

Notice of Decision and Reasons for Decision

Applicant:	'FS7'
Agency:	Department of Energy, Environment and Climate Action
Decision date:	17 September 2024
Exemption considered:	Section 28(1)(d)
Citation	'FS7' and Department of Energy, Environment and Climate Action (Freedom of Information) [2024] VICmr 56 (17 September 2024)

FREEDOM OF INFORMATION – Cabinet submission – Spoils Management Strategy – attachment to a cabinet submission – disclosure of cabinet deliberations

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 is the same as the Agency's decision and no further information is to be released.

Please refer to page 4 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Sean Morrison
Information Commissioner

17 September 2024

Reasons for Decision

Background to review

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

The latest copy of the Victorian Government's 'Spoils Management Strategy'

2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under sections 28(1)(b) and 28(1)(d). 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. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered relevant communications and submissions received from the parties.
7. 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.
8. 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

9. The Agency relied on section 28(1)(d) to refuse access to the document in full.
10. 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,¹ other than a document by which a decision of the Cabinet was officially published.
11. 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.²

¹ Section 28(7).

² *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].

12. The Victoria Court of Appeal has held ‘deliberations’ should be interpreted narrowly to apply to the actual debate that took place rather than the subject matter of a debate:³

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.⁴ The former would say nothing as to Cabinet’s deliberations; the latter might say a great deal.

13. In *Asher v Department of Sustainability and Environment*,⁵ 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.
14. 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.⁶
15. The Agency submits the document was attached to a cabinet submission and therefore would reveal cabinet deliberations.
16. The Agency has provided a copy of the relevant cabinet submission.
17. I am satisfied the document contains the deliberations of cabinet for the following reasons:
- (a) the nature of the contents of the document, being the government response to a sensitive and complex issue; and
 - (b) the contents of the cabinet submission, including its recommendations and details.
18. Accordingly, I am satisfied the document is exempt from release under section 28(1)(d). As I am satisfied the document is exempt under section 28(1)(d) I have not further considered the application of section 28(1)(b) to the document.

Section 25 – Deletion of exempt or irrelevant information

19. 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.
20. I am satisfied in this instance that it is not practicable to delete exempt information from the document as to do so would render the document meaningless.

³ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [8].

⁴ *Re Smith and Department of Environment and Sustainability* [2006] VCAT 1228.

⁵ (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].

⁶ *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.

Conclusion

21. On the information before me, I am satisfied the document is exempt from release under section 28(1)(d).
22. 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

23. 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.⁷
24. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
25. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
26. 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.
27. 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.¹⁰

When this decision takes effect

28. 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.

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ 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.	N/A	Victorian Government Spoil Management Strategy	69	Refused in full Sections 28(1)(b) and 28(1)(d)	Refuse in full Section 28(1)(d)	<p>Section 28(1)(d): I am satisfied the information exempted by the Agency records decisions and deliberations of a Cabinet and is exempt from release under section 28(1)(d) for reasons outlined in the Notice of Decision, above.</p> <p>Section 28(1)(b): As I am satisfied the document is exempt in full under section 28(1)(d), I have not considered the application of section 28(1)(b) to the same information in the document.</p> <p>Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>