

Notice of Decision and Reasons for Decision

Applicant:	'ET5'
Agency:	Department of Premier and Cabinet
Decision date:	26 August 2022
Exemptions considered:	Sections 28(1)(b), 28(1)(ba), 28(1)(c), 28(1)(d), 30(1)
Citation:	'ET5' and Department of Premier and Cabinet (Freedom of Information) [2022] VICmr 205 (26 August 2022)

FREEDOM OF INFORMATION – Quarterly Assets Investment Reports – document not prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet – document not prepared for the purpose of submission for consideration by the Cabinet – document not a copy or a draft of, or contain extracts from, a Cabinet document – document does not disclose any deliberation or decision of the Cabinet – disclosure would not be contrary to the public interest – disclosure would serve the public interest

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied the document is an exempt document under sections 28(1)(b), 28(1)(ba), 28(1)(c), 28(1)(d) or 30(1).

Accordingly, the document is to be released to the Applicant in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
26 August 2022

Reasons for Decision

Background to review

1. On [date], the Applicant made a freedom of information request to the Agency seeking access to the following documents:

The Department of Premier and Cabinet capital asset quarterly reports for the quarters ending 30 June 2021 and 30 September 2021.

2. The Agency identified one document falling within the terms of the Applicant's request, being the Agency's quarterly assets investment report (**QAIR**) for the quarter ending 30 June 2021. The Agency refused access to the document in full under section 28(1)(ba). At the time of the Applicant's request, no document was located by the Agency in relation to the 30 September 2021 quarter.
3. The Agency's decision sets out its reasons for decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document.
5. This review application is one of ten the Applicant has made to the Information Commissioner in relation to similar decisions made by other agencies to refuse access to QAIRs under various exemptions, including sections 28(1)(b), 28(1)(ba), 28(1)(c) and 30(1). In submissions provided by the Agency to OVIC there is reference to and reliance on information submitted by the Department of Treasury and Finance (**DTF**).
6. DTF has overall responsibility for coordinating QAIRs it receives from Victorian government departments and preparing a submission to a committee of the Cabinet for its consideration in relation to QAIRs on a quarterly basis.
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 examined a copy of the document subject to review.
9. During the review, the Agency was provided with my preliminary view that I was not satisfied the document is exempt from release under section 28(1)(ba). The Agency was given an opportunity to respond to the preliminary view. OVIC staff also requested the Agency provide relevant information or documents to support its decision. For example, a copy of any relevant briefing document prepared for a Minister.
10. In response, the Agency maintained its reliance on section 28(1)(ba) and provided a copy of a DTF [guidance] document [title redacted] which requests agencies, including the Agency, to provide it with asset information on a quarterly basis. This document, which I will refer to as the 'DTF QAIRs guidance document', is detailed below.
11. The Agency also referenced documents provided to OVIC by DTF, being meeting agenda for a sub-committee of the Cabinet (**Cabinet agenda**) and a submission made by DTF to a sub-committee of the Cabinet (**Cabinet submission**). The document subject to review is not attached to the Cabinet submission. Rather, some of the data and information in the Agency's QAIR is included in the Cabinet submission. Although it is not reproduced in full and is formatted differently in the submission.
12. I have considered all communications and submissions received from the parties during the review.

13. 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'.¹ 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.
14. While the Agency relies on section 28(1)(ba) to refuse access to the document only, for completeness and given other current review applications made by the Applicant concern similar documents to which access is refused by other Victorian government departments under various exemptions, I have also considered whether the document is exempt from release under sections 28(1)(b), 28(1)(ba), 28(1)(c), 28(1)(d) and 30(1).

Review of exemptions

Section 28(1) – Cabinet document exemptions

15. Section 28(1) provides:

28 Cabinet documents

- (1) A document is an exempt document if it is—
 - (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;
 - (c) a document that is a copy or draft of, or contains extracts from, a document referred to in paragraph (a), (b) or (ba); or
 - (d) 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.
16. A document will not be exempt document under section 28(1) if it contains purely statistical, technical or scientific material, unless its disclosure would involve the disclosure of any deliberation or decision of the Cabinet.²
17. 'Cabinet' includes a committee or sub-committee of the Cabinet.³
18. In *Ryan v Department of Infrastructure*,⁴ 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" about it. Rather, for a document to come within the Cabinet document exemption, "it must fit squarely within one of the four exceptions [(now five)]" in section 28(1) of the Act.

