

## Notice of Decision and Reasons for Decision

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Applicant:	'FJ4'
Agency:	Minister for WorkSafe and the TAC
Decision date:	17 August 2023
Provisions considered:	Sections 5(1), 13(b)
Citation:	'FJ4' and Minister for Worksafe and the TAC (Freedom of Information) [2023] VICmr 90 (17 August 2023)

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FREEDOM OF INFORMATION – right to access to official documents of a Minister where there is a change of Minister

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 a decision made by the Department of Justice and Community Safety (the **Department**), which was made on behalf of the Minister for WorkSafe and the TAC, in which it refused access to documents requested by the Applicant under the FOI Act.

I am satisfied any relevant documents meeting the terms of the Applicant's FOI request are no longer official documents of a Minister within the meaning of section 5(1) or subject to the right of access under section 13(b) of the FOI Act.

Accordingly, the effect of my decision is that the Applicant is no longer entitled to obtain access to the requested documents under the FOI Act.

My reasons for decision follow.

Joanne Kummrow  
**Public Access Deputy Commissioner**

17 August 2023

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to [a Minister], who at that time was the Minister for Workplace Safety (**former Minister**), for the following documents:

All emails, letters and attachments sent or received by the Office of the Minister for Workplace Safety in relation to [legislative amendment to a named Bill] during the period [date range], between it and the following:

- i. [named person];
- ii. [named person];
- iii. [named person];
- iv. [external organisation];
- v. [external organisation];
- vi. [a Victorian Government agency]; and
- vii. [a Victorian Government agency].

All emails, letters and attachments sent or received by the Minister for Workplace Safety in relation to [legislative amendment to a named Bill] during the period [date range], between her and the following:

- i. [named person];
- ii. [named person];
- iii. [named person];
- iv. [external organisation];
- v. [external organisation];
- vi. [a Victorian Government agency]; and
- vii. [a Victorian Government agency].

2. As is common in FOI requests made to a Minister for documents, the relevant Department is authorised by the Minister to make a decision on the request on the Minister's behalf. In doing so, it is important to note that the Minister remains the relevant recipient of the request and the Department acts as the Minister's authorised representative or agent.
3. In this case, the Department handled the FOI request and made a decision on the request on behalf of the Minister.
4. On [date], the Department advised the former Minister's office of the Applicant's request.
5. [Prior to the Victorian State election], the Department received seven documents from the former Minister's office that are relevant to the terms of the request. The Department continues to retain a copy of those documents.
6. [Prior to the Victorian State election], the Department provided the former Minister's office with its preliminary assessment of the documents and advised the Applicant that it was extending the date by which it would make its decision by 15 days to [date] under section 21(2)(a).

7. On 1 November 2022, the Caretaker period commenced prior to the Victorian state election.
8. Caretaker conventions are directed to ensuring that during the Caretaker period, certain government action, decision making and engagement with the public sector is modified or does not occur to preserve the autonomy of an incoming government, ensure the State's resources are used appropriately and not to the unfair advantage of the incumbent government and to protection the political neutrality of the public sector.<sup>1</sup>
9. On 26 November 2022, the Victorian state election was held and subsequently, the Victorian Labor Government was returned to Office.
10. On 5 December 2022, the Victorian Government announced changes to Victorian Ministers and their ministerial portfolios, and departments (the **Machinery of Government changes**).<sup>2</sup> One of the Machinery of Government changes announced was the cessation of the portfolio of Minister for Workplace Safety, which was held by [named Minister], and the portfolio of Minister for WorkSafe and the TAC (**Relevant Minister**) was created, presently held by [named Minister] (the **Ministerial changes**).
11. On 1 January 2023, the Machinery of Government changes came into effect.
12. [Following the Machinery of Government changes], the Department made a decision on the Applicant's request that the requested documents have ceased to be an official document of a Minister as they are no longer in the possession of the former Minister. Therefore, the right of access to official documents of a Minister under section 13(b) of the FOI Act no longer applies to the requested documents.

### **Review application**

13. On [date], the Applicant sought review by the Information Commissioner under section 49A(1) of the Department's decision to refuse access made on behalf of the Relevant Minister.
14. The Applicant and the Department were invited to make a written submission under section 49H(2) in relation to the review.
15. I have considered all communications and submissions received from the parties.
16. 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.
17. 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.

