

Notice of Decision and Reasons for Decision

Applicant:	'EX5'
Agency:	Department of Treasury and Finance
Decision date:	30 November 2022
Exemptions considered:	Sections 28(1)(d), 30(1)
Citation:	'EX5' and Department of Treasury and Finance (Freedom of Information) [2022] VICmr 242 (30 November 2022)

FREEDOM OF INFORMATION – ministerial briefing – brief – Native Title compensation – *Traditional Owner Settlement Act 2010* (Vic) – internal working documents – deliberation or decision of the Cabinet – public interest in disclosure of information – varied decision

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 satisfied information in Document 1 is exempt from release under section 28(1)(d), however, I have determined that certain information to which the Agency refused access under sections 28(1)(d) and 30(1) is not exempt information.

As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 1 with irrelevant and exempt information deleted in accordance with section 25, access to this document is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to Document 1.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 November 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the terms of their request to [be for copies of several briefs to the Treasurer including]:
 - B20/1179 - Native Title Compensation – First principles review [Document 1]
2. The Applicant does not seek access to the personal affairs information of non-executive Agency officers and excluded attachments to briefs, except for any list of attachments contained in a brief.
3. The Agency identified seven documents falling within the terms of the Applicant's request and granted access to one document in full and refused access to six documents in part under sections 28(1)(ba), 28(1)(d), 29(1), 30(1), 34(1)(b) and 34(4)(a)(ii). 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 to Document 1 under sections 28(1)(d) and 30(1).
5. Accordingly, the irrelevant information deleted by the Agency in Document 1 and the information to which the Agency refused access in Documents 2 to 7 is irrelevant information for the purposes of section 25, which is discussed below.
6. I have examined a copy of Document 1.
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 considered all communications and submissions received from the parties.
9. 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.
10. 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.
11. 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.

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

Review of exemptions

Section 28(1) – Cabinet documents

12. 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” around it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exemptions [(now five)]” in section 28(1) of the Act.

13. Section 28(3) provides the exemptions in section 28(1) do not apply to a document to the extent it contains purely statistical, technical, or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.³
14. ‘Cabinet’ includes a committee or sub-committee of Cabinet.⁴

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

15. 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.
16. This means the exemption will apply to a document that refers to the deliberation or decision of the Cabinet.⁵
17. In *Asher v Department of Sustainability and Environment*,⁶ VCAT held that where a document, on its face, does not disclose a decision or deliberation of the Cabinet, or the extent of the Cabinet’s interaction with a document is unclear, section 28(1)(d) will not apply.
18. ‘Deliberation’ means the actual debate that took place and not just the subject of the debate.⁷
19. The Victorian Court of Appeal has held ‘deliberation’ should be given a narrow interpretation such that it means the actual debate that took place, rather than the subject matter of a debate itself:⁸

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.⁹ The former would say nothing as to Cabinet’s deliberations; the latter might say a great deal.¹⁰

² [2004] VCAT 2346 at [33].

³ *Mildenhall v Department of Premier & Cabinet (No. 1)* [1995] 8 VAR 284.

⁴ Section 28(7).

⁵ *Smith v Department of Sustainability and Environment* [2006] 25 VAR 65; [2006] VCAT 1228 at [23]. *Asher v Department of Infrastructure* (2006) 25 VAR 143; [2006] VCAT 1375 at [27].

⁶ (General) [2010] VCAT 601 at [42].

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

⁸ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [6].

⁹ *Smith v Department of Environment and Sustainability* [2006] VCAT 1228.

¹⁰ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [8].

20. The Court of Appeal further held:

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 processes¹¹ – 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.¹²

21. 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'.¹³

22. Where the outcome of a decision or recommendation of the Cabinet is made public, releasing information about that outcome is unlikely to 'disclose' a Cabinet decision or deliberation.¹⁴

23. Document 1 is a ministerial brief relating to native title compensation. Given the nature of the Cabinet exemption I am limited in the amount of detail I can provide about the contents of the document to which the Agency refused access.

24. As described above, for information to be exempt from release under section 28(1)(d), I must be satisfied its release would disclose a decision or deliberation of the Cabinet.

25. Having reviewed Document 1, I am satisfied certain information would disclose a decision of the Cabinet. Accordingly, I am satisfied this information is exempt from release under section 28(1)(d).

26. However, I am not satisfied other information is exempt from release under section 28(1)(d) as:

(a) the information is not sufficiently detailed such that it records an actual decision of the Cabinet;

(b) certain information reveals the subject matter of general information to be considered by the Cabinet rather than disclosing deliberation or a decision; and

(c) noting the decision of the Supreme Court of Victoria in *Department of Infrastructure v Asher*,¹⁵ I do not consider the broad topics addressed in the document reveals deliberations of the Cabinet. As described above, the fact the Cabinet receives information will not necessarily reveal its 'thinking processes' or the evaluation of competing arguments or options.

27. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents in **Annexure 1**.

¹¹ *Re Waterford and the Department of the Treasury (No 2)* [1984] AATA 67; (1984) 1 AAR 1.

¹² *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [58].