Does the document contain purely statistical, technical or scientific material?

19. I am satisfied the document contains more than purely statistical, technical or scientific information. While the majority of the information is factual in nature, being actual or budgeted figures, I consider

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

² Section 28(3).

³ Section 28(7).

⁴ [2004] VCAT 2346 at [33].

elements of the report under the heading 'timing', interpreted broadly, constitutes the opinion or advice of Agency officers as to the status of each project.

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

20. 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 an issue to be considered by the Cabinet.
21. A document will be exempt from release under section 28(1)(ba) if the sole or one of the substantial purposes for which it was prepared was to brief a Minister in relation to issues to be considered by the Cabinet.⁵
22. In the absence of direct evidence, the sole or substantial purpose for which a document was created may be determined by examining the use of the document.⁶
23. The Cabinet briefing purpose must be 'immediately contemplated' when the document is created. The exemption will not apply merely because the Cabinet ultimately considered the issue.⁷
24. The word 'briefing' means a 'short accurate summary of the details of a plan or operation.'⁸ The purpose ... is to inform the person being briefed'.⁹ Therefore, the document should have the character of briefing material.¹⁰
25. A document will be of such a 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'.¹¹
26. The phrase, 'issues to be considered by the Cabinet' in section 28(1)(ba), requires that it must be more than just likely the Cabinet will consider the document. There must be an intention or expectation an issue will be considered by the Cabinet, even if it is not ultimately considered. Evidence that a matter was included in a Cabinet agenda will generally meet this requirement.¹²
27. In response to my preliminary view, the Agency submits:

... Victorian Government departments submit quarterly information on the State's capital program contained in the QAIR reports to support DTF in reporting back to the relevant Cabinet Committee on departmental progress in project delivery, including on major project performance.

These reports include detailed information on:

- the status, risk management, and performance of major projects and selected ICT projects;
- the financial performance and project status of the Government's full capital program that is either in development or in delivery; and
- trends and emerging risks in the delivery of the infrastructure investment program.

⁵ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Secretary to the Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

⁶ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

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

⁸ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁹ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *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.

It is clear the sole (or at the very least dominant or substantial purpose) of the QAIR reports, when taken together across Government, is to provide detailed information on projects for Cabinet deliberation. The material in the QAIR reports, when collated, provide Cabinet with information that is essential to DTF's role of exercising an effective and efficient oversight of the State's capital program. DPC contributes to this process by providing its reports for collation.

For example, information extracted from the reports is used for the purpose of enabling DTF to determine what course of action is appropriate or practical in particular circumstances, and to support arguments over relative options to undertake in relation to the operation of the State's capital program.

The creation of data in these QAIR reports is fundamentally driven by DTF's need to provide these sources of information to the relevant Cabinet sub-committee.

Once departments submit their reports, DTF prepares QAIR reports for Cabinet consideration as soon as practicable after the end of each quarter.

28. The DTF QAIRs guidance document advises departments required to submit a QAIR to DTF:

This document outlines the timelines and information requirements for the 2021-22 financial year for major projects and capital program performance reporting.¹³

29. In the 'Background' section to the DTF QAIRs guidance document, it states:

Departments are required to submit quarterly information on asset and major project delivery to support Department of Treasury and Finance (DTF) reporting to Cabinet Committees on departments' performance in project delivery.

DTF uses this information to advise government through the Major Project Performance Report (MPPR) and the Asset Performance Report. This report includes:

- the status of major projects and selected ICT projects;
- departments' performance in delivering Government's capital program; and
- trends in the delivery of Victoria's asset investment program.¹⁴

30. The document is a Microsoft Excel spreadsheet titled, 'Quarterly Asset Investment Report – Individual Project Level' and contains a number of listed government projects with associated budgeted and actual monetary amounts.

