

Notice of Decision and Reasons for Decision

Applicant:	'FJ9'
Agency:	Department of Premier and Cabinet
Decision date:	8 February 2024
Sections considered:	Sections 28(1)(d), 25
Citation:	'FJ9' and Department of Premier and Cabinet (Freedom of Information) [2024] VICmr 1 (8 February 2024)

FREEDOM OF INFORMATION – ministerial brief titles – decision of Cabinet – deliberations of Cabinet – information provided to briefing a Minister on issues to be considered by Cabinet – briefing titles

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 a document 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 information to which the Agency refused access under section 28(1)(d) is exempt from release.

In addition, I am satisfied information the Agency deleted on grounds it is not relevant to the Applicant's request, is relevant and is not exempt from release.

I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information on page 9 only (being a person's name) deleted in accordance with section 25.

My reasons for decision follow.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 28(1)(d) and 25.

For information about Victorian Civil and Administrative Tribunal (**VCAT**) review rights is set out at the end of this decision.

Joanne Kummrow
Acting Information Commissioner

8 February 2024

Reasons for Decision

Background to review

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

... a list of the titles of all ministerial briefs created between 1 January 2022 and 31 December 2022 for each of the ministers supported by the Department of Premier and Cabinet.
2. Following notification under section 25A(6), the Applicant amended the scope of their request to:

... a list of the titles of all finalised ministerial briefs (excluding briefs cancelled or withdrawn) created between 1 October 2022 and 31 December 2022 for each of the ministers supported by the Department of Premier and Cabinet.
3. The Agency produced one document falling within the terms of the Applicant's request under section 19 and refused access to certain information in the document under sections 28(1)(d), 30(1) and 33(1). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to information under sections 28(1)(d) and 30(1).
5. The Applicant does not seek review of information to which the Agency refused access under section 33(1). Therefore, this information is irrelevant information for the purpose of section 25 and is to remain deleted.
6. I have examined a copy of the document 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. The Agency refused access to information in two brief titles under section 30(1). In response to an informal view provided to the Agency by OVIC staff, it advised it no longer relies on section 30(1) to exempt information in the relevant brief titles. For completeness, I considered these titles in my review of section 28(1)(d).
9. I have considered all communications and submissions received from the parties.
10. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
11. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

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

12. In *Ryan v Department of Infrastructure*,¹ 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.

13. Section 28(1)(d) provides a document is an exempt document if its disclosure would involve the disclosure of any deliberation or decision of the Cabinet other than a document by which a decision of the Cabinet was officially published.

14. 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.²

15. Section 28(7)(a) defines ‘Cabinet’ as including a committee or sub-committee of the Cabinet.

16. A document will be exempt from release under section 28(1)(d) if there is evidence the Cabinet discussed and determined options or an issue set out in a document put before the Cabinet for its consideration.³

17. In *Asher v Department of Sustainability and Environment*,⁴ 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.

18. In *Secretary to the Department of Infrastructure v Asher*,⁵ the Victorian Court of Appeal held, ‘deliberation’ means the actual debate that took place, and not just the subject of the debate:

... 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. The former would say nothing as to Cabinet’s deliberations; the latter might say a great deal.⁶

...

... when one has regard to the meaning of the term ‘deliberation’ and the object of the Act as contained in s 3, one cannot accept the appellant’s submission that it is sufficient to attract the exemption that the document discloses the subject matter upon which Cabinet may have deliberated. The deliberative process involves the weighing up or evaluating of the competing

¹ [2004] VCAT 2346 at [33].

² *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

³ *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].

⁴ (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].

⁵ *Secretary to the Department of Infrastructure v Asher* [2007] VSCA 272.

⁶ *Ibid* at [8].

arguments or considerations that may have a bearing upon Cabinet's course of action – its thinking processes - 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.⁷

[Citations omitted]

19. 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.⁸
20. During the review, the Agency provided a confidential submission to OVIC. In summary, the Agency maintains the brief titles to which it refused access would disclose a decision or deliberation of the Cabinet. The Agency submits the document titles reveal matters considered by the Cabinet and, therefore, reveal deliberations of the Cabinet.
21. The document lists the titles of briefs submitted to the Cabinet. The titles refer to a range of issues and matters.
22. Having looked through each of the brief titles, I do not consider there is a substantial difference between titles the Agency released to the Applicant and those to which it refused access.
23. Adopting the Agency's view, arguably it would follow that all of the brief titles would be exempt from release under section 28(1)(d).
24. While it may be an agency or a Minister considers certain subject matter identified in a Cabinet brief title is more sensitive than another brief title, this not a relevant factor in relation to determining the application of section 28(1)(d).
25. Noting the requirements of section 28(1)(d) and relevant case law regarding this exemption, as set out above, I am not satisfied the relevant brief titles to which the Agency refused access disclose 'any deliberation or decision of the Cabinet'.
26. In reaching this decision, I have closely considered each brief title and am satisfied none disclose:
 - (a) specific or detailed information about the content of the brief provided to the Cabinet;
 - (b) options considered or deliberated upon by the Cabinet;
 - (c) any deliberation of the Cabinet, including any actual deliberation of the Cabinet; or
 - (d) a decision made by the Cabinet on the subject matter of each briefing.
27. Rather, the brief titles disclose a high-level description of the subject matter of each brief provided to the Cabinet.
28. Accordingly, I am not satisfied information to which the Agency refused access in the document is exempt from release under section 28(1)(d).

⁷ Ibid at [58].

⁸ *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.

Section 25 – Deletion of exempt or irrelevant information

29. 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.
30. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁹ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’ and release of the document is not required under section 25.¹⁰
31. The Agency deleted a brief title on page 2 on grounds it is not relevant to the terms of the Applicant’s request. There is no information before me to suggest this brief title does not fall within the terms of the Applicant’s request. Therefore, I have included this brief title in my review and am satisfied it is not exempt from release under section 28(1)(d), 30(1) or any other exemption. Accordingly, it is to be released to the Applicant.
32. I am satisfied it remains practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.

Conclusion

33. On the information before me, I am not satisfied information to which the Agency refused access under section 28(1)(d) is exempt from release.
34. In addition, I am satisfied information the Agency deleted on grounds it is not relevant to the Applicant’s request, is relevant and is not exempt from release.
35. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information on page 9 only (being a person’s name) deleted in accordance with section 25.

Timeframe to seek a review of my decision

36. If either party to this review is not satisfied with my decision, they are entitled to apply to **VCAT** for it to be reviewed.¹¹
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³

⁹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁰ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

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

¹² Section 52(5).

¹³ Section 52(9).

39. 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.
40. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹⁴

When this decision takes effect

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

¹⁴ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated	List of briefing titles	9	<p>Released in part</p> <p>Sections 28(1)(d), 30(1), 33(1)</p>	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with the irrelevant personal affairs information on page 8 deleted in accordance with section 25.</p>	<p>Section 28(1)(d): I am not satisfied release of the information to which the Agency refused access under section 28(1)(d) discloses any deliberation or decision of the Cabinet. Accordingly, the relevant information is not exempt from release under section 28(1)(d).</p> <p>Section 25: The information exempted from release under section 33(1) is not sought by the Applicant and is irrelevant information for the purpose of section 25. I am satisfied it is practicable to delete this information from the document. The Agency deleted a brief title on page 2 on grounds it is not relevant to the terms of the Applicant’s request. There is no information before me to suggest this information does not fall within the terms of the Applicant’s request. Therefore, I have included this brief title in my review and am satisfied it is not exempt from release under section 28(1)(d). Accordingly, it is to be released to the Applicant.</p>