

Notice of Decision and Reasons for Decision

Applicant:	'DO4'
Agency:	Department of Justice and Community Safety
Decision Date:	27 August 2021
Exemption considered:	Section 28(1)(b)
Citation:	'DO4' and Department of Justice and Community Safety (Freedom of Information) [2021] VICmr 257 (27 August 2021)

FREEDOM OF INFORMATION – Fines Reform Advisory Board (**FRAD**) – advice to government – delivery of fines reform report – document prepared for the sole, or substantial purpose of consideration by Cabinet – Cabinet in confidence

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 in relation to Document 1 is the same as the Agency's decision.

I am satisfied Document 1 is exempt in full under section 28(1)(b).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

27 August 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - The report completed by Fines Reform Advisory Board provided to the Department of Justice and Community Safety.
2. The Agency identified two documents falling within the terms of the Applicant's request and refused access to both documents in full, relying on the exemptions in sections 28(1)(d), 30(1), 33(1), 35(1)(b) and 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application and submissions

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 Agency advised it also sought to rely on the exemption in sections 28(1)(b) and 28(1)(ba) to refuse access to the documents.
5. It was later advised by the Agency that Document 2, 'Summary Report on the Delivery of Fines Reform' was now published on the Engage Victoria website. A copy of the published report was provided to the Applicant, and it was agreed Document 2 was no longer sought as part of this review.
6. As such, Document 1 (the **document**) is only the subject of my review and I have examined a copy of this document.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

Preliminary view

8. On [date], the Agency was provided with OVIC's preliminary view, specifically regarding the Agency's application of section 28(1)(d). Following consideration of the preliminary view, the Agency were invited to provide further evidence in support of their decision that the document is exempt. It was also open to the Agency to rely on the information already provided to OVIC.
9. On [date], in response to OVIC's preliminary view, the Agency provided a submission for my consideration. In its submission, the Agency advised that it withdrew its claims to the exemption in sections 30(1), 34(1)(b) and 35(1)(b) to the document. However, determined parts of the document was also exempt under section 31(1)(a).
10. Following receipt of the Agency's submission, OVIC invited the Agency to provide further evidence to satisfy me that the document is exempt under section 28(1)(b).
11. I have considered all communications and submissions received from the parties, including:
 - (a) the Applicant's submissions dated [dates];
 - (b) the Agency's submissions dated [date];
 - (c) supporting Cabinet material provided for my inspection; and

- (d) publicly available information regarding fines reform in Victoria and the Cabinet process.
12. 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.
13. I note Parliament's intention the FOI Act must be interpreted to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

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

14. Section 28(1)(b) provides a document is an exempt document if it was prepared by a Minister or on his or her behalf, or by an agency, for the purpose of submission for consideration by the Cabinet or a sub-committee of the Cabinet.
15. Section 28(7)(a) defines 'Cabinet' as including a committee or sub-committee of Cabinet.
16. In *Ryan v Department of Infrastructure*,¹ 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.
17. Therefore, 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.
18. 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.²
19. However, section 28(1)(b) turns upon the purpose for which a document was created, and it is not necessary to show the document was submitted to the Cabinet.³ Nor is it necessary to prove the Cabinet considered the document to satisfy the requirements of section 28(1)(b).⁴
20. In the context of considering a document prepared by an external consultant, the exemption is not contingent upon the document's author being made aware of the ultimate use of the document, but rather the purpose for which the document was 'commissioned by those who commissioned it'.⁵
21. 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.⁶

¹ (2004) VCAT 2346 at [33].

² *Secretary to the Department of Treasury and Finance v Della Riva* [2007] VSCA 11 at [15].

³ *Ryan v Department of Infrastructure* [2004] VCAT 2346 at [34].

⁴ *Ibid.*

⁵ *Honeywood v Department of Innovation, Industry and Regional Development* (2004) 21 VAR 453; [2004] VCAT 1657 at [28]; *Asher v Department of Premier and Cabinet* [2008] VCAT 450 at [43] and [74].

⁶ *Mildenhall v Department of Premier & Cabinet (No. 1)* (1995) 8 VAR 284.

