

## Notice of Decision and Reasons for Decision

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Applicants:	'CX1'
Agency:	Department of Families, Fairness and Housing (formerly Department of Health and Human Services)
Decision date:	19 April 2021
Exemptions considered:	Sections 28(1)(b), 28(1)(ba), 29(1)(a), 36(1)(b)
Citation:	'CX1' and <i>Department of Families, Fairness and Housing (Freedom of Information)</i> [2021] VICmr 101 (19 April 2021)

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FREEDOM OF INFORMATION – Cabinet documents – National Disability Insurance Scheme (NDIS) – funding of disability services – in-kind funding – government relations – Ministerial briefing – bilateral steering committee – meeting documents

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 Applicants under the FOI Act.

I am satisfied the documents are exempt under sections 28(1)(b), 28(1)(ba) and 29(1)(a).

As I am satisfied Documents 1, 2, 3 and 5 are exempt in full, I have refused access to these documents in full. However, I have granted access to Document 4 in part as I am satisfied it is practicable to provide an edited copy of this document with exempt information deleted in accordance with section 25.

Accordingly, my decision on the Applicant's request differs from the Agency's decision.

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  
19 April 2021

## Reasons for Decision

### Background to review

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

...the policy and determination within which the Department of Health & Human Services (DHHS)/the Agency) determined the need to extend a further bilateral agreement signed by the PM and Premier on 17 June 2019, the in-kind period past the time of 31 March 2019 when Life Without Barriers (LWB) took over the management of a large number of [the Agency's] group homes for people with intellectual and multiple disabilities throughout Victoria, when the support service funding for these group home residents should have been from their NDIS plans rather than continuing with in-kind government funding.
2. The requested documents concern the National Disability Insurance Scheme (**NDIS**). The NDIS is a Commonwealth Government initiative designed to provide direct funding to individuals with a permanent or significant disability.
3. Prior to the NDIS, the Commonwealth Government and State and Territory governments provided pre-paid lump sums to disability service providers to fund disability support services, known as 'in-kind funding' (**previous funding scheme**).
4. The documents concern government discussions regarding the transition to the NDIS from the previous funding scheme, which involved State, Territory and the Commonwealth Government providing pre-paid lump sums to service providers so they could provide support services to people with a disability.
5. On 17 June 2019, the Victorian Government entered into a bilateral agreement with the Commonwealth Government in relation to the NDIS. A copy of the final intergovernmental agreement is available on the NDIS website.<sup>1</sup>
6. The Applicant seeks access documents in relation to the administration of the NDIS, in particular, discussions leading up to intergovernmental agreements that set out the NDIS framework governing the roles and responsibilities of each Government in relation to the transitioning of clients from the previous funding scheme to the NDIS.
7. The Agency identified five documents falling within the terms of the Applicant's request and refused access to all documents in full relying on the exemptions in sections 28(1)(b), 28(1)(ba), 29(1)(a) and 36(1)(b). The Agency's decision letter sets out the reasons for its decision.

### Review

8. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
9. I have examined a copy of the documents subject to review.
10. The Applicants 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.

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<sup>1</sup> The NDIS Intergovernmental Heads of Agreement are available at <https://www.ndis.gov.au/about-us/governance/intergovernmental-agreements#victoria>.

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 28(1)(b) – Documents prepared for the purpose of submission for consideration by Cabinet***

14. In *Ryan v Department of Infrastructure*,<sup>2</sup> the Victorian Civil and Administrative Tribunal (VCAT) observed:

It has been said that a document is not exempt merely because it has some connection with Cabinet, or is perceived by departmental officers or others as being of a character that they believe ought to be regarded as a Cabinet document or because it has some Cabinet "aroma" around it. Rather, for a document to come within the Cabinet document exemption, "it must fit squarely within one of the four exemptions [(now five)]" in section 28(1) of the Act.

15. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
16. Section 28(1)(b) provides a document is an exempt document if it was prepared by or on behalf of a Minister or by an agency for the purpose of submission for consideration by the Cabinet.
17. However, section 28(1)(b) does not apply to purely statistical, technical or scientific material in a document unless disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.<sup>3</sup>
18. Section 28(1)(b) is focused on the purpose for which a document was prepared. A document will be exempt if the sole purpose, or one of the substantial purposes for which it was prepared, was for submission for consideration by Cabinet.<sup>4</sup>
19. However, it is not necessary to prove a document was submitted to Cabinet.<sup>5</sup> Further, the fact a document was submitted to Cabinet will not necessarily be evidence it was prepared for the sole or substantial purpose of submission for its consideration.
20. Section 28(1)(b) will not apply to a document circulated to Cabinet ministers 'merely for information purposes'.<sup>6</sup> As stated by Morris J in *Ryan v Department of Infrastructure*:<sup>7</sup>

It is important to observe that section 28(1)(b) of the Act does not extend to a document merely because the document has been prepared for the purpose of submission to the Cabinet. Rather the purpose of the preparation of the document must be for submission for consideration by the Cabinet. Hence documents will not fall within the exemption in section 28(1)(b) of the Act just because they were prepared with the intention of physically placing them before the Cabinet. Rather it is necessary to ask whether, at the time a document was prepared, the only purpose, or one of the substantial purposes,

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<sup>2</sup> (2004) VCAT 2346 at [33].

