

## Notice of Decision and Reasons for Decision

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Applicant: 'EZ1'  
Agency: Department of Health  
Decision date: 6 January 2023  
Exemptions considered: Sections 28(1)(d), 29(1)(a), 32(1), 33(1), 34(4)(a)(ii)  
Citation: 'EZ1' and Department of Health (Freedom of Information) [2023] VICmr 1 (6 January 2023)

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FREEDOM OF INFORMATION – meeting agendas – meeting minutes – list of attachments - National Cabinet – Crisis Council of Cabinet – [disclosure of documents would not prejudice relation between the State and Commonwealth]

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.

While I am satisfied the exemptions under sections 28(1)(d) and 32(1) apply to certain information, I am not satisfied certain information to which the Agency refused access is exempt under sections 28(1)(d), 29(1)(a), 30(1), or 34(4)(a)(ii). I am also not satisfied the personal affairs information subject to review is exempt under section 33(1).

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 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.

**Sven Bluemmel**  
Information Commissioner

6 January 2023

## Reasons for Decision

### Background to review

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

I seek copies of the agendas and minutes of, including a list of the titles of all attachments and reports considered at, all meetings of the Department of Health and Human Services Executive Committee between [date range].
2. The Agency identified three documents falling within the terms of the Applicant's request and granted access to the documents in part, relying on the exemptions under sections 28(1)(d), 29(1)(a), 30(1), 33(1), 32(1) and 34(4)(a)(ii). The Agency's decision letter sets out the reasons for its decision.

### Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Applicant indicated they seek access to the following information refused by the Agency:
  - (a) the information refused under sections 28(1)(d), 29(1)(a), 30(1), 32(1) and 34(4)(a)(ii); and
  - (b) the names and position titles of executive level third parties, where this information forms part of the information refused by the Agency under sections 28(1)(d), 29(1)(a), 30(1), 32(1) and 34(4)(a)(ii), but was released by the Agency in other parts of the documents.
5. Accordingly, the information refused by the Agency under section 33(1) is not subject to review and is to be deleted as irrelevant information in accordance with section 25.
6. I have examined a copy of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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.
11. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</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.

### Review of exemptions

#### **Section 28(1) – Cabinet documents**

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* [1979] 24 ALR 577 at 591.

12. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
13. In *Ryan v Department of Infrastructure*,<sup>2</sup> 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.
15. Section 28(3) provides the exemption in section 28(1) does not apply to a document to the extent it contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.<sup>3</sup>

#### ***Section 28(1)(d) – Disclosure of any deliberation or decision of the Cabinet***

16. 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 or a sub-committee of the Cabinet,<sup>4</sup> other than a document by which a decision of the Cabinet was officially published.
17. 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.<sup>5</sup>
18. In *Asher v Department of Sustainability and Environment*,<sup>6</sup> VCAT held that where a document, on its face, does not disclose a decision or deliberation of the Cabinet, or the extent of the Cabinet's interaction with a document is unclear, section 28(1)(d) will not apply.
19. The Victorian Court of Appeal has held 'deliberations' should be given a narrow interpretation such that it means the actual debate that took place rather than the subject matter of a debate itself:<sup>7</sup>

It all depends upon the terms of the document. At one end of the spectrum, a document may reveal no more than that a statistic or description of an event was placed before Cabinet. At the other end, a document on its face may disclose that Cabinet required information of a particular type for the purpose of enabling Cabinet to determine whether a course of action was practicable or feasible or may advance an argument for a particular point of view.<sup>8</sup> The former would say nothing as to Cabinet's deliberations; the latter might say a great deal.

20. The Victorian Court of Appeal also held:

The deliberative process involves the weighing up or evaluating of the competing arguments or considerations that may have a bearing upon Cabinet's course of action – its thinking processes<sup>9</sup> -

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<sup>2</sup> [2004] VCAT 2346 at [33].

<sup>3</sup> *Mildenhall v Department of Premier & Cabinet (No. 1)* [1995] 8 VAR 284.

