

Notice of Decision and Reasons for Decision

Applicant: 'ES4'
Agency: Department of Jobs, Precincts and Regions
Decision date: 10 August 2022
Exemptions considered: Sections 28(1)(b), 28(1)(ba), 30(1)
Citation: 'ES4' and Department of Jobs, Precincts and Regions (Freedom of Information) [2022] VICmr 195 (10 August 2022)

FREEDOM OF INFORMATION – Ministerial briefs – Ministerial briefings – Minister for Local Government
Cabinet documents – internal working documents – disclosure not contrary to 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 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 in the documents is exempt from release under sections 28(1)(b) and 28(1)(ba). However, I am not satisfied information is exempt from release under section 30(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the documents is granted in part.

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
10 August 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following ministerial briefing documents prepared by the Agency for the former Minister for Local Government:
 1. BMIN-2-21-9464 Minister's meeting with Mornington Peninsula Council, 14/01/2021
 2. BMIN-2-21-9828 COVIDSafe Business Fund Stream 4 – Local Councils Supporting Culturally and Linguistically Diverse (CALD) Networks, 1/02/2021
 3. BMIN-2-21-10133 COVID Relief Program, 15/02/2021
 4. BMIN-2-21-11068 Royal Commission into National Natural Disaster Arrangements, 19/03/2021.
2. During the handling of their FOI request, the Applicant advised the Agency they do not seek access to the names or contact details of non-executive Agency staff, or the contact details of executive Agency staff.
3. The Agency identified four documents falling within the terms of the Applicant's request and granted access to two documents in full and refused access to two documents in part under sections 28(1)(b), 28(1)(ba) and 28(1)(c). 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. Following consultation with OVIC staff, the Agency agreed to release further information in Document 2 and advised it no longer sought to rely on section 28(1)(ba) and 28(1)(c) in relation to Document 2. Accordingly, that information is to be released to the Applicant following my review.
6. The Agency also advised that it seeks to rely on section 30(1) in relation to certain information in Document 2.
7. I have examined a copy of the two documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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.
12. 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

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

my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Review of exemptions

Section 28(1) – Cabinet documents

13. In *Ryan v Department of Infrastructure*,² 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.

14. Section 28(3) provides a document will not be exempt under section 28 (1) to the extent it contains purely statistical, technical or scientific material, unless disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.
15. From my review of the documents, I am satisfied they do not contain purely statistical, technical or scientific material.
16. ‘Cabinet’ includes a committee or sub-committee of Cabinet.³

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

17. A document will 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.⁴
19. The Victorian Civil and Administrative Tribunal (**VCAT**) has held 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.⁵ Nor is it necessary to prove the Cabinet considered the document to satisfy the requirements of section 28(1)(b).⁶
20. In *Ryan v Department of Infrastructure*, former VCAT President Justice Morris held:⁷

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.

² [2004] VCAT 2346 at [33].

³ Section 28(7).

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

⁵ *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.

⁶ *Ibid.*

⁷ [2004] VCAT 2346 at [36].

21. The purpose of briefing the Cabinet must be ‘immediately contemplated’ when a document is created. The exemption will not apply merely because the Cabinet ultimately considered an issue.⁸
22. The Agency relied on section 28(1)(b) to refuse access to attachments to Document 4. Having reviewed this document, it is clear from its contents that these attachments were prepared for the purpose of being submitted to a sub-committee of the Cabinet at a future date.
23. Accordingly, I am satisfied certain information in Document 4 is exempt from release under section 28(1)(b).
24. My decision in relation to section 28(1)(b) is set out in the Schedule of Documents in **Annexure 1**.

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

25. Section 28(1)(ba) provides a document is exempt from release if it was prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
26. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which the document was prepared was to brief a Minister in relation to an issue to be considered by the Cabinet.⁹ In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to Cabinet.¹⁰
27. The Cabinet briefing purpose must be ‘immediately contemplated’ when the document is created. The exemption cannot apply merely because Cabinet ultimately considered the issue.¹¹
28. 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.
29. 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’. It requires more than having ‘placed a document before a Minister’.¹²
30. The term ‘issues to be considered by the Cabinet’ within the meaning of section 28(1)(ba), requires that a document must be more than just ‘likely’ to be considered by the Cabinet. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if not ultimately considered. Evidence that a matter was included on the Agenda for a Cabinet meeting will generally meet this test.¹³
31. It is evident on the face of Document 4 that it was prepared for the purpose of briefing a Minister.
32. The Agency submits:

Document 4 is a brief to the Minister for Local Government regarding the Royal Commission into National Natural Disaster Arrangement...

⁸ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

⁹ *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].

¹⁰ *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

¹¹ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

¹² *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

¹³ *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 was seeking the Ministers approval of the policy positions and for subsequent consideration by the [Cabinet Committee] in [date]...

... the purpose and intention behind the creation of the briefing was to brief that Minister regarding the issues to be considered by Cabinet.

33. Having considered the information before me, including the information provided by the Agency, I am satisfied Document 4 was prepared for the purpose of briefing a Minister in relation to issues that were considered by a sub-committee of the Cabinet.
34. Accordingly, I am satisfied certain information in Document 4 is exempt from release under section 28(1)(ba).
35. My decision in relation to section 28(1)(ba) is outlined in the Schedule of Documents in **Annexure 1**.

