

Notice of Decision and Reasons for Decision

Applicant: 'CU3'
Agency: Department of Premier and Cabinet
Decision date: 21 December 2021
Exemptions considered: Sections 28(1)(d), 30(1), 35(1)(a), 35(1)(b)
Citation: 'CU3' and Department of Premier and Cabinet (Freedom of Information) [2021] VICmr 76 (21 December 2021)

FREEDOM OF INFORMATION – Public Accounts and Estimates Committee (PAEC) brief – unreleased health data – Victorian Agency for Health Information (VAHI) – COVID-19 pandemic – impact on mental health, alcohol and other drug treatment services in Victoria

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 satisfied the documents subject to review are not exempt from release under sections 30(1), 35(1)(a) or 35(1)(b), with the exception of a small amount of information in Document 1, which I am satisfied is exempt under section 30(1) and section 28(1)(d).

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

21 December 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. A copy of the report 'The Victorian Agency for Health Information report Mental Health, Alcohol and Other Drug Treatment Services in Victoria'.
 2. All documents and information in the possession of the Department of Premier and Cabinet relating to the report.
 3. All documents involved with the decision to classify the report.
 4. All documents involved with the decision to mark the report as Confidential.
2. The Agency identified two documents falling within the terms of the Applicant's request to which it refuse access in full under sections 30(1), 33(1), 35(1)(a) and 35(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant advised they do not seek access to the personal affairs information of any person. This information, being names, physical addresses, email addresses and telephone numbers, is irrelevant information for the purposes of section 25, which is discussed below.
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 exemptions

10. In completing a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'. This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.
11. Having reviewed the documents, I have identified a paragraph on page 4 of Document 1, which I am satisfied discloses a decision of a sub-committee of the Cabinet and is exempt under section 28(1)(d).

Section 28(1) – Cabinet documents

12. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of Cabinet.
13. In *Ryan v Department of Infrastructure*,¹ 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.
14. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.

Section 28(1)(d)

15. Section 28(1)(d) provides a document is an exempt document if it is a document that is a document that disclosure of which 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.
16. A document will be exempt under section 28(1)(d) if there is evidence that Cabinet discussed various options contained in the document and chose between those options.
17. A ‘decision’ means any conclusion as to the course of action the Cabinet adopts whether that are conclusions as to final strategy on a matter or conclusions about how a matter should proceed.
18. Where a decision or the recommendation of Cabinet has been made public, releasing information would not disclose the Cabinet decision or deliberation.

Section 30(1) – Internal working documents

19. 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.
20. The exemption does not apply to purely factual material in a document.²
21. Determining whether the disclosure of the relevant information would be contrary to the public interest, requires a ‘process of the weighing against each other conflicting merits and demerits’.³
22. The Agency exempted the following documents from release under section 30(1):

¹ (2004) VCAT 2346 at [33].

² Section 30(3).

³ *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].

- (a) emails between Agency officers regarding the content of Public Accounts and Estimates Committee (**PAEC**) briefs; and possible questions relating to those briefs;
- (b) emails with weekly mental health, alcohol and other drug related reports attached (the reports themselves are claimed to be exempt under section 35(1)(a) and 35(1)(b) – see discussion below); and
- (c) a table of mental health, alcohol and other drug related data and other data and trends.

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?

- 23. I am satisfied the documents disclose matter in the nature of opinion, advice and recommendations, prepared by Agency officers.
- 24. In relation to the health data, I consider this information is purely factual information and does not constitute matter in the nature of opinion, advice or recommendations by virtue of section 30(3). Therefore, this information is not exempt under section 30(1).
- 25. However, I note the selection of the data and the context in which it is provided amounts to advice and opinion provided by Agency officers.

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?

- 26. I am satisfied the documents were prepared in the course of the deliberative processes involved in the functions of the Agency, that of preparing a PAEC brief, and in the provision of advice regarding the use of health data.

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

- 27. 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 government information subject to the protection of an essential public, personal or business interest.
- 28. In considering whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors in the context of this matter:⁴
 - (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;

⁴ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.

