

Notice of Decision and Reasons for Decision

Applicant:	'ED9'
Agency:	Department of Justice and Community Safety
Decision date:	29 April 2022
Exemption considered:	Section 28(1)(ba)
Citation:	'ED9' and Department of Justice and Community Safety (Freedom of Information) [2022] VICmr 62 (29 April 2022)

FREEDOM OF INFORMATION – Review of the Decriminalisation of Sex Work – report to government – government response – legislative change – ministerial briefing – report to minister – issues to be considered by the Cabinet

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 is the same as the Agency's decision.

I am satisfied the document is exempt from release in full under section 28(1)(ba).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
29 April 2022

Reasons for Decision

Background to review

1. Following consultation, the Applicant made a request to the Agency seeking access to the following documents:
 1. A copy of the final report – “Review to make recommendations for the decriminalisation of sex work in Victoria”, prepared by Fiona Patten MP, including the submissions received as part of the review.
 2. The submissions received in response to the Discussion Paper.
 3. Final versions of ministerial briefs only, excluding attachments, on the outcomes of the consultation and advice to government about responding to the recommendations of the Review.
2. The Agency identified the following documents in response to the request:
 - (a) the report prepared by Fiona Patten MP, and submissions from individuals and organisations;
 - (b) submissions received on the Department of Justice and Community Safety’s discussion paper ‘Decriminalising Sex Work’ to inform the implementation of sex work decriminalisation in Victoria; and
 - (c) eight ministerial briefs (totalling 16 pages) containing advice on the outcomes of the report consultation and responding to the recommendations of the review.
3. The Agency refused access to the above documents in full under sections 28(1)(b), 28(1)(ba), 28(1)(d), 30(1), 33(1) and 35(1)(b). The Agency’s decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency’s decision to refuse access.
5. During the review, the Applicant narrowed the scope of the review to the report prepared by Fiona Patten MP (the **Report**).
6. I have examined a copy of the Report.
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. 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.

12. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of the Cabinet.
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.²

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

14. The Agency originally relied on section 28(1)(b) to refuse access to the Report.
15. During the review, the Agency reconsidered its reliance on this exemption and now relies on section 28(1)(ba) as the basis upon it submits which access to the Report should be refused:
- [submission redacted]
16. 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.
17. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which it was prepared was to brief a Minister in relation to an issue to be considered by the Cabinet.³ In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining evidence of the use made of the document, including whether it was submitted to the Cabinet.⁴
18. Section 28(1)(ba) requires the purpose for which a ministerial brief was created must be ‘immediately contemplated’ to be in relation to an issue to be submitted to and considered by the Cabinet. The exemption does apply merely because the Cabinet ultimately considered an issue in relation to which a minister was earlier briefed by an agency without consideration of the intended role of the Cabinet.⁵
19. 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.

¹ (2004) VCAT 2346 at [33].

² *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

³ *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].

⁴ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

⁵ *Hennessey v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

20. 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 [m]inister’. The exemption requires more than having ‘placed a document before a Minister’.⁶
21. The phrase ‘issues to be considered by the Cabinet’ requires that it must be more than just ‘likely’ the Cabinet will consider the issue. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if it is not ultimately considered by the Cabinet. Evidence that a matter was included on a Cabinet meeting agenda will likely meet this test.⁷
22. In their review application, the Applicant submits:

The main document I seek is the report prepared by Fiona Patten MP.

I want the document because of the need to demonstrate that the flaws contained within, deduced to be by the reported reliance on statements quoted from the Report that are known to be false, in instances misrepresentation.

If I obtain the document I will be able to assist the government in reaching a better informed decision and most significantly prevent good public health policy on STI testing and condom use from being scuttled.

...

In the absence of the full request being met, I do agree to accept an edited copy of the document or documents, if certain information is held to be exempt or irrelevant.

...

Further reason to support Review

Confining my remarks just to the Patten Report, I say;

Attached is a copy of the media release issued by the then Hon. Marlene Kairouz MP then Minister for Consumer Affairs.

At a media conference Ms Kairouz said; ~Fiona will make recommendations to the government, we'll consider all of the recommendations that Fiona makes to government and then we'll proceed to introduce legislation sometime in 2021.

...

Section 28(1)(ba) is not infringed against - the report is not a document briefing the Minister for the purpose of submitting it to Cabinet for consideration...

...

23. I am constrained as to the amount of information I can provide in my decision regarding the Agency's submission and the amount of information I can disclose about the content of the Report as to do so would disclose exempt information.
24. However, there is some information available publicly about the Report, including the following:

In November 2019, the Victorian Government asked Fiona Patten MP to lead a review to make recommendations to the Minister for Consumer Affairs Victoria on decriminalising sex work in Victoria.

After carefully considering the review, the government decided to decriminalise sex work in Victoria.

The review consulted with a range of stakeholders to seek their views. This included: sex workers, sex worker peer organisations, legal, health and education support service providers, commercial operators and industry organisations, and workplace safety agencies, local government and Federal Government agencies, law enforcement agencies, and other community and expert organisations.

In making her recommendations, Ms Patten was asked to consider:

⁶ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁷ *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.

- all forms of sex work, including sex work in commercial brothels and escort agencies, sexual services provided in massage parlours and similar businesses, sex work by small owner-operated businesses, and street-based sex work
- workplace safety including health and safety issues and stigma and discrimination against sex workers
- regulatory requirements for operators of commercial sex work businesses
- enforcement powers required to address criminal activity in the sex work industry, including coercion, exploitation, debt bondage and slavery
- local amenity and the location of premises providing sexual services and street-based sex work
- the promotion of public health and appropriate regulation of sex work advertising
- the safety and wellbeing of sex workers, including the experience of violence that arises in the course of sex work and as a consequence of it, and worker advocacy for safety and wellbeing.

The review also looked at the decriminalisation of sex work in other jurisdictions including New Zealand and other Australian states and territories.⁸

25. Having reviewed the Report and the information provide to me by the Agency during the review to support its reliance upon section 28(1)(ba), I am satisfied:
- (a) The Report is addressed to a Minister, and was prepared for the purpose of briefing the Minister.
 - (b) The content of the Report relates to issues which, at the time, were intended to be considered by Cabinet.
 - (c) [redacted contextual information] the report was submitted to the Cabinet for its consideration.
 - (d) While information about the Report is publicly available, the report itself is not.
 - (e) While I note the Applicant's view the public interest would be furthered by disclosure of the Report, section 28(1)(ba) does not permit me to consider public interest factors, but to narrowly examine the purpose for which the document was created.
26. Accordingly, I am satisfied the document was prepared for the purpose of briefing a minister in relation to issues to be considered by the Cabinet, and is exempt from release under section 28(1)(ba).

Section 25 – Deletion of exempt or irrelevant information

27. 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.
28. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰

⁸ Victorian Government, 'Decriminalising sex work in Victoria' at <https://www.vic.gov.au/review-make-recommendations-decriminalisation-sex-work>.

⁹ *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].

¹⁰ *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].

29. In this case, given my decision that the Report was prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet, I am satisfied it is not practicable to provide an edited copy of the document given its purpose and content. Accordingly, I am satisfied the entire document is exempt from release.

Conclusion

30. On the information before me, I am satisfied the document is exempt from release in full under section 28(1)(ba).

Review rights

31. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
34. 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.
35. 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.¹⁴

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and 50(3FA).