

Notice of Decision and Reasons for Decision

Applicant:	'EW1'
Agency:	Department of Families, Fairness and Housing
Exemptions considered:	Sections 30(1), 35(1)(a), 25
Citation:	'EW1' and Department of Families, Fairness and Housing (Freedom of Information) [2022] VICmr 228 (14 October 2022)

FREEDOM OF INFORMATION – meeting minutes and agendas – internal working documents – information communicated in confidence – Roadmap Implementation Ministerial Advisory Group

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 in the documents is exempt from release under sections 30(1) and 35(1)(a).

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 October 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request to the following:

A copy of the agendas and minutes (excluding attachments) of the meetings of the Roadmap Implementation Ministerial Advisory Group (limited to the overarching governance group) for the period 1 June 2019 to 31 July 2021.

3. The Agency identified 13 documents falling within the terms of the Applicant's request and refused access to the documents in part under sections 30(1), 33(1) and 35(1)(a). 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. During the review, the Applicant advised they no longer seek access to information deemed exempt by the Agency under section 33(1).

Agency's intended fresh decision

6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On 10 June 2022, the Agency notified OVIC and the Applicant of its intention to make a fresh decision.
8. Section 49M(2) requires an agency to make its fresh decision 28 days after notifying the applicant and the Information Commissioner of its intention to do so, unless the agency and the Information Commissioner agree to an extension of time.
9. The Agency requested and I granted it three extensions of time to make its fresh decision by 17 August 2022. However, the Agency did not meet a final deadline by which it was required to make its fresh decision.
10. On 19 August 2022, the Agency provided the Applicant with its intended fresh decision in which it determined to release additional information in the documents.
11. As the Agency's intended fresh decision was made outside the required timeframe it is not a valid fresh decision, and I am required to resume my review based on the Agency's original decision in accordance with section 49MA(3).
12. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

13. Accordingly, while my review concerns the Agency's original decision, I have also considered the Agency's intended fresh decision in which it released further information to the Applicant.
14. I have examined a copy of the documents subject to review, which were provided to the Applicant following the Agency's intended fresh decision.
15. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
16. I have considered all communications and submissions received from the parties.
17. 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.
18. 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 35(1)(a) – Information communication to an agency that would be exempt if generated by an agency

19. The Agency relies on the exemption under section 35(1)(a) to refuse access to information in Documents 2 and 12 which it determined was communicated to the Agency in confidence.
20. A document is exempt under section 35(1)(a) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) the information would be exempt matter if it were generated by an agency or Minister.
21. The Agency advised OVIC it did not consult with the relevant third parties to seek their views as to whether the information was communicated in confidence and disclosure as required under section 35(1)(a).

Was the information communicated in confidence to the Agency?

22. Having reviewed Documents 2 and 12, I accept the third parties would have communicated the information in confidence to the Agency.
23. Therefore, I am satisfied the first condition of section 35(1)(a) is met.

Would the information be exempt from release if it were generated by the Agency?

24. The second condition requires I be satisfied that, had the information in Documents 2 and 12 been generated by an agency, it would be exempt from release under the FOI Act.
25. The Agency submits this information would be exempt from release under section 30(1) if it had been generated by the Agency. I note the Agency refused access to information in other documents under section 30(1). Therefore, I will first consider the application of section 30(1) to all information,

including in Documents 2 and 12, before determining whether section 35(1)(a) applies to Documents 2 and 12.

Section 30(1) – Internal working documents

26. 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.

27. Section 30(3) provides that the exemption under section 30(1) does not apply to purely factual material in a document.

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?

28. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.²

29. The documents subject to review are meeting minutes and agendas from the Roadmap Implementation Ministerial Advisory Group (**RIMAG**).

30. The Agency provided the following submission in relation to the RIMAG:

The RIMAG was formed as part of the Victorian government's response to the recommendations tabled by the Royal Commission into Family Violence in March 2016. The RIMAG is one of several governance bodies formed to ensure stakeholder input would feed directly into the agenda for implementing the Commission's 227 recommendations.

The *Roadmap for Reform: Strong Families, Safe Children* is the government's key platform to improve outcomes for vulnerable children, young people and families. It outlines three strategic reform directions:

- building supportive and culturally strong communities and an enhanced role for universal services,
- supporting children, young people and families in need with integrated wraparound supports and targeted early interventions, and
- strengthening home-based care and improving outcomes for children and young people in out-of-home care.

