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Notice of Decision and Reasons for Decision

Applicant: 'CE8'
Agency: Department of Health and Human Services
Decision date: 14 October 2020
Exemptions considered: Sections 28(1)(ba), 29(1)(a) and (b), 33(1)
Citation: 'CE8' and Department of Health and Human Services (*Freedom of Information*) [2020] VICmr 293 (14 October 2020)

FREEDOM OF INFORMATION – State Situation Report – COVID-19 patient data – public health entities – Coronavirus – pandemic

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 the exemptions in sections 28(1)(ba), 29(1)(a) or (b) apply to the documents.

I am satisfied the exemption in section 33(1) applies to parts of the documents.

As it is practicable to edit the documents to delete exempt information, I have determined to grant access to the documents in part with exempt information deleted in accordance with section 25.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

14 October 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

A copy of all emails, briefs, advice, and memos containing the keywords: coronavirus or pandemic sent or received by [Executive level named Agency officer] , between 25 December 2019 and 5 January 2020. A copy of all COVID-19 Situation Reports received by the [Executive level named Agency officer], between 9 March 2020 and the date of this request. Where a discrete document does not exist, yet the information requested could be generated in the form of a report, I request the production of a document pursuant to s 19 of the Act. Please note that personal information of non-executive staff, such as names and addresses, is not required. Accordingly, documents can be edited to redact such information.

2. In its decision, the Agency identified nine documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full. The Agency relied on section 28(1)(ba) 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.

Preliminary view

4. On [date] my office provided our preliminary view to the Agency that section 28(1)(ba) did not apply to the documents.
5. Our view was that the documents did not appear to have been 'prepared for' the Minister, as required by section 28(1)(ba), rather they appeared to have been prepared for a broad range of stakeholders. I also noted that given the broad distribution of the documents, including to what appears to be group email boxes, it is unlikely the documents would contain sensitive information to be considered by cabinet.
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review. The Agency responded to my preliminary view by advising it intended to make a fresh decision.
7. However, the Agency did not make a fresh decision within the required timeframe set out in section 49M(2). Instead the Agency provided me with an additional submission. This included the consultation it conducted with the Commonwealth Department of Health.
8. The Agency's submission included identifying additional exemptions to the documents, being sections 29(1)(a) and (b) and 33(1).
9. My review therefore is of the Agency's original decision, taking into consideration its additional submission and additional information received from the Applicant in response.
10. I have examined copies of the documents subject to review.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited

only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

13. I also 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)(ba)

13. Section 28(1)(ba) provides a document is an exempt document if it is a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
14. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which the document was prepared was to brief a Minister in relation to issues to be considered by Cabinet.¹ In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to Cabinet.²
15. The Cabinet briefing purpose must be 'immediately contemplated' when the document is created. The exemption cannot apply merely because Cabinet ultimately considered the issue.³
16. The word 'briefing' means a 'short accurate summary of the details of a plan or operation. The purpose...is to inform'. The document should have the character of a briefing material. A document will be of such character if it contains 'information or advice...prepared for the purpose of being read by, or explained to, a [m]inister'. It requires more than having 'placed a document before a Minister'.⁴
17. The term 'issues to be considered by Cabinet' within the meaning of section 28(1)(ba), requires that it must be more than just 'likely' that Cabinet will consider it. There must be an intention or expectation the issues will be considered by Cabinet (even if not ultimately considered). Evidence that a matter was included in the Cabinet Agenda will meet this test.⁵
18. I have determined section 28(1)(ba) does not apply to the documents for the following reasons:
 - (a) I am not satisfied one of the substantial purposes for which the documents were prepared was to brief the Minister; rather they were prepared to brief a broad range of stakeholders;
 - (b) While clearly COVID-19 is the subject of cabinet considerations, I am not satisfied the specific information in the documents, much of which is publicly available, could be considered an issue to be considered by cabinet for which the exemption was intended to protect;
 - (c) the majority of information is in the nature of data or general updates for broader consideration by the public sector responsible for the public policy response to such matters.

¹ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34]. See also *Department of Treasury and Finance v Della-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

² *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

³ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822.

⁴ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

⁵ *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996). See also *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998); *Hulls v Department of Treasury and Finance (No 2)* (1994) 14 VAR 295 at [320–321]; reversed on other grounds by the Court of Appeal: *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331; 15 VAR 360; [1999] VSCA 117.

Sections 29(1)(a)

19. Section 29(1)(a) provides a document is an exempt document if disclosure under the FOI Act:

- (a) would be contrary to the public interest; and
- (b) disclosure would prejudice relations between the State and the Commonwealth or any other State or Territory.