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<sup>1</sup> Department of Premier and Cabinet, *Guidelines on the Caretaker Conventions*, April 2022 available at <https://www.vic.gov.au/sites/default/files/2022-04/2022Guidelines-on-the-Caretaker-Conventions.pdf>.

<sup>2</sup> Premier of Victoria, 'New Cabinet to keep doing what matters', Media Release (5 December 2022, available at [https://www.premier.vic.gov.au/sites/default/files/2022-12/221205%20-%20New%20Cabinet%20To%20Keep%20Doing%20What%20Matters\\_0.pdf](https://www.premier.vic.gov.au/sites/default/files/2022-12/221205%20-%20New%20Cabinet%20To%20Keep%20Doing%20What%20Matters_0.pdf)).

18. 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 Department's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>3</sup> 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.

***Preliminary view provided to Department and Applicant***

19. On [date], I provided the Applicant and the Department with my preliminary view to which both parties were invited to provide a response. I advised, having considered the above sequence of events, preliminary enquiries with the Department and reviewing decisions made by the Office of the Australian Information Commissioner (**OAIC**) in relation to similar matters, I was satisfied that at the time of making my fresh decision the requested documents are no longer 'official documents of a Minister' for the purposes of section 5(1) and are no longer subject to access under section 13(b) of the FOI Act. I also advised that the ongoing handling of this matter sits with the Relevant Minister since the cessation of the former Minister, noting the Department may continue to act on behalf of the Relevant Minister.
20. While the Department agrees with my preliminary view that the requested documents are no longer subject to access under the FOI Act, it submits it is now the 'respondent' for the purposes of this review rather than the Relevant Minister (ie. it assumes the role of the former Minister in the ongoing handling of the Applicant's request).

**Review**

21. There are a number of issues to resolve in relation to this review:
- (a) What is the status of a document of a Minister?
  - (b) Does an FOI request cease because there is a change of Minister?
  - (c) Is the Relevant Minister or the Department the 'respondent' for the purpose of this review?
  - (d) Are the documents 'official documents of a minister' to which there is a legal right of access under the FOI Act?
22. I address each of these issues below.

***What is the status of a document of a Minister?***

23. A Minister or their office can create documents, receive documents from their department in relation to their ministerial portfolio, or from other sources within and outside of government.
24. Public Records Office Victoria (**PROV**) administers public records in Victoria in accordance with the *Public Records Act 1972 (Vic)* (**Public Records Act**). It is well established that a document of a Minister is not a public record.

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<sup>3</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

25. PROV provides a relevant summary of the status of documents of a Minister:

Records relating to the establishment and administration of the ministerial office (including the records of ministerial advisors) are not public records under the definitions of the Act.

The actions and decisions of the Minister as documented by departments and other agencies are public records and are managed by those agencies in accordance with the Act. This includes records received by the Minister that were sent by departments and other agencies. The versions of these records held by Minister or within ministerial offices are considered to be copies of the public records held in departments and other agencies and are not required to be managed as public records.

While the majority of records held by a Minister or in a ministerial office are not public records, there may be some records held that were public records before they arrived and therefore remain public records.<sup>4</sup>

26. Accordingly, the status of a document of a Minister is different to that of a department. Although a copy of a document created or obtained by a department and provided to a Minister will be a public record.
27. In this case, the documents received by the former Minister, which are relevant to the Applicant's request, are documents of a Minister and not public records for the purpose of the Public Records Act. As such, copies of those documents are not required to be retained by the Minister ceasing or changing their ministerial portfolio. Further, given the Department obtained a copy of the documents from the Minister in the course of processing the Applicant's request on behalf of the Minister, I do not consider provision of those documents to the Department changes their status.
28. Nor do I consider that a copy of the documents, despite them being held by the Department, remain an official copy of a Minister's documents. This is because the Department was acting as a representative of the former Minister and now the Relevant Minister as their agent only. As such, by virtue of it holding the documents, the status of those documents does not change - either during the time the former Minister occupied their portfolio or following their cessation as the Minister.

