

Notice of Decision and Reasons for Decision

Applicant:	'EV3'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	21 September 2022
Exemption considered:	Section 30(1)
Citation:	'EV3' and Department of Jobs, Precincts and Regions (Freedom of Information) [2022] VICmr 221 (21 September 2022)

FREEDOM OF INFORMATION – Ministerial briefing documents – Briefs – Creative Victoria – performing arts sector – Minister for Creative Industries – COVID-19 pandemic – government grants – public funding – disclosure not contrary to public interest – review of Agency fresh 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 fresh 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 as I am not satisfied the documents are exempt from release under section 30(1).

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

My decision in relation to each document subject to review is set out in the Schedule of Documents in **Annexure 1**.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

21 September 2022

Reasons for Decision

Background to review

1. The Applicant is a Member of the Victorian Parliament.
2. The Applicant made a request to the Agency seeking access to the following documents:
 1. BMIN-2-21-9338 Strategic Initiative Grants January 2021
 2. BMIN-2-21-9426 Creative Workers: February 2021 Funding Round - Program Design Plan
 3. BMIN-2-21-9576 Organisations Strategic Investment Fund - Stage 3
 4. BMIN-2-21-9981 Melbourne Arts Precinct Board - Meeting One
 5. BMIN-2-21-10157 Melbourne International Film Festival industry programs,
 6. BMIN-2-21-10156 Victorian Government submission to Commonwealth media reform process
 7. BMIN-2-21-10326 Regional Partnership and Strategic Initiative Programs,
 8. BMIN-2-21-10435 Melbourne Arts Precinct Board - Meeting Two
 9. BMIN-2-21-11432 National Performing Arts Partnership Framework funding allocation
3. The Agency identified nine documents falling within the terms of the Applicant's request and refused access to eight documents in part and one document in full under sections 28(1)(d), 30(1), 33(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 partial access to the requested documents.

Fresh decision made by Agency

5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On 3 June 2022, the Agency made a fresh decision in which it determined to release further information in the documents.
7. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
8. The Applicant seeks review of the documents to which the Agency refused access under section 30(1) only. Therefore, the information the Agency exempted under other exemptions is not subject to review, and this review relates to Documents 1 and 3 only.
9. I have examined a copy of the two documents subject to review. The briefing documents are for the Minister for Creative Industries. One document concerns the approval of 'Strategic Initiative Grants' for 2021, and the other document concerns the 'Strategic Investment Fund'.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties.
12. 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.
13. 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 30(1) – Internal working documents

14. 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.

15. The exemption does not apply to purely factual material in a document.¹

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?

16. 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.²
17. Considered broadly, I am satisfied the documents contain information in the nature of opinion, advice and recommendations prepared by 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

18. 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.³
19. In *Re Waterford and Department of Treasury (No.2)*,⁴ 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.

20. I am satisfied the relevant information was provided in the course of the Agency’s deliberative processes in relation to the administration of support packages and public funding of businesses in response to the COVID-19 pandemic.

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

21. In determining if disclosure of a document 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

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

³ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208], citing *Re Waterford and Department of the Treasury (No 2)* (1984) 5 ALD 588 at [606].

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

promote the disclosure of information. This involves a 'process of the weighing against each other conflicting merits and demerits'.⁵

22. In doing so, I have given weight to the following factors in the context and content of the documents:⁶
- (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 their creation;
 - (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 reasonably explain upon disclosure of the documents;
 - (f) the impact of disclosing documents in draft form, including where disclosure would not clearly or accurately representing a final position or decision reached by the Agency at the end of the decision or deliberative 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 public interest would be served or requires a greater scrutiny of the underlying issues.
23. In its submission to OVIC, the Agency advised it considered disclosure of certain parts of Document 1 would be contrary to the public interest consistent with my decision '*BC2*' and *Department of Health and Human Services*⁷.
24. The Agency submits:

The above decision relates to a review of handwritten notes made by interview panel members during the interview portion of a recruitment process.

The department considers that an interview panel assessing applicants for a job is similar to the processes and actions taken by an assessment panel when considering grant applications.

Both panels are required to ask questions and the applicant is required to respond, with the panels assessing those responses against set criteria. It is not irrelevant whether that process occurs face to face or in a written format as the intention of both the process and the outcomes are the same.

In reviewing this document, the exempt information is a short summary of the ranking and issues considered in the awarding of these grants. The information is not the complete view or record of the assessment panel, and therefore the full meaning and intent is not contained within these documents. We submit that this is therefore not in the public interest to release incomplete assessment information or detail.

⁵ *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].

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

⁷ (Freedom of Information) [2020] VICmr 25 (13 February 2020).

Releasing information about how or why an application for a grant was successful could be used by others to manipulate their responses when making grant applications themselves, given that there is no restriction or conditions applied to documents released under the Act.

25. The Agency also noted my decision '*AL5' and Victoria Police*⁸ in support of its fresh decision.
26. In relation to Document 3, the Agency submits disclosure of certain information would be contrary to the public interest as:

As supported recently in *Davis v Department of Transport*⁹, Judge Jenkins reiterated the use of precedence set by Judge Hampel in *Friends of Mallacoota Inc v Department of Planning and Community Development*⁵, being that:

Decision-makers should be judged on the final decision and their reasons for it, not on what might have been considered or recommended by others in preliminary or draft internal working documents.

It is contrary to the public interest to disclose documents that would have an adverse effect on the integrity or effectiveness of a decision-making, investigative or other process.

