

Notice of Decision and Reasons for Decision

Applicant:	'FT1'
Agency:	Department of Energy, Environment and Climate Action
Decision date:	11 December 2024
Exemptions and provision considered:	Sections 28(1)(d), 33(1), 25
Citation:	'FT1' and Department of Energy, Environment and Climate Action (Freedom of Information) [2024] VICmr 54 (11 December 2024)

FREEDOM OF INFORMATION – disclosure of any deliberation or decision of the Cabinet – procedural email

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 section 28(1)(d) is exempt from release.

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.

Please refer to page 5 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

11 December 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 briefs to the Secretary about the Spoils Management Strategy, provided between [date range].
 - A copy of all emails received by the Secretary, between [date range], with the following in the subject line: Spoils Management Strategy
2. When making the FOI request, the Applicant confirmed they did not seek the personal affairs information of non-executive staff.
3. The Agency identified four documents, exempting an email (Document 1) in full under section 28(1)(d), and exempting three attachments (Documents 2-4) to the email in full under sections 28(1)(ba) and 28(1)(c).

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. The Applicant was provided with an initial view about the likely outcome of this review in relation to Documents 2-4 if it were to proceed to a formal decision. In response, the Applicant's representative limited the scope of the review to the email only in Document 1, excluding the attachments as captured in Documents 2-4. Accordingly, this review is of the content of Document 1 only, which the Agency refused access in full under section 28(1)(d).
7. Subsequently, the Agency was provided my preliminary view that section 28(1)(d) does not apply to the email content in Document 1. In response, the Agency maintained its view that it did. I have considered its response in my assessment below.
8. I confirm I have examined a copy of Document 1 and 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 28(1)(d) – Disclosure of any deliberation or decision of the Cabinet

11. 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.
12. 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
13. In *Asher v Department of Sustainability and Environment*,³ 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. 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:⁴

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.⁵ The former would say nothing as to Cabinet's deliberations; the latter might say a great deal.

15. 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
16. 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.⁷
17. The Agency submits section 28(1)(d) applies to the document because the topic of Cabinet discussions amounts to a deliberation or decision of Cabinet.
18. The document is an email which is largely procedural in nature. As set out above, a 'deliberation' of Cabinet as described by section 28(1)(d) should be given a narrow interpretation. I do not consider the content of the email, including the broad topics that may be discussed by Cabinet, to be sufficiently detailed as to reveal the decisions or deliberations of Cabinet.

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].

³ (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].

⁴ *Department of Infrastructure v Asher* (2007) 19 VR 17; [2007] VSCA 272 at [8].

⁵ *Re Smith and Department of Environment and Sustainability* [2006] VCAT 1228.

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.

⁷ *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. Accordingly, I am not satisfied that the requirements for section 28(1)(d) are met.

Section 33(1) – Documents affecting personal privacy

20. I have further considered the application of section 33(1) to the document. I note the Applicant is not seeking the personal affairs information of non-executive level staff.
21. A document or information is exempt under section 33(1) if two conditions are satisfied:
- (a) the document or information relates to the ‘personal affairs’ of a natural person (living or deceased); and
 - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.
22. I consider the document contains the names of an executive and a Minister that falls within the scope of the Applicant’s request. As their information is publicly available and the information in the document about them relates only to their professional roles, I do not consider that it would be unreasonable to release their names.
23. The name of the addressee of the email, and the name of the Minister referred to in the body of the email is therefore not exempt under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

24. 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.
25. The Applicant did not seek the personal affairs information of non-executive level staff. Therefore, I have determined the email addresses of those copied into the email, as well as the name, position title, email and telephone number of the sender of the email is irrelevant to the request.
26. As noted above, the Applicant narrowed the scope of this review to exclude Documents 2-4 which were attached to Document 1. As such, I consider the references or links to these documents as contained in Document 1 constitutes irrelevant information which is to be deleted.
27. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁸ 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 25.⁹
28. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with the above referenced irrelevant information deleted in accordance with section 25.

⁸ *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].

⁹ *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].

Conclusion

29. On the information before me, I am not satisfied information in Document 1 is exempt from release under section 28(1)(d).
30. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information, being the personal affairs information of non-executive staff and the references or links to the attachments to Document 1 deleted in accordance with section 25.

Timeframe to seek a review of my decision

31. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
34. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au.
35. 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.¹³

Third party review rights

36. As I have determined to release a document that contains the personal affairs information of persons other than the Applicant, 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.¹⁴
37. 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 or as soon as possible thereafter.

When this decision takes effect

38. 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.

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and 50(3FA).

¹⁴ Sections 49P(5) and 50(3).

Annexure 1 – Schedule of Documents