***Does an FOI request cease because there is a change of Minister?***

29. The decision of *Phillip Morris Ltd v Treasurer* [2013] AICmr 88 (the **Phillip Morris case**) involved similar circumstances to the present review, where there was a change of Ministers holding the Treasurer's portfolio following a Federal election and change of Government. The Australian Information Commissioner held:

... an FOI request or an IC review,<sup>[2]</sup> in which a Minister is the respondent to the FOI request, does not cease just because there is a change of Minister. The request or IC review continues, and the new minister is the respondent. This is a consequence of s 20 of the *Acts Interpretation Act 1901*, which provides that '[w]here in an Act any person holding or occupying a particular office or position is mentioned or referred to in general terms, such mention or reference shall be deemed to include all persons who at any time hold or occupy for the time being, or perform for the time being the duties of, the office or position'.<sup>5</sup>

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<sup>4</sup> Public Records Office of Victoria, *Ministerial Records*, at <https://prov.vic.gov.au/recordkeeping-government/a-z-topics/ministerial-records>.

<sup>5</sup> *Phillip Morris Ltd and Treasurer* [2013] AICmr 88 at [14].

30. Further:

As noted above, the Treasury has the documents that are the subject of this IC review. Section 16(1) of the FOI Act provides that, where a request is made to an agency or a minister that does not have the requested documents, the request can be transferred to the agency or minister that does. There is no analogous mechanism in the Act in relation to IC reviews; even though the Treasury has the documents, it cannot become the respondent—or the person who made the IC reviewable decision—in this IC review.<sup>6</sup>

31. Section 47 of the *Interpretation of Legislation Act 1982* (Vic) contains a similar provision:

**47 Reference to officer in general terms**

In an Act or subordinate instrument a reference in general terms to a person holding or occupying a particular office or position shall, unless the contrary intention appears, be construed as a reference to all persons who at any time hold, occupy, act in or perform the duties of that office or position for the time being.

32. I adopt the above reasoning of the Australian Information Commissioner in the Phillip Morris case to the Victorian context. I agree that a request made under the FOI Act does not cease if the Minister, who received the request, ceases to hold their ministerial portfolio or their ministerial portfolio ceases. Rather, the new Minister, who takes over the relevant area or areas of responsibility of the former Minister, is taken to be the relevant Minister or 'respondent' for the purposes of the ongoing handling of the Request or review.

33. This view is supported by several other decisions made by the Australian Information Commissioner, in which different holders of that office have consistently held that an FOI review application does not automatically cease when a Minister ceases to hold their ministerial portfolio or their ministerial portfolio ceases and the matter continues to be handled by the new relevant Minister, despite the fact that a different individual holds office.<sup>7</sup>

***Is the Relevant Minister or the Department the 'respondent' for the purpose of this review?***

34. In response to my preliminary view, the Department submits it is now the 'respondent' for the purposes of this review rather than the Relevant Minister (ie. the Department assumes the role of the former Minister in the ongoing handling of the Applicant's request):

...the Phillip Morris case can be properly distinguished from the circumstances of this case. The Phillip Morris case concerned a Commonwealth FOI application to the Federal Treasurer, a portfolio that remained the same post-election, albeit with a different incumbent as Minister. In this case, the Ministerial portfolio was ostensibly abolished and replaced with a different (though similar) portfolio. Given the distinction between the factual circumstances of the two matters, the findings from the Phillip Morris case should not be applied to this matter. The Department submits the Phillip Morris case does not enable the Commissioner to determine that a similar portfolio is the rightful successor of a now abolished Ministerial portfolio.

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<sup>6</sup> Ibid at [21].

<sup>7</sup> See for example, *Phillip Morris Ltd and Treasurer* [2013] AICmr 88; '*ACY*' and *Attorney-General* (Freedom of Information) [2023] AICmr 7 at [3]-[5]; *Thomas and Prime Minister* [2014] AICmr 18 at [13]; *Paul Farrell and Prime Minister of Australia* (Freedom of information) [2023] AICmr 32, referring to '*ACY*'; '*ADK*' and *the Treasurer* (Freedom of Information) [2023] AICmr 35, referring to '*ACY*'; \**Rex Patrick and Attorney-General* (Freedom of information) [2023] AICmr 9 at [16] [\*1 understand the final decision in this list is presently the subject of an appeal by the applicant, Rex Patrick to the Administrative Appeals Tribunal, which will consider the issue central to this matter].