<sup>4</sup> Section 28(7).

<sup>5</sup> *Smith v Department of Sustainability and Environment* [2006] 25 VAR 65; [2006] VCAT 1228 at [23]; *Asher v Department of Infrastructure* [2006] 25 VAR 143; [2006] VCAT 1375 at [27].

<sup>6</sup> (General) [2010] VCAT 601 (6 May 2010) at [42], citing *Re Birrell and Department of Premier and Cabinet [Nos 1 and 2]* [1986] 1 VAR 230 at [239].

<sup>7</sup> *Department of Infrastructure v Asher* [2007] 19 VR 17; [2007] VSCA 272 at [8].

<sup>8</sup> *Re Smith and Department of Environment and Sustainability* [2006] VCAT 1228.

<sup>9</sup> *Re Waterford and the Department of the Treasury (No 2)* [1984] AATA 67; [1984] 1 AAR 1.

with a view to the making of a decision. It encompasses more than mere receipt of information in the Cabinet room for digestion by Cabinet ministers then or later.<sup>10</sup>

21. A 'decision' means any conclusion as to the course of action the Cabinet adopts whether it is a conclusion as to final strategy on a matter or conclusions about how a matter should proceed.<sup>11</sup>
22. Where a decision made by the Cabinet is public, an announcement in relation to the issue decided will not disclose the Cabinet's decision or deliberation.<sup>12</sup>
23. The Agency submits the following categories of information are exempt from release under section 28(1)(d):
  - (a) Category 1:
    - i. Updates on deliberations from various Cabinet committees, such as Crisis Council of Cabinet (**CCC**);
    - ii. Minutes disclosing the contents of submissions to Cabinet; and
    - iii. Matters deliberated in Cabinet meetings.
  - (b) Category 2:
    - i. The titles of Cabinet submission attachments considered by the Agency's executive board;
    - ii. The titles of submissions prepared for CCC; and
    - iii. Agenda items for CCC meetings.
24. Document 1 is headed 'DHHS Executive Board and Subcommittees', and lists the titles of various documents, including agenda, attachments, reports and minutes. The Agency has exempted the titles and dates of meetings of certain Cabinet subcommittees, as well as the titles of certain documents the Agency states were submitted to the CCC under section 28(1)(d).
25. Document 2 comprises the Agenda for various meetings of the DHHS Executive Board. The information exempted by the Agency from the document under section 28(1)(d) is the titles of various meeting agenda relating to the CCC or National Cabinet.
26. Document 3 are the meeting minutes for the DHHS Executive Board for various dates. The Agency exempted the titles of certain submissions to Cabinet, the titles of upcoming bills, and brief general topics of discussion at a Cabinet committee meeting. The Agency also exempted information on page 50 of the pdf document that does not appear to be cabinet related as well as information related to the National Cabinet or more closely related to executive or ministerial matters rather than Cabinet.
27. As described above, for information to be exempt under section 28(1)(d) I must be satisfied that its disclosure would involve the disclosure of a decision or deliberation of Cabinet.
28. Having reviewed the documents, I am satisfied certain information in Document 3 would disclose a deliberation of the Cabinet. Accordingly, I am satisfied this information is exempt from release under section 28(1)(d).

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<sup>10</sup> *Re Birrell and Department of the Premier and Cabinet* (1986) 1 VAR 230. *Department of Infrastructure v Asher* [2007] 19 VR 17; [2007] VSCA 272 at [17].

<sup>11</sup> *Dalla-Riva v Department of Treasury and Finance* [2005] 23 VAR 396; [2005] VCAT 2083 at [30], citing *Toomer and Department of Agriculture, Fisheries and Forestry and Ors* [2003] AATA 1301.

<sup>12</sup> *Honeywood v Department of Innovation, Industry and Regional Development* [2004] 21 VAR 1453; [2004] VCAT 1657 at [26]. *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [46].