31. As discussed above, in order to be satisfied a document is exempt from release under section 28(1)(ba), it must be established that the sole or substantial purpose for which the document was created was 'to brief a Minister in relation to issues to be considered by the Cabinet'.

32. The evidence before me is:

- (a) Having reviewed the document subject to review, I confirm it is not in the nature of a ministerial briefing document.
- (b) The document is marked 'Protected/Cabinet-in-Confidence', although such markings applied by a government department are not determinative for the purpose of satisfying the exemptions under section 28(1).
- (c) The Agency prepared its QAIR at the request of DTF in accordance with the DTF QAIRs guidance document.

¹³ 2021-22 [DTF QAIRs guidance document], page 1.

¹⁴ 2021-22 [DTF QAIRs guidance document], page 2.

- (d) Once DTF receives the Agency's QAIR, it uses the document as a 'source of information' for the purpose of preparing 'QAIR reports for Cabinet consideration as soon as practicable after the end of each quarter'.
 - (e) The Agency 'contributes to this [DTF] process by providing its reports [to DTF] for collation'.
 - (f) The Cabinet meeting agenda includes a relevant agenda item for the purpose of this matter.
 - (g) The Cabinet submission demonstrates that some of the information was transcribed from the Agency's QAIR into a separate Cabinet submission, however it is in a different format and has been edited.
33. There is no information before me, including the description of the QAIR process above, that describes the document was prepared for the purpose of briefing a Minister.
 34. Having considered the requirements of section 28(1)(ba), the document subject to review, the Agency's submission and documents provided to assist me with my review, I am not satisfied the document is exempt from release under section 28(1)(ba).
 35. I accept there is a connection between the QAIR prepared by the Agency for provision to DTF, which is then responsible for preparing 'QAIR reports for Cabinet consideration as soon as practicable after the end of each quarter'. However, the fact the document subject to review was prepared to 'support' the Agency's process of reporting to a sub-committee of the Cabinet and the information be used to 'advise government' is not sufficient to establish the document was created for the sole or substantial purpose of briefing a Minister for the purpose of section 28(1)(ba).
 36. Accordingly, I am not satisfied the document was prepared for the sole or substantial purpose of briefing a Minister in relation to issues to be considered by the Cabinet, and the document is not exempt from release under section 28(1)(ba).
 37. In light of the other current applications before OVIC seeking review of decisions made by other different government departments refusing access to the QAIR of another government department, but under different exemptions, I now consider whether the document is exempt from release under sections 28(1)(b), 28(1)(c) or 28(1)(d).

Section 28(1)(b) – Document prepared for the purpose of submission for consideration by the Cabinet

38. 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.
39. A document will be exempt from release 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. 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.¹⁵
40. A report prepared by an external consultant is a document prepared by an 'agency' for the purposes of section 28(1)(b).¹⁶
41. As well as the information supplied by the Agency and the Department of Treasury and Finance, in conducting this review I have also had regard to *Secretary to the Department of Infrastructure v Louise Asher MP* (the **Asher decision**).¹⁷ That matter dealt with documents similar to those in this

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

¹⁶ See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

¹⁷ [2007] VSCA 272.

review and the Victorian Court of Appeal heard evidence from Agency officers regarding the purpose for which the documents subject to review were created. VCAT determined the documents were not exempt under section 28(1)(b).

42. The documents in the Asher decision are described as ‘quarterly asset performance reports’ which are submitted to the Department of Treasury and Finance at its request.¹⁸ The purpose for requesting the documents is set out in a similar document to that provided to OVIC in this matter, being a memorandum describing the information required, and the purpose for which the request is being made. The purpose in that document is described as:

The departmental quarterly report provides the basis of the Department of Treasury and Finance (DTF):

- (a) Recommendations to the Minister for Finance and Treasurer on the amount of appropriation revenue that could be certified and applied for each department in the quarter based on their reported output performance against targets.
- (b) Reporting to the Expenditure Review Committee (ERC) and Cabinet on the Government’s ownership interest in departments. This includes:
 - implementation of key business strategies and initiatives;
 - progress in major asset investments;
 - occupational health and safety (OH&S) performance;
 - extent to which 2003-04 savings targets are being achieved;
 - financial performance; and
 - identification of budget pressures and emerging risks to future output, asset or financial performance.

