

Notice of Decision and Reasons for Decision

Applicant:	'ER4'
Agency:	Department of Treasury and Finance
Decision date:	30 June 2022
Exemptions considered:	Sections 28(1)(ba), 28(1)(d), 34(1)(b), 34(4)(a)(ii)
Citation:	'ER4' and Department of Treasury and Finance (Freedom of Information) [2022] VICmr 185 (30 June 2022)

FREEDOM OF INFORMATION – cabinet documents – briefings to the Minister – matters of a business, commercial or financial nature

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 in that I have determined to release additional information in the documents.

I am satisfied certain information in the documents is exempt under sections 28(1)(ba) and 28(1)(d).

However, I am not satisfied that other information in the documents is exempt under sections 34(1)(b) and 34(4)(a)(ii).

Where 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 documents is granted in part. Where I am not satisfied, access to the document 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.

Sven Bluemmel
Information Commissioner

30 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 - B21/507 - Approval in Principle for Government Leases and Licences Schedule [date]
 - B21/397 - Savings opportunity by extending Fitzroy gasworks remediation contract
 - B21/563 - Approval in Principle to Proposed Property Transaction Schedule [date]
 - B21/403 - Approval in Principle to Proposed Property Transactions Schedule [date]
 - B21/516 - The Royal Women's Hospital - Purchase of laneway
 - B21/165 - Cash and Banking State Purchase Contract
 - B21/639 - [title]
 - B21/320 - Review outcomes: Measures to reduce likelihood of sham contracting occurring in public construction
2. The Agency's decision letter advises that the Applicant requested the exclusion of personal affairs information.
3. The Agency identified eight documents falling within the terms of the Applicant's request and decided to grant access to three documents in full, four documents in part and refused access to one document in full. The Agency relied on the exemptions under sections 28(1)(ba), 28(1)(d), 34(1)(b) and 34(4)(a)(ii) to refuse access to parts of the documents. 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. In response to queries from OVIC staff, the Applicant confirmed they do not seek access to the personal affairs information in the documents. Accordingly, this information is irrelevant.
6. During the review, the Agency agreed to release further information in Document 5, which it previously determined to be exempt under section 28(1)(d). Accordingly, this information will not be reviewed and is to be released to the Applicant.
7. I have examined copies of the 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.

Review of exemptions

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

12. 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 issues to be considered by the Cabinet.
13. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
14. 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 issues to be considered by Cabinet.¹ 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.²
15. The Cabinet briefing purpose must be ‘immediately contemplated’ when the document is created. The exemption cannot apply merely because the Cabinet ultimately considered the issue.³
16. The word ‘briefing’ means a ‘short accurate summary of the details of a plan or operation. The purpose ... is to inform’.⁴
17. Therefore, the document should have the character of briefing material.⁵ 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 minister’.⁶ It requires more than having ‘placed a document before a minister’.⁷
18. The phrase ‘issues to be considered by the Cabinet’ requires it must be more than just ‘likely’ a document will be considered by the Cabinet. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if it is not ultimately considered. Evidence that a matter was included on the agenda for a Cabinet meeting will meet this test.⁸
19. Given the nature of documents subject to section 28(1), I am limited in the amount of information I can provide about any documents provided to support the Agency’s submission as to do so would reveal exempt information. However, it is evident on the face of Document 7 that it was prepared for the purpose of briefing a Minister. Accordingly, the Agency was asked to provide evidence that the issues discussed in the document were to be considered by the Cabinet when the document was created.
20. In response the Agency provided two documents that demonstrate the issues discussed in the briefing were discussed by a subcommittee of the Cabinet. Together with the contents of the briefing I am satisfied that the document contains information that, at the time of the creation of the document, was to be considered by a subcommittee of the Cabinet.

¹ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Dalla-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

² *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

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

⁴ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *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.

21. Accordingly, I am satisfied Document 7 was prepared for the purpose of briefing a Minister in relation to issues that were to be considered by the Cabinet and is exempt from release under section 28(1)(ba).

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

22. 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.
23. 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 a document.⁹
24. 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.¹⁰
25. Where a decision made by the Cabinet is subsequently made public, as is usually the case, releasing information about the outcome of a Cabinet decision does not necessarily disclose a decision or any deliberation of the Cabinet for the purposes of section 28(1)(d).¹¹
26. In *Asher v Department of Sustainability and Environment*,¹² the Victoria Civil and Administrative Tribunal (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.
27. Having reviewed Document 3, it is clear the information exempted by the Agency refers to decisions made by a subcommittee of Cabinet.
28. Accordingly, I am satisfied this information is exempt under section 28(1)(d).
29. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents in **Annexure 1**.

