

Notice of Decision and Reasons for Decision

Applicant:	'FR6'
Agency:	Minister for Environment
Decision date:	30 September 2024
Sections:	28(1)(b), 28(1)(ba), 28(1)(d)
Citation:	'FR6' and Minister for Environment (Freedom of Information) [2024] VICmr 46 (30 September 2024)

FREEDOM OF INFORMATION – review of the *Wildlife Act 1975 (Vic)* – expert panel report – not prepared for submission to cabinet – disclosure of deliberation or decision of cabinet

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.

I have decided the documents subject to review are exempt from release.

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

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

My reasons for decision follow.

Sean Morrison
Information Commissioner

30 September 2024

Reasons for Decision

Background to review

1. The Applicant made a request to the Minister's office seeking access to documents relating to the Expert Panel Report appointed to review the *Wildlife Act 1975* (Vic). Specifically, the Applicant sought:
 - a. Any briefs/briefing notes/memoranda (including drafts) to or for the Minister (and/or their delegate and/or advisors and/or staff) regarding the Expert Panel Report, between December 2021 and the date of this application;
 - b. Any correspondence and/or communications (including emails, letters, file notes, meetings notes, diary entries and voice recordings) exchanged between the Minister (and/or their delegate and/or advisors and/or staff) and the Expert Panel regarding the Expert Panel Report, between 21 December 2021 and the date of this application;
 - c. Any correspondence and/or communications (including emails, letters, file notes, meetings notes, diary entries and voice recordings) between officers of the Department of Environment, Land, Water and Planning (DELWP) and the Minister (and/or their delegate and/or advisors and/or staff) regarding the Expert Panel Report, between 21 December 2021 and the date of this application; and
 - d. Any correspondence between any other Victorian Minister, Senator, or Member of Parliament (or their advisors and/or staff), regarding the Expert Panel Report, between 21 December 2021 and the date of this application.
2. The Agency processed the request on behalf of the Minister's office.
3. The Agency identified three documents with attachments falling within the terms of the request and refused access to them under section 28(1)(ba). The Agency advised the documents were prepared for briefing a Minister in relation to issues to be considered by cabinet.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the documents 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 relevant 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 involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Note on the records

11. The date range for this request is from 21 December 2021 to the date of the request, being [in] November 2023.
12. Mr Steve Dimopoulos MP was sworn in on 2 October 2023 as Minister for Environment. As the request was made [in] November 2023, the request was made to Mr Steve Dimopoulos MP.
13. The Agency advises the Minister was not briefed on the report during the time between their appointment and the making of the request.
14. While the request is for documents dating from 21 December 2021, I accept records of a former ministers at the time of an FOI request are no longer 'official records' of a Minister within the meaning of section 5(1) or subject to the right of access under section 13(b) of the FOI Act.²
15. While I note the Agency has attempted to locate additional material within its own records due to the Ministerial changes, the Applicant may wish to request further information via the Agency rather than the Minister's office to locate additional documents relating to the subject matter of their request.

Review of exemptions

Section 28(1) – Cabinet documents

16. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
17. In *Ryan v Department of Infrastructure*,³ 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

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

² See former Public Access Deputy Commissioner decision regarding Ministerial records here [fj4-and-minister-for-worksafe-and-the-tac-freedom-of-information-2023-vicmr-90-17-august-2023/](#)

³ [2004] VCAT 2346 at [33].

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.

18. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.
19. 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.⁴

Section 28(1)(b) – Document prepared for purpose of submission for consideration by the Cabinet

20. Section 28(1)(b) provides a document is exempt if it has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet.
21. A document will be exempt under section 28(1)(b) if the sole purpose, or one of the substantial purposes, for which it was prepared, was for submission to the Cabinet for its consideration. In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to the Cabinet.⁵
22. A report prepared by an external consultant is a document prepared by an ‘agency’ for the purposes of section 28(1)(b).⁶

Section 28(1)(ba) – Document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet

23. Section 28(1)(ba) provides a document is exempt if it has been prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.
24. A document will be exempt under section 28(1)(ba) if the sole purpose, or one of the substantial purposes, for which the document was prepared was to brief a Minister in relation to an issue to be considered by the Cabinet.⁷ In the absence of direct evidence, the sole or substantial purpose of a document may be determined by examining the use of the document, including whether it was submitted to Cabinet.⁸
25. The Cabinet briefing purpose must be ‘immediately contemplated’ when the document is created. The exemption cannot apply merely because Cabinet ultimately considered the issue.⁹
26. The word ‘briefing’ means a ‘short accurate summary of the details of a plan or operation. The ‘purpose...is to inform’. Therefore, the document should have the character of briefing

⁴ *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

⁵ *Secretary to the Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11 at [15].

⁶ See for example *Smith v Department of Sustainability and Environment* (2006) 25 VAR 65; [2006] VCAT 1228 at [16-17].

⁷ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [34] citing *Mildenhall v Department of Premier and Cabinet (No 2)* (1995) 8 VAR 478, at 290; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924, at [72]. See also *Department of Treasury and Finance v Dalla-Riva* (2007) 26 VAR 96; [2007] VSCA 11 at [13].

⁸ *Secretary to the Department of Treasury and Finance v Dalla Riva* [2007] VSCA 11 at [15].