¹³ *Dalla-Riva v Department of Treasury and Finance* [2005] 23 VAR 396; [2005] VCAT 2083 at [30].

¹⁴ *Honeywood v Department of Innovation, Industry and Regional Development* [2004] 21 VAR 1453; [2004] VCAT 1657 at [26]; *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [46].

¹⁵ (2007) 19 VR 17; [2007] VSCA 272 at [6].

Section 30(1) – Internal working documents

28. 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.

29. The exemption does not apply to purely factual material in a document.¹⁶

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?

30. To meet the requirements of section 30(1), a document must contain matter in the nature of opinion, advice or recommendations prepared by an agency officer, or consultation or deliberation between agency officers.

31. It is not necessary for a document to be in the nature of opinion, advice or recommendations. Rather, the issue is whether release of the document would disclose matter of that nature.¹⁷

32. I am satisfied the document contains the opinion and recommendations of Agency officers.

33. However, I am not satisfied all information to which the Agency refused access under section 30(1) is in the nature of an opinion, advice or recommendation, but rather certain information is factual. As stated above, the exemption under section 30(1) does not apply to purely factual information in a document.¹⁸ Therefore, factual information in the document is not exempt from release.

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?

34. 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.¹⁹

35. In *Re Waterford and Department of Treasury (No.2)*,²⁰ 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.

36. I am satisfied the document was prepared in the course of the deliberative processes of the Agency, in relation to native title determination and compensation under the *Traditional Owners Settlement Act 2010* (Vic) (**TOS Act**).

¹⁶ Section 30(3).

¹⁷ *Mildenhall v Department of Education* [1998] 14 VAR 87.

¹⁸ Section 30(3).

¹⁹ *Brog v Department of Premier and Cabinet* [1989] 3 VAR 201 at 208.

²⁰ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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

37. I must also be satisfied disclosure of this information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.²¹
38. In doing so, I am required to consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
39. In deciding whether the information to which the Agency refused access would be contrary to the public interest, I have given weight to the following relevant factors:²²
- (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 document and the broader context giving rise to the creation of the document;
 - (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 document 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 document 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 document;
 - (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.
40. Having reviewed the content and context of the document, I am not satisfied disclosure of the information to which the Agency refused access under section 30(1) would be contrary to the public interest for the following reasons:
- (a) The document is now more than two years old. As such, the matters discussed would likely be resolved or sufficiently advanced such that disclosure at this time would have no material impact on any policy development or deliberations current at that time.
 - (b) In my view certain information in the document is brief and general in nature, such that its disclosure would not have any material impact on the deliberation on similar matters in the future.
 - (c) I consider there is a public interest in transparency in the way government undertakes modelling of current and proposed formulae in relation to determining compensation payable under the TOS Act.

²¹ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

²² *Hulls v Victorian Casino and Gambling Authority* [1998] 12 VAR 483.

41. My decision on the application of section 30(1) is outlined in the Schedule of Documents in **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’²³ 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 25.²⁴
44. I have considered the information the Agency deleted from Document 1 as irrelevant. I agree it falls outside the scope of the Applicant’s request and the Applicant is not seeking access to this type of information as part of my review.
45. I am satisfied it is practicable to delete exempt and irrelevant information from the document in accordance with section 25, as to do so would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

46. While I am satisfied certain information in Document 1 is exempt from release under section 28(1)(d), I am not satisfied all information to which the Agency refused access under sections 28(1)(d) and 30(1) is exempt information.
47. As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 1 with irrelevant and exempt information deleted in accordance with section 25, access to this document is granted in part.
48. The Schedule of Documents in **Annexure 1** sets out my decision in relation to Document 1.

Review rights

49. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁵
50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁶
51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁷
52. 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.

²³ *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].

²⁴ *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].

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

²⁶ Section 52(5).

²⁷ Section 52(9).

53. 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.²⁸

When this decision takes effect

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

²⁸ 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.	14/07/2020	B20/1179 - Native Title Compensation – First principles review	4	Released in part Sections 28(1)(d), 30(1)	<p>Release in part</p> <p>Sections 28(1)(d), 25</p> <p>The document is to be released except for the following exempt and irrelevant information which is to be deleted in accordance with section 25:</p> <p>The following information which is exempt from release under section 28(1)(d):</p> <p><u>Page 1:</u> The first sentence in the first paragraph under the heading ‘Key Points’.</p> <p><u>Page 3:</u> The information in paragraphs 4, 5 and 6.</p> <p>The information deleted by the Agency as irrelevant information.</p>	<p>Section 28(1)(d): I am satisfied certain information in the document discloses a decision of the Cabinet and is exempt from release under section 28(1)(d).</p> <p>However, I am not satisfied all information is exempt from release under section 28(1)(d) for the reasons described above in the Notice of Decision.</p> <p>Section 30(1): I am not satisfied information to which the Agency refused access is exempt from release under section 30(1) for the reasons described in the Notice of Decision above.</p> <p>Section 25: The Applicant does not seek access to the information deleted by the Agency as irrelevant information for the purposes of section 25. Therefore, this information is to remain deleted.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						information deleted in accordance with section 25.