

## Notice of Decision and Reasons for Decision

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Applicant:	'EV2'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	14 September 2022
Exemptions considered:	Sections 30(1), 34(4)(a)(ii)
Citation:	'EV2' and Department of Jobs, Precincts and Regions (Freedom of Information) [2022] VICmr 220 (14 September 2022)

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FREEDOM OF INFORMATION – Ministerial briefs – draft ministerial briefs – agency not engaged in trade or commerce

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.

I am not satisfied information to which the Agency refused access under sections 30(1) and 34(4)(a)(ii) is exempt from release.

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.

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

14 September 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  1. BMIN-2-21-9284 Variation of Grant agreement – [named business undertaking, date]
  2. BMIN-2-21-9893 Overdue Payment of [named project] Management Costs, 4/02/2021
  3. BMIN-2-21-10032 Approval of four Regional Digital Fund projects from the Ovens Murray Region, Great South Coast and Gippsland, 9/02/2021
  4. BMIN-2-21-10063 Portland Foreshore Redevelopment Milestone Timing Variation, 11/02/2021
  5. BMIN-2-21-10850 Bendigo GovHub - Capital Funding, 12/03/2021
  6. BMIN-2-21-10933 Cultural Infrastructure Projects for Regional Development, 16/03/2021
  7. BMIN-2-21-10928 Termination of Grant Agreement - [named business undertaking, date]
  8. BMIN-2-21-10976 Variation to Grant Agreement - [named business undertaking, date]
  9. BMIN-2-21-11049 [named business undertaking] - Request for Variation to scope - [named] Fund, 19/03/2021.
2. The Applicant advised the Agency they do not seek access to the names or contact information of non-executive Agency officers or the personal contact information of executive Agency officers.
3. The Agency identified nine documents falling within the terms of the Applicant's request and granted access to four documents in full and refused access to two documents in part and three documents in full under sections 30(1), 34(4)(a)(ii). The Agency's decision letter sets out the reasons for its decision.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the documents.
5. The Applicant seeks review of Documents 1, 2, 5 and 8 only.
6. I have examined a copy of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
10. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

## Review of exemptions

### *Section 30(1) – internal working documents*

11. 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.
12. The exemption does not apply to purely factual material in a document.<sup>1</sup>
13. The term ‘officer of an agency’ is defined in section 5(1). It includes a member of an agency’s staff and any person employed or engaged by or on behalf of an agency, regardless of whether they are subject to the *Public Administration Act 2004* (Vic).

*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?*

14. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
15. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>2</sup>
16. I am satisfied the documents contain information in the nature of opinion, advice or recommendation prepared by Agency officers and provided to the Minister.

*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?*

17. The term ‘deliberative process’ is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, a Minister or government.<sup>3</sup>
18. In *Re Waterford and Department of Treasury (No.2)*,<sup>4</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.

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>3</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

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

19. I am satisfied the documents were made in the course of or for the purpose of the deliberative processes of the Agency and the Minister. Namely, briefing the Minister for Regional Development on various issues relevant to her Ministerial portfolios.

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

20. 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 promote the disclosure of information.

21. In doing so, I have given weight to the following relevant factors:<sup>5</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;
- (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.

22. The Agency submits:

[regarding Document 1]

The brief remains in draft form and was not sighted or signed by the Minister. It is imperative that decision makers are judged only on final actions undertaken rather than information prepared at the officer level not viewed by the Minister.

It is open to the applicant at any stage to seek access to organisational brief titles and/or the final organisational level version of this brief.

[regarding Document 2]

Being a draft brief, the document itself contains notes advising of the next steps required including that the brief process is not the process to be followed moving forward with this matter.

Advice received from the relevant program area is that this brief was partially drafted and closed as it was instead decided that an existing brief on the subject would be used to include the information contained within.

It was not sighted by the Minister and contains incomplete information due to its draft nature.

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<sup>5</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

[regarding Document 8]

The relevant program area advised that the release of such information would be contrary to the public interest as it does not adequately reflect the actions that ultimately occurred in relation to this grant. The brief did not proceed and was closed with no further action and without being sighted by the Minister. The business is yet to commence activities and the release of commercial information in such circumstances would likely effect the working relationships between the parties and their ability to deliver on this project for the Victorian public.