A phased approach to reform has been developed to enable effective co-design, deliver early success and set the foundation for longer-term sustainable change. The RIMAG forms a vital part in this staged approach, enabling the department to engage directly with the sector.

For the time frame covered by the documents, the RIMAG was co-chaired by the then Minister for Child Protection and Minister for Disability, Ageing and Carers.

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

31. From my review of the documents, I am satisfied they contain information in the nature of opinion, advice and recommendations prepared by Agency officers or consultation between Agency officers.

Were the documents made in the course of, or for the purpose of, the deliberative process involved in the functions of an agency or Minister or of the government

32. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³
33. In *Re Waterford and Department of Treasury (No.2)*,⁴ the former Victorian Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

34. I am satisfied the documents were created in the course of the Agency's deliberative processes in relation to the implementation of government reforms arising from the recommendations of the Victorian Royal Commission into Family Violence.

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

35. 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. In doing so, I have given weight to the following relevant factors:⁵
- (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (b) the right of every person to gain access to documents under the FOI Act;
 - (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

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

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

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

- (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.

36. The Agency submits it would be contrary to the public interest to release certain information in documents for the following reasons:

Whilst the department recognises there is a small degree of public interest in release of the material, the issues that could be caused by release outweigh any potential benefit in this instance. The department is concerned that the nature of the information is so sensitive that it could cause significant damage to the RIMAG's deliberative and consultative processes. The degree of sensitivity of the issues discussed in the documents is so high that it is key factor pointing against disclosure.

There is a strong public interest in Ministers and government officials being judged based on final actions undertaken, rather than options presented by officers at a point in time.

While the department recognises there may be a public interest in release of the material, the mischief that could be caused by release outweighs any potential benefit in this instance.

37. Having reviewed the documents and considered their content and context, I am not satisfied their disclosure would be contrary to the public interest for the following reasons:

- (a) I do not consider the meeting agenda documents are particularly sensitive as they do not disclose any detailed deliberations or debate. Rather, they list the topics for discussion at each meeting.
- (b) I acknowledge that the topics discussed in the minutes could be considered sensitive as they relate to improving outcomes for vulnerable children, young people and families in the context of family violence. However, I note the discussions do not relate to any specific child, young person or family's situation. Rather, they discuss broader policy issues and strategic options for the sector.
- (c) I also note the two Commissioner for Children and Young People (CCYP) inquiries that are mentioned in the minutes were completed in 2019 and the reports for those inquiries are publicly available on the CCYP's website.⁶
- (d) While I acknowledge certain policy options considered during the meetings may not have been ultimately adopted, I am not persuaded that disclosure of those options considered at a point in time would be likely to misinform or confuse the public or cause unnecessary debate. In my view, this underestimates the capacity of the public to be informed about and understand advice received and decisions made by government. Nevertheless, it is open for the Agency to release the documents with any necessary additional information explaining the basis for any decision taken to eliminate or minimise any potential for confusion or misunderstanding upon release of the documents.
- (e) The documents are marked 'Draft'. However, there are no further versions of the documents that exist. Accordingly, I consider the documents are in their final form and their disclosure represents views expressed on issues discussed at RIMAG meetings.
- (f) It is clear that RIMAG was not established as a decision making body. As such, it is clear the views discussed and recorded in the documents are not binding and form part of a deliberative process.

⁶ Commission for Children and Young People, 'In our own words' (27 November 2019) <https://ccyp.vic.gov.au/inquiries/systemic-inquiries/in-our-own-words/>; Commission for Children and Young People, 'Lost, not forgotten' (13 November 2019) <https://ccyp.vic.gov.au/inquiries/systemic-inquiries/lost-not-forgotten/>.

- (g) Agency officers performing their official duties are responsible for ensuring advice provided is accurate, complete and properly considered on matters central to the Agency's governmental functions. Agency officers, as public sector employees, are required to discharge their duty to provide impartial and fulsome advice to decision makers, and stakeholders, given this requirement is a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic) and the Victorian Public Sector Commission's, *Code of conduct for Victorian public sector employees*.⁷ I am not persuaded Agency officers would be deterred from discharging their professional and obligations should the documents be disclosed under the FOI Act, particularly in relation to the discussion of public policy matters of significance to the Agency and the community.
- (h) In my view, the public interest weighs in favour of disclosure of the documents to allow for greater transparency and public scrutiny of the RIMAG, which is comprised largely of senior Agency and public sector officers.