29. However, I am not satisfied other information is exempt under section 28(1)(d) for the following reasons:
- (a) The documents detail discussions held by the Executive of DHHS, rather than, for example, the actual discussions that took place during meetings of a subcommittee of Cabinet. The information is therefore less sensitive and contains significantly less detail than would have taken place at the subcommittee of Cabinet itself.
  - (b) Some of the legislation referred to has since been introduced to parliament, passed and assented to.
  - (c) Information concerning National Cabinet does not relate to the Victorian state government Cabinet.
  - (d) The information is not detailed enough to record actual decisions of the Cabinet or a subcommittee of Cabinet.
  - (e) Noting the decision of the Supreme Court of Victoria in *Department of Infrastructure v Asher*,<sup>13</sup> I do not consider the broad topics noted in the documents reveal deliberations of Cabinet or a subcommittee of Cabinet. As described above, Cabinet having received information does not reveal the 'thinking processes' or the evaluation of competing arguments or options.
30. My decision in relation to section 28(1)(d) is set out in the Schedule of Documents in **Annexure 1**.

***Section 29(1)(a) – Disclosure of documents that would prejudice relation between the State and Commonwealth***

31. Section 29(1)(a) provides a document is an exempt document if disclosure under the FOI Act:
- (f) would be contrary to the public interest; and
  - (g) disclosure would prejudice relations between the State and the Commonwealth or any other State or Territory.
32. The Agency applied section 29(1)(a) to parts of Document 3. The information broadly relates to Commonwealth-State relations, Commonwealth agencies and information relating to a Committee comprising other state representatives.
33. There is no information before me concerning the Commonwealth government's view on disclosure of the information in the document.
34. The first requirement under section 29(1)(a) is whether disclosure of a document would be contrary to the public interest.
35. In my view, the use of the word 'would' requires certainty that an event will occur, rather than a mere possibility or likelihood. The Agency has not addressed how disclosure would be contrary to the public interest in its decision letter but has submitted the topics are not publicly known and typically consist of sensitive, high level topics affecting the Australian public.
36. In determining whether disclosure would be contrary to the public interest, I have had regard to the following factors that were accepted by VCAT in *Millar v Department of Premier and Cabinet*:<sup>14</sup>
- (a) protecting uninhibited exchanges between the governments of Australia;

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<sup>13</sup> [2007] 19 VR 17; [2007] VSCA 272 at [6].

<sup>14</sup> [2011] VCAT 1230 at [62].

- (b) encouraging cooperative Federalism within Australia;
  - (c) protecting processes that contribute to high quality policy development by the governments of Australia;
  - (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy; and
  - (e) protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision-making process.
37. Based on the information before me, I am not satisfied disclosure of the information in the document the Agency determined exempt under section 29(1)(a) would be contrary to the public interest for the following reasons:
- (a) the information is general in nature, and does not reveal any ongoing or sensitive negotiations between Victoria and the Commonwealth government;
  - (b) the document does not appear to contain any individual contributions of any State or Territory, or the Commonwealth government provided in confidence to the Victorian government;
  - (c) as such I do not consider disclosure would have any impact on any future negotiations or inhibit exchanges between the Victorian and Commonwealth governments;
  - (d) rather, the public interest is in favour of disclosure as it describes the way in which the Victorian government contributes to, or responds to, matters of national significance.
38. As I have decided disclosure would not be contrary to the public interest, I have not further considered the remaining requirements of sections 29(1)(a).
39. The Schedule of Documents in **Annexure 1** sets out my decision on section 29(1)(a) to the relevant document.

***Section 30(1) – Internal working documents***

40. 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.
41. The exemption does not apply to purely factual material in a document.<sup>15</sup>
42. To find information exempt under this section, I must also be satisfied releasing this information is contrary to the public interest. This requires a ‘process of the weighing against each other conflicting merits and demerits’.<sup>16</sup>

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<sup>15</sup> Section 30(3).

<sup>16</sup> *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].

