

Notice of Decision and Reasons for Decision

Applicant: 'ET1'
Agency: Department of Treasury and Finance
Decision date: 22 August 2022
Exemptions considered: Sections 28(1)(d), 30(1)

Citation: 'ET1' and Department of Treasury and Finance (Freedom of Information) [2022] VICmr 201 (22 August 2022)

FREEDOM OF INFORMATION – Cabinet documents – disclosure of any deliberation or decision of the Cabinet – social housing – Social and Affordable Housing Contribution – revenue modelling – impact on housing affordability

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied information in the documents subject to review are exempt from release under sections 28(1)(d) and 30(1).

As I am not 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 documents 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
22 August 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

Documents detailing assessments of the proposed Social and Affordable Housing Contribution and any modelling of the revenue to be raised by it and its impact on housing affordability.
2. The Agency identified two documents falling within the terms of the Applicant's request and refused access to the documents in full under section 28(1)(d). 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. During the review, the Agency located four additional documents which are relevant to the terms of the Applicant's request. The Agency submits these documents are exempt from release in full under section 28(1)(d).
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 is the 'correct or preferable decision'. This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of making my fresh decision.¹

Review of exemptions

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

11. In relation to Cabinet documents and the exemptions under section 28(1), it has been said:

... a document is not exempt merely because it has some connection with Cabinet, or is perceived by departmental officers or others as being of a character that they believe ought be regarded as a Cabinet document or because it has some Cabinet "aroma" about it. Rather, for a document to come within the Cabinet document exemption, "it must fit squarely within one of the

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

four exceptions” in section 28(1) of the Act.^[11] But the language used to describe the exemptions is itself open to different interpretations.²

12. The Cabinet includes a committee or sub-committee of the Cabinet.³
13. Section 28(1)(d) provides a document is an exempt document if its disclosure would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
14. A document will be exempt under section 28(1)(d) if there is evidence the Cabinet discussed and determined options or issues set out in the document.⁴
15. A decision of the Cabinet includes a course of action set, or a determination made as to the final strategy for a matter or a conclusion as to how a matter should proceed.⁵
16. Where a decision made by the Cabinet is subsequently made public, as is usually the case, releasing information about the outcome of the Cabinet’s decision will not necessarily disclose a decision or deliberation of the Cabinet for the purpose of section 28(1)(d).⁶
17. In *Department of Infrastructure v Asher*⁷ (**Asher**), ‘deliberations’ was interpreted narrowly such that it means the actual debate that takes place, rather than the subject matter of the debate itself:

It all depends upon the terms of the document. At one end of the 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 feasible or may advance an argument for a particular point of view.⁸ The former would say nothing as to Cabinet’s deliberations; the latter might say a great deal.⁹

18. The Victorian Supreme Court of Appeal also held in *Asher*:

The deliberative process involves the weighing up or evaluating of the competing arguments or considerations that may have a bearing upon Cabinet’s course of action – its thinking processes¹⁰ - with a view to the making of a decision. It encompasses more than mere receipt of information in the Cabinet room for digestion by Cabinet ministers then or later.¹¹

Documents 1 and 2

19. OVIC staff requested the Agency provide evidence the documents contain information that would disclose deliberation of the Cabinet. In response, the Agency provided copies of four Cabinet submissions to assist me in my review.

² *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [33] (per Justice Morris, VCAT President) quoting *Birnbauer v Department of Industry Technology and Resources* [1986] 1 VAR 279.

³ Section 28(7).

⁴ *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

⁵ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

⁶ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

⁷ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [6].

⁸ *Smith v Department of Environment and Sustainability* [2006] VCAT 1228.

⁹ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [8].

¹⁰ *Re Waterford and the Department of the Treasury (No 2)* [1984] AATA 67; (1984) 1 AAR 1.

¹¹ *Re Birrell and Department of the Premier and Cabinet* (1986) 1 VAR 230. *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [17].

20. Given the nature of documents subject to section 28(1), I am limited in the amount of information I can provide about these documents. However, it is clear from the Cabinet submissions that Documents 1 and 2 were submitted to a committee of the Cabinet for its consideration.
21. Based on the information before me, I am satisfied Documents 1 and 2 contain information that would disclose the deliberations of a committee of the Cabinet.
22. Accordingly, I am satisfied Documents 1 and 2 are exempt from release under section 28(1)(d).

Documents 3 to 6

23. The Agency submits that Documents 3 to 6 were created following Documents 1 and 2 and contain similar analysis in relation to a legislative proposal.
24. I acknowledge that Documents 3 to 6 contain information in relation to the same subject matter in Documents 1 and 2. However, I do not consider there is a sufficient connection between those documents and the deliberations of the Cabinet. Rather, I consider these documents are internal documents of the Agency that contain its analysis that was not presented to or considered by the Cabinet.
25. If the relevant information were to be exempt from release under section 28(1)(d), it would mean the exemption could apply to a vast number of documents that underpin the eventual deliberation or decision of the Cabinet. In my view, such an interpretation would be inconsistent with the text and purpose of this provision and the object of the FOI Act.
26. Accordingly, I am not satisfied Documents 3 to 6 are exempt from release under section 28(1)(d).
27. My decision regarding section 28(1)(d) is set out in the Schedule of Documents at **Annexure 1**.

