

## Notice of Decision and Reasons for Decision

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Applicant:	'EV5'
Agency:	Department of Health
Decision date:	19 September 2022
Exemptions and provision considered:	Sections 28(1)(b), 28(1)(ba), 28(1)(c), 30(1), 33(1), 25
Citation:	'EV5' and Department of Health (Freedom of Information) [2022] VICmr 223 (19 September 2022)

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FREEDOM OF INFORMATION – organisation reform – review of agency role and functions – documents prepared by external consultant – Program Plan – organisational restructure – Office of the Chief Health Officer

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.

While I am satisfied Document 9 is exempt from release under section 28(1)(b), I am not satisfied other documents subject to review are exempt from release under sections 28(1)(ba), 28(1)(c) or 30(1).

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

19 September 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - The report of a review on the Chief Health Officer's role and function conducted in or about [year] by [business undertaking].
  - The report of a review into implementation of the Chief Health Officer, conducted by [business undertaking], in or about [date range].
  - The report of a review into the Office of the Chief Health Officer, conducted by [business undertaking] in or about [year].
  - Decisions and action taken as a result of these reviews and reports.

These documents are all referred to in the relevant Annual Reports of the Department of Health and Human Services, under lists of consultancies.
2. The Agency identified eight documents falling within the terms of the Applicant's request and refused access to five documents in part and three documents in full under sections 28(1)(ba), 28(1)(c), 30(1) and 33(1). 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. In their review application, the Applicant advised they do not seek review of the information to which the Agency refused access under section 33(1). Accordingly, this information is irrelevant information for the purpose of section 25 and is to remain deleted.
5. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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.
10. 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'.<sup>1</sup> 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.

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

## Agency document search

11. On [date], OVIC staff provided my preliminary view to the Agency that additional documents were likely in the Agency's possession that would fall within the scope of point 4 of the Applicant's request. The Agency was invited to provide a submission in response to the preliminary view.
12. On [date], the Agency disagreed with the preliminary view, as it considered OVIC's interpretation of the scope of point 4 of the Applicant's request was unreasonable and disproportionate, and the Agency's interpretation of the request is in line with the objects of the FOI Act.
13. On [date], OVIC staff advised the Agency that my preliminary view remains that further documents that fall within the terms of point 4 of the Applicant's request are likely to be in the Agency's possession. The Agency was provided with examples of what categories of documents were expected to fall within the terms of the request and was advised that the Public Access Deputy Commissioner proposed to issue a notice under section 49KA(2)(b) to require the Agency to undertake further document searches. The Agency was encouraged to conduct further documents searches without the need to issue a notice.
14. In response, the Agency made further document searches and located one additional document, being a budget proposal. The Agency provided a submission detailing its additional document searches following receipt of the preliminary view. On the information before me, I am satisfied the Agency has now conducted a thorough and diligent document search.
15. Accordingly, I will consider the additional relevant document located by the Agency (**Document 9**), which it submits is exempt in full under sections 28(1)(b) and 28(1)(ba).

## Review of exemptions

16. The documents subject to review concern external reviews of the functioning and resourcing of the Office of the Chief Health Officer that were conducted on behalf of the Agency in [year].
17. A review was undertaken, firstly by [business undertaking], and subsequently by [business undertaking], to identify the resources and capability of the Office of the Chief Health Officer with a view to strengthening processes for ensuring health information provided to the public is transparent, accessible, reliable and appropriate.

## Section 28(1) – Cabinet documents

18. Section on 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.

19. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of the Cabinet.
20. In *Ryan v Department of Infrastructure*,<sup>2</sup> 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.

*Do the documents contain purely statistical, technical or scientific material?*

21. In determining whether the exemptions in section 28(1) would apply, section 28(3) provides a document will not be an exempt document under subsection (1) to the extent it contains purely statistical, technical or scientific material unless its disclosure would involve the deliberation or a decision of the Cabinet.
22. I am satisfied they do not contain purely statistical, technical or scientific material.

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

23. The Agency refused access to Document 9 under section 28(1)(b).
24. Section 28(1)(b) provides a document is exempt from release if it was prepared by a Minister or on their behalf or by an agency for the purpose of submission for consideration by the Cabinet.
25. The sole purpose, or one of the substantial purposes, for which a document was prepared must have been for submission to the Cabinet for its consideration. The exemption cannot apply merely because the Cabinet ultimately considered an issue.<sup>3</sup>
26. In the absence of direct or objective 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.<sup>4</sup> However, it is not necessary to show the document was submitted to the Cabinet.<sup>5</sup> Nor is it necessary to prove Cabinet considered the document to satisfy the requirements of section 28(1)(b).<sup>6</sup>
27. As stated by Morris J in *Ryan v Department of Infrastructure*:<sup>7</sup>

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.