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

<sup>44</sup> *Mildenhall v Department of Premier and Cabinet (No 2)* (1995) 8 VAR 478 at 290; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924 at [72].

<sup>5</sup> *Asher v Department of Premier and Cabinet* [2002] VCAT 499 at [9]; *Wilson v Department of Premier and Cabinet* [2001] VCAT 663; (2001) 16 VAR 455 at 459.

<sup>6</sup> *Olexander v Department of Premier Cabinet* [2002] VCAT 497 at [46].

<sup>7</sup> [2004] VCAT 2346 at [36].

for the preparation of the document was for the purpose of submission for consideration by the Cabinet.

*Were the documents prepared by or on behalf of a Minister or an agency?*

21. Document 1 is a submission prepared for a sub-committee of Cabinet. It has an allocated Cabinet submission number and is presented in a Cabinet submission template. Documents 2 and 3 are attachments to the Cabinet submission in Document 1.
22. I am satisfied Documents 1, 2 and 3 were prepared by the [specified Victorian Government agency], which is an agency for the purposes of the FOI Act.

*Were the documents created for the sole or substantial purpose of submission for consideration by Cabinet?*

23. Document 2 is a marked up copy of a document. While I accept the original document was not prepared for the purpose of submission to Cabinet for its consideration, having reviewed the Cabinet submission, the comments inserted into and information marked up in the document, I am satisfied Document 2 was prepared for the purpose of submission to Cabinet.
24. Document 3 is a table. I accept it was prepared by the [specified Victorian Government agency]. Similarly, to Document 2, having reviewed the Cabinet submission and information in Document 3, I am satisfied it was prepared for the purpose of submission to Cabinet as it is closely linked to Document 1.
25. I am constrained in providing any further detail regarding the documents, as to do so would disclose information exempt under section 28(1).
26. Accordingly, I am satisfied Documents 1, 2 and 3 were created for the sole or substantial purpose of submission for consideration by Cabinet.

*Do the documents contain purely statistical, technical or scientific material?*

27. From my review of the documents, I am satisfied the documents do not contain purely statistical, technical or scientific material.
28. Accordingly, I am satisfied Documents 1, 2 and 3 are exempt under section 28(1)(b).
29. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 28(1)(b).

***Section 28(1)(ba) – Documents prepared for the purpose of briefing a Minister***

30. The Agency relies on section 28(1)(ba) to refuse access to Document 5 in full.
31. 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 Cabinet.
32. 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 an issue to be considered by Cabinet.<sup>8</sup>

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<sup>8</sup> *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

33. 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 Cabinet.<sup>9</sup>
34. The purpose of the briefing must be 'immediately contemplated' when the document is created. The exemption cannot apply merely because Cabinet ultimately considered the issue.<sup>10</sup>
35. The word 'briefing' means a 'short accurate summary of the details of a plan or operation. The purpose...is to inform'.<sup>11</sup>
36. The document should have the character of a briefing material. 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 [m]inister'. It requires more than having 'placed a document before a Minister'.<sup>12</sup>
37. The phrase 'issues to be considered by Cabinet' requires it must be more than just 'likely' that Cabinet will consider an issue. There must be an intention or expectation the issues will be considered by Cabinet, even if an issue is not ultimately considered.
38. Evidence that an issue was included in a Cabinet agenda will often provide the necessary evidence in the context of a Minister being briefed about an issue before it is considered by Cabinet.<sup>13</sup>
39. Document 5 is a brief to the Premier prepared by the [specified Victorian Government agency]. It is a two page brief and references three attachments. In response to enquiries made by OVIC staff, the Agency confirmed it does not hold copies of the three attachments.
40. Having carefully considered the information in Document 5 and Documents 1, 2 and 3, I am satisfied Document 5 was prepared for the purpose of briefing the Premier in relation to an issue to be considered by a sub-committee of Cabinet.
41. Accordingly, I am satisfied Document 5 is exempt under section 28(1)(ba).
42. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 28(1)(ba).

***Section 29(1)(a) – Disclosure would prejudice relations between governments***

43. A document is exempt under section 29(1)(a) if its disclosure:
  - (a) under the Act would be contrary to the public interest; and
  - (b) would prejudice relations between the State and the Commonwealth or any other State or Territory.
44. The Agency relies on section 29(1)(a) to refuse access to Documents 1, 2, 3, 4 and 5, on the basis that disclosure under the FOI Act would prejudice relations between the Victorina and Australian Governments.