...

As the departmental reports form the basis of advice to Cabinet, they must be marked Cabinet-in-Confidence.

...

The advice from departments forms the basis of a quarterly report to the Treasurer and ERC on major issues impacting on departmental performance. The report to the Treasurer aims to assist Government in making timely strategic decisions.¹⁹

43. In relation to the purpose for the preparation of the documents in the Asher decision, the Victorian Court of Appeal observed:

It is clear enough from the evidence, as the Tribunal held with respect to each of the documents, that it was prepared in order to enable the creation of another and quite separate document and it was the latter that was to be submitted for Cabinet consideration. The initial reports were to be used by [the Agency] in the preparation of the actual submission. They could have been incorporated in whole or part, or edited, recast, reformatted or reworded.²⁰

None of the documents in issue were directed to be prepared in the expectation that they would themselves necessarily be submitted to Cabinet. At most, they were to be included in or annexed to another document that was to provide the framework for possible Cabinet consideration of the progress, developments and issues described or detected. As it transpired, almost all of the content of five of the reports was set out ‘verbatim’, but reformatted and edited into a ‘seamless’ document to which was added DTF analysis and advice. It is reasonable to assume that it was this advice and analysis of the data and issues contained in the reports, that constituted the core of the ‘whole of Government’ submission and was contemplated would form the basis of their deliberations and, as Mr Monforte put it, ‘assist Government in making timely decisions’.²¹

¹⁸ Ibid at [16].

¹⁹ Ibid at [19].

²⁰ Ibid at [36].

²¹ Ibid at [37].

44. Importantly, the test for whether a document is exempt from release under section 28(1)(b) was described as follows:

Bearing in mind that the Freedom of Information Act has been accepted as remedial legislation designed to assist in ensuring open and accountable government, I am unpersuaded that the words in s 28(1)(b) should be attributed with anything other than their ordinary meanings and consider that they were intended to confine exemption from disclosure to the particular documents which it was contemplated would be placed before Cabinet for their consideration. Preliminary or preparatory material, not constituting a draft or copy, would accordingly not be encompassed [footnote redacted].²²

45. I am satisfied the document is not exempt from release under section 28(1)(b) for the following reasons:
- (a) As described above, 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.
 - (b) It is necessary to consider the purpose for which the document was created, not the use to which the document was put.
 - (c) For section 28(1)(b) to apply, the actual document must have been prepared for the purpose of submission to the Cabinet. The document subject to review was not prepared this purpose. On the information before me, it was created to enable DTF to create another and separate document and that was to be submitted for consideration by the Cabinet.
46. Accordingly, I am not satisfied the document was prepared for the purpose of submission for consideration by the Cabinet, and the document is not exempt from release under section 28(1)(b).

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

47. 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).
48. A document will be a copy if it is a reproduction of the document, for example a photocopy.
49. 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 submissions or because there is information common to both sets of documents. It should be the actual document, preferably marked as draft and not documents of ‘different kinds prepared by different agencies’.
50. In relation to an extract from a Cabinet document, a document will usually contain a reproduction of part of the text or material from a Cabinet document such as a quote, paraphrase, or summary. Simply referring to a Cabinet document is not sufficient.²³
51. In *Smith v Department of Sustainability and Environment*,²⁴ Justice Morris earlier held:

There was another claim for exemption advanced that I will briefly comment on. This was a claim under section 28(1)(c) of the Act. The respondent submitted that the KPMG report (dated March 2003) contained “extracts from” the Cabinet submission dated 7 May 2003. Clearly the Cabinet submission dated 7 May 2003 is a document that was prepared by a minister for the purpose of submission for consideration by Cabinet. However I cannot accept the argument that the KPMG Report contains “extracts from” that Cabinet submission. It is true that the Cabinet submission contains passages which are identical to passages in the KPMG Report. I would characterise the

²² Ibid at [40].

