) [2022] VICmr 57 (13 May 2022)

---

FREEDOM OF INFORMATION – Ministerial briefings — business project – Development Victoria

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.

A small amount of additional information is to be released in Document 2 as section 28(1)(ba) does not apply to the document.

I have determined Document 1 is exempt in full under section 30(1) and Document 3 is exempt in full under section 28(1)(ba).

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

13 May 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  1. BMIN-[reference, title, date]
  2. BMIN-2-21-9578 [title]
  3. BMIN-[reference, title, date].
2. The Agency identified 3 documents falling within the terms of the Applicant's request and decided to grant access to 1 document in part and to refuse access to 2 documents in full relying on the exemptions under sections 28(1)(ba), 30(1), 33(1), 34(1)(b) and 34(4)(a)(ii). 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

#### ***Section 28(1) – Cabinet documents***

10. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
11. In *Ryan v Department of Infrastructure*,<sup>2</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" around it. Rather, for a document to come

---

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

<sup>2</sup> (2004) VCAT 2346 at [33].

within the Cabinet document exemption, “it must fit squarely within one of the four exemptions [(now five)]” in section 28(1) of the Act.

12. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.
13. 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.<sup>3</sup>

***Section 28(1)(ba) – Document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet***

14. Section 28(1)(ba) provides a document is exempt if it has been 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 an issue to be considered by the Cabinet.<sup>4</sup> 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.<sup>5</sup>
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.<sup>6</sup>
17. The word ‘briefing’ means a ‘short accurate summary of the details of a plan or operation. The ‘purpose...is to inform’. Therefore, the document should have the character of briefing material. A document will be of such character if it contains ‘information or advice...prepared for the purpose of being read by, or explained to, a minister’. It requires more than having ‘placed a document before a minister’.<sup>7</sup>
18. The term ‘issues to be considered by the Cabinet’ within the meaning of section 28(1)(ba), requires that it must be more than just ‘likely’ the Cabinet will consider it. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if not ultimately considered. Evidence that a matter was included on the Agenda for a Cabinet meeting will meet this test.<sup>8</sup>
19. I am satisfied Document 3 is exempt in full under section 28(1)(ba) for the following reasons:
  - (a) the document is a briefing to a minister recommending the subject of the briefing be a matter for a forthcoming Cabinet submission;
  - (b) the subject of the briefing is of sufficient importance, and relating to legislative change, such that it would likely be considered by Cabinet; and

---

<sup>3</sup> *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

<sup>4</sup> *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].

<sup>5</sup> *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

<sup>6</sup> *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

<sup>7</sup> *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

<sup>8</sup> *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 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.

- (c) the Agency advises that the subject matter had previously been scheduled for Cabinet consideration but was withdrawn when determined further work was required prior to resubmission.

***Section 28(1)(d) – Disclosure would involve disclosure of any deliberation or decision of the Cabinet***

- 20. 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.
- 21. A document will be exempt under section 28(1)(d) if there is evidence that the Cabinet discussed various options in the document and deliberated upon and/or adopted on or more of the options for its consideration.<sup>9</sup>
- 22. A ‘decision’ means any conclusion as to the course of action the Cabinet adopts whether it is a conclusion as to final strategy on a matter or conclusions about how a matter should proceed.<sup>10</sup>
- 23. Where a decision of the Cabinet is made public, the announcement in relation to the issue decided will not disclose the Cabinet’s decision or deliberation.<sup>11</sup>
- 24. While not applied by the Agency, I consider Document 3 also contains decisions and deliberations of Cabinet. Document 3 is also exempt in part under section 28(1)(d).

***Section 30(1) – Internal working documents***

- 25. The Agency exempted Document 1 in full under section 30(1).’
- 26. 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.
- 27. The exemption does not apply to purely factual material in a document.<sup>12</sup>

*Does the document 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?*

- 28. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
- 29. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>13</sup>

---

<sup>9</sup> *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

<sup>10</sup> *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

<sup>11</sup> *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

<sup>12</sup> Section 30(3).

<sup>13</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

30. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant information deleted, where it is practicable to do so.
31. Document 1 is a briefing to a Minister about a [project] between Development Victoria and a third party. The document contains the advice and recommendations of Agency officers.

*Was the document 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?*

32. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>14</sup>
33. In *Re Waterford and Department of Treasury (No.2)*,<sup>15</sup> the former Victorian Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.  
...

34. The document was made in the course of the deliberative processes of the Agency, being decisions relating to a potential infrastructure project.

*Would disclosure of the documents be contrary to the public interest?*

35. 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.
36. 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:<sup>16</sup>
  - (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;

---

<sup>14</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

<sup>15</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>16</sup> *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.

37. In its submission to my office, the Agency provides the following reasons for considering disclosure would be contrary to the public interest:

Section 30 of the Act has been applied to this document as it contains various options for progressing [a project]. The purpose for the writing of the brief is for the Minister to consider the options prior to their discussion and the decision making occurring at Cabinet. The brief contains the options available to the minister in this consideration, including the financial implications for the state, DV [Development Victoria] and [a third party].