35. I do not agree with the Department's reasoning for the following reasons:
- (a) Sections 5(1) and 13(b) provide that agencies and Ministers are separate entities for the purposes of the FOI Act.
  - (b) The Department, at the time the request was made to the Minister, had administrative responsibility for processing the request on behalf of or as an agent of the former Minister. In this regard, it did not receive the request or hold the documents the subject of the request. Rather, it obtained a copy of the relevant documents from the former Minister's office in order to process the request on behalf of the Minister.
  - (c) While the Minister for Workplace Safety portfolio ceased on 1 January 2023, the Relevant Minister is now assumes responsibility for administering all but one Act to which the former Minister was responsible and is in effect, in my view, is the same or similar portfolio.<sup>8</sup>
36. As such, while the Department holds the documents in its capacity as the authorised representative of the former Minister, who has now been replaced by the Relevant Minister, and the Department made a decision on behalf of the Relevant Minister, I consider it is not and cannot be the 'respondent' to this review.
37. Accordingly, I am satisfied that following the Victorian state election in November 2023 and a change in ministerial portfolios and Ministers, the Relevant Minister took over the ministerial portfolio most relevant to the terms of Applicant's request from the former Minister. In these circumstances, the conduct of the Applicant's review application transfers to the Relevant Minister as the new occupant of the relevant ministerial office (noting the Department will or may act on behalf of the Relevant Minister).

***Are the documents 'official documents of a Minister' to which access can be provided?***

38. Under section 13(b), every person has a legally enforceable right to obtain access in accordance with the FOI Act to an official document of a Minister, other than an exempt document.
39. The definition of 'official document of a Minister or official document of the Minister' in section 5(1) provides:
- a document in the possession of a Minister, or in the possession of the Minister concerned, as the case requires, that relates to the affairs of an agency, and, for the purposes of this interpretation, a Minister shall be deemed to be in possession of a document that has passed from his possession if he is entitled to access to the document and the document is not a document of an agency.
40. The Victorian Supreme Court of Appeal in *Office of the Premier v The Herald and Weekly Times Pty Ltd*,<sup>9</sup> held this definition has two limbs:

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<sup>8</sup> See 'Minister for Workplace Safety' in General Order dated 20 October 2022, available at <https://www.vic.gov.au/general-order-dated-20-october-2022#minister-for-workplace-safety> and 'Minister for WorkSafe and the TAC' in General Order dated 5 December 2022, available at <https://www.vic.gov.au/general-order-dated-5-december-2022#minister-for-worksafe-and-the-tac>.

<sup>9</sup> (2013) 38 VR 684 at [12].

- (a) an official document of a minister is a document that is 'in the possession of a Minister' (including those documents which have 'passed from his possession if he is entitled to access the document'); and
- (b) the document 'relates to the affairs of an agency'.

41. 'Minister', as defined in section 38 of the *Interpretation of Legislation Act 1984* (Vic), provides:

the responsible Minister of the Crown for the time being administering the provision in which, or in respect of which, the expression is used or, if, for the time being, different Ministers are administering that provision in different respects, each of those Ministers to the extent that he or she is administering that provision in the relevant respect, and where a Minister of the Crown is referred to by the title of his or her Ministerial office, the reference shall be construed as including a reference to a Minister of the Crown for the time being acting for or on behalf of that Minister.

42. As explained above in the background of this matter, the Department obtained documents from the former Minister's office prior to the Ministerial changes and Machinery of Government changes. I accept that at point in time the requested documents were 'official documents of the Minister'.

43. The key issue for consideration is whether the requested documents remain 'official documents of the Minister' to which there is a right of access under section 13(b) following a change in Ministers. Specifically, whether the documents subject to the Applicant's FOI request and currently held by the Department remain 'official documents of the Minister'.

44. I have considered the decision in the Phillip Morris case which, as noted above, concerns a request for documents where there had been a change of Minister and in which the Australian Information Commissioner held:

... an FOI request cannot continue to be processed, and an IC review cannot continue to be undertaken, if (for some reason) the FOI Act no longer applies to the documents that are the subject of that request or that review.