²³ *Mildenhall v DoE* (unreported, VCAT, Glover M, 16 April 1999).

²⁴ (General) [2006] VCAT 1228 at [28].

Cabinet submission as containing “extracts from” the KPMG Report. However I cannot accept the argument that the reverse would apply, as the KPMG Report was a predecessor in time of the Cabinet submission. Notwithstanding what might have been said by Deputy President Macnamara in *Mildenhall No (2)*,^[3] I would doubt that the expression “extracts from” could operate so as to apply to a document that was a predecessor of the document that was referred to in paragraphs (a), (b) or (ba) of section 28(1).^[4]

52. I am not satisfied the document is exempt under section 28(1)(c) for the following reasons:
- (a) it is not a copy of a document referred to in either sections 28(1)(a), 28(1)(b) or 28(1)(ba);
 - (b) the document is not a draft of a document described in 28(1)(a), 28(1)(b) or 28(1)(ba), rather it contains finalised figures provided to DTF for reporting purposes;
 - (c) the document is not an extract from a document referred to in sections 28(1)(a), 28(1)(b) or 28(1)(ba), as it was created prior to the Cabinet submission referred to above. Rather it contains information that was ultimately included in a document to which section 28(1)(b) may have applied.
53. Accordingly, I am not satisfied the document is a copy or a draft of, nor does it contain extracts from, a document referred to in sections 28(1)(a), 28(1)(b) or 28(1)(ba), and the document is not exempt from release under section 28(1)(c).

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

54. Section 28(1)(d) provides a document is an exempt document if 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.
55. A document will be exempt from release under section 28(1)(d) if there is evidence the Cabinet discussed various options in the document and deliberated upon and/or adopted on or more of the options for its consideration.²⁵
56. 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.²⁶
57. 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.²⁷
58. As described above, the document subject to review is the same or similar to those the subject of the Asher decision. In that matter, the term ‘deliberation’ is described as follows:

The question is whether the word ‘deliberation’ in s 28(1)(d) includes a topic on which Cabinet deliberates or is limited to the manner in which Cabinet deals with a topic. The appellant would have it that every document placed before the Cabinet is exempt.²⁸

...

... The word is coupled with ‘decision’, that is, with an action taken by Cabinet with respect to a subject matter. Similarly, I think ‘deliberation’ refers to Cabinet’s treatment of a subject matter.²⁹

...

That is not to say that a document supplied to Cabinet for its consideration could never be exempt as disclosing a deliberation of Cabinet. It all depends upon the terms of the document. At one end of the

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

²⁶ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

²⁷ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

²⁸ [2007] VSCA 272 at [5].

²⁹ *Ibid* at [6].

spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or may advance an argument for a particular point of view. The former would say nothing as to Cabinet's deliberations; the latter might say a great deal. In my view, in the present case the reports were in the former, rather than the latter, category. The reports revealed information about the performance and requirements of government departments, but said nothing about the deliberations of Cabinet.³⁰

59. The document contains a list of projects and their budgeted costs as well as other information about those projects. As such, the document presents information that, according to the Agency, 'support[s] DTF' in preparing a separate document that is submitted to the Cabinet 'on departmental progress in project delivery, including on major project performance'. As such, the disclosure of the Agency's QAIR report would not involve the disclosure of any deliberation or decision of the Cabinet, rather it discloses only brief, factual information provided to the Cabinet. As described above, this is not sufficient to meet the requirements of section 28(1)(d).
60. Accordingly, I am not satisfied disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet, and the document is not exempt from release under section 28(1)(d).

Section 30(1) – Internal working documents

61. 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;
 - (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.
62. The exemption does not apply to purely factual material in a document.³¹

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?

63. 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.
64. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether disclosure of a document would disclose matter of that nature.³²
65. While information in the document is primarily factual, taken broadly, I consider it could also contain advice or recommendations where it relates to the timing or status of a project.

