

Notice of Decision and Reasons for Decision

Applicant: 'EK6'
Agency: Department of Premier and Cabinet
Decision date: 11 May 2022
Exemptions considered: Sections 25, 28(1)(a), 28(1)(b), 28(1)(c)

Citation: 'EK6' and Department of Premier and Cabinet (*Freedom of Information*) [2022] VICmr 124 (11 May 2022)

FREEDOM OF INFORMATION – cabinet documents – police resources – submissions to cabinet committees and sub-committees

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 documents are exempt from release under sections 28(1)(a), 28(1)(b) and 28(1)(c).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, 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

11 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 - Copies of any proposal/s from [Victoria government agency] to the Victorian Government in the calendar year [year] that contributed to the government decision for a substantial increase in police numbers and resources announced in [date].
 - Copies of communications from calendar year [year] between [named person]] or [their] office and then [Victorian government agency] [named person], about police numbers and the need for more police.
 - Copies of communications from calendar year [year] between [named person] or [their] office and the [named organisation], about police numbers and resources.
 - Copies of any business case that assessed proposal/s for more police and resources developed before the [date] announcement.
 - A copy of the new staff allocation model for police recruitment, based on population and need, and announced by [named person] in [date].
2. The Agency identified six documents falling within the terms of the Applicant's request and refused access to each of documents in full under sections 28(1)(a), 28(1)(b) and 28(1)(c). 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 a copy 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.

Review of exemptions

Section 28(1)(a)

9. The Agency relies on section 28(1)(a) to exempt from release Documents 4, 5 and 6.
10. In relation to Cabinet documents and the exemptions under section 28(1):

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 be regarded as a Cabinet document or because it has some Cabinet "aroma" about it. Rather, for a

document to come within the Cabinet document exemption, “it must fit squarely within one of the four exceptions” in section 28(1) of the Act.¹¹¹ But the language used to describe the exemptions is itself open to different interpretations.¹

11. Section 28(1)(a) exempts a document that is the official record of any deliberation or decision of Cabinet.
12. The former Victorian Administrative Appeals Tribunal has confirmed section 28(1)(a) exempts both the Cabinet’s deliberations and its decisions from production.² Thus, a document that records the Cabinet’s deliberations may be exempt even if it does not record a decision of the Cabinet.
13. I am constrained in the information I can provide in my reasons for decision as to provide more detail would likely disclose exempt information. However, Documents 4, 5 and 6 contain decision extracts from two named subcommittees of the Cabinet. It is evident on the face of the documents they contain official records or deliberations and decisions of the Cabinet.
14. Accordingly, I am satisfied Documents 4, 5 and 6 are exempt from release under section 28(1)(a).

Section 28(1)(b)

15. The Agency relies on section 28(1)(b) to exempt from release Documents 3, 4, 5 and 6.
16. 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.
17. A document will only be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to the Cabinet for its consideration.
18. 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
19. Section 28(1)(b) turns upon the purpose for which a document was created, and it is not necessary to show the document was submitted to the Cabinet.⁴ Nor is it necessary to prove the Cabinet considered the document to satisfy the requirements of section 28(1)(b).⁵
20. As stated by Morris J in *Ryan v Department of Infrastructure*:⁶

It is important to observe that section 28(1)(b) of the Act does not extend to a document merely because the document has been prepared for the purpose of submission to the Cabinet. Rather the purpose of the preparation of the document must be for submission for consideration by the Cabinet. Hence documents will not fall within the exemption in section 28(1)(b) of the Act just because they were prepared with the intention of physically placing them before the Cabinet. Rather it is necessary to ask whether, at the time a document was prepared, the only purpose, or one of the substantial purposes, for the preparation of the document was for the purpose of submission for *consideration* by the Cabinet.

¹ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [33] (per Justice Morris, VCAT President) quoting *Birnbauer v Department of Industry Technology and Resources* [1986] 1 VAR 279.

² *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998).

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

⁴ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34], citing *Asher v Department of Premier and Cabinet* [2002] VCAT 499 at [9]; *Wilson v Department of Premier and Cabinet* [2001] VCAT 663; (2001) 16 VAR 455 at 459.

⁵ *Ibid.*

⁶ [2004] VCAT 2346 at [36].

21. The purpose of the Cabinet briefing must be 'immediately contemplated' when the document is created. The exemption cannot apply merely because the Cabinet ultimately considered an issue.⁷
22. There is evidence Documents 3, 4, 5 and 6 were prepared for submission to two named subcommittees of the Cabinet. I am satisfied the documents were prepared by [named Victorian government agencies], which are agencies for the purpose of the FOI Act.
23. It is clear from the face of the documents, they were prepared for the purpose of submission for consideration by the Cabinet. The documents contain certificates of endorsement from the relevant Minister approving the submissions for endorsement by a committee or sub-committee of the Cabinet.
24. Accordingly, I am satisfied the documents are exempt from release under section 28(1)(b).

