

Notice of Decision and Reasons for Decision

Applicant: 'CV1'
Agency: Department of Treasury and Finance
Decision date: 17 December 2021
Exemptions considered: Sections 28(1)(d), 30(1)

Citation: 'CV1' and Department of Treasury and Finance (Freedom of Information) [2021] VICmr 83 (17 December 2021)

FREEDOM OF INFORMATION – ministerial brief – Ballarat GovHub fit-out costs – government procurement – expenditure of public funds – decision of Cabinet – decision of a Minister

All reference to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I 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 in that I have determined to release additional information to the Applicant.

I am satisfied certain information in the documents is exempt under sections 28(1)(d) and 30(1). However, I am not satisfied all information exempted from release by the Agency in Documents 4 or 5 is exempt.

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt 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
17 December 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following Ministerial briefs (the **Briefs**):
 - B20/220 - [subject]
 - B20/887 - [subject]
 - B20/650 - [subject]
 - B20/707 - Approach to harmonising goods and services and construction procurement
 - B20/772 - Ballarat GovHub fit-out costs
 - B20/1161 - [subject]
2. The Applicant advised they do not seek access to personal affairs information nor any attachments to the Briefs.
3. The Agency identified six documents falling within the terms of the Applicant's request and refused access to five documents in part and one document in full under sections 28(1)(ba), 28(1)(d), 30(1), 34(1)(b) and 34(4)(a)(ii).
4. The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant advised they do not seek review of four of the six documents.
7. I have examined a copy of the two documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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) – 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.

Section 28(1)(d)

14. Section 28(1)(d) provides a document is an exempt document if its disclosure would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.
15. A document will be exempt under section 28(1)(d) if there is evidence the Cabinet discussed and determined options or issues set out in a document.²
16. A decision of the Cabinet includes a course of action set, or a determination made as to the final strategy for a matter or a conclusion as to how a matter should proceed.³
17. Where a decision made by the Cabinet is subsequently made public, as is usually the case, releasing information about the outcome of a Cabinet decision does not necessarily disclose a decision or any deliberation of the Cabinet for the purposes of section 28(1)(d).⁴
18. As the Agency considers certain parts of the Briefs are exempt under section 28(1)(d), there is limited information I can provide in my decision as to their content so as not to disclose exempt information.

Document 4

19. In relation to Document 4, the Agency provided a submission detailing what it considers is information subject to deliberation by the Cabinet, which I have considered in conjunction with a careful review of the document, both in terms of its contents and its context and the role of the Cabinet in relation to its deliberation of an issue submitted for its consideration or making of a decision.
20. While I accept the document contains certain limited information that would disclose the actual deliberation or a decision of the Cabinet, I am not satisfied information, which relates to certain steps taken by the Agency for which the brief sets out options for the Minister’s consideration, would disclose a deliberation of the Cabinet for the following reasons:
- (a) there is no information before me to demonstrate the information provided to the Minister was the subject of deliberation by the Cabinet;
 - (b) much of the information in the brief post-dates any deliberation or a decision of the Cabinet;
 - (c) the opinion, advice and recommendations in the brief was presented to the Minister and subject to a decision by the Minister, not the Cabinet; and
 - (d) the Minister signed and accepted the recommendation set out in the brief.

¹ (2004) VCAT 2346 at [33].

² *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [23].

³ *Della-Riva v Department of Treasury and Finance* (2005) 23 VAR 396; [2005] VCAT 2083 at [30].

⁴ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 1453; [2004] VCAT 1657 at [26].

21. My decision in relation to Document 4 and section 28(1)(d) is set out in **Annexure 1**.
22. Given my decision in relation to Document 4 and section 28(1)(d), I have also considered the application of section 30(1) in addition to Document 5.

Document 5

23. The Agency no longer relies on section 28(1)(d) to exempt from release the costs associated with the Ballarat GovHub fit-out.
24. I note certain parts of Document 5 refer to decisions or deliberations of the Cabinet or a sub-committee of the Cabinet.
25. Similarly to Document 4, while I accept the document contains certain limited information that would disclose the actual deliberation or a decision of the Cabinet, there is no information before me that supports the view the information in 'key point' 6 was the subject of deliberation by the Cabinet. Rather, the brief suggests an agency is considering a Cabinet submission in the future. As there is no evidence before me that this in fact took place, I am not satisfied section 28(1)(d) applies.
26. My decision in relation to Document 5 and section 28(1)(d) is set out in **Annexure 1**.
27. Given my decision in relation to Document 5 and section 28(1)(d), I have also considered the application of section 30(1) in addition to Document 5 more broadly.

Section 30(1) – Internal working documents

28. The Agency applied section 30(1) to exempt from release parts of Document 5. However, as mentioned above, given my decision in relation to section 28(1)(d), I have also considered the application of section 30(1) to each of the Briefs.
29. 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.
30. The exemption does not apply to purely factual material in a document.⁵
31. I must also be satisfied disclosure of the relevant information would not be contrary to the public interest, which requires a 'process of the weighing against each other conflicting merits and demerits'.⁶

⁵ Section 30(3).

⁶ *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].

Does the document 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?

32. I am satisfied the Briefs contain opinion, advice and recommendations made to a Minister by Agency officers.

Was the document 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?

33. I am satisfied the Briefs were prepared in the course of the deliberative processes involved in the Minister and the Agency carrying out their governmental functions.

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

34. 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.