29. In relation to whether disclosure of the documents would be contrary to the public interest, the Agency submits:

DPC considers that disclosure of these deliberations is likely to inhibit the department's ability to prepare its briefing materials in an unencumbered manner and would inhibit the ability of officers across different departments to collaborate in the drafting of briefs.

Forming an attachment to document 1 is a draft PAEC brief which is the subject of the email correspondence between DPC and DHHS. The document is in draft form and contains a range of draft, unfinalised talking points and responses to possible questions. Disclosure of this document would be misleading as the document is now out of date as the PAEC hearings have already taken place and the Minister's responses are on the public record. Such disclosure would be contrary to the public interest given the sensitive and contentious nature of the material contained in these briefs and would inhibit one of the key functions of both DPC and DHHS; that is, to ensure its ministers are appropriately briefed for public hearings such as those undertaken through the PAEC process.

30. Having reviewed the content of the briefs, their purpose and the Agency's submission, I am not satisfied disclosure of the documents would be contrary to the public interest for the following reasons:

- (a) Some of the information is publicly available (for example regarding government measures undertaken in relation to the COVID-19 pandemic and associated spending amounts).
- (b) While I note the topic of the documents, some of the information is general in nature and therefore not sensitive.
- (c) The discussion between Agency officers in the emails is not particularly sensitive as it relates to the inclusion of certain information in the brief, which would not be considered uncommon or controversial in the circumstances.
- (d) While I note the draft status of the document headed 'possible questions' and the inclusion of certain information referred to in (c) above, the information in the documents was designed with the purpose of it being publicly disclosed at a PAEC hearing. In my view, disclosure of the data itself would not be contrary to the public interest.
- (e) Opinion, advice and recommendations provided by an agency officer 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 the document would be contrary to the public interest.
- (f) There is no objective evidence before me that demonstrates disclosure of the information in the briefs would have a negative impact on the nature and quality of advice provided by agency officers in the future. In this regard, I accept the view expressed by the Victorian Civil

and Administrative Tribunal (**VCAT**) in *Graze v Commissioner of State Revenue*,⁵ that the possibility of public scrutiny may improve the quality of advice provided by agency officers.

- (g) I do not consider disclosure would inhibit communications between agency officers as they are required to discharge their duty to provide impartial and fulsome advice to decision makers, given this requirement is a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic) (**Public Administration Act**).
- (h) It is clear from the Public Administration Act and the Victorian public sector values (the **Values**) in the *Code of Conduct for Victorian Public Sector Employees*, which regulate the conduct of agency officers, that they are required to abide by the Values, including:
 - i. Responsiveness: by providing frank, impartial and timely advice to the Government;
 - ii. Integrity: by being honest, open and transparent in their dealings; and
 - iii. Impartiality: by making decisions and providing advice on merit and without bias, caprice, favouritism or self interest, and by acting fairly by objectively considering all relevant facts and fair criteria.

Accordingly, I am not persuaded disclosure of the briefs would 'inhibit' the ability of Agency officers to provide advice of this nature or 'inhibit the ability of officers across different departments to collaborate in the drafting of briefs' in future briefings'. The provision of opinion, advice and recommendations to an agency, a Minister or government goes to the heart of the duties and responsibilities of public sector employees on behalf of their departments and Ministers.

While I appreciate there may be a tension between Ministers, as members of the government, not wishing to disclose advice they receive from their department, I do not accept a department or public sector employee can do anything other than continue to provide advice to government and Ministers based on merit regardless of whether the advice is later subject to disclosure under the FOI Act or external oversight and disclosure, for example, by way of production to a public inquiry or integrity body.

