

## Notice of Decision and Reasons for Decision

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Applicant:	'EX6'
Agency:	Department of Health
Decision date:	8 December 2022
Exemptions considered:	Sections 28(1)(d), 29(1)(a), 29(1)(b), 30(1), 32(1)
Citation:	'EX6' and Department of Health ( <i>Freedom of Information</i> ) [2022] VICmr 243 (8 December 2022)

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FREEDOM OF INFORMATION – COVID-19 pandemic – Cabinet documents – National Cabinet – briefing – internal working documents – legal advice - legal professional privilege – documents containing matter communicated by any other State – documents prepared by the Australian Health Protection Principal Committee – whether deleted information is irrelevant to freedom of information request

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 certain information in the documents is exempt from release under sections 28(1)(d) and 32(1), I am not satisfied the documents are exempt documents under sections 29(1)(a), 29(1)(b) and 30(1).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt 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

8 December 2022

## Reasons for Decision

### Background to review

1. The Applicant [description of Applicant] made a request to the Agency for access to the following documents:
  - A copy of all briefs created by the department relating to the implementation of the 5km, 10km and 25km restricted areas decisions (and directions) from 1 March 2020 to the date of this request.
  - A copy of all final health advice provided to the Premier or Minister for Health (or their offices) from the Chief Health Officer or the Public Health regarding these decisions.
2. The Applicant does not seek access to the personal affairs information of Agency non-executive officers.
3. The Agency located 12 documents falling within the terms of the Applicant's request and granted access to four documents in full, and refused access to six documents in full and two documents in part under sections 28(1)(d), 29(1)(a), 29(1)(b), 30(1) and 32(1). 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. 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.

### Review of provision

#### **Section 25**

10. OVIC staff made enquiries with the Agency regarding attachments referenced in Documents 1, 7 and 12, but that were not referenced by the Agency in its decision or provided to OVIC for review. The Agency submits these attachments are irrelevant to the terms of the Applicant's request.
11. Documents 1, 7 and 12 are briefings to the [senior Agency officers] concerning the reissuing of public health directions in response to the COVID-19.
12. Section 25 provides in relation to the deletion of exempt or irrelevant information in a document:

Where—

- (a) a decision is made not to grant a request for access to a document on the ground that it is an

exempt document or that to grant the request would disclose information that would reasonably be regarded as irrelevant to the request;

- (b) it is practicable for the agency or Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document or a document that would not disclose such information (as the case requires); and
- (c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy—

the agency or Minister shall grant access to such a copy of the document.

13. In summary, if it is practicable to do so and an applicant is agreeable, section 25 permits an agency to release an edited copy of a document with any exempt information or information that falls outside the scope of the applicant's request deleted. If it is not practicable to provide an edited copy of a document or the applicant does not agree to receiving an edited copy, the agency can refuse access to the document in full.
14. The Agency has a duty to locate and disclose all documents relevant to the terms of an applicant's FOI request.<sup>1</sup>
15. Section 49F provides that I 'may review the decision that is the subject of the application for review'.
16. Having reviewed the terms of the Applicant's request, I consider they seek access to briefs and health advice in relation to the decisions and directions to implement 5km, 10km and 25km restricted areas in response to the COVID-19 pandemic.
17. In response to OVIC's enquiries regarding the deletion of information under section 25, the Agency provided the following submission:

In relation to the Attachment As for each brief, these are administrative documents authorising an individual to exercise the appropriate powers under the *Public Health and Wellbeing Act 2008*. Therefore, these documents do not contain briefing information and the department therefore assessing that they are not relevant to the applicant's request for "briefs" and "health advice"; and

In relation to the other Attachment B and Cs, the applicant requested documents relating to the specific topic of "the implementation of the 5km, 10km and 25km restricted areas decisions (and directions)". The briefs contain the draft directions (Attachment B) and legal advice (Attachment C) that were to come into effect on a particular day; therefore, different directions imposing different public health measures are compiled into the one brief for the day.

The documents initially provided to OVIC relate to the directions which implemented the restricted areas decisions as per the applicant's request; the other attachments relate to other public health measures, and are therefore not relevant to the applicant's request.

