

Notice of Decision and Reasons for Decision

Applicant:	'FN2'
Agency:	Department of Education
Decision date:	11 January 2024
Sections considered:	Sections 30(1), 35(1)(b)
Citation:	'FN2' and Department of Education (Freedom of Information) [2024] VICmr 6 (11 January 2024)

FREEDOM OF INFORMATION – ministerial briefing – ministerial decision making processes – minister approval – payroll tax – school payroll tax liability – non-government schools – exemption from payroll tax – consultation with stakeholders

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 sections 30(1) and 35(1)(b) in Document 1 is exempt from release.

As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 1 with irrelevant information deleted in accordance with section 25, I have determined to grant access to the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision.

My reasons for decision follow.

Please refer to the end of my decision for information about further review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

Shantelle Ryan
Acting Public Access Deputy Commissioner

11 January 2024

Reasons for Decision

Background to review

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

A copy of all analyses, reports and briefs to [a Minister], regarding changes to payroll tax affecting Victorian non-government schools, from [date] to the date of this request. Please note that personal information of non-executive staff, such as names and addresses, is not required.
2. The Agency identified three documents falling within the terms of the Applicant's request and granted access to one document in part under sections 30(1) and 35(1)(b), refused access to one document in full under section 28(1)(ba) and granted access to one document outside of the FOI Act in accordance with section 16. 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. The Applicant advised that they only seek review of the first seven pages of the documents that were released to them (Document 1).
5. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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.
10. 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'.¹ This

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

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 30(1) – Internal working documents

11. 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; and
 - (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.
12. The exemption does not apply to purely factual material in a document.²

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?

13. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
14. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.³
15. The document is a briefing to [a Minister] concerning payroll tax for non-governmental schools. The briefing sets out relevant information for the Minister to consider in making their decision to approve several recommendations, including to exempt a proposed list of non-government schools from payroll tax. I am satisfied the document thereby discloses matter in the nature of 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?

16. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.⁴
17. In *Re Waterford and Department of Treasury (No.2)*,⁵ the former Victorian Administrative Appeals Tribunal held:

² Section 30(3).

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

⁵ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

18. I am satisfied that the document was made in the course of, or for the purpose of, the deliberative processes involved in the functions of the Minister. Specifically, the Minister’s deliberation of payroll tax liability for non-government schools and whether to declare a proposed list of non-government schools as exempt from payroll tax.

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

19. 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.
20. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁶
- (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 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.
21. As set out in its decision letter, the Agency determined that the following factors against disclosure outweigh the factors in favour of disclosure:

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- the degree of sensitivity of the issues involved in the consideration
 - the state of the policy development process at which the communication was made
 - disclosure would be likely to inhibit frankness and candour in the making of communications
 - disclosure would lead to confusion having regard to possibilities discussed
 - disclosure of the documents would give merely a part explanation rather than a complete explanation for a particular decision
 - disclosure would create mischief in one way or another such as a risk of mischievous interpretation
 - disclosure may inhibit robust and candid advice from public servants in the future
 - disclosure may compromise the Government's ability to obtain access to information
 - disclosure would reasonably be expected to prejudice an agency's ability to obtain similar information in the future.
22. While I acknowledge the Agency's views as set out in its decision letter, I do not consider that it has provided sufficient information, other than in the generic terms set out in its decision letter, to support its view that disclosure would be contrary to the public interest.
23. In making my decision, I have considered a media release from the Premier of Victoria on 29 June 2023 which announced that certain non-government schools would be subject to payroll tax and that the Minister for Education had determined a list of non-government schools to be declared exempt from payroll tax.⁷
24. I have also considered several media articles and media releases from stakeholders with respect to the issue of payroll tax for non-government schools, referred to below.
25. On careful consideration, I am not satisfied that disclosure of the information exempted by the Agency would be contrary to the public interest, as I am satisfied that disclosure is in the public interest for the following reasons:
- (a) Payroll tax and exemptions from liability for payroll tax are a matter of significant public interest, particularly within the non-government school community. This is reflected in the media releases from stakeholders and other media releases following the announcement concerning payroll tax and this continues to be a current issue.⁸

⁷ Available at <https://www.premier.vic.gov.au/fairness-payroll-tax-non-government-schools>. Also see <https://www.vic.gov.au/payroll-tax-non-government-schools>.

⁸ For example see <https://www.abc.net.au/news/2023-06-29/victoria-private-school-payroll-tax-government-budget-loss/102542522>; <https://www.theage.com.au/national/victoria/tax-reprieve-until-2029-for-private-schools-currently-not-on-payroll-hit-list-20230730-p5dsg7.html>; <https://is.vic.edu.au/media-release/learning-tax-hit-list-targets-54-independent-schools/>; <https://is.vic.edu.au/media-release/a-huge-blow-for-families-as-school-payroll-tax-bill-passes/>; <https://is.vic.edu.au/media-release/a-huge-blow-for-families-as-school-payroll-tax-bill-passes/>; <https://cathnews.com/~documents/media-releases/media-releases-2023/230629-cecv-relief-for-some-catholic-school-communities-but-no-school-should-be-subject-to-payroll-t/?layout=default>;

- (b) The Minister approved each of the recommendations in the briefing, therefore, disclosure of the relevant information will provide greater transparency about why the recommendations were approved by the Minister.
- (c) There is a public interest in transparency about recommendations that agencies make to a Minister, particularly where those recommendations are approved.
- (d) There is no information before me to suggest that disclosure of the information will result in the consequences set out in the Agency's decision letter, excerpted above in paragraph 21.