⁹ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission & Anor* [2013] VCAT 822.

material. A document will be of such character if it contains ‘information or advice...prepared for the purpose of being read by, or explained to, a [m]inister’. It requires more than having ‘placed a document before a Minister’.¹⁰

27. The term ‘issues to be considered by the Cabinet’ within the meaning of section 28(1)(ba), requires that it must be more than just ‘likely’ the Cabinet will consider it. There must be an intention or expectation the relevant issue will be considered by the Cabinet, even if not ultimately considered. Evidence that a matter was included on the Agenda for a Cabinet meeting will meet this test.¹¹

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

28. 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,¹² other than a document by which a decision of the Cabinet was officially published.
29. 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.¹³
30. In *Asher v Department of Sustainability and Environment*,¹⁴ the Victoria Civil and Administrative Tribunal (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.
31. The Victoria 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:¹⁵

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.¹⁶ The former would say nothing as to Cabinet’s deliberations; the latter might say a great deal.

32. 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.¹⁷

¹⁰ *Ryan v Department of Infrastructure* (2004) 22 VAR 226; [2004] VCAT 2346 at [41].

¹¹ *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996). See also *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998); *Hulls v Department of Treasury and Finance (No 2)* (1994) 14 VAR 295 at [320–321]; reversed on other grounds by the Court of Appeal: *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331; 15 VAR 360; [1999] VSCA 117.

¹² Section 28(7).

¹³ *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].

¹⁴ (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].

¹⁵ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [8].

¹⁶ *Re Smith and Department of Environment and Sustainability* [2006] VCAT 1228.

¹⁷ *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.

33. 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.¹⁸
34. The Department of Energy Environment and Climate Action has published information about the review of the *Wildlife Act 1975* (Vic), the appointment of the Expert Advisory Panel, and its report. The Department notes:

The Victorian Government is committed to releasing the expert panel report into the Wildlife Act review and the Government Response. Given the importance of this review and its complexity we want to take the time to ensure we get it right.¹⁹

35. I note therefore while the intention of the government is to make the panel report public, it has decided not to do so at the time of this decision.
36. The Schedule of Documents at **Annexure 1** sets out my decision in relation to each document.

Section 25 – Deletion of exempt or irrelevant information

37. 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.
38. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²⁰ 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 25.²¹
39. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the documents meaningless.

Conclusion

40. On the information before me, I am satisfied the documents are exempt in full under sections 28(1)(b), 28(1)(ba) or 28(1)(d).
41. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

Timeframe to seek a review of my decision

¹⁸ *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].

¹⁹ <https://www.wildlife.vic.gov.au/wildlife-act-review>

²⁰ *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].

²¹ *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].

42. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.²²
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²³
44. 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.
45. 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.²⁴

When this decision takes effect

46. 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.

²² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²³ Section 52(5).

²⁴ 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.	[date]	Request for endorsement - submission	4	Refused in full Section 28(1)(ba)	Refuse in full Section 28(1)(ba)	Section 28(1)(ba): Based on the contents of the document, I am satisfied it was prepared for briefing a Minister in relation to issues to be considered by cabinet. Section 25: It is not practicable to delete exempt information from the document.
1a.	[date]	Cabinet submission	14	Refused in full Section 28(1)(b)	Refuse in full Section 28(1)(b)	Section 28(1)(b): Based on the contents of the document, I am satisfied it was prepared for submission to cabinet. Section 25: It is not practicable to delete exempt information from the document.
1b.	[date]	Expert Advisory Panel Report	102	Refused in full Section 28(1)(b)	Refuse in full Section 28(1)(d)	Section 28(1)(d): I am not satisfied the document was prepared for the sole or dominant purpose of submission to cabinet, given its contents and the information above regarding its intended publication. However, I am satisfied the document contains the deliberations of cabinet as it was attached to a cabinet submission, contains content consistent with cabinet deliberations, and based on other

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						information subject to this review, including Document 1c. Section 25: It is not practicable to delete exempt information from the document.
1c.	[date]	Government response to the Expert Review of the Wildlife Act 1975	50	Refused in full Section 28(1)(b)	Refuse in full Section 28(1)(b)	Section 28(1)(b): Based on the contents of the document, and information in the relevant cabinet submission, I am satisfied it was prepared for submission to cabinet. Section 25: It is not practicable to delete exempt information from the document.
1d.	[date]	Communications plan for government response to the Wildlife Act review	3	Refused in full Section 28(1)(b)	Refuse in full Section 28(1)(b)	Section 28(1)(b): Based on the contents of the document, and information in the relevant cabinet submission, I am satisfied it was prepared for submission to cabinet. Section 25: It is not practicable to delete exempt information from the document.
2.	[date]	Review of the Wildlife Act 1975 - slides	23	Refused in full Section 28(1)(ba)	Refuse in full Section 28(1)(ba)	Section 28(1)(ba): Based on the contents of the document, I am satisfied it was prepared for briefing a Minister in relation to issues to be considered by cabinet.

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 25: It is not practicable to delete exempt information from the document.
3.	[date]	Review of the Wildlife Act 1975 - slides	24	Refused in full Section 28(1)(ba)	Refuse in full Section 28(1)(ba)	Section 28(1)(ba): Based on the contents of the document, and its similarity to Document 2, I am satisfied it was prepared for briefing a Minister in relation to issues to be considered by cabinet. Section 25: It is not practicable to delete exempt information from the document.