38. Therefore, on balance, I am not satisfied certain information in the documents is exempt from release under section 30(1).
39. As I am not satisfied information in Documents 2 and 12 is exempt from release under section 30(1), I am also not satisfied this information would be exempt from release under section 35(1)(a).
40. My decision in relation to each document and sections 30(1) and 35(1)(a) 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'⁸ 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 25.⁹
43. As noted above, the Applicant does not seek access to the information to which it refused access under section 33(1). Accordingly, this information is irrelevant information for the purposes of section 25.
44. I have considered the effect of deleting irrelevant information from the documents. I am satisfied it is practicable to do so, as it would not require substantial time and effort, and the edited documents would retain meaning.

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 35(1)(a).

⁷ For example, see public sector values in section 7(1) of the *Public Administration Act 20014* (Vic) (including Responsiveness, Integrity and Impartiality) and the Victorian Public Service Commission, *Code of Conduct for Victorian Public Sector Employees* at <https://vpssc.vic.gov.au/ethics-behaviours-culture/codes-of-conduct/code-of-conduct-for-victorian-public-sector-employees/>.

⁸ *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].

⁹ *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].

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 to the documents is granted in part.

Review rights

47. 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.¹⁰
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
50. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
51. 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.¹³

Third party review rights

52. As I have determined to release information in the document that the Agency determined is exempt under sections 35(1)(a), if practicable, I am required to notify the relevant third party of its right to seek review by VCAT within 60 days from the date they are given notice of my decision.¹⁴
53. I am satisfied it is practicable to notify one third party of its review rights and confirm it will be notified of my decision.
54. However, I consider it would be impracticable to notify the remaining third parties, where it is unclear who provided the information.

When this decision takes effect

55. My decision does not take effect until the third party's 60 day review period expires.
56. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and 50(3FA).

¹⁴ Sections 49P(5), 50(3AB) and 52(3).

Schedule of Documents

Document No.	Date of Document	Document Description	No of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	12/06/2019	RIMAG Agenda	4	<p>Released in part</p> <p>Sections 30(1), 33(1), 25</p>	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.</p>	<p>Section 30(1): I am not satisfied in the document is exempt from release under section 30(1) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: As the Applicant does not seek access to the information to which the Agency refused access under section 33(1), this information is irrelevant information for the purpose of section 25.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25.</p>
2.	12/06/2019	RIMAG Minutes	8	<p>Released in part</p> <p>Sections 30(1), 33(1), 35(1)(a) 25</p>	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.</p>	<p>Section 35(1)(a): I am not satisfied information in this document is exempt from release under section 35(1)(a) for the reasons outlined in the Notice of Decision above.</p> <p>Section 30(1): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>

Document No.	Date of Document	Document Description	No of pages	Agency Decision	OVIC Decision	OVIC Comments
3.	24/07/2019	RIMAG Agenda	3	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.
4.	24/07/2019	RIMAG Minutes	6	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.
5.	04/09/2019	RIMAG Agenda	4	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1),	Section 30(1): 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
					deleted in accordance with section 25.	
6.	04/09/2019	RIMAG Minutes	8	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.
7.	20/11/2019	RIMAG Agenda	4	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.
8.	20/11/2019	RIMAG Minutes	9	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information,	Section 30(1): 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
					to which the Agency refused access under section 33(1), deleted in accordance with section 25.	
9.	26/02/2020	RIMAG Agenda	4	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.
10.	26/02/2020	RIMAG Minutes	8	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.
11.	17/11/2020	RIMAG Agenda	3	Released in part Sections 30(1), 33(1), 25	Release in part Section 25	Section 30(1): See comments for Document 1.

Document No.	Date of Document	Document Description	No of pages	Agency Decision	OVIC Decision	OVIC Comments
					The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 25: See comments for Document 1.
12.	17/11/2020	RIMAG Minutes	8	Released in part Sections 30(1), 33(1), 35(1)(a) 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 35(1)(a): See comments for Document 2. Section 25: See comments for Document 1.
13.	16/06/2021	RIMAG Agenda	5	Released in part Sections 30(1), 33(1), 25	Release in part Section 25 The document is to be released with information, to which the Agency refused access under section 33(1), deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 25: See comments for Document 1.