26. Accordingly, I am not satisfied that information in the document is exempt under section 30(1).

Section 35(1)(b) – Information obtained in confidence

27. A document is exempt under section 35(1)(b) if two conditions are satisfied:

- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
- (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

28. Section 35(2) provides that this section does not apply to information—

- (a) acquired by an agency or a Minister from a business, commercial or financial undertaking; and
- (b) that relates to trade secrets or other matters of a business, commercial or financial nature.

Was the information obtained in confidence?

- 29. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.⁹
- 30. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.¹⁰
- 31. The information exempted by the Agency is details of consultation with key stakeholders for non-government schools, including [named entities].
- 32. For the purposes of section 35(2), I am satisfied that these stakeholders are not business, commercial or financial undertakings given their roles as representative bodies.

<https://www.cecv.catholic.edu.au/getmedia/f9a3adea-1541-4540-90e8-00c6aa7cc753/200623-CECV-Media-Statement-Schools-payroll-tax-will-hit-families-and-could-cost-more-than-its-worth.aspx?ext=.pdf>; <https://www.iwire.com.au/victorian-government-budget-to-exact-heavy-toll-on-schools/>.

⁹ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹⁰ *XYZ v Victoria Police* [2010] VCAT 255 at [265], referring to *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

33. There is no information before me concerning the views of the stakeholders on whether they considered that the information they provided was in confidence as the Agency did not consult with the stakeholders.
34. Based on contextual information in the document, which indicates that representatives of the Agency had met with the stakeholders, I consider the stakeholders likely had an expectation that the information they provided to the Agency would be treated as confidential, such that their views would only be communicated within the Agency and to the Minister.

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

35. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
36. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out of an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.¹¹
37. The Agency's decision letter did not set out the reasons why it considered that disclosure of the information would impair the ability of the Agency or Minister to obtain similar information in the future.
38. With respect to information provided by the stakeholders for non-government schools, I am not satisfied that disclosure in this instance would inhibit the Agency from obtaining information of this nature in future for the following reasons:
 - (a) the information exempted by the Agency is the views of each of the stakeholders with respect to the proposed changes to payroll taxes for non-government schools and was provided in their capacity as representatives for the non-government school sector and to protect the interests of that community;
 - (b) there is nothing controversial about the views of each of the stakeholders set out in the document, considering their purpose and objectives in representing the interest of the non-government school sector;
 - (c) each of the stakeholders have made various media releases with respect to its views relating to payroll tax, including following the Minister's announcement setting out their concerns;¹²
 - (d) I consider that stakeholders will continue to consult with the government on issues they are concerned with, irrespective of disclosure in this instance.

¹¹ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

¹² Footnote omitted.

39. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

40. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
41. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹³ 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 25.¹⁴
42. As stated above, the Applicant only sought review of information exempted in Document 1 (pages one to seven) and they did not seek access to personal affairs information of non-executive Agency officers. Accordingly, the remaining documents and the personal affairs information redacted from the documents is to remain deleted, as it is irrelevant information for the purposes of my review.
43. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

44. On the information before me, I am not satisfied information in Document 1 is exempt from release under sections 30(1) or 35(1)(b).
45. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25, access is granted in part.
46. The Schedule of Documents in **Annexure 1** sets out my decision.

Timeframe to seek a review of my decision

47. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷

¹³ *Mickelburgh 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].

¹⁴ *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], [155].

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

50. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
51. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹⁸

Third party review rights

52. As I have determined to release a document claimed exempt under section 35(1)(b), 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.¹⁹
53. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights and confirm they will be notified of my decision on the date of decision.

When this decision takes effect

54. 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.

¹⁸ Sections 50(3F) and 50(3FA).

¹⁹ Sections 49P(5), 50(3AB) and 52(3).

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Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Briefing	26	Released in part Sections 30(1), 35(1)(b)	Release in part Section 25 The information that the Agency exempted from release under sections 30(1) and 35(1)(b) is to be released.	Only the first seven pages of this document is subject to review. Sections 30(1) and 35(1)(b): I am satisfied information in the document is not exempt under sections 30(1) or 35(1)(b) for the reasons set out in the Notice of Decision, above. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25. The irrelevant information is the personal affairs information that the Agency deleted from the document.
2.	[Date]	PAEC Inquiry into the 2023-24 Budget Estimates – Non-government schools payroll tax	6	Released in full	Not subject to review	
3.	[Date]	Submission	1	Refused in full Section 28(1)(ba)	Not subject to review	