28. A report prepared by an external consultant is a document prepared by an agency for the purpose of section 28(1)(b).<sup>8</sup>

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<sup>2</sup> [2004] VCAT 2346 at [33].

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

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

<sup>5</sup> *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.

<sup>6</sup> *Ibid.*

<sup>7</sup> [2004] VCAT 2346 at [36].

<sup>8</sup> See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16].

29. In relation to Document 9, the Agency submits:

The budget proposal is an integral part of the budget cycle process. As per the Department of Treasury and Finance's website ('DTF'); (please see), budget proposals are considered by Ministers before submitting them to the Expenditure Review Subcommittee. Section 28(7) states that the reference to Cabinet includes a committee or subcommittee of Cabinet.

Therefore, the nature of the budget proposal document itself, lends weight to the submission that it has been prepared for the purpose of submission for consideration by Cabinet; just as the fact that a document is prepared as a Cabinet submission, supports the finding that it has been prepared for the purpose of submission to Cabinet. I note that as per *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34], it is not necessary to prove Cabinet considered the document not that Cabinet actually considered the proposal.

30. Having considered the content and purpose of Document 9, I am satisfied it was prepared for the sole purpose of submission for consideration by the Cabinet as part of a State budget process.

31. Accordingly, I am satisfied Document 9 is exempt from release under section 28(1)(b).

32. My decision in relation to section 28(1)(b) is outlined 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***

33. The Agency refused access to Documents 1 and 2, and 8 and 9 under section 28(1)(ba).

34. As I am satisfied Document 9 is exempt from release under section 28(1)(b), it is not necessary to also consider the application of section 28(1)(ba) to this document.

35. 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.

36. Therefore, a document will be exempt from release 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.<sup>9</sup>

37. The purpose and scope of section 28(1)(ba) was considered by Morris J in *Ryan v Department of Infrastructure*, and can be summarised as follows:

- (a) the purpose for which the document must be prepared, to be an exempt document, is the purpose of 'briefing' a Minister in relation to issues to be considered by the Cabinet;
- (b) it is necessary that the document was prepared for the purpose of briefing a Minister;
- (c) briefing a Minister means much more than creation for the purpose of placing a document before a Minister;
- (d) 'briefing' means 'a short, accurate summary of the details of a plan or operation';
- (e) the exemption should be limited to documents that have the character of briefing material, for example, those that contain 'information or advice and is prepared for the purpose of being read by, or explained to, a minister'; and

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<sup>9</sup> *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].

(f) a document will not have the character of briefing material merely because it was prepared with the intention of placing the document before a Minister.<sup>10</sup>

38. The phrase 'issues to be considered by the Cabinet' requires that it must be more than just 'likely' the Cabinet will consider the document. There must be an intention or expectation the relevant document will be considered by the Cabinet, even if it was not ultimately considered. Evidence that an issue was included on a Cabinet meeting agenda will meet this test.<sup>11</sup> The exemption will not apply merely because the Cabinet ultimately considered the issue.<sup>12</sup>
39. The Agency submits the [business undertaking] and [business undertaking] reports (Documents 1, 2 and 8) are exempt from release in full under section 28(1)(ba) as the documents informed a budget submission that was prepared for the Cabinet.
40. On [date], OVIC staff provided the Agency with my preliminary view that the requirements for section 28(1)(ba) were not met in relation to Documents 1, 2 and 8 as there was no objective evidence the issues to which the reports relate were to be considered by the Cabinet at the time the reports were prepared. The Agency was invited to provide a further submission setting out objective evidence to address this view.
41. In response, the Agency maintained its view the [business undertaking] and [business undertaking] reports were prepared for the Minister for Health, for a budget bid considered by the Cabinet at the time. The Agency also noted that Document 3A states the report was used as a business case supporting a budget submission endorsed by the Minister.
42. On [date], OVIC staff provided the Agency with my further view that the purpose of the [business undertaking] and [business undertaking] reports was to provide the Minister, Agency, its Secretary and relevant staff with the findings and recommendations arising from the reviews. Further, that any budget submission would be part of a subsequent and further process that would arise only after the reports' recommendations were made, considered and adopted.
43. In other words, it was unlikely the Deputy Commissioner would be able to be satisfied the budget submission was contemplated *prior* to the Minister, Agency, its Secretary and relevant staff knowing what the outcome of the reviews would be, or to infer the [business undertaking] and [business undertaking] reports would be used as part of a business case for a budget bid at the time the reports were prepared. The Agency was invited to provide further information in support of its reliance on section 28(1)(ba) or to make a fresh decision on the request.
44. No further information was submitted by the Agency to OVIC, with the exception of Document 9, which it located following further document searches, as discussed above. Document 9 is an undated budget funding proposal to which Documents 1, 2 and 8 were attached.
45. While I accept the Cabinet may have considered the issues the subject of Documents 1, 2 and 8, in the absence of any objective evidence that at the time Documents 1 and 2, and 8 were prepared it was intended the Cabinet would do so, I am unable to be satisfied the requirements for section 28(1)(ba) are met.
46. Accordingly, I am not satisfied Documents 1, 2 and 8 are exempt from release under section 28(1)(ba).