The release of the options that are currently under consideration by the government are not in the public interest as the project has not yet been finalised. Any decision... will be made public in due course. It is not in the interest of the public to release considerations prior to financial matters being finalised between the involved parties and the release of that information could seriously undermine negotiations that remain live. [see *Davis v Department of Transport (Review and Regulation)* [2021] VCAT 484 (14 May 2021) [at 127 to 129]

38. I have decided it would be contrary to the public interest to disclose the document for the following reasons:

- (a) the information is not publicly available;
- (b) the document is sensitive as it relates to the government negotiating with a non-government third party and contains information unlikely to be known by that third party;
- (c) I consider disclosure would likely have a significant impact on the relationship between the government and the third party that would likely cause substantial harm to the negotiating power of the government;
- (d) such outcome would likely have a detrimental impact on the success of the prospective [project];
- (e) the [project] being developed by Development Victoria is at an early stage, where key decisions have not yet been made; and
- (f) for the above reasons and having carefully considered the detail in the document, I consider the public interest in this instance weighs against disclosure in this instance.

39. Document 1 is therefore exempt under section 30(1).

***Section 33(1) – Documents affecting personal privacy of third parties***

40. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI Act would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person other than the Applicant;<sup>17</sup> and
- (b) such disclosure would be ‘unreasonable’.

---

<sup>17</sup> Sections 33(1) and (2).

41. I have considered the application of section 33(1) to Document 2 only.

*Does the document contain personal affairs information of individuals other than the Applicant?*

42. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>18</sup>

43. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>19</sup>

44. I am satisfied Document 2 contains personal affairs information, specifically names, email addresses and telephone numbers.

*Would disclosure of the personal affairs information be unreasonable?*

45. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

46. In *Victoria Police v Marke*,<sup>20</sup> the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.<sup>21</sup> The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.<sup>22</sup>

47. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

- (a) the nature of the personal affairs information;
- (b) the circumstances in which the information was obtained;
- (c) the applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
- (d) whether any public interest would be promoted by release of the personal affairs information the likelihood of disclosure of information, if released;
- (e) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;
- (f) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>23</sup>

---

<sup>18</sup> Section 33(9).

<sup>19</sup> *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

<sup>20</sup> [2008] VSCA 218 at [76].

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid* at [79].

<sup>23</sup> Section 33(2A).

48. The only information the Agency seeks to exempt under section 33(1) is mobile telephone numbers, email addresses and the name of a graduate trainee in Document 2.
49. I consider this is personal affairs information that would be unreasonable to disclose, as to do so would be an unnecessary intrusion on those individuals, given such information would not aid in the Applicant's understanding of the document.
50. The information exempted by the Agency in Document 2 is therefore exempt under section 33(1).

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

51. 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.
52. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>24</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>25</sup>
53. I have considered the effect of deleting exempt information from Document 2. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited document would retain meaning.
54. I have considered the effect of deleting exempt information from Documents 1 and 3. In my view, it is not practicable for the Agency to delete the exempt information from those documents, because deleting the exempt information would render the documents meaningless.

### **Conclusion**

55. On the information available, I am satisfied the exemptions in sections 28(1)(ba), 28(1)(d), 30(1) and 33(1) applies to the documents.
56. As it is practicable to release Document 2 in part with exempt information deleted, access is granted in part.
57. As it is not practicable to release Documents 1 or 3 with exempt information deleted, access is denied to those documents in full.

### **Review rights**

58. 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.<sup>26</sup>
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>27</sup>

---

<sup>24</sup> *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].

<sup>25</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].

<sup>26</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>27</sup> Section 52(5).



60. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>28</sup>
61. 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.
62. 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>29</sup>

**When this decision takes effect**

63. 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.

---

<sup>28</sup> Section 52(9).

<sup>29</sup> Sections 50(3F) and (3FA).

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Brief: BMIN [reference]	37	Refused in full  Sections 28(1)(ba), 30(1), 33(1), 34(1)(b), 34(4)(a)(ii)	Refuse in full  Sections 30(1)	<p><b>Section 30(1):</b> I am satisfied the document is exempt in full under section 30(1) for the reasons described above in the Notice of Decision.</p> <p>Given my decision on the application of section 30(1), I have not considered the remaining exemptions applied by the Agency.</p> <p><b>Section 25:</b> I am not satisfied it is practicable to edit this document to delete exempt information in accordance with section 25. Accordingly, access is refused in full.</p>
2.	[Date]	Brief: BMIN-2-21-9578	45	Released in part  Sections 28(1)(ba), 33(1)	<p>Release in part</p> <p>Section 33(1)</p> <p>The document is to be released with the information identified by the Agency exempt under section 33(1) deleted in accordance with section 25.</p>	<p>During the review the Agency advised it no longer sought to apply section 28(1)(ba) to the document.</p> <p><b>Section 33(1):</b> I am satisfied the document is exempt in full under section 33(1) for the reasons described above in the Notice of Decision.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<b>Section 25:</b> I am satisfied it is practicable to edit this document to delete exempt information in accordance with section 25. Accordingly, access is granted in part.
3.	[Date]	Brief: BMIN [reference]	14	Refused in full  Section 28(1)(ba), 33(1)	<b>Refuse in full</b>  Section 28(1)(ba), 28(1)(d)	<p><b>Section 28(1)(ba):</b> I am satisfied the document is exempt in full under section 28(1)(ba) for the reasons described above in my Notice of Decision.</p> <p><b>Section 28(1)(d):</b> I am satisfied the document contains information that is exempt in under section 28(1)(d) for the reasons described above in my Notice of Decision.</p> <p><b>Section 25:</b> See comments for Document 1.</p>