23. On the information before me, I am not satisfied disclosure of the opinion, advice and recommendation in the documents would be contrary to the public interest for the following reasons:
- (a) Opinion, advice and recommendations provided by an agency officer to a Minister, including draft documents, are not automatically exempt under section 30(1). Rather, each document must be considered in terms of its content and context, and an agency must demonstrate disclosure of a document would be contrary to the public interest.
  - (b) There is a considerable public interest in the community being better informed about government decision making, particularly in regards to the approval for the payment of and the expenditure of public funds. By providing access to information that demonstrates the basis upon which a decision is made, disclosure of documents such as these builds community trust in government and its decision making processes. Further, I consider this public interest arises regardless of whether or not the relevant expenditure or funding was approved or not approved, or expended or not expended. Therefore, I consider disclosure of the documents serves the public interest in promoting open and accountable government.
  - (c) Having reviewed the documents, I do not consider their content concerns or discusses particularly sensitive issues. The documents concern matters involving variations of grants, project funding and expenditure of public funds. Further, the context of the briefs reflects the common activity of an agency in preparing a briefing or proposing to brief a Minister on a matter or matters relevant to the Minister's government portfolio and exercise of statutory power.
  - (d) I accept the Agency's submission that these briefs did not progress beyond the draft stage and were not provided to the Minister for their consideration. However, I consider the Applicant, as a member of the Victorian Parliament, and also members of the public, are capable of understanding the difference between draft and final versions of documents and that these briefs may not reflect the final decision that was made.
  - (e) Nevertheless, it is open for the Agency to release the documents with any necessary additional information explaining the basis of any decision made to eliminate or minimise any potential for confusion or misunderstanding concerning the documents, should this be required.
  - (f) I am not satisfied disclosure of the relevant information in the documents would negatively impact upon the nature or quality of advice and recommendations prepared by Agency officers in the future. I note the views of the Victorian Civil and Administrative Tribunal (VCAT) in *Graze v Commissioner for State Revenue*,<sup>6</sup> which observed the possibility of public scrutiny in some circumstances would provide for better administrative decision making. In any case, it is arguable Agency officers are responsible for ensuring advice provided is accurate, complete and properly considered on matters central to its governmental functions.
24. Accordingly, I am not satisfied the documents are exempt under section 30(1).

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<sup>6</sup> [2013] VCAT 869 at [25]-[27].

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

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

26. Section 34(4)(a)(ii) provides a document is an exempt document if:

- (a) the agency is engaged in trade or commerce;
- (b) the document contains information of a business, commercial or financial nature; and
- (c) disclosure of which would be likely to expose the agency unreasonably to disadvantage.

27. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>7</sup>

28. VCAT has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.<sup>8</sup> VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.<sup>9</sup> An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency’s other functions.<sup>10</sup>

29. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.<sup>11</sup>

30. While the phrase ‘trade and commerce’ may be interpreted broadly,<sup>12</sup> it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.<sup>13</sup>

31. The fact an agency’s predominant activities may be described as ‘governmental’ does not preclude it from relying on the exemption under section 34(4)(a)(ii).<sup>14</sup>

32. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself, or part of its operations, in a manner similar to a commercial entity.

*Is the Agency engaged in trade and commerce?*

33. The Agency submits:

[regarding Document 1]

The department is engaged in trade or commerce in that it provides financial assistance to private third parties to develop their business through contractual funding arrangements. The document contains information related to the financial, commitments of the business as well as the amounts that would be granted to the organisation.

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<sup>7</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

<sup>8</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

<sup>9</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 22 ALR 621 at [649].

<sup>10</sup> *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

<sup>11</sup> *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

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

<sup>13</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

<sup>14</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

[regarding Document 5]

The department submits that it is involved in trade or commerce in this instance, as the project involves the departmental purchase of land and the contracting of various providers to develop the Gov Hub on the purchased site. The exempt information consists of financial information and costs relevant to both the department and the [another Victorian government agency].