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<sup>10</sup> *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

<sup>11</sup> *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.

<sup>12</sup> *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

47. My decision in relation to section 28(1)(ba) is outlined in the Schedule of Documents in **Annexure 1**.

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

48. The Agency refused access to Documents 3A, 4, 5 and 7 under section 28(1)(ba).

49. Section 28(1)(c) provides a document is an exempt document if it is a document that 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).

50. A document will be a copy if it is a reproduction of the document, for example a photocopy.

51. 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 to satisfy the requirement for section 28(1)(c).<sup>13</sup>

52. In relation to whether a document contains an extract from a Cabinet document for the purposes of section 28(1)(c), Morris J held in *Honeywood v Department of Human Services*:<sup>14</sup>

The question of whether a document contains extracts from a Cabinet submission has not been authoritatively determined. In *Smith v Department of Sustainability and Environment*<sup>[2]</sup> I commented that it would appear that a document cannot “contain extracts from” a Cabinet document if it was created before the preparation of the Cabinet document. In *Mildenhall v Department of Education*<sup>[3]</sup> it was suggested that a document will “contain extracts from” a Cabinet document if it contains a quotation or paraphrase of that document. Commonly a document that is an extract from another document will contain an attribution to the other document, but I accept that the absence of an attribution will not be fatal. The question will need to be determined by reference to all the evidence. In particular, the absence of an attribution will not be fatal where there is direct evidence before the tribunal of a process of extracting content from a Cabinet submission to be included in a document which is claimed to be exempt under section 28(1)(c) of the Act.

53. In *Smith v Department of Sustainability and Environment*,<sup>15</sup> Morris J 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 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)*,<sup>[3]</sup> 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).<sup>[4]</sup>

54. The Agency submits:

This section has been applied to attachments that contain extracts from the review report prepared by [business undertaking], as these extracts would reveal the content of information submitted to a committee of Cabinet for the purposes of its deliberations or the deliberations and decisions of Cabinet.

55. Having reviewed the documents, I am satisfied information in Documents 3A, 4, 5 and 7 contains extracts from Documents 1 and 2. However, as I am not satisfied Documents 1 or 2 are exempt from

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<sup>13</sup> *Mildenhall v DoE* (unreported, VCAT, Glover M, 16 April 1999).

<sup>14</sup> (General) [2006] VCAT 2048 at [19].

<sup>15</sup> (General) [2006] VCAT 1228 at [28].

release under section 28(1)(ba), I am unable to be satisfied the extracts from Documents 1 and 2 are exempt from release under section 28(1)(c).

56. My decision in relation to section 28(1)(c) is outlined in the Schedule of Documents in **Annexure 1**.

**Section 30(1) – Internal working documents**

57. The Agency refused access to Documents 3A, 5 and 6 under section 30(1).

58. 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.

59. The exemption does not apply to purely factual material in a document.<sup>16</sup>

*Do the documents 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?*

60. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of an agency, a member of an agency’s staff, and any person employed by or on behalf of an agency, whether or not the person is subject to the *Public Administration Act 2004* (Vic).

61. 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.

62. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>17</sup>

63. I am satisfied documents that were created for the Agency by external consultants that are each an officer of the Agency for the purpose of section 30(1).

64. I am also satisfied the documents contain information in the nature of opinion, advice and recommendation prepared by Agency officers or consultation between Agency officers.

*Were the documents 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?*

65. 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.<sup>18</sup>

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<sup>16</sup> Section 30(3).

<sup>17</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>18</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.



66. In *Re Waterford and Department of Treasury (No.2)*,<sup>19</sup> 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.

67. I am satisfied the documents were made in the course of, or for the purpose of, the deliberative processes of the Agency in conducting a review of the Office of the Chief Health Officer.