20. The Agency advised it considered section 29(1)(a) applied to information that appears in the documents relating to two entities responsible for providing health policy advice to government.

21. In its submission to the Agency, the Commonwealth government advised:

The documents contain information about the advice and deliberations of the [two entities]. This information was provided for the purpose of consulting with the states and territories on the health response to the COVID-19 pandemic. Disclosure could adversely affect current and future consultation and negotiation and would prejudice the willingness for the Australian Government to share information for similar purposes in the future.

22. In my view it would not be contrary to the public interest to release this information for the following reasons:

- (a) the existence of these bodies, and their responsibilities in relation to COVID-19, is publicly known and subject to regular media reports;
- (b) I note also the role of these bodies and their role in the Australian government's early response to COVID-19 was reported to the Senate Select Committee on COVID-19 on 12 May 2020⁶;
- (c) the specific information in the documents is general in nature; I do not consider the information reveals sensitive or deliberative information the disclosure of which would be contrary to the public interest;
- (d) given the brief and general nature of the information, I do not consider disclosure would affect the provision of information to the State of Victoria by the Commonwealth; and
- (e) I must also consider the FOI Act creates a right of access by members of the public to government information. This means that I must consider the public interest in disclosure. In my view the public interest is served by a transparent and accountable government. The role in public health undertaken by the entities named in the documents should be subject to such public scrutiny.

23. As I do not consider it would be contrary to the public interest to disclose the information in the documents, it is not exempt under section 29(1)(a).

Section 29(1)(b)

24. A document is exempt under section 29(1)(b) if two conditions are satisfied:

- (a) disclosure of the document would be contrary to the public interest;

⁶ Available at www.aph.gov.au

(b) disclosure of the document would divulge any information or matter communicated in confidence by or on behalf of the government of:

- (i) another country; or
- (ii) the Commonwealth of Australia; or
- (iii) any other State or Territory of Australia;

to the government of the State of Victoria, or a person receiving a communication on behalf of the government of the State of Victoria; and

25. In its submission to the Agency, the Commonwealth government advised:

The redacted information was also provided to the Victorian Government on the basis it would be treated in-confidence. This information is not publicly available and it remains confidential.

26. While I am satisfied the information was provided in confidence by the Commonwealth government to the government of the State of Victoria I am not satisfied disclosure of the document would be contrary to the public interest for the reasons described above in paragraph 22.

27. I therefore do not consider the information in the documents is exempt from disclosure under section 29(1)(b).

Section 33(1)

28. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;⁷ and
- (b) such disclosure would be 'unreasonable'.

29. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.⁸

30. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

31. In its submission, the Agency advised:

...we request that OVIC consider the information contained in the Contact tracing section on page 3 of document 1, as the doctor referred to is clearly identifiable as [name], and is unreasonable to release. Additionally, we request that OVIC consider the potential for case numbers less than five to potentially identify individuals.

Do the documents contain personal affairs information relating to a person other than the applicant?

32. I have identified the following personal affairs information in the documents:

- (a) the name of the authorising officer;
- (b) the names of people to whom the document was distributed; and

⁷ Sections 33(1) and (2).

⁸ Section 33(9).

(c) the information referred to by the Agency that identifies a member of the public on page 3 of Document 1.

33. I note also the Agency considers numbers less than five that appear in the documents amounts to personal affairs information as it could be used to re-identify individuals. While I am not fully satisfied this is the case, for the purposes of this decision, I have considered whether disclosure of such information would be unreasonable.

Would disclosure of the information be unreasonable?

34. I have determined the following in relation to the personal affairs information in the documents:

- (a) It is not unreasonable to disclose the name of the officers who authorised the documents. The information relates only to their professional roles. The officers are senior public sector officials who are accountable for the contents of the documents. It is not unreasonable to release such information where it provides transparency and accountability to the public sector.
- (b) The names of the people to whom the documents were distributed are unreasonable to release. The distribution list contains a broad range of public sector officers. As they were not responsible for the documents' contents, I do not consider their disclosure would support accountability for government decision making in this instance.
- (c) I agree the information on page 3 of Document 1 could identify a member of the community. I have decided it would be unreasonable to release this information as, in my view, it is sensitive information and that person's personal privacy outweighs the public interest in disclosure.

35. In relation to the numbers fewer than five that appear in the documents, I have determined it would not be unreasonable to disclose this information for the following reasons:

- (a) a substantial amount of the data is publicly available;
- (b) the amount and detail of data published about COVID-19 is significant and includes reporting of small numbers, including for example deaths by age group, number of hospitalisations, and many other criteria;
- (c) I consider it is not unreasonable to release such information where it is in the public interest to do so. In this instance, I consider there is a strong public interest in the disclosure of such information for the following reasons:
 - (i) so that members of the public can make decisions about their own safety based on accurate information;
 - (ii) to create greater transparency about the reasons for decisions made by government that in the current circumstances have a significant impact on the community; and
 - (iii) to assist members of the public to hold government to account for its decisions about the management of COVID-19.