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<sup>9</sup> *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

<sup>10</sup> *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

<sup>11</sup> *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

<sup>12</sup> *Ibid.*

<sup>13</sup> *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.

45. As I have already determined Documents 1, 2, 3 and 5 are exempt under sections 28(1)(b) or 28(1)(ba) it is not necessary for me to consider the Agency's application of section 29(1)(a) to these documents.
46. Therefore, my review is directed at Document 4.

*Would disclosure under the FOI Act be contrary to the public interest?*

47. Firstly, I must be satisfied disclosure of the document would be contrary to the public interest.
48. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>14</sup>
49. The starting point is the object of the FOI Act in section 3(1), which recognises the right of every person to gain access to a document held by government limited by exemptions which protect essential public interests only.
50. The term 'public interest' is not defined in the FOI Act. I note the observation of the Supreme Court in *Director of Public Prosecutions v Smith*<sup>15</sup> which highlights the distinction between the public interest and an issue of interest to the public:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ...

51. The document concerns the State of Victoria's position in relation to the recommended in-kind programs proposed payments and phase out deadlines. The document is marked as a 'draft'.
52. In terms of content, Document 4 is deliberative in that it describes considerations to be made by the Victorian NDIS Bilateral Steering Committee (the **Steering Committee**) and recommends a course of action to be taken in future negotiations between the Victorian and Commonwealth Governments regarding a bilateral funding agreement.
53. Having regard to the issues and competing policy interests and considerations, I am of the view disclosure of departmental advice provided to Ministers and department heads in preparation for government negotiation processes for intergovernmental agreements, including advice about possible discussions and responses, could undermine future negotiations, the Victorian Government's negotiating position and consequently lead to detrimental outcomes.
54. The 'essential public interests' that limit disclosure of information under the FOI Act, in my view, include maintaining high level government deliberation and decision making, the disclosure of which would reasonably disrupt the efficient and economical conduct of government.
55. While I am satisfied disclosure of information in Document 4 would be contrary to the public interest, equally, I consider the document contains certain information that is more general and factual in nature. To the extent the document contains information of a factual or descriptive nature, reflects accepted facts about plans and actions to be undertaken, or already undertaken, or information that is already in the public domain, I am not satisfied disclosure would be contrary to the public interest.

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<sup>14</sup> *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].

<sup>15</sup> [1991] 1 VR 63, 75.

56. Accordingly, I am satisfied it would be contrary to the public interest to disclose certain information in Document 4.

*Would disclosure prejudice relations between the State and Commonwealth or any other State or Territory?*

57. Section 29(1)(a) also requires that I be satisfied disclosure of a document would prejudice the relations between the State and Commonwealth governments.
58. In my view, the use of 'would' requires certainty that an event will occur, rather than a mere possibility or likelihood.
59. Section 29(2) provides that, in deciding whether a document is exempt under section 29(1), if practicable, an agency must notify the relevant Commonwealth, State or Territory agency, authority or Minister of the request,<sup>16</sup> and seek its views as to whether the document should be disclosed.<sup>17</sup>
60. The Agency advised it did not consult with the relevant Commonwealth agency to obtain its views on disclosure of the document.
61. In determining whether disclosure of a document would prejudice relations between the Victorian and Commonwealth Governments, I have had regard to the following factors:<sup>18</sup>
- (a) protecting uninhibited communications between the Commonwealth and Victorian Governments;
  - (b) encouraging cooperative Federalism in Australia;
  - (c) protecting processes that contribute to high quality government policy and decision making;
  - (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for a government policy or decision;
  - (e) protecting against unnecessary confusion or debate by avoiding premature release of a document that represents a stage of a negotiation or decision making process; and
  - (f) ensuring the Victorian Government meets its obligations and expectations for confidentiality under binding agreements with other Australian governments.
62. Having carefully considered Document 4, I am satisfied certain information in the document that I have determined would be contrary to the public interest to disclose would also prejudice Commonwealth and Victorian Government relations, given the sensitive nature of negotiations between the Governments in relation to the NDIS.
63. While the negotiations have concluded and a bilateral agreement has been signed, I consider the sensitive nature of the information in the documents, which reflects the high level advice and approach taken by the Victorian Government in negotiations with the Commonwealth Government, means disclosure of such documents under the FOI Act would reasonably prejudice relations between the two governments, both in relation to the NDIS and more broadly.
64. Accordingly, I am satisfied certain information in Document 4 is exempt under section 29(1)(a).

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<sup>16</sup> Section 29(2)(a).

<sup>17</sup> Section 29(2)(b).