*Would disclosure of the documents be contrary to the public interest?*

68. In determining if release 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:<sup>20</sup>

- (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.

69. The Agency’s decision letter states that disclosure of the information would be contrary to the public interest as:

It is considered that the release of the material would be contrary to the public interest given the relationship between recommendations and final actions taken and the release of the material could lead to ill-informed debate among the public.

70. On the information before me, I am not satisfied disclosure of the opinion, advice and recommendations in the documents would be contrary to the public interest for the following reasons:

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<sup>19</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>20</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (a) I acknowledge the documents may have been considered to contain sensitive information at the time of they were created. However, given the passage of time since the documents were created in [year], and noting legislative changes made to the powers of Chief Health Officer arising from the COVID-19 pandemic,<sup>21</sup> I am of the view the sensitivity of information in the documents has decreased in the intervening five years.
- (b) A significant amount of information in the documents has been released by the Agency to the Applicant. Based on the information already released, I consider the disclosure of the remaining information would not be contrary to the public interest.
- (c) While I acknowledge the information exempted from release by the Agency reflects preliminary considerations and recommendations following the [business undertaking] and [business undertaking] reviews, I am not persuaded disclosure of the options considered at a particular point in time would be likely to misinform or confuse the public or ‘could lead to ill-informed debate among the public’. In my view, this underestimates the capacity of the public to be informed about and understand advice received and decisions made by government. Nevertheless, it is open to the Agency to release the documents with any necessary additional information explaining the basis of any decisions made to eliminate or minimise any potential for confusion or misunderstanding concerning the documents, should this be required.
- (d) I am not satisfied disclosure of the relevant information in the documents would negatively impact upon the nature or quality of advice and recommendations prepared by Agency officers for future or similar projects. I note the views of VCAT in *Graze v Commissioner for State Revenue*,<sup>22</sup> which observed the possibility of public scrutiny in some circumstances would provide for better administrative decision making.
- (e) While I appreciate there may be a tension between Ministers, as members of the government, not wishing to disclose advice they receive from their department, I do not accept a department or public sector employee can do anything other than continue to provide impartial and responsive advice to government and Ministers regardless of whether the advice is later subject to disclosure under the FOI Act or external oversight and disclosure, for example, by way of production to a public inquiry or integrity body.
- (f) I consider the public interest weighs in favour of disclosure, given the central involvement of the Agency and the Office of the Chief Health Officer with the COVID-19 pandemic response. While the [business undertaking] and [business undertaking] reviews were conducted prior to the pandemic, I consider the release of these documents may assist members of the public in understanding important matters of public health and the structure, role and powers of the Agency and Office of the Chief Health Officer prior to the pandemic. Further, I am of the view that where documents concern important matters regarding the health and wellbeing of the public, the public interest is better served by transparency and rather than maintaining secrecy.

71. Accordingly, I am not satisfied the documents are exempt from release under section 30(1).

72. The Schedule of Documents in **Annexure 1** outlines my decision on section 30(1) to each document.

### **Section 25 – Deletion of exempt or irrelevant information**

73. 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.

<sup>21</sup> See *Public Health and Wellbeing Amendment (Pandemic Management) Act 2021* (Vic).

<sup>22</sup> [2013] VCAT 869 at [25]-[27].

74. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>23</sup> 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.<sup>24</sup>
75. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information where I consider an exemption applies to the entirety of the document. However, in some instances I have determined it is practicable to delete exempt information because it would not require substantial time and effort, and the edited documents would retain meaning.
76. My decision on whether it practicable to provide an edited copy of a document is outlined in the Schedule of Documents in **Annexure 1** for each document.

### **Conclusion**

77. On the information before me, While I am satisfied Document 9 is exempt from release under section 28(1)(b), I am not satisfied other documents subject to review are exempt from release under sections 28(1)(ba), 28(1)(c) or 30(1).
78. Where it is practicable to provide the Applicant with an edited copy of a document with exempt and irrelevant information deleted in accordance with section 25, access to the document is granted in part. Where it is not practicable do to so, access is refused in full.
79. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

80. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>25</sup>
81. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>26</sup>
82. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>27</sup>
83. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
84. 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.<sup>28</sup>

### **When this decision takes effect**

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

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<sup>23</sup> *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].

<sup>24</sup> *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].

<sup>25</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>26</sup> Section 52(5).

<sup>27</sup> Section 52(9).