36. I have therefore determined it would not be unreasonable to release any information in the documents that refers to people where that information is a number fewer than five. This information therefore is not exempt under section 33(1).

Deletion of exempt or irrelevant information

37. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
38. 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 the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹⁰
39. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

40. On the information available, I am not satisfied the exemptions in sections 28(1)(ba), 29(1)(a) or (b) apply to the documents.
41. I am satisfied the exemption in section 33(1) applies to:
 - (d) the second dot point against 'contact tracing' that appears in Document 1 on page 3; and
 - (e) the distribution list of each document.
42. As it is practicable to edit the documents to delete exempt information, I have determined to grant access to the documents in part with exempt information deleted in accordance with section 25.

Review rights

43. 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.¹¹
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
46. 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.
47. 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

⁹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [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 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

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).

When this decision takes effect

48. I have decided to disclosure information the Agency determined was personal affairs information to the Applicant.
49. The relevant third parties will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
50. My decision does not take effect until the relevant 60-day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC comments
1.	9/3/2020	COVID-19 State Situation Report	8	Refused in full Section 28(1)(ba)	Release in part Section 33(1) The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: <ul style="list-style-type: none"> on page 3 in the second dot point of ‘contact tracing’; the names and position titles of the Agency officers to which the document was distributed. 	<p>Section 33(1): I agree the information on page 3 in the second dot point of ‘contact tracing’ could identify a member of the community. I have decided it would be unreasonable to release this information as, in my view, it is sensitive information and that person’s personal privacy outweighs the public interest in disclosure.</p> <p>Further, I consider the names of the people to whom the documents were distributed are unreasonable to release. The distribution list contains a broad range of public sector officers. As they were not responsible for the documents’ contents, I do not consider their disclosure would support accountability for government decision making in this instance.</p> <p>However, I do not consider the name or position title of the Agency officer who authorised the document is exempt under</p>

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC comments
						<p>section 33(1) as they are accountable for the document.</p> <p>I also do not consider, where numbers fewer than five appear in tables relating to members of the public, that it would be unreasonable to release that information as in my view it is in the public interest to release the information.</p>
2.	11/3/2020	COVID-19 State Situation Report	8	<p>Refused in full</p> <p>Section 28(1)(ba)</p>	<p>Release in part</p> <p>Section 33(1)</p> <p>The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the names and position titles of the Agency officers to which the document was distributed. 	<p>Section 33(1): See comments for Document 1.</p>

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC comments
3.	12/3/2020	COVID-19 State Situation Report	7	Refused in full Section 28(1)(ba)	Release in part Section 33(1) The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: the names and position titles of the Agency officers to which the document was distributed.	Section 33(1): See comments for Document 1.
4.	13/3/2020	COVID-19 State Situation Report	7	Refused in full Section 28(1)(ba)	Release in part Section 33(1) The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: the names and position titles of the Agency officers to which the document was distributed.	Section 33(1): See comments for Document 1.

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC comments
5.	14/3/2020	COVID-19 State Situation Report	8	Refused in full Section 28(1)(ba)	Release in part Section 33(1) The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: the names and position titles of the Agency officers to which the document was distributed.	Section 33(1): See comments for Document 1.
6.	14/3/2020	COVID-19 State Situation Report	8	Refused in full Section 28(1)(ba)	Release in part Section 33(1) The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: the names and position titles of the Agency officers to which the document was distributed.	Section 33(1): See comments for Document 1.

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC comments
7.	15/3/2020	COVID-19 State Situation Report	9	Refused in full Section 28(1)(ba)	Release in part Section 33(1) The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: the names and position titles of the Agency officers to which the document was distributed.	Section 33(1): See comments for Document 1.
8.	16/3/2020	COVID-19 State Situation Report	9	Refused in full Section 28(1)(ba)	Release in part Section 33(1) The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: the names and position titles of the Agency officers to which the document was distributed.	Section 33(1): See comments for Document 1.

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC comments
9.	17/3/2020	COVID-19 State Situation Report	9	Refused in full Section 28(1)(ba)	Release in part Section 33(1) The document is to be released with the following information exempt under section 33(1) deleted in accordance with section 25: the names and position titles of the Agency officers to which the document was distributed.	Section 33(1): See comments for Document 1.