18. The Agency also provided OVIC with a copy of the relevant attachments for my review, except for Attachment B5 for the brief in Document 12.
19. Having reviewed Attachments B and C to each brief, I accept these documents are not relevant to the terms of the Applicant's request as they do not relate to a decision or directions regarding the implementation of the 5km, 10km and 25km restricted areas. Accordingly, these attachments are not subject to my further review.
20. I am satisfied Attachment B5 for the brief in Document 12 is not relevant to the terms of the Applicant's request.
21. However, I am satisfied Attachment A to each brief are relevant to the terms of the Applicant's request. While these documents may contain administrative information about appropriate powers under the *Public Health and Wellbeing Act 2008* (Vic) (**PHW Act**), I am of the view the attachments

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<sup>1</sup> *Roberts v Southern Rural Water* (unreported, VCAT, Preuss SM, 20 April 2000).

have a sufficient connection to the requested briefs and the implementation of public health directions to come within the terms of the Applicant's request.

22. Accordingly, I am satisfied Attachment A to each brief are relevant to the terms of the Applicant's request and subject to review.
23. In the interests of procedural fairness, the Agency was provided with the above view and invited to consider whether it seeks to rely on an exemption as a basis for refusing access to these documents.
24. In response, the Agency did not apply any exemptions. However, it provided OVIC with a marked-up copy of Attachment A for the brief in Document 1 with the personal affairs information of non-executive Agency officers deleted as the Applicant does not seek access to this information. The Attachment A documents are referred to as Documents 4, 9 and 14 in the Schedule of Documents in **Annexure 1**.
25. Following further enquiries made by OVIC staff, the Agency provided a copy of Attachment B4, which is an attachment to the brief in Document 1. The Agency advised this document could be released in full. This document is referred to as Document 3 in the Schedule of Documents in **Annexure 1**.

### **Review of exemptions**

#### ***Section 28(1)(d) – Disclosure would involve disclosure of any deliberation or decision of the Cabinet***

26. 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.
27. Cabinet is a forum of Ministers chaired by the Premier which decides major policy for the Victorian Government. It comprises of all Ministers and considers questions of policy, administration and legislation.<sup>2</sup>
28. 'Cabinet' includes a committee or sub-committee of Cabinet.<sup>3</sup>
29. A document will be exempt from release under section 28(1)(d) if there is evidence the Cabinet discussed various options in a document and deliberated upon and/or adopted options for its consideration.<sup>4</sup>
30. Whether a document would disclose a 'deliberation of Cabinet' depends on the terms of the document. The Court of Appeal of the Victorian Supreme Court has held:

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. The former would say nothing as to Cabinet's deliberations; the latter might say a great deal.<sup>5</sup>
31. 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.<sup>6</sup>

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<sup>2</sup> Victorian Government, *Cabinet Handbook*, at <https://www.vic.gov.au/cabinet-handbook>.

<sup>3</sup> Section 28(7)(a).

<sup>4</sup> *Smith v Department of Sustainability and Environment* [2006] 25 VAR 65; [2006] VCAT 1228 at [23].

<sup>5</sup> *Department of Infrastructure v Asher* [2007] 19 VR 17; [2007] VSCA 272 at [8].

<sup>6</sup> *Dalla-Riva v Department of Treasury and Finance* [2005] 23 VAR 396; [2005] VCAT 2083 at [30].

32. Where a Cabinet decision is made public, the announcement in relation to the issue decided will not be taken to disclose the Cabinet's decision or deliberation.<sup>7</sup>

*Document 6*

33. On the face of the document, I am not satisfied the information on page 1, to which the Agency refused access, would disclose a decision made by or deliberation of the Cabinet.
34. There is also no objective evidence before me that the Cabinet discussed various options or disclosure of this information would reveal the substance of deliberations of the Cabinet. Rather, it reveals the subject matter of information that was considered by a committee of the Cabinet.
35. On page 8, the Agency relies on section 28(1)(d) to exempt from release information concerning National Cabinet. I am not satisfied National Cabinet falls within the definition of Cabinet for the purpose of section 28(1), while also noting the Administrative Appeals Tribunal held that National Cabinet is a not a subcommittee of the Federal Cabinet for the purpose of the *Freedom of Information Act 1982* (Cth).<sup>8</sup>
36. I am satisfied the information exempted on page 9 reveals a decision of a committee of Cabinet and is exempt under section 28(1)(d).