<sup>28</sup> 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 undertaking] Review Report: Volume 1 – Issues and Recommendations	50	Refused in full Section 28(1)(ba)	Release in part Section 25  The document is to be released, except for the names of third parties which are irrelevant and are to be deleted in accordance with section 25.	<p><b>Section 28(1)(ba):</b> While I am satisfied the document was created for the purpose of briefing a Minister on an issue, I am not satisfied that issue was intended to be considered by the Cabinet at the time of the document's creation. Accordingly, I am not satisfied the requirements for section 28(1)(ba) are met and the document is exempt from release.</p> <p><b>Section 25:</b> As noted above, the Applicant does not seek access to the personal affairs information of third parties. Therefore, this information is irrelevant information for the purpose of section 25.</p> <p>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.</p>
2.	[date]	[business undertaking] Review Report: Volume 2 – Background and Details	104	Refused in full Section 28(1)(ba)	Release in part Section 25  The document is to be released, except for the	<p><b>Section 28(1)(ba):</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					names of third parties which are irrelevant and are to be deleted in accordance with section 25.	
3.	Various	Two email threads and an attachment	5	Released in part Section 33(1)	Not subject to review	In their review application, the Applicant advised they do not seek access to the personal affairs information of third parties which the Agency determined was exempt.
3A	[date]	Agency Organisational Transformation Subcommittee Paper	5	Released in part Sections 28(1)(c), 30(1)	Release in part Section 25  The information the Agency exempted from release under sections 28(1)(c) and 30(1) is to be released.	<b>Section 28(1)(c):</b> The graphic exempted from release under section 28(1)(c) by the Agency is similar to a graphic on page 24 of Document 1 and page 21 of Document 2. As I am not satisfied Documents 1 and 2 are exempt from release under section 28(1), I am not satisfied this document is exempt from release under section 28(1)(c).  <b>Section 30(1):</b> I am not satisfied the document is exempt from release under section 30(1) for the reasons provided in the Notice of Decision above.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						<b>Section 25:</b> See comments for Document 1.
4	[date]	[business undertaking] Report: Summary presentation	22	Released in part Section 28(1)(c)	Release in part Section 25  The document is to be released, except for names of third parties which are irrelevant and are to be deleted in accordance with section 25.	<b>Section 28(1)(c):</b> The document contains information that is a copy or extract from Documents 1 and 2. However, as I am not satisfied Documents 1 and 2 are exempt under section 28(1), I am therefore not satisfied the exempted information in this document is exempt under section 28(1)(c).  <b>Section 25:</b> See comments for Document 1.
5	[date]	Agency Executive Board Item for Approval	8	Released in part Section 28(1)(c), 30(1)	Release in part Section 25  The information the Agency exempted from release under sections 28(1)(c) and 30(1) is to be released.	<b>Section 28(1)(c):</b> See comments for Document 3A.  <b>Section 30(1):</b> See comments for Document 3A.  <b>Section 25:</b> See comments for Document 1.
6	[date]	Modernising and Strengthening Health	9	Released in part	Release in part Section 25	<b>Section 30(1):</b> See comments for Document 3A.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		Protection Project Board		Sections 30(1), 33(1)	The information the Agency exempted from release under section 30(1) is to be released.	<b>Section 25:</b> The information that the Agency exempted under section 33(1) is irrelevant information for the purpose of this review and is to remain deleted.
7	[business undertaking]	[business undertaking]- Modernising and strengthening health protection	25	<b>Released in part</b>  Section 28(1)(c), 30(1), 33(1)	<b>Release in part</b>  Section 25  The information the Agency exempted from release under sections 28(1)(c) and 30(1) is to be released.	<b>Section 28(1)(c):</b> The information exempted from release by the Agency concerns recommendations made in the [business undertaking] Review. As I am not satisfied Documents 1 and 2 are exempt from release under section 28(1), I am not satisfied the information in this document is exempt from release under section 28(1)(c).  <b>Section 30(1):</b> See comments for Document 3A.  <b>Section 25:</b> See comments for Document 6.
8	[date]	[business undertaking] report – Review of the functions of the Office of the Chief Health Officer	66	<b>Refused in full</b>  Section 28(1)(ba)	<b>Release in part</b>  Section 25  The document is to be released, except for the names of third parties which are irrelevant and	<b>Section 28(1)(ba):</b> See comments for Document 1.  <b>Section 25:</b> See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					to be deleted in accordance with section 25.	
9.	Undated	Budget Proposal and Costings Attachment	22	Refused in full Sections 28(1)(b), 28(1)(ba)	Refuse in full Sections 28(1)(b)	<p><b>Section 28(1)(b):</b> I am satisfied this document is exempt from release under section 28(1)(b) for the reasons outlined in the Notice of Decision.</p> <p><b>Section 25:</b> I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>