In this case, the documents that [the applicant] requested are no longer in the possession of the new Minister—the person (to adopt the words of the Acts Interpretation Act) who holds for the time being, and performs for the time being the duties of, the office (Treasurer) to which the FOI request was made. The documents requested are no longer 'official documents of a Minister'.

It is not just that the new Treasurer cannot give [the applicant] access, under s 11A(3) of the FOI Act, to the requested documents because they are not in his possession. The documents are no longer subject to the FOI Act, so s 11A(3) does not apply.

....

The documents that [the applicant] has requested are no longer official documents of a Minister because they are no longer in the possession of the Treasurer. The FOI Act no longer applies to the documents.<sup>10</sup>

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<sup>10</sup> *Phillip Morris Ltd and Treasurer* [2013] AICmr 88 at [15]-[20]. Section 11A(3) of the *Freedom of Information Act 1982* (Cth) provides 'the agency or Minister must give the person access to the document in accordance with this Act, subject to this section'.



45. As stated above, various Australian Information Commissioners have made this same finding in subsequent decisions involving the application of the FOI Act where there is a change of Minister.<sup>11</sup>
46. I have also considered whether the Relevant Minister holds the requested documents, which broadly is for access to documents sent or received by the [the former Minister], and [their] Office, and several third parties in relation to [legislative amendments] between [date range].
47. I have viewed a copy of the requested documents and confirm they were not sent or received by the Relevant Minister.
48. The Bill to which the request relates was given Royal Assent on [date], prior to the Ministerial changes and Machinery of Government changes. As such, I consider the former Minister was unlikely to have provided the documents to the Relevant Minister as the amendments to the Bill had already been made.
49. As discussed above, official documents of a Minister are subject to the FOI Act, documents made or received by Ministers are not public records (regardless of the content) as they are not made or received by a public officer in the course of their duties.<sup>12</sup> Having viewed the documents, I am satisfied they are not public records and as such are not required to be managed and disposed of in accordance with the Public Records Act. As such, the documents may not have been retained by the former Minister and may have been disposed of following the Machinery of Government changes.
50. On careful consideration, I am satisfied the documents obtained the Department in the course of processing of the request on behalf of the former Minister are no longer official documents of a Minister within the meaning of sections 5(1) and for the purpose of section 13(b) following the Ministerial changes.

## Conclusion

51. On the information before me, I am satisfied any relevant documents meeting the terms of the Applicant's FOI request are no longer official documents of a Minister within the meaning of section 5(1) and no longer subject to the right of access under section 13(b) of the FOI Act.
52. Accordingly, the effect of my decision is that the documents to which the Applicant seeks access from the Minister for WorkSafe and the TAC are no longer subject to the FOI Act.
53. In my view, this also means that while the Department holds a copy of the documents it obtained from the former Minister in its capacity as a representative or agent of the former Minister, there is no legal right for a person to seek access to those documents under the FOI Act. However, it is open to the Applicant to make a new FOI request to the Department for

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<sup>11</sup> 'ACY' and Attorney-General (Freedom of Information) [2023] AICmr 7; *Thomas and Prime Minister* [2014] AICmr 18; *Paul Farrell and Prime Minister of Australia* (Freedom of information) [2023] AICmr 32; 'ADK' and the Treasurer (Freedom of Information) [2023] AICmr 35; \**Rex Patrick and Attorney-General* (Freedom of information) [2023] AICmr 9 [\*I understand the final decision in this list is currently the subject of an appeal to the Administrative Appeals Tribunal by the applicant, former Senator Rex Patrick].

<sup>12</sup> See Public Records Office Victoria, *Ministerial records* at <https://prov.vic.gov.au/recordkeeping-government/a-z-topics/ministerial-records>.

documents it otherwise independently holds in its possession relevant to the terms of the Applicant's request.

### **Review rights**

54. 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.<sup>13</sup>
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>14</sup>
56. The Relevant Minister may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>15</sup>
57. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
58. The Relevant Minister, or the Department on their behalf, is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>16</sup>

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

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

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<sup>13</sup> The Applicant in section 50(1)(b) and the Minister in section 50(3D).

<sup>14</sup> Section 52(5).

<sup>15</sup> Section 52(9).

<sup>16</sup> Sections 50(3F) and 50(3FA).