*Document 11*

37. I am satisfied the information to which the Agency refused access on page 24 reveals a decision of a committee of the Cabinet and is exempt from release under section 28(1)(d).
38. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents in **Annexure 1**.

***Section 29(1)(a) and 29(1)(b) – Documents containing matter communicated by any other State***

39. Section 29(1)(a) provides a document is an exempt document if its disclosure under the FOI Act:
- (a) would be contrary to the public interest; and
  - (b) its disclosure would prejudice relations between the State and the Commonwealth or any other State or Territory.
40. Section 29(1)(b) provides a document is an exempt document if its disclosure under the FOI Act:
- (a) would be contrary to the public interest; and
  - (b) disclosure would divulge any information or matter communicated in confidence by or on behalf of the government of another country or of the Commonwealth or of any other State or Territory to the government of the State or Territory or a person receiving a communication on behalf of that government.
41. In determining whether a document is exempt from release under subsection 29(1), if practicable, an agency or Minister must:

notify any of the following that are relevant that the agency or Minister has received a request for access to the document—

- i. another agency or Minister;

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<sup>7</sup> *Honeywood v Department of Innovation, Industry and Regional Development* [2004] 21 VAR 1453; [2004] VCAT 1657 at [26].

<sup>8</sup> *Patrick and Secretary, Department of Prime Minister and Cabinet (Freedom of Information)* [2021] AATA 2719 (5 August 2021) at [210].

- ii. an agency of another country or the Commonwealth or another State or a Territory;
  - iii. an authority of another country or the Commonwealth or another State or a Territory; and
- seek the view of that agency, authority or Minister as to whether the document should be disclosed.

42. The Agency submits it has previously consulted with the Commonwealth government in relation to the Australian Health Protection Principal Committee (AHPPC) documents, and the Commonwealth government considers the information was provided confidentially and would substantially and negatively impact relations between the Commonwealth and States should it be released. While the Agency did not consult with the Commonwealth government in this instance, the Agency considers the Commonwealth's position would not have changed.
43. The first limb of both sections 29(1)(a) and 29(1)(b) require that I determine whether disclosure of a document would be contrary to the public interest.
44. I have considered the following public interest factors:<sup>9</sup>
- (a) protecting uninhibited exchanges between the governments of Australia;
  - (b) encouraging cooperative Federalism within Australia;
  - (c) protecting processes that contribute to high quality policy development by the governments of Australia; and
  - (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy.
45. Also relevant is the decision of *Patrick and Secretary, Department of Prime Minister and Cabinet*,<sup>10</sup> in which Justice White of the Commonwealth Administrative Appeals Tribunal, observed in relation to the equivalent provision in the *Freedom of Information Act 1982* (Cth) and similar documents to this matter:

In my view, when regard is had to the nature of the minutes of the National Cabinet meeting (including the matters which they do not contain), the Prime Minister's public statements concerning the decisions made at the meeting on 29 May 2020, and the apparent expectation of the National Cabinet participants that the Prime Minister would announce publicly the decisions made at the meeting, a finding that disclosure of the formal record of the decisions would cause damage to relations between the Commonwealth and a State would be inappropriate. I emphasise that, in forming that view, I have taken into account that the minutes do not reveal the contribution of any individual participant, any debate which may have occurred regarding each item or the considerations taken into account in relation to each item. In that circumstance, there is no reason to suppose that any participant in the National Cabinet, acting rationally, would feel some inhibition in his or her contributions to the debate at the National Cabinet by reason of the formal disclosure of the minutes of 29 May 2020.<sup>11</sup>

46. The Agency submits:

There is an established understanding between the members of the AHPPC [Australian Health Protection Principal Committee] that information provided, shared or deliberated by members or produced by the AHPPC is confidential. This understanding and expectation enables members of the AHPPC to fully deliberate live issues relating to the rapidly evolving COVID-19 pandemic without concern that the information they are sharing, which may need to change or be revised as circumstances develop, may be later divulged.