The department believes that releasing proposals put forward to the Minister by program areas, particularly when those proposals have not been determined is against the public interest in line with the above detail.

27. The Agency consulted with a relevant third party that considered disclosure would be contrary to the public interest.
28. Having considered the context and reviewed the content of the Ministerial briefs, and considered the information before me, I am not satisfied disclosure of information to which the Agency refused access under section 30(1) would be contrary to the public interest for the following reasons:
- (a) Opinion, advice and recommendations provided by an agency officer to a Minister are not automatically exempt from release under section 30(1). Rather, each document must be considered in terms of its content and context, and an agency must demonstrate disclosure of the document would be contrary to the public interest.
 - (b) It is publicly known the Victorian creative sector faced significant challenges from the COVID-19 pandemic, which required State institutions to respond to and implement necessary financial assistance during and arising from this period.¹⁰
 - (c) I do not consider the information subject to review is particularly sensitive in nature. In relation to Document 1, it contains information specific to each funding grant application. I consider disclosure of the relevant information would not have any impact on the awarding of other funding grants in the future. In relation to Document 3, the information is general in nature and would not be unexpected or novel in terms of such government funding of programs and related decision making.
 - (d) I acknowledge the Agency's submission that the information relating to the assessment of funding applicants may be incomplete. While I accept the assessments recorded may have changed over time, I consider the Agency could address this issue by providing details of the correct amount of funding granted to avoid any confusion, if required.
 - (e) I consider this matter is distinguishable from '*BC2' and Department of Health and Human Services* in that the documents in that matter were preliminary in nature, in contrast to this

⁸ (Freedom of Information) [2019] VICmr 104 (12 September 2019).

⁹ *Davis v Department of Transport* (Review and Regulation) [2021] VCAT 484 at [34]

¹⁰ Creative Victoria, 'Creative Victoria Multiyear Investment' at <https://creative.vic.gov.au/grants-and-support/programs/multiyear-investment>.

matter in which the Ministerial briefs are well developed. I also consider this matter is distinguishable from 'AL5' and Victoria Police as that matter related to more sensitive information relating to recruitment decisions at Victoria Police.

- (f) Having considered the information exempted by the Agency under section 30(1) and noting the majority of the information in the Ministerial briefs was released to the Applicant, I am of the view disclosure of further information relating to the provision of publicly funded grants would not be contrary to the public interest and would rather promote transparency and accountability in government decision making.
- (g) There is a public interest in the community being better informed about the expenditure of public funds and associated government decision making processes. By providing access to information that demonstrates the basis upon which a funding decision was made, disclosure of documents like this builds the community's trust in government and is an important element of public accountability.

29. As I am not satisfied disclosure of the information in the documents that the Agency exempted from release under section 30(1) would be contrary to the public interest, I am satisfied the relevant information is not exempt from release under section 30(1).

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

Section 25 – Deletion of exempt or irrelevant information

31. 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.

32. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ 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 25.¹²

33. As noted above, the Applicant seeks review of information to which the Agency refused access under section 30(1). Therefore, the remaining information to which the Agency relies on an exemption is irrelevant information for the purpose of section 25.

34. I have considered the effect of deleting irrelevant information from the documents. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited documents would retain meaning.

35. My decision in relation to section 25 is set out in the Schedule of Documents in **Annexure 1**.

Conclusion

36. On the information before me, I am satisfied the documents are not exempt from release under section 30(1).

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

¹¹ *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].

¹² *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].

38. My decision in relation to each document subject to review is set out in the Schedule of Documents in **Annexure 1**.

Review rights

39. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹³

40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴

41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵

42. 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.

43. 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.¹⁶

When this decision takes effect

44. My decision does not take effect until the Agency's 14 day review period expires.

45. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ 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
1.	28/01/2021	BMIN-2-21-9338 Briefing for Minister for Creative Industries	4	Released in part Sections 30(1), 33(1), 34(1)(b)	Release in part Section 25 I am not satisfied disclosure of the information to which the Agency refused access under section 30(1) in its fresh decision would be contrary to the public interest for the reasons set out in the Notice of Decision above. Accordingly, this information is to be released to the Applicant. The document is to be released except for irrelevant information, namely information to which the Agency originally refused access under sections 33(1) and 34(1)(b).
2.	8/01/2021	BMIN-2-21-9426 Briefing for Minister for Creative Industries	4	Not subject to review	
3.	Undated	BMIN-2-21-9576 Briefing for Minister for Creative Industries	4	Released in part Sections 28(1)(d), 30(1), 33(1)	Release in part Section 25 I am not satisfied disclosure of the information to which the Agency refused access under section 30(1) in its fresh decision would be contrary to the public interest for the reasons set out in the Notice of Decision above. Accordingly, this information is to be released to the Applicant.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision
					The document is to be released except for irrelevant information, namely information to which the Agency originally refused access under sections 28(1)(d) and 33(1).
4.	16/02/2021	BMIN-2-21-9981 Briefing for Minister for Creative Industries	2	Not subject to review	
5.	25/02/2021	BMIN-2-21-10157 Briefing for Minister for Creative Industries	3	Not subject to review	
6.	3/03/2021	BMIN-2-21-10156 Briefing for Minister for Creative Industries	5	Not subject to review	
7.	Undated	BMIN-2-21-10326 Briefing for Minister for Creative Industries	4	Not subject to review	
8.	25/02/2021	BMIN-2-21-10435 Briefing for Minister for Creative Industries	2	Not subject to review	
9.	30/07/2021	BMIN-2-21-11432 Briefing for Minister for Creative Industries	6	Not subject to review	