Section 34(1)(b) – Documents of a business, commercial or financial nature

30. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking and:
- (a) the information relates to other matters of a business, commercial or financial nature; and
 - (b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
31. The Agency applied section 34(1)(b) to information in Documents 1 and 4. The exempted information is the length of lease terms entered into by various Victorian government agencies.

Was the information acquired from a business, commercial or financial undertaking?

32. In *Thwaites v Department of Human Services*,¹³ the VCAT observed the phrase ‘information acquired’ in section 34(1) signifies the need for some positive handing over of information in some precise form.

⁹ *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

¹⁰ *Dalla-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

¹¹ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].
¹² [2010] VCAT 601.

¹³ (1999) 15 VAR 1.

33. For the purposes of section 34(1), I am satisfied most of the information was acquired from the lessor of the sites, however, the relevant undertakings are not named in the documents. For one document the information relates to the renewal of a licence with an energy delivery business.
34. For the lessors therefore, I cannot confirm if any of the entities are a business, commercial or financial undertaking for the purposes of section 34(1)(b). Nevertheless, I consider that lessors of commercial or industrial land are likely to be business, commercial or financial undertakings, so I will consider the remaining limbs of the exemption.

Does the information relate to matters of a business commercial or financial nature?

35. VCAT has also recognised the words ‘business, commercial or financial nature’ have their ordinary meaning.¹⁴
36. I am satisfied the information relates to matters of a business, commercial and financial nature.

Would disclosure of the information be likely to expose the undertaking unreasonably to disadvantage?

37. Section 34(2) provides that in deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—
- (a) whether the information is generally available to competitors of the undertaking;
 - (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
 - (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
 - (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

38. I have also had regard to the decision in *Dalla Riva v Department of Treasury and Finance*,¹⁵ in which VCAT held documents are exempt under section 34(1)(b) if their disclosure would:
- (a) give competitors of a business undertaking a financial advantage;
 - (b) enable competitors to engage in destructive competition with a business undertaking; and
 - (c) would lead to the drawing of unwarranted conclusions as to a business undertaking’s financial affairs and position with detrimental commercial and market consequences.
39. I consider the phrase ‘expose the undertaking unreasonably to disadvantage’ in section 34(1)(b), contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word ‘unreasonably’ in section 34(1)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed ‘unreasonably’ to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.

¹⁴ *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

¹⁵ [2007] VCAT 1301 at [33].

40. Accordingly, section 34(1)(b) contemplates a business undertaking may be exposed to a certain level of disadvantage. The question is whether any such disclosure would expose the undertaking unreasonably to disadvantage.
41. In determining whether disclosure of commercially sensitive information in a document would expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify an undertaking and seek its views on disclosure.¹⁶
42. There is no information before me concerning the views of the lessors who own the relevant properties.
43. I am not satisfied disclosure of the information will expose the lessors unreasonably to disadvantage for the following reasons:
- (a) The documents were created to brief the Minister in relation to leases being entered into by the Victorian State Government. I consider there is nothing sensitive about the nature of such documents.
 - (b) While they appear to relate to fixed-term leases, there is no information before me to be satisfied that disclosure of the information within the documents subject to review would unreasonably impact future negotiations.
 - (c) Commercial organisations entering into lease agreements with government agencies should reasonably expect a greater degree of transparency and accountability given the use of public funds.
 - (d) There is a public interest in disclosure of information concerning the expenditure of public funds, and these particular documents concern leases entered into by the Victorian State Government.
 - (e) While it is possible the undertaking may be exposed to a certain measure of disadvantage if the documents are disclosed, I am not satisfied any such exposure would be unreasonable in the circumstances of this matter.
44. In summary, I am not satisfied any information in the documents is exempt under section 34(1)(b).
45. My decision in relation to section 34(1)(b) is outlined in the Schedule of Documents in **Annexure 1**.

Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage

46. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, ‘in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage’. A document is exempt under section 34(4)(a)(ii) if:
- (a) the agency is engaged in trade or commerce;
 - (b) the document contains information of a business, commercial or financial nature; and
 - (c) disclosure of which would be likely to expose the agency unreasonably to disadvantage.
47. The Agency applied section 34(4)(a)(ii) to the same information that was exempted under section 34(1)(b) in Documents 1 and 4.

¹⁶ Section 34(3).

Is the Agency engaged in trade or commerce?

48. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.¹⁷
49. VCAT has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.¹⁸ VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.¹⁹ An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency’s other functions.²⁰
50. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.²¹
51. While the phrase ‘trade and commerce’ may be interpreted broadly,²² it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.²³
52. The fact an agency’s predominant activities may be described as ‘governmental’ does not preclude it from relying on the exemption under section 34(4)(a)(ii).²⁴
53. The Agency submits:

the terms of a rental agreement, if made public, may in some instances compromise future or other lease negotiations by the Department if other parties are aware of when leases are due to expire.
54. While the documents concern the State Government entering into leases or a licensing agreement, in my view, where the State Government enters into a contract on behalf of the State of Victoria, it does not do so as an activity in trade or commerce, but rather to fulfil its role to deliver governmental services, functions and on behalf of the community. In this particular instance, the purpose of entering into the lease was to provide workspaces for Victorian Public Services employees or facilities for the delivery of public services, which are governmental functions rather than a commercial venture.
55. On the information before me, I am not satisfied the essential character or core activity undertaken by the State Government in this instance, and to which the information relates, meets the requirement of ‘trade or commerce’ for the purposes of section 34(4)(a)(ii).
56. Accordingly, I am satisfied information in the documents is not exempt under section 34(4)(a)(ii).
57. My decision in relation to section 34(1)(a)(ii) is set out in the Schedule of Documents in **Annexure 1**.

¹⁷ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

¹⁸ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

¹⁹ *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

²⁰ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

²¹ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

²² *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

²³ *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

²⁴ *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

Section 25 – Deletion of exempt or irrelevant information

58. 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.
59. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’²⁵ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not ‘practicable’ and release of the document is not required under section 25.²⁶
60. As noted above, the Applicant does not seek access to personal affairs information.
61. I have considered the effect of deleting irrelevant and exempt information from the documents. I am satisfied it is practicable for the Agency to delete irrelevant and exempt information from certain documents, because it would not require substantial time and effort, and the edited documents would retain meaning.
62. However, I am not satisfied it is practicable to provide the Applicant with an edited copy of Document 7, where the remaining document would not retain any meaning.

Conclusion

63. On the information available, I am satisfied certain information is exempt under sections 28(1)(ba) and 28(1)(d).
64. However, I am not satisfied other information is exempt under sections 34(1)(b) and 34(4)(a)(ii).
65. Where 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 documents is granted in part. Where I am not satisfied, access to the document is refused in full.

Review rights

66. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁷
67. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁸
68. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁹
69. 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.
70. 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.³⁰

²⁵ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

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

²⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁸ Section 52(5).

²⁹ Section 52(9).

³⁰ Sections 50(3F) and (3FA).

Third party review rights

71. As I have determined to release documents that the Agency exempted under section 34(1)(b), if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.³¹
72. In the circumstances, I have decided notifying the relevant third parties is not practicable as the third parties are not identified in the documents.

When this decision takes effect

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

³¹ Sections 49P(5), 50(3) [for personal affairs information], 50(3A) [for business information], 50(3AB) [for section 35(1)(b) information] and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Briefing to Minister	3	Released in part Sections 34(1)(b), 34(4)(a)(ii)	Release in part Section 25 The document is to be released with the irrelevant information deleted in accordance with section 25.	Section 34(1)(b): I am not satisfied the document is exempt under section 34(1)(b) for the reasons outlined in the Notice of Decision, above. Section 34(4)(a)(ii): I am not satisfied the document is exempt under section 34(4)(a)(ii) for the reasons outlined in the Notice of Decision, above. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25.
2.	[date]	Briefing to Minister	5	Released in full	Not subject to review	
3.	[date]	Briefing to Minister	2	Released in part Section 28(1)(d)	Release in part Sections 28(1)(d), 25 The document is to be released with the information deemed exempt under section	Section 28(1)(d): I am satisfied certain information in the Document is exempt under section 28(1)(d) for the reasons outlined in the Notice of Decision.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					28(1)(d) and the irrelevant information deleted in accordance with section 25.	Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant and exempt information deleted in accordance with section 25.
4.	[date]	Briefing to Minister	2	Released in part Sections 34(1)(b), 34(4)(a)(ii)	Release in part Section 25 The document is to be released with the irrelevant information deleted in accordance with section 25.	Section 34(1)(b): See comments for Document 1. Section 34(4)(a)(ii): See comments for Document 1. Section 25: See comments for Document 1.
5.	[date]	Briefing to Minister	2	Released in part Section 28(1)(d)	Release in part Section 25 The document is to be released with the irrelevant information deleted in accordance with section 25.	During the review, the Agency agreed to release further information previously exempt under section 28(1)(d). Section 25: See comments for Document 1.
6.	[date]	Briefing to Minister	2	Released in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
7.	[date]	Briefing to Minister	4	Refused in full Section 28(1)(ba)	Refuse in full Section 28(1)(ba)	<p>Section 28(1)(b): I am satisfied the Document is exempt under section 28(1)(ba) for the reasons outlined in the Notice of Decision.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant and exempt information deleted in accordance with section 25.</p>
8.	[date]	Briefing to Minister	5	Released in full	Not subject to review	