35. In doing so, I have given weight to the following relevant factors in the context of this matter:⁷

- (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 document;
- (c) the stage or 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 or the Minister to make an informed and well-considered decision or participate fully and properly in a decision making process in accordance with the functions or other statutory obligations of the Agency or the Minister;
- (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 document;
- (f) the impact of disclosing a document in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency or the Minister at the conclusion of a decision or decision making process; and
- (g) the public interest in the community being better informed about the way in which the functions of the Agency or the Minister are carried out, including deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

36. The Agency submits in relation to 'key point' 5 in Document 5:

This is a direct reference to the Department expressing a 'recommendation' to the Minister.

It would be against the public interest for the Department to be hampered in its ability to provide material such as this in briefings if released publicly. A central function of DTF is to provide

⁷ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

'recommendations and options' to the Minister, it is against the public interest for the Department to be compromised in its capacity to do so.

37. In relation to information under the heading 'additional information' point 4 in Document 5, the Agency submits:

This is a direct reference to the Department expressing a point-of-time 'opinion' to the Minister ...

It would be against the public interest for the Department to be hampered in its ability to provide material such as this in briefings if released publicly. A central function of DTF is to provide 'opinions and explanations' to the Minister, it is against the public interest for the Department to be compromised in its capacity to do so.

38. Having reviewed the content of the Briefs, their purpose and the Agency's submission, I have determined it would not be contrary to the public interest to disclose certain information the Agency exempted from release under section 30(1) and additional information that I have determined is not exempt from release under section 28(1)(d) for the following reasons:

- (a) Opinion, advice and recommendations provided by an agency officer to a Minister 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.
- (b) In my view, disclosure of the additional information in the Briefs which is in the nature of opinion, advice and recommendation provided by Agency officers to the Minister would be in the public interest as it would assist members of the community understand government decision making in relation to the expenditure of public funds.
- (c) Disclosure of the additional information in the Briefs will provide greater transparency, accountability and scrutiny of the expenditure by government of public funds and the management and oversight of major infrastructure projects.
- (d) There is no objective evidence before me that demonstrates disclosure of the additional information in the Briefs would have a negative impact on the nature and quality of advice provided by Agency officers to a Minister 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*,⁸ that the possibility of public scrutiny may improve the quality of advice provided by agency officers.
- (e) It is clear from the *Public Administration Act 2004* (Vic) and the Victorian public sector values (the **Values**) in the *Code of Conduct for Victorian Public Sector Employees* that agency officers 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 additional information in the Briefs would 'hamper' the Agency's ability to provide advice of this nature in future Ministerial briefings or 'compromise' the capacity of Agency officers to provide 'recommendations and options' to a

⁸ [2013] VCAT 869.

Minister. The provision of opinion, advice and recommendations to an agency, a Minister or government goes to the heart of the public sector duties and responsibilities of public sector employees on behalf of their departments.

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.

Having carefully considered the information in the Briefs, I have determined to disclose additional information in relation to a recommended option that was accepted by the Minister. In the case of Document 4, given the differences between the options presented, I have determined to exempt the options considered but not adopted by the Minister, which I think reflects the necessary balance between disclosure of opinion, advice and recommendation provided at a high level of government between a department and public sector employees to the responsible Minister.

39. My decision regarding section 30(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

40. 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.
41. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁹ 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 25.¹⁰
42. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant’s review application as it is personal affairs information.
43. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25. 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

44. On the information before me, I am satisfied certain information in the documents is exempt under section 28(1)(d). Further, I am satisfied certain information in Document 4 is exempt under section 30(1). However, I am not satisfied all the information exempted from release by the Agency in Document 5 under section 30(1) is exempt.
45. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the documents is granted in part.

⁹ *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].

¹⁰ *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. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

47. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹

48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²

49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³

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.¹⁴

When this decision takes effect

52. My decision does not take effect until the Agency's 14 day review period expires.

53. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
Note: Documents 4 and 5 are subject to review only.						
4.	[date]	Ministerial Brief – reference B20/707	4	Released in part Sections 28(1)(d), out of scope	Release in part Sections 28(1)(d),30(1), 25 The document is to be released with exempt and irrelevant information deleted in accordance with section 25.	<p>Section 28(1)(d): I am satisfied disclosure of the following information, which the Agency exempted from release, would disclose deliberation by or a decision of a subcommittee of the Cabinet:</p> <ul style="list-style-type: none"> • under the heading ‘Recommendation/s’ points 1 and 2; and • under the heading ‘Additional information’ points 1, 2. <p>I am not satisfied the remainder of the document is exempt under section 28(1)(d) for the reasons set out in the Notice of Decision above.</p> <p>Section 30(1): I am satisfied points 5(b) and 5(c), and points 7 and 8 are exempt under section 30(1) for the reasons set out in the Notice of Decision above.</p> <p>Section 25: The Applicant does not seek access to personal affairs information and I am satisfied it is practicable to delete this irrelevant information and exempt information in accordance with section 25.</p>

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
5.	[date]	Ministerial Brief – reference B20/772	3	Released in part Sections 28(1)(d), 30(1), out of scope	Release in part Sections 28(1)(d), 25 The document is to be released with exempt and irrelevant information deleted in accordance with section 25.	<p>Section 28(1)(d): I am satisfied the following information would disclose a deliberation or decision of the Cabinet:</p> <ul style="list-style-type: none"> • under the heading ‘recommendations’ point 2, dot point 1; • under the heading ‘key points’ 2, 3 and the last 12 words of the last line of point 4 and point 6; and • under the heading ‘additional information’ point 2. <p>I am not satisfied the remainder of the document is exempt under section 28(1)(d) for the reasons set out in the Notice of Decision above.</p> <p>Section 30(1): I am not satisfied the document is exempt under section 30(1) for the reasons set out in the Notice of Decision above.</p> <p>Section 25: See comments for Document 4.</p>