Section 30(1) – internal working documents

28. As I am not satisfied Documents 3 to 6 are exempt from release under section 28(1)(d), I have also considered the application of section 30(1) to these documents.
29. 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.
30. The exemption does not apply to purely factual material in a document.¹²

¹² Section 30(3).

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?

31. 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.¹³
32. As the Agency considers these documents are exempt from release under section 28(1)(d), I am limited in the information I can provide about them. However, considered broadly, I am satisfied the documents contain information in the nature of opinion, advice and recommendations prepared by Agency officers or consultation and deliberation between Agency officers.

Were the documents 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?

33. 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.¹⁴
34. In *Re Waterford and Department of Treasury (No.2)*,¹⁵ 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.

35. I am satisfied the documents were prepared in the course of the Agency's deliberative purposes in relation to the consideration of proposed legislation.

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

36. 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:¹⁶
 - (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;

¹³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

¹⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

¹⁵ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

¹⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.
37. The documents contain sensitive analysis in relation to proposed changes to legislation regarding social and affordable housing. I note that earlier this year, the Victorian government announced that the changes proposed to social and affordable housing would not proceed.¹⁷ It is apparent on the face of the documents that they contain information similar to, or based on, the information in Documents 1 and 2.
38. The Victorian Civil and Administrative Tribunal (**VCAT**) has held that a reasonably proximate relationship of a document to the Cabinet process may support section 30(1) applying to a document.¹⁸ While I am not satisfied the documents are exempt from release under section 28(1)(d), I am of the view they have a proximate relationship to the Cabinet process and legislation that was considered by the Cabinet.
39. While I acknowledge there is a public interest in transparency and the community being informed about government decision making processes, I also consider there is a public interest in the integrity and effectiveness of the Cabinet process, including the role of a department preparing analysis that underpins and informs matters upon which the Cabinet is required to consider and deliberate, including the legislative proposals.
40. Accordingly, I am satisfied that Documents 3 to 6 are exempt from release under section 30(1).
41. My decision regarding section 30(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

42. 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.
43. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁹ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’ and release of the document is not required under section 25.²⁰

¹⁷ Premier of Victoria, Media Release, ‘Statement on Planning Reform Package’ at <https://www.premier.vic.gov.au/statement-planning-reform-package> (accessed 22 August 2022).

¹⁸ *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.

¹⁹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

²⁰ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

44. 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, because deleting the exempt information would render the documents meaningless.

Conclusion

45. On the information available, I am satisfied Documents 1 and 2 are exempt under section 28(1)(d). Further, I am satisfied that Documents 3 to 6 are exempt under section 30(1).
46. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

Review rights

47. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²¹
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²²
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²³
50. 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.
51. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.²⁴

When this decision takes effect

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

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

²² Section 52(5).

²³ Section 52(9).

²⁴ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Report Title	72	Refused in full Section 28(1)(d)	Refuse in full Section 28(1)(d)	<p>Section 28(1)(d): I am satisfied this document is exempt from release under section 28(1)(d) for the reasons outlined in the Notice of Decision.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>
2.	[date]	Additional Report	4	Refused in full Section 28(1)(d)	Refuse in full Section 28(1)(d)	<p>Section 28(1)(d): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>
3.	Undated	Spreadsheet with data	N/A	Refused in full Section 28(1)(d)	Refuse in full Section 30(1)	<p>Section 28(1)(d): I am not satisfied this document is exempt from release under section 28(1)(d) for the reasons outlined in the Notice of Decision.</p> <p>Section 30(1): I am satisfied this document is exempt from release under section 30(1) for the reasons outlined in the Notice of Decision.</p> <p>Section 25: See comments for Document 1.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	Undated	Spreadsheet with data	N/A	Refused in full Section 28(1)(d)	Refuse in full Section 30(1)	Section 28(1)(d): See comments for Document 3. Section 30(1): See comments for Document 3. Section 25: See comments for Document 1.
5.	Undated	Spreadsheet with data	N/A	Refused in full Section 28(1)(d)	Refuse in full Section 30(1)	Section 28(1)(d): See comments for Document 3. Section 30(1): See comments for Document 3. Section 25: See comments for Document 1.
6.	Undated	Spreadsheet with data	N/A	Refused in full Section 28(1)(d)	Refuse in full Section 30(1)	Section 28(1)(d): See comments for Document 3. Section 30(1): See comments for Document 3. Section 25: See comments for Document 1.