43. The Agency applied section 30(1) to parts of Document 3.

*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?*

44. The following do not constitute matter in the nature of opinion, advice or recommendation:

- (a) the recitation of present existing facts;<sup>17</sup>
- (b) the recording of events such as a conversation with the applicant;<sup>18</sup>
- (c) a statement of intention,<sup>19</sup> and
- (d) an internal document by which one officer informed another of a sequence of events.<sup>20</sup>

45. I am not satisfied all the information exempted by the Agency under section 30(1) is in the nature of an opinion, advice or recommendation of an Agency officer or consultation or deliberation between Agency officers. Rather, I consider the refused information consists of factual information, directions, statements of intention, updates and lists of topics discussed.

46. However, I am satisfied parts of the document contain information in the nature of opinion, advice and recommendation.

*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?*

47. I am satisfied Document 3 was prepared in the course of the deliberative processes of the Agency, in relation to discussing various public health matters, [further topics redacted].

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

48. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

49. In deciding whether disclosure of the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>21</sup>

- (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 document and the broader context giving rise to the creation of the document;
- (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 document would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or

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<sup>17</sup> *Pullen v Alpine Resorts Commission* (unreported, AAT of Vic, Macnamara DP, 23 August 1996).

<sup>18</sup> *Re City Parking Pty Ltd* [1996] 10 VAR 170.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* See also *Porter v Police (Vic)* [2005] VCAT 962, where VCAT stated at [23] that it took the AAT to be saying that 'advice' must be 'something better' than mere 'informing'.

<sup>21</sup> *Hulls v Victorian Casino and Gambling Authority* [1998] 12 VAR 483.

participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;

- (e) whether disclosure of the document 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 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.

50. The Agency submits it would be contrary to the public interest to disclose exempted information for the following reasons:

This section has been applied mainly to the minutes in Document 3 that disclose deliberations between the senior level officers in the Executive Board.

The department notes that these deliberations are occurring at a high level of government, involving mainly senior level executives. It is essential that these senior executive officers can deliberate on matters in frankness and candour, to ensure the decisions made are fully informed and well evaluated. The timeframe of these documents is at a critical time in the COVID-19 pandemic when important public health measures and decisions needed to be made to ensure that the pandemic did not significantly worsen. In this context, it is important and in the public interest that senior officers are able to deliberate freely and without impediment in order to ensure timely and proper decisions were made, given the potential consequences.

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The department submits that, the more sensitive or contentious the issues involved, the more likely that the material should not be disclosed (*Howard v Treasurer (Cth)* (1985) 7 ALD 626). As the Commissioner identified that the information in the documents is sensitive (such as the information on page 47 and 80 of Document 3), sensitive issues can include information about the workings of high levels of government or contentiousness of the subject matter.

Disclosure would also be contrary to the public interest where disclosure would be likely to lead to confusion and ill-informed debate. There is a potential for the release of this material to result in misinterpretation about actions taken, leading to a spurious stand of the document, and the release may result in ill-informed debate or mislead the public.

51. I am not satisfied disclosure of the information identified exempt under section 30(1) by the Agency would be contrary to the public interest for the following reasons:

- (a) While I appreciate the seniority of those concerned, and the sensitivity of the topics discussed, in my view the actual information in the document is brief and general in nature, such that its disclosure should not have any adverse impact on the Agency's deliberations on similar matters in the future.
- (b) The documents are now more than two years old, such that the matters discussed would likely be resolved or sufficiently advanced for their disclosure to have no negative impact on any policy development or deliberations current at that time.
- (c) I have given weight to the role public access to information has in building public trust, particularly during times of crisis.



- (d) I am of the view that Agency officers performing their official duties are responsible for ensuring advice provided is accurate, complete and properly considered. Agency officers, as public sector employees, are required to discharge their duty to provide impartial and fulsome advice to decision makers, and stakeholders, given this requirement is a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic). In my view therefore I do not consider disclosure would be likely to inhibit the frankness and candour of such exchanges in the future.
- (e) In my view the public interest weighs in favour of information demonstrating an agency meeting its governance obligations through its executive board meetings.

52. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

***Section 32(1) – Documents subject to legal privilege***

53. Section 32(1) provides a document is an exempt document ‘if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege’ (**legal privilege**).
54. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>22</sup>
- (a) between the client (or the client’s agent) and the client’s professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
  - (b) between the client’s professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
  - (c) between the client (or the client’s agent) and third parties that was made for the purpose of obtaining information to be submitted to the client’s professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

*Has legal privilege been waived?*

55. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client’s express or implied consent.<sup>23</sup>
56. The Agency relies on section 32(1) to refuse access to certain information in Document 3.
57. During the review, the Agency submitted that it also relies on the exemption under section 32(1) to the already redacted paragraph of item 3.1 on page 9 of Document 3.
58. I am satisfied Document 3 contains information that is a confidential communications between the Agency and its legal representatives that was made for the purpose of providing legal advice. However, I am not satisfied that all information refused by the Agency under section 32(1) is exempt under that provision.
59. My decision in relation to section 32(2) is set out in the Schedule of Documents in **Annexure 1**.

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<sup>22</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

<sup>23</sup> Sections 122(2) and 122(3) of the *Evidence Act 2008* (Vic) or *Mann v Carnell* [1999] 201 CLR 1 at [28].

### **Section 34(4)(a)(ii) – Information that would expose the Agency unreasonably to disadvantage**

60. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, ‘in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage’. A document is exempt under section 34(4)(a)(ii) if:

- (a) the agency is engaged in trade or commerce;
- (a) the document contains information of a business, commercial or financial nature; and
- (b) disclosure of which would be likely to expose the agency unreasonably to disadvantage.

#### *Is the Agency engaged in trade and commerce?*

61. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.<sup>24</sup>
62. VCAT has held ‘the terms ‘trade’ and ‘commerce’ are not words of art; rather they are expressions of fact and terms of common knowledge’.<sup>25</sup> VCAT has adopted the view of the Federal Court of Australia that these terms are ‘of the widest import’.<sup>26</sup> An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency’s other functions.<sup>27</sup>
63. Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.<sup>28</sup>
64. While the phrase ‘trade and commerce’ may be interpreted broadly,<sup>29</sup> it has been held trade and commerce must ‘of their nature, bear a trading or commercial character’.<sup>30</sup>
65. The fact an agency’s predominant activities may be described as ‘governmental’ does not preclude it from relying on the exemption under section 34(4)(a)(ii).<sup>31</sup>
66. I take the view described in *Pallas v Roads Corporation* that a government agency engaged in meeting its public functions is not engaged in trade or commerce, for example in relation to VicRoads:

In carrying out its road building functions the Corporation engages in Governmental activities rather than in trade or commerce...

Nor can it be said that VicRoads is engaged in trade or commerce in putting a road project out to tender or in awarding a contract which has been the subject of a tender process. No doubt the contracting process in a general sense is a manifestation of trade or commerce. The construction companies which might tender for and undertake the contract clearly are engaged in trade or commerce. That fact does not mean that the Corporation is. A consumer who purchases a consumer item from a department store is not, for that

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<sup>24</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

<sup>25</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [33].

<sup>26</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [34]; *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd 1978* 22 ALR 621 at [649].

<sup>27</sup> *Marple v Department of Agriculture* [1995] 9 VAR 29 at [47].

<sup>28</sup> *Thwaites v Metropolitan Ambulance Services* [1996] 9 VAR at [473].

<sup>29</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

<sup>30</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; [1990] 169 CLR 594 at 690; *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

<sup>31</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

reason, engaged in trade or commerce, although the department store most certainly is and the sale transaction must be regarded as part of the processes of trade or commerce.<sup>32</sup>

67. The Agency exempted information under section 34(4)(a)(ii) that broadly relates to its budget, funding, savings and brief information relating to two contracts.
68. The Agency has not advised how it considers it is engaged in trade or commerce. In my view, the activities described in the documents relate only to the Agency's ordinary governmental functions and as such is not engaged in trade or commerce.
69. Accordingly, I am not satisfied the information is exempt under section 34(4)(a)(ii).
70. My decision in relation to section 34(4)(a)(ii) is set out in the Schedule of Documents in **Annexure 1**.