³⁰ Ibid at [8].

³¹ Section 30(3).

³² *Mildenhall v Department of Education* (1998) 14 VAR 87.

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?

66. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³³

67. In *Re Waterford and Department of Treasury (No.2)*,³⁴ 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.

68. I am satisfied the document was prepared in the course of the deliberative processes of the Agency, that of part of compulsory reporting on the status of certain projects.

Would disclosure of the document be contrary to the public interest?

69. In determining if disclosure of a document would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have given weight to the following relevant factors:³⁵

- (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 of 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;
- (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.

³³ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

³⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

³⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

70. VCAT has found that a reasonably proximate relationship of a document to the Cabinet process may support section 30(1) applying to a document.³⁶
71. In this case, I have determined disclosure of the Agency's QAIR report would not be contrary to the public interest for the following reasons:
- (a) For the most part, the document contains factual information prepared by the Agency about 'departmental progress in project delivery, including on major project performance'.
 - (b) While I accept certain information or parts of the document were included in a separate document that was submitted to the Cabinet, the disclosure of this document would not involve the disclosure of any deliberation or decision of the Cabinet, nor would objectively interfere or undermine the Cabinet process.
 - (c) I do not consider the information is particularly sensitive from the public's perspective. It relates to quarterly reporting by the Agency on project delivery progress, estimated and actual budgeted costs, and the expenditure of public funds.
 - (d) As the document is part of a reporting process coordinated by DTF, I do not consider its disclosure would have any detrimental effect on that process, which allows oversight by the Cabinet of 'departmental progress in project delivery, including on major project performance'. In the same way the Victorian Auditor-General undertakes audits of major government projects, such independent oversight contributes to strengthening agency processes and performance with a view to improving the performance of agencies in the way in which they carry out their functions and implement the policies and programs of the government of the day.
 - (e) The document contains information in its final form as it was submitted to DTF. It provides a progress report at a particular point in time and, given it is prepared with a view to being included in a document to be provided to the Cabinet, should be taken as containing considered and accurate information.
 - (f) While the Agency relies on a number of public interest factors in favour of non-disclosure, it did not present any public interest factors in favour of release. Factors in favour of disclosure and non-disclosure both need to be considered.
 - (g) In this case, there is a strong public interest in disclosure of the financial performance and progress of Agency major projects, including actual costs against budgeted expenditure of public funds. The disclosure of such information is in the public interest as it provides for greater transparency and accountability in the progress and performance of government projects. While I acknowledge agencies and government may be hesitant for such information to be publicly disclosed, I consider that the disclosure of such information falls squarely within the scope of information the Victorian Parliament intends be made available and released under the FOI Act. I consider it also meets the expectations of the Victorian public that a democratically elected government will be open, transparent and accountable.
 - (h) In short, I am not satisfied refusal of the document under the FOI Act is necessary to protect an essential public interest, rather its disclosure is necessary to serve an essential public interest in building public trust through increased openness, transparency and accountability.

³⁶ *Herington v Department of Transport Planning & Local Infrastructure* [2014] VCAT 1026 at [52], [62] and [74]; *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39 at [68]. See also *Department of Premier & Cabinet v Birrell* (No 2) [1990] VR 51 at 56; *Evans v Ministry for the Arts* (1986) 1 VAR 315 at 322, *Davis v Department of Transport (Review and Regulation)* [2022] VCAT 721 at [54]-[56].

72. Accordingly, I am not satisfied disclosure of the document would be contrary to the public interest, and the document is not exempt from release under section 30(1).

Conclusion

73. On the information before me, I am not satisfied the document is exempt from release under sections 28(1)(b), 28(1)(ba), 28(1)(c), 28(1)(d) or 30(1). Therefore, the document is to be released in full to the Applicant.

Review rights

74. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.³⁷
75. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.³⁸
76. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.³⁹
77. 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.
78. 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.⁴⁰

When this decision takes effect

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

³⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

³⁸ Section 52(5).

³⁹ Section 52(9).

⁴⁰ Sections 50(3F) and 50(3FA).