

Notice of Decision and Reasons for Decision

Applicant:	'FR3'
Agency:	Department of Families, Fairness and Housing
Decision date:	28 June 2024
Exemption considered:	Sections 30(1)
Citation:	'FR3' and Department of Families, Fairness and Housing (Freedom of Information) [2024] VICmr 43 (28 June 2024)

FREEDOM OF INFORMATION – internal working documents – ministerial brief – Victorian African Communities Action Plan – alcohol and other drugs initiative – funding for the [specified financial year]

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.

The Applicant has sought review of the information exempted from release under section 30(1) in Document 6 only.

I am not satisfied the information in the document is exempt from release under section 30(1).

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, I have determined to release more information.

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

Please refer to pages 7-8 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman
Acting Public Access Deputy Commissioner

28 June 2024

Reasons for Decision

Background to review

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

Pursuant to the Freedom of Information Act 1982, I seek access to a copy of the following briefs to the Minister for [portfolio] (excluding attachments):

- [list of briefs]

Please note that personal information of non-executive staff, such as names and addresses, is not required. Accordingly, documents can be edited to redact such information.

2. The Agency identified eight documents falling within the terms of the Applicant's request and granted access to documents in part. Documents 1, 6 and 8 were all released in part under sections 30(1) and 33(1), while the remaining documents were released in part under section 33(1) alone. 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 only sought review of the information exempted from release under section 30(1) in Document 6. They do not seek review of information exempted from release under section 33(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. The Agency was provided with an initial view from OVIC staff about the likely outcome of this review if it proceeded to a formal decision.
8. I have considered relevant 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.

Review of exemption

Section 30(1) – Internal working documents

11. To be exempt under section 30(1), three conditions must be satisfied:
- (a) the document or information is matter in the nature of:
 - (i) opinion, advice or recommendation prepared by an agency officer or a Minister; or
 - (ii) consultation or deliberation that has taken place between agency officers or Ministers; and
 - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions; 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.¹ In this case, the document contains performance information which I consider is of this nature and therefore not except under section 30(1).
13. My consideration of the application of section 30(1) to other content in the document follows.

First requirement – opinion, advice, recommendation, or consultation or deliberation

14. I am satisfied the document contains recommendations prepared by Agency officers for the Minister to consider.

Second requirement – deliberative process

15. Where a document contains deliberative information, an agency or Minister must also determine whether the deliberative information was created in a 'deliberative process' related to the functions of an agency, Minister, or the government.
16. 'Deliberative process' is widely interpreted to include most processes undertaken by an agency or Minister in relation to their functions.²
17. I am satisfied the information was created during the deliberative processes of the Agency, specifically, in briefing the Minister concerning a matter within their portfolio, specifically concerning funding for the Victorian African Communities Action Plan Alcohol and Other Drugs initiative (**the initiative**).

Third requirement – would disclosure of the document be contrary to the public interest?

18. 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:³
- (a) the right of every person to gain access to documents under the Act;

¹ Section 30(3).

² *Re Waterford and Department of Treasury (No.2)* (1981) 1 AAR 1 referred to in *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 208.

³ See OVIC FOI Guidelines – Section 30(1)

- (b) the sensitivity of the issues involved and the broader context of how the document were created;
 - (c) the stage of a decision or policy development at the time the communications were made;
 - (d) whether disclosure of the document would be likely to inhibit communications between agency officers that are essential for the agency to make an informed and well-considered decision or for those officers to properly participate in a process of the agency's functions (such as an audit or investigation, regulatory or law enforcement function);
 - (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, but only where the agency would not otherwise be able to explain upon disclosure of the documents;
 - (f) the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions;
 - (g) the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes;
 - (h) the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process and building the community's trust in government and its decision making processes; and
 - (i) whether there is controversy or impropriety around the decision or the decision-making process.
19. Regarding the public interest test, the Agency advises the document was created for the purposes of briefing [a Minister] and relates to sensitive information on a topical issue. The Agency further notes:
- In determining whether disclosure ... would be contrary to the public interest, the department has had regard to various factors.⁴
- ...The principal argument that disclosure would be contrary to the public interest rests on the fact there is a strong public interest in Ministers and departmental staff being able to access confidential advice on matters of high public importance.⁵
- ...
20. I have further considered the additional points raised in the Agency's submission, including its position that:

⁴ See *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483, *Friends of Mallacoota Inc v Department of Planning and Community Development* [2011] VCAT 1889 at [51] *Howard v Treasurer (Cth)* (1985) 7 ALD 626.

⁵ *McIntosh v Department of Premier and Cabinet* [2009] VCAT 1528 at [70].

- (a) There is a strong public interest in protecting the effectiveness of the Agency's ability to prepare its Ministers for key meetings and parliamentary proceedings; and
 - (b) The public interest in the information within the document is satisfied by the amount of information available to the public regarding the initiatives in question, including high level information and outcomes referred to in the documents which has already been presented to the public on the Victorian government's own website and the website of the federal Department of Home Affairs (Ministerial forum on Multicultural Affairs – Communique (homeaffairs.gov.au)).
21. On careful consideration, I have decided it would not be contrary to the public interest to disclose the information in the document for the following reasons:
- (a) the brief under review is from [month and year] in relation to funding for the initiative for [a specified financial year] which has concluded;
 - (b) the brief is signed by the Minister;
 - (c) it discloses matters that the Minister considered when deciding to approve the funding and therefore supports transparency around decision-making processes concerning expenditure of public funds;
 - (d) the funding was sought for an initiative to benefit a vulnerable community, which weighs in favour of public interest;
 - (e) I acknowledge the Agency's position; however, there is no evidence before me to support the concern that disclosure in this particular case will result in Agency officers being inhibited from preparing briefings of this nature in future, considering the nature of the information in the document, which is generally what would be expected to be included where funding is sought;
 - (f) while I do not consider certain information meets the first limb of section 30(1), in any case, I am not satisfied that its disclosure would compromise the government's ability to continue to administer the initiative; and
 - (g) I accept the document contains information relating to recommendations on a topical issue. However, I also consider such information relates to the government's accountability to the public for its decision making and expenditure of public funds.
22. I consider the public interest weighs in favour of disclosure. Therefore, the document is not exempt under section 30(1).

Section 25 – Deletion of exempt or irrelevant information – practicable to edit

23. 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.

24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
25. The Applicant does not seek review of the information that was exempted from release under section 33(1). Therefore, that information is irrelevant for the purposes of my review.
26. I have considered the effect of deleting irrelevant information from the document. 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

27. On the information before me, I am not satisfied the information in the document is exempt from release under section 30(1).
28. 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, more information is to be released.

Timeframe to seek a review of my decision

29. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
32. 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.
33. 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.¹¹

When this decision takes effect

⁶ *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].

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and 50(3FA).

34. My decision does not take effect until the Agency's 14 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
6.	[date]	Document 006 – [reference]	2	Released in part Sections 30(1), 33(1)	Release in part Section 25 The information the Agency exempted from release under section 30(1) is to be released, with exception to the signature which is irrelevant to my review.	<p>Section 30(1): I am not satisfied that the information in this document is exempt for the reasons outlined in the Notice of Decision, above.</p> <p>Section 25: The information the Agency exempted from release under section 33(1) is not subject to review.</p> <p>The Agency applied section 30(1) over some personal affairs information, including a signature. During the review, the Agency claimed the signature is exempt under section 33(1). As the Applicant does not seek review of information exempted under section 33(1), the signature is not subject to review.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information, being the information exempted by the Agency under section 33(1), deleted in accordance with section 25.</p>