### ***Section 33(1) – Documents affecting personal privacy of third parties***

71. For completeness, I have also considered the exemption under section 33(1), but only with respect to the names and position titles of executive level third parties where this information forms part of the information refused by the Agency under sections 28(1)(d), 29(1)(a), 30(1), 32(1) and 34(4)(a)(ii). The Applicant seeks access to this type of personal affairs information where it was refused by the Agency under the above listed exemptions but was released in other parts of the documents.
72. 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 (a **third party**);<sup>33</sup> and
  - (b) such disclosure would be 'unreasonable'.

#### *Do the documents contain personal affairs information of individuals other than the Applicant?*

73. 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.<sup>34</sup>
74. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>35</sup>
75. It has been held there is nothing particularly sensitive about matters occurring or arising in the course of one's official duties and disclosure of this type of information is generally considered not unreasonable.<sup>36</sup>
76. The Agency exempted from release the names and position titles of certain executive level Agency officers. I am satisfied this information relates to the personal affairs of individuals other than the Applicant (**third parties**).

#### *Would disclosure of the personal affairs information be unreasonable?*

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<sup>32</sup> *Pallas v Roads Corporation (Review and Regulation)* [2013] VCAT 1967 at [57-58].

<sup>33</sup> Sections 33(1) and 33(2).

<sup>34</sup> Section 33(9).

<sup>35</sup> *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

<sup>36</sup> *Milthorpe v Mt Alexander Shire Council* [1996] VCAT 368.

77. 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.
78. In *Victoria Police v Marke*,<sup>37</sup> the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.<sup>38</sup> The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.<sup>39</sup>
79. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
- (a) The nature of the personal affairs information;
  - (b) The circumstances in which the information was obtained;
  - (c) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
  - (d) Whether any public interest would be promoted by release of the personal affairs information;
  - (e) The likelihood of disclosure of information, if released;
  - (f) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
  - (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>40</sup>
80. In balancing the above factors, I am satisfied disclosure of the names and position titles of certain executive level third parties would not be unreasonable for the following reasons:
- (a) the names of executive officers have been released throughout the remainder of the documents; and
  - (b) the information is not sensitive as it relates only to their professional roles and does not relate to any particularly sensitive information.
81. Accordingly, I am satisfied the personal affairs information subject to review is not exempt from release under section 33(1).
82. My decision in relation to section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

### ***Section 25 – Deletion of exempt or irrelevant information***

83. 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.

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<sup>37</sup> [2008] VSCA 218 at [76].

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid* at [79].

<sup>40</sup> Section 33(2A).

84. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>41</sup> 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.<sup>42</sup>
85. I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted as to do so will not require substantial time and effort, and the edited documents will retain sufficient meaning for the Applicant.
86. My decision in relation to section 25 is set out in the Schedule of Documents in **Annexure 1**.

### **Conclusion**

87. While I am satisfied the exemptions under sections 28(1)(d) and 32(1) apply to certain information, I am not satisfied certain information to which the Agency refused access is exempt under sections 28(1)(d), 29(1)(a), 30(1), and 34(4)(a)(ii). I am also not satisfied the personal affairs information subject to review is exempt under section 33(1).
88. 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 is granted in part.

### **Review rights**

89. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>43</sup>
90. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>44</sup>
91. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>45</sup>
92. 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.
93. 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.<sup>46</sup>

### **Third party review rights**

94. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant and information the Agency determined exempt under section 34, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>47</sup>
95. In this case, I am satisfied it is not practicable to notify the relevant persons of their third party review rights given the Agency has already released the names and position titles of these third parties in other

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<sup>41</sup> *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].