The release of AHPPC documents would be likely to prejudice the willingness of member states to share information as openly in the future, which would undermine the objectives of the AHPPC and could

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<sup>9</sup> Included in *Millar v Department of Premier and Cabinet* (General) [2011] VCAT 1230 at [62].

<sup>10</sup> (*Freedom of Information*) [2021] AATA 2719 [5 August 2021].

<sup>11</sup> *Ibid* at [267].

adversely impact on National Cabinet's management and response to the pandemic, and the health and safety of the Australian public.

47. The AHPPC is a decision making committee for health emergencies, comprising state and territory Chief Health Officers, and chaired by the Australian Chief Medical Officer. AHPPC provides advice and recommendations to the Australian Health Ministerial Advisory Council and the National Cabinet. The Commonwealth Department of Health provides secretariat support.<sup>12</sup> AHPPC is one of the primary bodies advising the National Cabinet on the country's response to the COVID-19 pandemic.<sup>13</sup>
48. In this case, having reviewed the documents, I have determined it would not be contrary to the public interest to release certain documents for the following reasons:
- (a) The documents contain a substantial amount of publicly available information with respect to the framework for National reopening.<sup>14</sup>
  - (b) The documents contain information that is largely factual in nature.
  - (c) National Cabinet and the AHPPC are important and influential bodies. In a liberal democratic system of government, there is an overwhelming public interest in the operation of such a central decision making body being transparent and accountable for decisions made given such decisions have a significant impact on members of the community, including at times of or in relation to a crisis or emergency situation.
  - (d) The documents do not appear to contain any individual contributions made by a State or Territory, or the Commonwealth government and provided in confidence to the Victorian Government.
  - (e) I do not accept disclosure of the documents would have a negative impact on future information sharing and communications between State, Territory and the Commonwealth governments.
  - (f) The documents appear to be in final form and there is no information before me to indicate they do not provide an accurate account of the reasons for the Victorian government's decisions in respect of public health directions.
  - (g) The documents contain information about the way in which the Victorian government responded to the COVID-19 pandemic, including the rationale for the making of public health orders. I consider there is significant public interest in transparency in government decision making which provides members of the community with the ability and opportunity to participate in a democratic society and scrutinise government decision making.
49. As I am of the view disclosure of the documents would not be contrary to the public interest, it is not necessary for me to consider the second limb of the exemptions and whether disclosure of the documents would prejudice relations between the State or Commonwealth, or divulge any information communicated in confidence by the Commonwealth to the State.
50. Accordingly, I am satisfied the documents is not exempt from release under section 29(1)(a) or 29(1)(b).

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<sup>12</sup> Australian Government, 'Australian Health Protection Principal Committee', *Australian Government – Directory* (April 2021) at <https://www.directory.gov.au/portfolios/health/department-health/australian-health-protection-principal-committee>.

<sup>13</sup> Australian Government Media Release issued by the Prime Minister, Minister for Health, Chief Medical Officer, 'Advice on coronavirus' (13 March 2020) at <https://www.pm.gov.au/media/advice-coronavirus>.

<sup>14</sup> Australian Government, *Framework for National Reopening* (October 2020), at <https://www.australia.gov.au/framework-national-reopening>.

51. My decision in relation to sections 29(1)(a) and 29(1)(b) is set out in the Schedule of Documents at **Annexure 1**.

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

52. 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.

53. The exemption does not apply to purely factual material in a document.<sup>15</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?*

54. I am satisfied the documents disclose matter in the nature of advice, prepared by an Agency officer.

*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?*

55. 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>16</sup>

56. In *Re Waterford and Department of Treasury (No.2)*,<sup>17</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.

57. I am satisfied the documents were prepared in the course of the deliberative processes of the Agency in relation to the issuing of public health directions.

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

58. In deciding if release is 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>18</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;

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<sup>15</sup> Section 30(3).

<sup>16</sup> *Brog v Department of Premier and Cabinet* [1989] 3 VAR 201 at 208.

<sup>17</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>18</sup> *Hulls v Victorian Casino and Gambling Authority* [1998] 12 VAR 483.



- (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.