- 31. Accordingly, I am not satisfied the briefs are exempt under section 30(1) with the exception of a paragraph in Document 1 which is part of an email in which an Agency officer records an opinion which I consider is sensitive and does not directly relate to the documents requested. Nor would the opinion expressed assist the Applicant in understanding the substantive information in the documents.
- 32. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 35 – Documents containing material obtained in confidence

Section 35(1)(a)

- 33. 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.
- 34. The documents include weekly reports prepared by the Victorian Agency for Health Information (**VAHI**) and were provided to the Agency by the Department of Health. The reports include various

⁵ [2013] VCAT 869.

selected data relating to the provision of mental health, alcohol and other drug treatment services in Victoria.

35. The VAHI website states its purpose as:

The Victorian Agency for Health Information (VAHI) is a division of the Department of Health, dedicated to delivering trusted information to inform better decisions that improve the health and wellbeing of Victorians.

VAHI contributes to the Department's ambitious system reform agenda in many ways:

- Analysing and sharing information across the Victorian health system to ensure services have an accurate picture of their quality and safety.
- Monitoring and reporting on public and private services that impact on health, wellbeing, quality and safety to stimulate and inform improvements, increase transparency and accountability, and inform the community.
- Collecting and analysing information about the health status of Victorians to inform policy development and planning, and to give a complete picture of health in Victoria.

36. I note the Agency consulted with the Department of Health, which advised the information was provided in confidence to the Agency. I also note the documents are labelled 'interim data – for internal improvement – not for publication'. Therefore, I am satisfied the data was provided to the Agency in confidence.

37. As I am satisfied the documents were provided in confidence, I have considered whether the documents would be exempt under section 30(1). My analysis above at paragraph 31 is also relevant in relation to section 35(1)(a). In addition, I am satisfied would not be contrary to the public interest to release the documents for the following reasons:

- (a) While I consider the data is purely factual and not exempt by virtue of section 30(3), I accept that in selecting, providing context and the provision of some (although limited) commentary amounts to opinion and advice prepared by VAHI officers. I also note this information is prepared for the deliberative processes of government – that of determining the type of public health services and resources required by and to be provided to the community.
- (b) The documents contain data that would have formed part of the basis for government decision making regarding certain public health services. I consider the public interest weighs in favour of disclosure so that members of the public can understand the rationale for such decisions and the government is subject to scrutiny of and accountability for those decisions.
- (c) Similar information, and in some cases the same information, is publicly available (for example Medicare Benefits Schedule data, data published by Ambulance Victoria). I also note there are significant amounts of other health data sets published by the Victorian and Commonwealth governments.
- (d) VAHI has since published a version of the reports subject to this review on its website with updated data. While I note not all of the data selected for the report is included in the publicly available version, the documents are substantially similar.
- (e) In my view members of the public are capable of understanding that data can vary depending on when it is sourced and any issues or concerns around the currency and timing of the data be explained by the Agency at the time of release, should this be required.
- (f) Finally, there is significant public interest in the issue of adult and child mental health and substance use arising from the COVID-19 pandemic, which is evident from the substantial public discussion and debate regarding government decision making during this period.

I consider the disclosure of the VAHI report provides an important source of data that will assist in increasing the public's understanding of government decision making through disclosure of the objective data government collects and to which it has access.

38. As I am satisfied it would not be contrary to the public interest to release the documents, they would not be exempt under section 30(1) and are not exempt under section 35(1)(a).

Section 35(1)(b)

39. A document is exempt under section 35(1)(b) 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) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
40. As described above, I am satisfied the documents were provided to the Agency in confidence.
41. I also note the Agency's submission that certain data is received from an external entity with which the Department of Health has a memorandum of understanding that states the information supplied it is not for public release.
42. However, I have determined disclosure would not be likely to impair the ability of the Agency to obtain similar information in the future for the following reasons:
- (a) For the most part, section 35(1)(b) applies to information provided by members of the public, or business undertakings to an Agency where that information is provided voluntarily and where those external parties do not have a legal obligation to provide the information.
 - (b) In this matter, the Agency, and the entity that provided the information to the Agency, have statutory obligations to provide specific services to the community. This places on them under an obligation to cooperate where their functions overlap, regardless of whether any statutory power is being exercised.
 - (c) In my view, and as discussed above, all Agency officers, as public servants, are required to discharge their duties to provide impartial and fulsome advice to decision makers and this requirement is a core aspect of their professional responsibilities and accords with their obligations under the Public Administration Act. As such, I do not consider the officers in either agency would be able to properly discharge their duties without cooperating on such matters the subject of this request.
 - (d) I also consider the requested documents are not sensitive, rather, they contain general statistical information and commentary, some of which is publicly available. In particular, I note the entity referred to in paragraph 42 publishes monthly data similar to that in the documents. I also consider this information is less sensitive given the passage of time.
43. Accordingly, I am satisfied the documents are therefore not exempt under section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