Document 1

34. I consider the Agency's functions are to develop the Victorian economy by growing industries, regions and employment. I am not satisfied the Agency is engaged in trade or commerce on the basis it is administering a grant program for projects being undertaken. Rather, in doing so, I consider it was carrying out a governmental function to support economic development and to grow employment within the state.
35. Accordingly, I am not satisfied the essential character or core activity undertaken by the Agency, and to which the information relates, meets the requirement of 'trade or commerce' for the purposes of section 34(4)(a)(ii).

Document 5

36. Whilst I acknowledge the project concerns the procurement of services from commercial entities, in my view, where the Government enters into a contract on behalf of the State of Victoria with a private entity in exchange for the provision of services for the benefit of the public, it does not constitute an activity in the capacity of engaging in trade or commerce, but rather to fulfil its role to deliver governmental services, functions and deliver publicly funded projects on behalf of the community.
37. Accordingly, I am not satisfied this information meets the requirement of 'trade or commerce' for the purposes of section 34(4)(a)(ii).
38. Given my decision on the first limb of section 34(4)(a)(ii), it is not necessary for me to consider the remaining limbs of the exemption.
39. Therefore, I am not satisfied the documents contain information that is exempt from release under section 34(4)(a)(ii).
40. My decision in relation to the application of section 34(4)(a)(ii) is set out in the Schedule of Documents in **Annexure 1**.

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

41. 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.
42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>15</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>16</sup>
43. As noted above, the Applicant does not seek access to certain personal affairs information in the documents. Accordingly, I am satisfied this information is irrelevant for the purpose of section 25.

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<sup>15</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>16</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].

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

### **Conclusion**

45. On the information before me, I am not satisfied certain information in the documents is exempt from release under sections 30(1) and 34(4)(a)(ii).
46. 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 is granted in part.
47. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

48. 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>17</sup>
49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
51. 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.
52. 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>20</sup>

### ***When this decision takes effect***

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

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<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</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.	Undated	BMIN-2-21-9284: Variation of Grant agreement - [named business undertaking, date]	5	Refused in full Sections 30(1), 34(4)(a)(ii)	Release in part Section 25 The document is to be released except for the irrelevant information, which is to be deleted in accordance with section 25.	<p>Section 30(1): I am not satisfied this document is exempt from release under section 30(1) for the reasons outlined in the Notice of Decision above.</p> <p>Section 34(4)(a)(ii): I am not satisfied this document is exempt from release under section 34(4)(a)(ii) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: I am satisfied the following information is irrelevant information and it is practicable for it to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> <li>• name and telephone number of the third party listed as the 'recommender';</li> <li>• name of the third party listed as the notified of recommendation; and</li> <li>• name of the lead author.</li> </ul> <p>it is practicable to provide the Applicant with an edited copy of this document with</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						irrelevant information deleted in accordance with section 25.
2.	Undated	BMIN-2-21-9893: Overdue Payment of [named project] Management Costs	2	Refused in full Section 30(1)	Release in part Section 25 The document is to be released except for the irrelevant information, which is to be deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.
3.	Undated	BMIN-2-21-10032: Approval of four Regional Digital Fund projects from the Ovens Murray Region, Great South Coast and Gippsland	5	Released in part Section 34(4)(a)(ii)	Not subject to review	
4.	Undated	BMIN-2-21-10063: Portland Foreshore Redevelopment Milestone Timing Variation	6	Released in full	Not subject to review	
5.	Undated	BMIN-2-21-10850: Bendigo GovHub - Capital Funding	5	Released in part Section 34(4)(a)(ii)	Release in part Section 25 The document is to be released except for the irrelevant	Section 34(4)(a)(ii): See comments for Document 1. Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					information, which is to be deleted in accordance with section 25.	
6.	Undated	BMIN-2-21-10933: Cultural Infrastructure Projects for Regional Development	3	Released in full	Not subject to review	
7.	Undated	BMIN-2-21-10928: Termination of Grant Agreement - [named business undertaking]	6	Released in full	Not subject to review	
8.	Undated	BMIN-2-21-10976: Variation to Grant Agreement – [named business undertaking]	5	Refused in full Section 30(1)	Release in part Section 25 The document is to be released except for the irrelevant information, which is to be deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.
9.	Undated	BMIN-2-21-11049: [named business undertaking] - Request for Variation to Scope - [named] Fund	4	Released in full	Not subject to review	