

Notice of Decision and Reasons for Decision

Applicant: 'EM7'
Agency: Department of Treasury and Finance
Decision date: 30 May 2022
Exemptions considered: Sections 28(1)(ba), 28(1)(d), 32(1)

Citation: 'EM7' and Department of Treasury and Finance (*Freedom of Information*) [2022] VICmr 143 (30 May 2022)

FREEDOM OF INFORMATION – Cabinet documents – legal professional privilege – briefing to a Minister – Cabinet decisions or deliberations

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 information is exempt from release under sections 28(1)(ba), 28(1)(d) and 32(1). However, I have determined to release further information which I am satisfied is not exempt under sections 28(1)(d) and 32(1).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part. Where I am not satisfied it is practicable to do so, access is refused in full.

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
30 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following Ministerial briefings:
 - B20/2562 - Health Services Contingency Funding
 - B20/2563 - Youth Justice update and funding request
 - B21/206 - Treasurer's Advance for Victorian Aboriginal Heritage Council and Aboriginal Corporation Litigation Costs
 - B21/170 - Victorian University Support Package (VUSP) - approval of funding for proposals, tranche 2
 - B21/158 - [title redacted]
 - B21/193 - Project communications
 - B21/155 - Reimbursement of State Revenue Office Growth Areas Infrastructure Contribution Administration Costs
 - B21/207 - Proposed Increase to the Total Estimated Investment of the Establishing Support and Safety Hubs initiative'
2. As part of their FOI request, the Applicant advised they did not seek access to the personal affairs information of third parties. The decision letter also refers to an agreement to exclude copies of attachments.
3. The Agency identified eight documents falling within the terms of the Applicant's request and granted access to three documents in full, and refused access to four documents in part and one document in full under sections 28(1)(ba), 28(1)(d), 30(1), 32(1) and 34(4)(a)(ii). 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 Agency agreed to release further information in Document 3, which it previously determined to be exempt from release under sections 30(1) and 32(1). Accordingly, this information is to be released to the Applicant and my review will focus on the remainder of the information the Agency determined is exempt from release under sections 28(1)(ba), 28(1)(d) and 32(1).
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

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

11. Section 28(1)(ba) provides a document is an exempt document if it was prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
12. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
13. 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.¹ 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.²
14. The Cabinet briefing purpose must be 'immediately contemplated' when the document is created. The exemption cannot apply merely because the Cabinet ultimately considered the issue.³
15. The word 'briefing' means a 'short accurate summary of the details of a plan or operation. The purpose ... is to inform'.⁴
16. Therefore, the document should have the character of briefing material.⁵ 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'.⁶ It requires more than having 'placed a document before a minister'.⁷
17. The phrase 'issues to be considered by the Cabinet' requires it must be more than just 'likely' a document will be considered by the Cabinet. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if it is not ultimately considered. Evidence that a matter was included on the agenda for a Cabinet meeting will meet this test.⁸
18. It is evident on the face of Document 5 that it was prepared for the purpose of briefing a Minister. Accordingly, the Agency was asked to provide evidence that the issues discussed in the document were considered by the Cabinet when the document was created. Given the nature of documents subject to section 28(1), I am limited in the amount of information I can provide about any documents provided to support the Agency's submission.
19. Having considered the information before me, including the information provided by the Agency, I am satisfied Document 5 was prepared for the purpose of briefing a Minister in relation to issues that were considered by the Cabinet.
20. Accordingly, I am satisfied Document 5 is exempt from release under section 28(1)(ba).

¹ *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].

² *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

³ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

⁴ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *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.