22. Further, section 28(3) has been held not to apply in the following circumstances:

In relation to the exception contained in section 28(3) of the Act, an examination of the business plan and its annexures satisfies me that there is no material of a purely statistical, technical or scientific nature such that the exemption would apply. I agree with the opinion of Mr Oulton that it does not contain any purely technical, scientific or statistical information. Statistical, scientific and technical information in the business case appears by way of argument, evaluation, proposals and modelling relating to the Project, based on subjective assumptions by, or inputs from, the relevant authors, experts or consultants.⁷

Applicant's submissions

23. In relation to the Agency application of section 28(1)(b) to the Report, the Applicant submits:

...The 'Engage Vic' website for the FRAB outlines that this report is to consider 'independent advice on how the fines system is working since reforms introduced by the Fines Reform Act 2014.' Again, we submit nothing on the 'Engage Vic'[3]⁸ website for the FRAB report is noted to be a cabinet document or an issue to be considered by cabinet.

We submit that unless DJCS can clearly demonstrate that this document has been placed before the cabinet then the exemption under s28(1)(b) should not apply.

Agency's submissions

24. The Agency provided its submissions to OVIC in confidence. The Agency also provided a response in relation to matters raised by OVIC staff regarding the Agency's application of section 28(1).

25. In summary, the Agency submits:

- (a) The Report is exempt in full under sections 28(1)(b), 28(1)(ba) and 28(1)(d).
- (b) The Report 'contains independent advice and recommendations from the Fines Reform Advisory Board (the **Board**) to the Victorian Attorney-General on the delivery of reform and forward plan for services'.
- (c) The Report was attached to a Cabinet submission that was submitted for consideration by a subcommittee of Cabinet on [date].

Was the document prepared by, or on behalf of, a Minister or an agency?

26. From my review of the report and other documents before me, I accept:

- (a) the Board was established for the purpose of providing independent advice to the Government on reform of the Victorian fines system;
- (b) the Report was prepared by the Board for provision to the Attorney General on behalf of the Government.

27. Accordingly, I am satisfied the document was prepared on behalf of a Minister.

⁷ *Donnellan v Linking Melbourne Authority (Revised) (Review and Regulation)* [2014] VCAT 1027 at [63].

⁸ <http://engage.vic.gov.au/fines-reform>.

Was the document prepared for the sole purpose, or the substantial purpose, of submission for consideration by the Cabinet?

28. To assist my review, the Agency provided OVIC with extrinsic material to support its decision regarding section 28(1)(b), which I have carefully examined.
29. From my review of the document and this supporting material, I accept:
 - (a) the purpose of the document was to provide advice to the Government;
 - (b) one of the substantial purposes for which the document was prepared was for submission for consideration by the Cabinet;
 - (c) the document was an attachment to a Cabinet submission provided to a subcommittee of the Cabinet; and
 - (d) the report informed legislative reform of the Victorian fines system.
30. In relation to section 28(3), I do not consider the document contains purely statistical, technical or scientific information. Instead, the document can be described as containing advice and recommendation, which has been prepared by experts, based on the application of their knowledge, rather than merely stating facts and quoting technical data devoid of any analysis or deliberation.
31. Accordingly, I am satisfied the document was prepared for the sole, or a substantial purpose of submission for consideration by the Cabinet.
32. According, having considered all information available to me, I am satisfied the document is exempt from release under section 28(1)(b).

Section 25 – Deletion of exempt or irrelevant information

33. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
34. Having reviewed the document and based on my decision in relation to section 28(1)(b), I am satisfied the document is exempt in full.
35. As such, no obligation arises for the Agency to provide the Applicant with an edited copy of the document in accordance with section 25.

Other exemptions relied on by the Agency

36. As I am satisfied the document is exempt from release under section 28(1)(b), it is not necessary for me consider the Agency's application of sections 28(1)(d), 28(1)(ba), 33(1) and 31(1)(a).

Conclusion

37. On the information before me, I am satisfied the document is exempt from release under section 28(1)(b).
38. Having reviewed the document and based on my decision in relation to section 28(1)(b), I am satisfied the document is exempt in full.

Review rights

39. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
42. 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.
43. 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.¹²

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).