44. 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.

45. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
46. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as it does not relate to the report the subject of their request.
47. As detailed above, the Applicant does not seek access to the personal affairs information of any third party and this information is therefore also irrelevant.
48. I have considered the effect of deleting irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable to delete irrelevant information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

49. On the information before me, I am satisfied the documents subject to review are not exempt from release under sections 30(1), 35(1)(a) or 35(1)(b), with the exception of a small amount of information in Document 1, which I am satisfied is exempt under section 30(1) and section 28(1)(d).
50. 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.
51. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

52. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
55. 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.
56. 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.¹¹

⁶ *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].

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

Third party review rights

57. As I have determined to release documents the Agency considers is exempt under section 35(1)(b), if practicable, I am required to notify the third party of its right to seek review by VCAT within 60 days from the date they are given notice of my decision.¹²
58. I am satisfied it is practicable to notify the third party of its review rights and confirm they will be notified of my decision.

When this decision takes effect

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

¹² Sections 49P(5), 50(3AB) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision
1.	[date] and [date]	Email chain attaching Victorian Agency for Health Information report on 'Mental Health, Alcohol and Other Drug Treatment Services in Victoria' for the week commencing [date]	149	<p>Refused in full</p> <p>Sections 28(1)(d), 30(1), 33(1), 35(1)(a), 35(1)(b)</p>	<p>Section 30(1): I am not satisfied all the information identified by the Agency is exempt for the reasons set out above in the Notice of Decision. However I am satisfied the following information is exempt under section 30(1):</p> <ul style="list-style-type: none"> • On page 2, in the email dated [date] at [time], the paragraph beginning 'There' and ending in '[month]'. <p>Sections 35(1)(a) and 35(1)(b): As detailed in in the Notice of Decision above, I am not satisfied the documents are exempt under sections 35(1)(a) or 35(1)(b).</p> <p>Section 28(1)(d) The document is to be released with the following exempt information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> • The paragraph commencing with 'NB' on page 4 of the covering email. <p>Section 25: The document is to be released with the following irrelevant information deleted in accordance with section 25.</p> <ul style="list-style-type: none"> • the information determined irrelevant by the Agency as I am satisfied it falls outside the terms of the Applicant's request; and

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision
					<ul style="list-style-type: none"> • personal affairs information being names, email addresses, telephone numbers and floor numbers; and • under the heading 'suicide surveillance' the line of text on page 11 of the pdf, the first sentence of the third paragraph, as I am satisfied, given it refers to a single person, that it is more than likely they could be identified from the information provided and, in any case, the Applicant does not seek access to personal affairs information.
2.	[date] and [date]	Email chain attaching Victorian Agency for Health Information report on 'Mental Health, Alcohol and Other Drug Treatment Services in Victoria' for the week commencing [date]	61	<p>Refused in full</p> <p>Sections 30(1), 33(1), 35(1)(a), 35(1)(b)</p>	<p>Sections 30(1), 35(1)(a) and 35(1)(b): See comments for Document 1.</p> <p>Section 25: The document is to be released with the following irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> • personal affairs information being names, email addresses, telephone numbers and floor numbers; and • under the heading '[topic]' the line of text on page 162 of the pdf, the first sentence of the third paragraph, as I am satisfied, given it refers to a single person, that it is a more than likely the person could be identified from the information provided and personal affairs information is not sought by the Applicant.