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

Section 28(1)(d) – Disclosure of any deliberation or decision of the Cabinet

22. Section 28(1)(d) provides a document is an exempt document if its disclosure 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.
23. A document will be exempt under section 28(1)(d) if there is evidence the Cabinet discussed and determined options or issues set out in a document.⁹
24. A decision of the Cabinet includes a course of action set, or a determination made as to the final strategy for a matter or a conclusion as to how a matter should proceed.¹⁰
25. Where a decision made by the Cabinet is subsequently made public, as is usually the case, releasing information about the outcome of a Cabinet decision does not necessarily disclose a decision or any deliberation of the Cabinet for the purposes of section 28(1)(d).¹¹
26. In *Asher v Department of Sustainability and Environment*,¹² the Victoria Civil and Administrative Tribunal (**VCAT**) held that where a document, on its face, does not disclose a decision or deliberation of the Cabinet, or the extent of the Cabinet's interaction with a document is unclear, section 28(1)(d) will not apply.
27. Having reviewed Documents 1 and 2, it is clear the exempt information references decisions made by two working groups of Cabinet.
28. Accordingly, I am satisfied this information is exempt under section 28(1)(d).
29. However, I am not satisfied disclosure of information in Document 4 would involve the disclosure of any deliberation or decision of the Cabinet. The information deemed exempt by the Agency is the title of a Cabinet submission. Whilst the exempted information references a Cabinet submission, I do not consider Document 4 contains any substantive information about the deliberations of Cabinet. Rather, the information deemed exempt by the Agency merely references the subject matter considered by the Cabinet.
30. Accordingly, I am not satisfied information in Document 4 is exempt from release under section 28(1)(d).
31. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents in **Annexure 1**.

Section 32(1) – Documents subject to legal professional privilege or client legal privilege

32. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege' (**legal privilege**).
33. A document will be subject to legal privilege and exempt under section 32(1) where it contains a confidential communication:

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

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

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

¹² [2010] VCAT 601.

- (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
- (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
- (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation

34. The High Court of Australia has held the purpose of legal privilege ensures a client can openly and candidly discuss legal matters with their legal representative and seek legal advice:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.¹³

35. The dominant purpose for which a confidential communication was made will determine whether the exemption applies.¹⁴ Where mixed purposes exist, the paramount purpose of the communication is used.¹⁵

36. A document may also be privileged in part. As such, the fact a document contains non-privileged material does not mean the document, in its entirety, ceases to be privileged.¹⁶ In this respect, the High Court of Australia has held:

If a communication satisfies the description of a document brought into existence for the sole purpose of enabling a confidential professional communication between a client and his legal adviser in connexion with pending or anticipated legal proceedings then in our opinion it follows that it is an exempt document within the meaning of s. 42 of the Act. In such a case it is not to the point that the document may contain advice which relates to matters of policy as well as of law. It is the connexion between the document and legal proceedings that establishes its character and thus attracts the privilege.¹⁷

37. Legal privilege will apply to a document prepared by the recipient of legal advice or an employee of the recipient, if it contains a written record of confidential legal advice provided by the recipient's legal advisor. The dominant purpose test is to be applied to the original communication and extends to notes without having to apply the dominant purpose test to the separate document recording the advice.¹⁸ This means, if an agency creates an internal document that records or discloses legal advice received by the Agency, legal privilege also will extend to that document.
38. Document 3 is a briefing to the Minister regarding a legal proceeding. The Agency advised the exempt information reflects advice provided by the Agency's inhouse Legal team.
39. On the information before me, I am satisfied the requisite lawyer-client relationship exists between the Minister and the Agency's inhouse lawyers.

¹³ *Grant v Downs* (1976) 135 CLR 674 at [19].

¹⁴ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

¹⁵ *Martin v Melbourne Health (Review and Regulation)* [2019] VCAT 1190 at [35].

¹⁶ *Waterford v Commonwealth* (1987) 163 CLR 54 at [66]-[67].

¹⁷ *Waterford v Commonwealth* (1987) 163 CLR 54 at [67].

¹⁸ *Standard Chartered Bank of Australia Ltd v Antico* (1995) 36 NSWLR 87 at [91]-[93].

40. I am satisfied Document 3 contains a confidential communication between an Agency officer and the Minister which records legal advice provided by the Agency's in-house legal team.
41. Accordingly, I am satisfied certain information in Document 3 is exempt under section 32(1).
42. My decision in relation to section 32(1) is set out in the Schedule of Documents in **Annexure 1**.