<sup>18</sup> *Millar v Department of Premier & Cabinet* [2011] VCAT 1230 at [62].

65. The Schedule of Documents in **Annexure 1** sets out my decision in relation to Document 4. The Agency has been provided with a marked-up version of this document showing the information to be released.

***Section 36(1)(b) – Disclosure of instructions provided in the negotiation and execution of contracts***

66. A document is an exempt under section 36(1)(b) if:

...

- (b) in the case of documents of a department or prescribed authority its disclosure under this Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided for the use or guidance of, officers of an agency on the procedures to be followed or the criteria to be applied in negotiation, including financial, commercial and labour negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to the financial property or personnel management and assessment interests of the Crown or of an agency.

67. In its submissions, the Agency advised Document 4 discloses instructions provided by Agency officers for guidance in negotiating terms of the NDIS scheme.
68. Having reviewed Document 4, I am not satisfied the recommendations it contains, for consideration by Steering Committee when making policy decisions, disclose ‘instructions’ or ‘guidance’ to be used or followed for the purpose of section 36(1)(b).
69. Accordingly, I am satisfied the exemption in section 36(1)(b) does not apply to the documents.

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

70. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
71. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>19</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>20</sup>
72. I have considered whether it is practicable to provide the Applicants with an edited copy of Documents 1, 2, 3 and 5 with exempt information deleted in accordance with section 25. Given I am satisfied these documents are exempt in full under sections 28(1)(b) and 28(1)(ba), I am satisfied no obligation arises under section 25 to provide the Applicants with an edited copy of these documents.
73. However, I am satisfied Document 4 is exempt in part and it is practicable to delete the exempt information as to do so would not require substantial effort or resources and the edited document would not be rendered meaningless.

**Conclusion**

74. On the information before me, I am satisfied the documents are exempt under sections 28(1)(b), 28(1)(ba) and 29(1)(a).
75. As I am satisfied Documents 1, 2, 3 and 5 are exempt in full, I have refused access to these documents in full. However, I have granted access to Document 4 in part as I am satisfied it is

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<sup>19</sup> *Mickelburgh 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>20</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].



practicable to provide an edited copy of this document with exempt information deleted in accordance with section 25.

76. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

#### **Review rights**

77. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>21</sup>
78. The Applicants may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>22</sup>
79. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>23</sup>
80. 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.
81. 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>24</sup>

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

<sup>22</sup> Section 52(5).

<sup>23</sup> Section 52(9).

<sup>24</sup> Sections 50(3F) and (3FA).

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Undated	Cabinet Submission	12	Refused in full  Sections 28(1)(b), 29(1)(a), 36(1)(b)	<b>Refuse in full</b>  Section 28(1)(b)	<b>Section 28(1)(b):</b> For the reasons set out in the Notice of Decision above, I am satisfied the document was created for the sole, or for the substantial purpose of being submitted for consideration by a sub-committee of Cabinet. According, I am satisfied the document is exempt in full under section 28(1)(b).
2.	[date]	Attachment A	26	Refused in full  Sections 28(1)(b), 29(1)(a), 36(1)(b)	<b>Refuse in full</b>  Section 28(1)(b)	This document is an attachment to Document 1.  <b>Section 28(1)(b):</b> See comments for Document 1.
3.	Undated	Attachment B	4	Refused in full  Sections 28(1)(b), 29(1)(a), 36(1)(b)	<b>Refuse in full</b>  Section 28(1)(b)	This document is an attachment to Document 1.  <b>Section 28(1)(b):</b> See comments for Document 1.
4.	Undated	Document prepared for NIDS Bilateral Steering Committee Meeting	4	Refused in full  Sections 29(1)(a), 36(1)(b)	<b>Release in part</b>  Sections 29(1)(a), 25  The Agency has been provided with a marked-up copy of the document indicating information that is not exempt under section 29(1)(a) and	<b>Section 29(1)(a):</b> For the reasons set out in the Notice of Decision above, I am satisfied the document is exempt under section 29(1)(a). However, I am not satisfied in all instances information in the document is exempt on grounds that I am not persuaded disclosure of certain information in the document would be contrary to the public interest.  <b>Section 36(1)(b):</b> For the reasons set out in the Notice of Decision above, I am not satisfied the

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					is to be released in accordance with section 25.	document contains information that meets the requirements for section 36(1)(b).  <b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. Accordingly, access is granted to the document in part.
5.	Undated other than a reference to [year]	Unsigned draft Brief to Premier	2	Refused in full  Sections 29(1)(a), 28(1)(ba)	<b>Refuse in full</b>  Section 28(1)(ba)	<b>Section 28(1)(ba):</b> I am satisfied the document contains information prepared for the purposes of briefing the Premier in relation to an issue to be considered by a sub-committee of Cabinet.  <b>Section 25:</b> See comments in Document 1.