Section 30(1) – Internal working documents

36. As noted above, the Agency relies on section 30(1) to refuse access to certain information in Document 2.
37. 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.
38. The exemption does not apply to purely factual material in a document.¹⁴

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?

39. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.¹⁵
40. Considered broadly, I am satisfied the document contains information in the nature of opinion, advice and recommendations prepared by Agency officers.

Was the document made in the course of, or for the purpose of, the deliberative process involved in the functions of an agency or Minister or of the government

41. 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.¹⁶
42. In *Re Waterford and Department of Treasury (No.2)*,¹⁷ the former Victorian Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or

¹⁴ Section 30(3).

¹⁵ *Mildenhall v Department of Education* (1998) 14 VAR 87.

¹⁶ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

¹⁷ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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.

43. I am satisfied the relevant information was provided in the course of the Agency's deliberative processes in relation to the funding of businesses in response to the COVID-19 pandemic.

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

44. In determining if disclosure of the documents 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:¹⁸
- (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (b) the right of every person to gain access to documents under the FOI Act;
 - (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.
45. On the information before me, I am not satisfied disclosure of the document would be contrary to the public interest for the following reasons:
- (a) I do not consider the information regarding the expenditure of public funds is sensitive given there is already publicly available information regarding government assistance provided to businesses and organisations in response to the COVID-19 pandemic.
 - (b) I acknowledge the Agency's submission that the amount of public funding referenced in the document may be inaccurate. However, I consider the Agency could address this issue by providing details of the correct amount of funding to avoid any confusion in relation to funding. I understand the Agency has already prepared some information to provide to the Applicant that explains any errors regarding funding amounts. In my view, it is clear the funding amounts recorded may have changed over time.

¹⁸ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (c) There is a public interest in the community being better informed about the expenditure of public funds and government decision making processes. By providing access to information that demonstrates the basis upon which decisions are made, disclosure of documents like this builds the community's trust in government and its decision making processes.
- (d) I am not satisfied disclosure of the relevant information would negatively impact upon the nature or quality of advice and recommendations prepared by Agency officers in the future. I note the views of the Victorian Civil and Administrative Tribunal (VCAT) in *Graze v Commissioner for State Revenue*,¹⁹ which observed the possibility of public scrutiny in some circumstances provides for better administrative decision making. In any case, Agency officers are responsible for ensuring advice provided to agencies, ministers and the government is accurate, properly considered and impartial regardless of whether such information is intended to be publicly released.
- (e) Concerns regarding the reputation of an agency are, in my view, not relevant in considering whether disclosure would be contrary to the public interest. Nor would any such consideration outweigh the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative processes.

46. Accordingly, I am satisfied disclosure of the relevant information in Document 2 would not be contrary to the public interest and is not exempt from release under section 30(1).

47. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

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

48. Where I am satisfied information in a document is exempt from release under section 28(1)(ba), it is not necessary for me to also consider the application of section 28(1)(c).

Section 25 – Deletion of exempt or irrelevant information

49. 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.

50. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²⁰ 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 25.²¹

51. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

52. I am satisfied certain information in the documents is exempt from release under sections 28(1)(b) and 28(1)(ba). However, I am not satisfied information is exempt from release under section 30(1).

¹⁹ [2013] VCAT 869 at [25]-[27].

²⁰ *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].

²¹ *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].

53. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the documents is granted in part.
54. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

55. 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.²²
56. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²³
57. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁴
58. 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.
59. 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.²⁵

When this decision takes effect

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

²² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²³ Section 52(5).

²⁴ Section 52(9).

²⁵ 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.	Undated	Ministerial Brief	4	Released in full	Not subject to review	
2.	Undated	Ministerial Brief	20	Release in part Sections 28(1)(ba), 28(1)(c)	Release in part Section 25 The document is to be released with irrelevant information deleted in accordance with section 25.	<p>Section 28(1)(ba) and 28(1)(c): During the review, the Agency advised it no longer relies on sections 28(1)(ba) and 28(1)(c) to refuse access to the document. While the Agency agreed to release certain information in the document, it seeks to rely on section 30(1) to refuse access to other information.</p> <p>Section 30(1): For the reasons outlined in the Notice of Decision above, I am not satisfied the relevant information in the document is exempt from release under section 30(1).</p> <p>Section 25: I am satisfied the information the Agency deleted in the document, being Agency staff names and telephone numbers, is irrelevant to the terms of the Applicant's request as they are not sought by the Applicant.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of the</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						document with irrelevant information deleted in accordance with section 25.
3.	Undated	Ministerial Brief	10	Released in full	Not subject to review	
4.	Undated	Ministerial Brief	11	Release in part Sections 28(1)(b), 28(1)(ba), 28(1)(c)	Release in part Sections 28(1)(b), 28(1)(ba), 25 The document is to be released with exempt and irrelevant information deleted in accordance with section 25.	Section 28(1)(b): For the reasons outlined in the Notice of Decision above, I am satisfied the information to which the Agency refused access is exempt from release under section 28(1)(b). Section 28(1)(ba): For the reasons outlined in the Notice of Decision above, I am satisfied the information to which the Agency refused access is exempt from release under section 28(1)(ba). Section 25: See comments for Document 2.