<sup>42</sup> *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].

<sup>43</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>44</sup> Section 52(5).

<sup>45</sup> Section 52(9).

<sup>46</sup> Sections 50(3F) and (3FA).

<sup>47</sup> Sections 49P(5), 50(3), 50(3A).

parts of the documents. However, I am satisfied it is practicable to notify the two business undertakings named in document 3 and will therefore notify them of my decision.

**When this decision takes effect**

My decision does not take effect until the third parties' 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	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Various [date range]	List of attachments	22	Released in part Section 28(1)(d)	Release in full	<b>Section 28(1)(d):</b> I am not satisfied the document is exempt under section 28(1)(d) for the reasons described above in the Notice of Decision.
2.	Various [date range]	Meeting Agendas	21	Released in part Sections 28(1)(d), 33(1) and 34(4)(a)(ii)	Release in part Section 25  The document is to be released with the information refused by the Agency under section 33(1) deleted as irrelevant information in accordance with section 25.	<b>Section 25:</b> The Applicant is not seeking access to personal affairs information exempted by the Agency under section 33(1). Therefore, this type of information is irrelevant and is to be deleted in accordance with section 25 as this information falls outside the scope of this review. I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.  <b>Section 28(1)(d):</b> See comments for Document 1.  <b>Section 34(4)(a)(ii):</b> The information is not exempt under section 34(4)(a)(ii) for

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						the reasons described above in the Notice of Decision.
3.	Various [date range]	Meeting minutes	89	<b>Released in part</b> Sections 28(1)(d), 29(1)(a), 30(1), 32(1), 33(1) and 34(4)(a)(ii)	<b>Release in part</b> Sections 28(1)(d), 32(1), 25  The document is to be released with the following exempt and irrelevant information deleted in accordance with section 25: <ul style="list-style-type: none"> <li>• The following information which is exempt from release under section 28(1)(d): <ul style="list-style-type: none"> <li>○ <u>Page 71</u> Item 2.1</li> <li>○ <u>Page 75</u> Item 2.1 – The information in the second dot point.</li> <li>○ <u>Page 87</u> Item 2.2.1</li> </ul> </li> </ul>	<b>Section 25:</b> The Applicant is not seeking access to the name and position title of executive level third parties where the Agency did not release this information elsewhere in the document. Therefore, this type of information is irrelevant and is to be deleted in accordance with section 25 as this information falls outside the scope of this review. See also comments for Document 2.  <b>Section 28(1)(d):</b> See comments for Document 1. <b>Section 29(1)(a):</b> The document is not exempt under section 29(1)(a) for the reasons set out in the Notice of Decision.  <b>Section 30(1):</b> I am not satisfied the document is exempt under section 30(1) for



Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>• The following information which is exempt from release under section 32(1):               <ul style="list-style-type: none"> <li>○ <u>Page 9</u> The information in the dot points under paragraph 3.1.</li> <li>○ <u>Page 68</u> The information in the second and third dot point under paragraph d); and</li> </ul> </li> <li>• The following irrelevant information:               <ul style="list-style-type: none"> <li>○ The information refused by the Agency under section 33(1).</li> <li>○ The position title in the following parts of the document:</li> </ul> </li> </ul>	<p>the reasons described above in the Notice of Decision.</p> <p><b>Section 32(1):</b> I am satisfied certain information is exempt under section 32(1) for the reasons described above in my Notice of Decision.</p> <p><b>Section 34(4)(a)(ii):</b> See Document 2.</p> <p><b>Section 33(1):</b> I am not satisfied it would be unreasonable to disclose the name and position title of certain executive level third parties for the reasons described above in the Notice of Decision.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>▪ Page 21 – last dot point;</li>   <li>▪ Page 47 – The following information in the second dot point: <ul style="list-style-type: none"> <li>e) – the last position title; and</li>   <li>f) – second sentence.</li> </ul> </li>   <li>▪ Page 64 – first dot point – d.</li> </ul>	