59. The Agency submits disclosure would be contrary to the public interest for the following reasons:

- (a) They reveal high-level deliberative processes of government, and it would jeopardise the trust and confidence between public officials.
- (b) The documents contain sensitive information that has not been released publicly. Public release may lead to similar briefings being sanitised for public release, leaving out detailed evidence, data and/or assessment. This would deprive future decision-makers of relevant information, jeopardising both the effectiveness of the deliberative process and, potentially, undermining the ability of a decision-maker to be satisfied of the relevant statutory criteria.
- (c) The possibility that documents might ultimately be published might affect the frankness and candour of those preparing them and ultimately negatively impact important decision making and government policy as public duties could not be discharged effectively should every document that relates to policy making be disclosed.
- (d) In addition to the high-levels of government involved in this process, we note that the subject-matter of both the briefing pack and these deliberations — the making of Directions — was a core element of Victoria's response to the COVID-19 pandemic at the time, the Directions being the key means by which restrictions were imposed on individuals, businesses and other facilities in order to limit the spread of COVID-19. The cover brief, summarising the deliberations and legal considerations, can thus be seen as containing deliberative materials relating to the high level framing of government policy with respect to the COVID-19 pandemic.
- (e) The public release of these documents may give the misleading impression that evidence, data or analysis not specifically outlined in the briefing was never taken into account as part of the deliberative process or decision-making. The CHO [Chief Health Officer] may have been informed on other aspects via daily briefings, meetings, as well as active participation in the development of the proposed Health Directions.

60. Having reviewed the documents and considered the Agency's submissions, I am satisfied disclosure of the documents would not be contrary to the public interest for the following reasons:

- (a) The documents describe the reasons for the [senior Agency officers] exercising statutory powers under the PHW Act to restrict the movements of members of the community, including in relation to sensitive matters, such as hospital visits, which had a profound effect on the personal lives and freedom of movement of Victorians.
- (b) Given the significance of the public health directions issued by the [senior Agency officers] under the PHW Act and their impact on the Victorian community, I consider there is a strong

public interest in the documents, which contain factors and the reasons underpinning decisions of the [senior Agency officers'] to issue public health directions.

- (c) In these circumstances, members of the community have a right to access documents that describe the background information considered, reasons, the legal basis for, and documents that record those decisions.
- (d) I consider the public interest weighs in favour of the public having access to information that informed the exercise of the [senior Agency officers'] statutory powers under the PHW Act and to make public health directions in the interests of transparency and public scrutiny. Further, I have given weight to the role public access to information has in building public trust in government, particularly during times of crisis or emergency situations.
- (e) The documents are in final form and support the public health directions that were ultimately made and subsequently publicised.
- (f) Given public health directions in the context of the COVID-19 pandemic have significantly impacted the civil liberties of the Victorian community, it is unlikely briefings on similar matters, should the situation arise in the future, would be negatively impacted due to disclosure of these briefings. Rather, persons responsible for issuing public health directions would be reasonably likely to request, and be provided with, detailed information before issuing directions of this nature.
- (g) I do not consider their disclosure would negatively impact on the ability of Agency officers to provide future similar advice given the responsibilities of public sector employees under the Public Sector Values, including to provide frank, impartial and timely advice to the Government (Responsiveness); making decisions and providing advice on merit and without bias, caprice, favouritism or self interest (Impartiality); submitting themselves to appropriate scrutiny (Accountability); and making decisions and providing advice consistent with human rights (Human Rights).<sup>19</sup>
- (h) I do not accept disclosure of the documents could mislead the Applicant or members of the public. Rather, I consider members of the public are capable of understanding the role and statutory powers of the [senior Agency officers] under the PHW Act.
- (i) Significant parts of the documents contain publicly available information about the public health directions.

61. As I have determined it would not be contrary to the public interest to disclose the documents, I am satisfied they are not exempt from release under section 30(1).

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

### ***Section 32(1) – Documents affecting legal proceedings***

#### *Legal professional privilege*

63. A document will be subject to legal professional privilege where it contains a confidential communication between:<sup>20</sup>

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<sup>19</sup> Section 7(1) of the *Public Administration Act 2004* (Vic).