Sections 30(1) and 34(4)(a)(ii)

43. As I am satisfied that Document 5 is exempt under section 28(1)(ba), I have not considered the application of sections 30(1) and 34(4)(a)(ii).

Section 25 – Deletion of exempt or irrelevant information

44. 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.
45. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁹ 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 25.²⁰
46. As noted above, the Applicant does not seek access to the personal affairs information of third parties. Accordingly, I am satisfied this information is irrelevant.
47. I have considered the effect of deleting exempt and irrelevant information from the documents. Where I am satisfied it is practicable to provide access to an edited copy of a document with exempt and irrelevant information deleted in accordance with section 25, I have granted access to the document in part. Where it is not practicable to do so, access is denied in full.

Conclusion

48. On the information before me, I am satisfied certain information is exempt from release under sections 28(1)(ba), 28(1)(d) and 32(1). However, I have determined to release further information which I am satisfied is not exempt under sections 28(1)(d) and 32(1).
49. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part. Where I am not satisfied it is practicable to do so, access is refused in full.
50. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

51. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²¹

¹⁹ *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].

²⁰ *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].

²¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

52. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²²
53. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²³
54. 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.
55. 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.²⁴

When this decision takes effect

56. My decision does not take effect until the Agency's 14 day review period expires.
57. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²² Section 52(5).

²³ Section 52(9).

²⁴ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Health Services Contingency Funding	2	Released in part Section 28(1)(d)	Release in part Sections 28(1)(d), 25 The document is to be released except for the information the Agency determined is exempt from release under section 28(1)(d) and the irrelevant information.	Section 28(1)(d): I am satisfied that information in the document is exempt under section 28(1)(d) for the reasons outlined in the Notice of Decision, above. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.
2.	[date]	Youth Justice update and funding request	3	Released in part Section 28(1)(d)	Release in part Sections 28(1)(d), 25 The document is to be released except for the information the Agency determined is exempt from release under section 28(1)(d) and the irrelevant information.	Section 28(1)(d): See comments for Document 1. Section 25: See comments for Document 1.
3.	[date]	Treasurer's Advance for Victorian Aboriginal Heritage Council and Aboriginal	2	Released in part Sections 30(1), 32(1)	Release in part Sections 32(1), 25	On 18 May 2022, the Agency agreed to release information in paragraphs 4 and 7 which it previously determined is exempt

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Corporation Litigation Costs			<p>The document is to be released except for the information the Agency determined is exempt from release under section 32(1), deleted in accordance with section 25:</p> <ul style="list-style-type: none"> • information deemed exempt by the Agency in paragraph eight on page two; • all information in paragraph nine on page two; and • all information in paragraph 11. 	<p>from release under sections 30(1) and 32(1).</p> <p>Section 32(1): I am satisfied the remaining information in the document is exempt from release under section 32(1) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: See comments for Document 1.</p>
4.	[date]	Victorian University Support Package (VUSP) – approval of funding for proposals, tranche 2	4	Released in part Section 28(1)(d)	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with the irrelevant information deleted in accordance with section 25.</p>	<p>Section 28(1)(d): I am not satisfied information in the document is exempt from release under section 28(1)(d) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: See comments for Document 1.</p>
5.	[date]	Briefing to the Minister	5	Refused in full	<p>Refuse in full</p> <p>Section 28(1)(ba)</p>	<p>Section 28(1)(ba): I am satisfied this document is exempt from release under section 28(1)(ba) for</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
				Sections 28(1)(ba), 30(1), 34(4)(a)(ii)		<p>the reasons outlined in the Notice of Decision above.</p> <p>Sections 30(1) and 34(4)(a)(ii): Where I am satisfied the document is exempt from release under section 28(1)(ba), I have not considered the application of sections 30(1) and 34(4)(a)(ii).</p> <p>Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.</p>
6.	[date]	Project Communications	4	Released in full	Not subject to review	
7.	[date]	Reimbursement of State Revenue Office Growth Areas Infrastructure Contribution Administration Costs	2	Released in full	Not subject to review	
8.	[date]	Proposed Increase to the Total Estimated	2	Released in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Investment of the Establishing Support and Safety Hubs initiative				