Section 28(1)(c)

25. The Agency relies on section 28(1)(c) to exempt from release Documents 1 and 2.
26. Section 28(1)(c) provides a document is an exempt document if it is a copy or a draft of, or contains extracts from, a document referred to in sections 28(1)(a), 28(1)(b) or 28(1)(ba), which provide:
 - (a) the official record of any deliberation or decision of the Cabinet;
 - (b) 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;
 - (ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;
27. A document will be a copy of a Cabinet document if it is a reproduction of a Cabinet document, for example, a photocopy of a Cabinet submission.
28. A draft Cabinet document is a 'preliminary version' of the document. A document is not a draft document simply because it was created before the relevant Cabinet document or because there is information common to both a document and a Cabinet document. The relevant document must be a draft of the actual Cabinet document, and preferably be marked as 'draft' and not documents of 'different kinds prepared by different agencies'.⁸
29. The Agency was requested to provide evidence to support its decision that Documents 1 and 2 are exempt from release under section 28(1)(c).
30. The Agency submits Documents 1 and 2 are draft versions of documents that were eventually submitted to the Cabinet.
31. In relation to Document 1, the Agency advised:
 - The document is a draft business case prepared by [Victorian government agency] for the purpose of submission to a subcommittee of Cabinet as part of the [financial year] Budget process.
 - The document was superseded by the proposal in Document 3. This business case was lodged with the named subcommittee of Cabinet and considered on [date].

⁷ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

⁸ *Asher v Department of Infrastructure* (2006) 25 VAR 143.

32. In relation to Document 2, the Agency advised:

- The document is a draft business case which ultimately formed part of [reference number and title] that was considered by a subcommittee of Cabinet in [date].
- The certificate of endorsement for this submission is signed by the [position title] and dated [date].
- The decision extract for the named subcommittee of Cabinet meeting of [date] also refers to the submission.
- Whilst the document differs from the final version, the titles of the documents are the same and there is similar information in relation to the funding amounts and main initiatives.

33. Having considered the information before me, including additional contextual information provided by the Agency about the final versions of the documents and when they were submitted to the Cabinet for consideration, I am satisfied the documents are drafts of documents prepared for the sole purpose of submission for consideration by the Cabinet.

34. Accordingly, I am satisfied Documents 1 and 2 are exempt from release under section 28(1)(c).

Section 25 – Deletion of exempt or irrelevant information

35. 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.

36. 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

37. I have considered whether it is practicable to provide the Applicant with 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 amount of exempt information to be deleted would render the documents meaningless.

Conclusion

38. On the information before me, I am satisfied the documents are exempt from release under sections 28(1)(a), 28(1)(b) and 28(1)(c).

39. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

40. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

41. 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.¹¹

⁹ *Mickelburgh 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].

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

42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
44. 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.
45. 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

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ 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]	Business Case	30	Refused in full Section 28(1)(c)	Refuse in full Section 28(1)(c)	<p>Section 28(1)(c): I am satisfied this document is exempt from release under section 28(1)(c) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>
2.	[date]	Business case	58	Refused in full Section 28(1)(c)	Refuse in full Section 28(1)(c)	<p>Section 28(1)(c): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>
3.	[date]	Cabinet submission	51	Refused in full Section 28(1)(b)	Refuse in full Section 28(1)(b)	<p>Section 28(1)(b): I am satisfied this document is exempt from release under section 28(1)(b) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: See comments for Document 1.</p>
4.	[date]	Cabinet submission	13	Refused in full Sections 28(1)(a), 28(1)(b)	Refuse in full Sections 28(1)(a), 28(1)(b)	<p>Section 28(1)(a): I am satisfied this document is exempt from release under section 28(1)(a) for the reasons outlined in the Notice of Decision above.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<p>Section 28(1)(b): See comments for Document 3.</p> <p>Section 25: See comments for Document 1.</p>
5.	[date]	Cabinet submission	35	<p>Refused in full</p> <p>Sections 28(1)(a), 28(1)(b)</p>	<p>Refuse in full</p> <p>Sections 28(1)(a), 28(1)(b)</p>	<p>Section 28(1)(a): See comments for Document 4.</p> <p>Section 28(1)(b): See comments for Document 3.</p> <p>Section 25: See comments for Document 1.</p>
6.	[date]	Cabinet submission	71	<p>Refused in full</p> <p>Sections 28(1)(a), 28(1)(b)</p>	<p>Refuse in full</p> <p>Sections 28(1)(a), 28(1)(b)</p>	<p>Section 28(1)(a): See comments for Document 4.</p> <p>Section 28(1)(b): See comments for Document 3.</p> <p>Section 25: See comments for Document 1.</p>