<sup>20</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

- (a) the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
- (b) the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
- (c) the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

#### *Client legal privilege*

64. A document will be subject to client legal privilege where it contains a 'confidential communication' between:
- (a) the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice;<sup>21</sup> or
  - (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.<sup>22</sup>
65. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.
66. Legal privilege extends to communications between government agencies and its in-house lawyers provided those lawyers are sufficiently independent.<sup>23</sup>
67. Documents 1, 7 and 12 are written briefs provided to the [senior Agency officers] concerning the reissuing of public health directions to limit the spread of Novel Coronavirus 2019. Each briefing was prepared by Agency inhouse lawyers, who I am satisfied hold a practising certificate having reviewed their status on the Victorian Legal Services Board. Certain written briefs were also prepared in consultation with the Victorian Government Solicitor's Office and Counsel. On the information before me, I am satisfied the documents are confidential communications made between the Agency and its inhouse and external legal representatives that were made for the dominant purpose of providing legal advice in relation to the issuing of the public health directions.
68. Documents 5, 10 and 15 are memorandums of legal advice and are attached to the briefs discussed above. Each document contains the heading 'subject to legal professional privilege' and contains legal advice regarding the issuing of public health directions. I am satisfied the documents are confidential communications between the Agency and its legal representatives that were made for the purpose of providing legal advice prior to the making of decisions.

#### *Has legal privilege been waived?*

69. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with

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<sup>21</sup> Section 118 of the *Evidence Act 2008* (Vic).

<sup>22</sup> Section 119 of the *Evidence Act 2008* (Vic).

<sup>23</sup> *Waterford v The Commonwealth* [1987] HCA 25 at 4 (per Mason and Wilson JJ) and at 5 to 6 (per Brennan J).

the client's express or implied consent.<sup>24</sup> No submission was made and there is no information before me to indicate legal privilege in the relevant documents has been waived.

70. Accordingly, I am satisfied Documents 1, 5, 7, 10, 12 and 15 are exempt from release under section 32(1).
71. My decision in relation to section 32(1) is set out in the Schedule of Documents in **Annexure 1**.

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

72. 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.
73. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>25</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>26</sup>
74. As discussed above, I am satisfied Documents 4, 9 and 14 are relevant to the terms of the Applicant's request.
75. I have considered the effect of deleting exempt information from the documents. I am satisfied it is not practicable:
- (a) to delete exempt information from Documents 1, 5, 7, 10, 12 and 15, as each of these documents is exempt from release under section 32(1) in its entirety, and
  - (b) to provide the Applicant with an edited copy of Documents 4, 6 and 11 as to do so would render these documents meaningless.
76. My decision in relation to section 25 is outlined in the Schedule of Documents in **Annexure 1**.

### **Conclusion**

77. On the information before me, while I am satisfied information in the documents is exempt from release under sections 28(1)(d) and 32(1), I am not satisfied the documents are exempt from release under sections 29(1)(a), 29(1)(b) and 30(1).
78. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, access is granted in part. Where it is not practicable to do so, access is refused in full.
79. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

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<sup>24</sup> Sections 122(2) and 122(3) of the *Evidence Act 2008* (Vic) (for client legal privilege) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

<sup>25</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>26</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].

## **Review rights**

80. 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.<sup>27</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>28</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>29</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>30</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>27</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>28</sup> Section 52(5).

<sup>29</sup> Section 52(9).

<sup>30</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]	Brief	10  (Excluding attachments)	Refused in full  Sections 30(1), 32(1)	Refuse in full  Section 32(1)	<p><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.</p> <p><b>Section 32(1):</b> I am satisfied the document is exempt from release under section 32(1) for the reasons provided in the Notice of Decision above.</p> <p><b>Section 25:</b> I am satisfied Attachments B1 to B3 and C1 to C3 are not relevant to the terms of the Applicant’s request and are irrelevant documents for the purpose of section 25.</p> <p>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, as to do so would render the document meaningless, and access is refused in full.</p>
2.	[date]	Draft directions  (Not an attachment from Document 1)	17	Released in full	Not subject to review	
3.	[date]	Attachment B4	17	Released in full	Not subject to review	During the review, the Agency located this additional attachment to Document 1. The

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		(Attachment from Document 1)				Agency agreed for the document to be released in full.
4.	[date]	Attachment A (Attachment from Document 1)	6	Refused in full  Section 25	Release in part  Section 25  The document is to be released with the irrelevant personal affairs information of Agency non-executive officers' deleted in accordance with section 25.	<p><b>Section 25:</b> The Applicant does not seek access to the personal affairs information of non-executive Agency officers. Therefore, such information is irrelevant information for the purpose of section 25.</p> <p>For the reasons outlined in the Notice of Decision above, I am satisfied certain information is relevant to the terms of the Applicant's request, however, I am satisfied it is not exempt from release.</p> <p>As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25, access is granted in part.</p>
5.	[date]	Attachment C4 (Attachment from Document 1)	22	Refused in full  Section 32(1)	Refuse in full  Section 32(1)	<p><b>Section 32(1):</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
6.	[date]	Attachment D	32	Released in part	Release in part	<b>Section 28(1)(d):</b> While I am satisfied information on page 9 is exempt from release under section 28(1)(d), I am not satisfied the remaining information, to which the Agency

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		(Attachment from Document 1)		Sections 28(1)(d), 29(1)(a), 29(1)(b)	Sections 28(1)(d), 25  The document is to be released, except for the information that the Agency exempted from release under section 28(1)(d) on page 9, which is to remain deleted.	refused access, is exempt from release under section 28(1)(d) for the reasons provided in the Notice of Decision above.  <b>Sections 29(1)(a) and 29(1)(b):</b> I am not satisfied the document contains information that is exempt from release under these exemptions for the reasons provided in the Notice of Decision above.  <b>Section 25:</b> As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25, access is granted in part.
7.	[date]	Brief	11  (Excluding attachments)	<b>Refused in full</b>  Sections 30(1), 32(1)	<b>Refuse in full</b>  Section 32(1)	<b>Section 30(1):</b> See comments for Document 1.  <b>Section 32(1):</b> See comments for Document 1.  <b>Section 25:</b> I am satisfied Attachments B2, B4, B5, B6, and C2 to C6 are irrelevant to the terms of the Applicant's FOI request. See comments for Document 1.
8.	[date]	Attachment B1 and B3 – Draft directions (Attachment to Document 7)	39	<b>Released in full</b>	<b>Not subject to review</b>	



Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
9.	[date]	Attachment A (Attachment to Document 7)	1	Refused in full  Section 25	Release in full	Section 25: See comments for Document 4.
10.	[date]	Attachment C1 (Attachment to Document 7)	21	Refused in full  Section 32(1)	Refuse in full  Section 32(1)	Section 32(1): See comments for Document 1.  Section 25: See comments for Document 1.
11.	[date]	Attachment D (Attachment to Document 7)	40	Released in part  Sections 28(1)(d), 29(1)(a), 29(1)(b)	Release in part  Sections 28(1)(d), 25  The document is to be released, except for the information that the Agency exempted from release under section 28(1)(d) on page 24, which is to remain deleted.	Section 28(1)(d): I am satisfied the document contains information that is exempt from release under section 28(1)(d) as it contains a decision of a Cabinet committee.  Sections 29(1)(a) and 29(1)(b): See comments for Document 6.
12.	[date]	Brief	21  (Excluding attachments)	Refused in full  Sections 30(1), 32(1)	Refuse in full  Section 32(1)	Section 30(1): See comments for Document 1.  Section 32(1): See comments for Document 1.  Section 25: I am satisfied Attachments B2 to B7 and C2 to C4 are irrelevant to the terms of the

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						Applicant's FOI request. See comments for Document 1.
13.	[date]	Attachment B1 - Draft directions (Attachment to Document 12)	33	Released in full	Not subject to review	
14.	[date]	Attachment A (Attachment to Document 12)	3	Refused in full Section 25	Release in full	Section 25: See comments for Document 4.
15.	[date]	Attachment C1 (Attachment to Document 12)	24	Refused in full Section 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 1.
16.	[date]	Attachment D (Attachment to Document 12)	49	Released in full	Not subject to review	