

Notice of Decision and Reasons for Decision

Applicant:	'FY2'
Agency:	Department of Justice and Community Safety
Agency reference:	118811
Exemption and provision considered:	Sections 28(1)(ba), 28(1)(b), 28(1)(d), 30(1), 33(1) and 25
Citation:	'FY2' and Department of Justice and Community Safety (Freedom of Information) [2025] VICmr 47 (24 June 2025)

FREEDOM OF INFORMATION – ministerial briefings – funding – budget independence – Quarterly Asset Investment Report (**QAIR**) – Asset Investment Program (**AIP**)

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 and more information is to be released.

I am satisfied:

- Document 1 is not exempt under sections 28(1)(d) or 30(1); however, telephone numbers are exempt under section 33(1)
- Document 4 is exempt in part under sections 30(1) and 33(1)
- Document 7 is not exempt under sections 28(1)(b), 28(1)(ba) or 30(1); however, telephone numbers are exempt under section 33(1).

I am satisfied it is practicable to edit each of the documents to delete exempt and irrelevant information in accordance with section 25.

A marked-up copy of Document 4 indicating exempt and/or irrelevant information in accordance with my decision has been provided to the Agency.

The Schedule of Documents in **Annexure 1** sets out my decision further.

Please refer to page 21 for information about review rights through the Victorian Civil and Administrative Tribunal (VCAT).

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

24 June 2025

Reasons for Decision

Background to review

1. The Agency made a decision on the Applicant's request which was for the following ministerial briefings:
 - EBC 22088963 - Redirection of surplus funding to delivery key priority initiatives (including attachments).
 - EBC [ref number] - [name redacted]
 - EBC [ref number] [name redacted]
 - EBC 22104096 - Embargoed copy - Budget independence for Victoria's Independent Officers of Parliament - joint position paper (including attachment).
 - EBC [ref number] - [name redacted]
 - EBC [ref number] - [name redacted]
 - EBC [ref number] - [name redacted]
2. The Agency identified 7 documents falling within the terms of the Applicant's request and granted access to 1 document in full, 2 documents in part, and refused access to 4 documents in full.
3. The Applicant did not seek access to personal affairs information of Agency officers, with exception to Executive officers.
4. The Agency relied on the exemptions under sections 30(1), 28(1)(ba), 28(1)(b) and 28(1)(d) to refuse access to information in the documents.
5. The Agency's decision letter sets out the reasons for its decision.

Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. The Applicant only sought review of Document 7 inclusive of its attachment and information that the Agency exempted in Documents 1 and 4 under section 30(1).
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered relevant communications and submissions received from the parties.
10. 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.

11. 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.
12. 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.

OVIC initial view

13. During the review, OVIC provided an initial view to the Agency that section 28(1)(ba) does not apply to Document 7.
14. In response, the Agency provided further evidence in support of its application of this exemption.
15. A further initial view was provided to the Agency that information in Documents 1 and 4 is not exempt under section 30(1), to which the Agency provided a further submission in response.

Review of exemptions

16. I will first consider the application of section 28(1)(b), as it provides background information as to why I am not satisfied section 28(1)(ba) applies to Document 7.

Section 28(1)(b) – Documents prepared for the purpose of submitting to Cabinet for consideration

17. The Agency refused access to the attachment to Document 7 (**Attachment A**) under section 28(1)(b) in full. Attachment A is [type of report] prepared by the Agency that is attached to a ministerial briefing.
18. The Agency described Attachment A as [description of document].
19. Section 28(1)(b) exempts from release a document that was prepared by a Minister, or on behalf of a Minister, or by an agency, for the purpose of submitting it to Cabinet for Cabinet's consideration.
20. The document must have been created for the sole, substantial or dominant purpose of submission to the Cabinet for its consideration.²
21. If there is more than one purpose of a document's creation, it can be useful to ask whether the document would have been created but for the purpose of submission for consideration by the

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

² *Ryan v Department of Infrastructure* [2004] VCAT 2346, [34]; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924, [72].

Cabinet.³ If the document would have been created in any event, this may indicate the purpose of the document's creation was not for submission for consideration by the Cabinet.⁴

22. The document does not need to have been, in fact, considered by, or submitted to, the Cabinet.⁵ The purpose of the document's creation is the key consideration. However, where there is no evidence of the purpose of the document's creation, the actual use of the document can assist to determine the purpose of its creation.⁶
23. The documents must be prepared for consideration by the Cabinet, not merely for the purpose of placing them before the Cabinet.⁷
24. As well as the information supplied by the Agency, in conducting this review, I have also had regard to *Secretary to the Department of Infrastructure v Louise Asher MP* (the **Asher decision**).⁸ That matter dealt with documents similar to those in this review and the Victorian Court of Appeal considered evidence from Agency officers regarding the purpose for which the documents subject to review were created. VCAT determined the documents were not exempt under section 28(1)(b).
25. The documents in the Asher decision are described as 'quarterly performance reports' which are submitted to DTF at its request.⁹ The reports were created following a 'Budget Memorandum' of the 'quarterly performance reporting and appropriation revenue invoicing requirements for 2003-04'. The memorandum described the information required and the purpose for which the request was being made. The purpose in that document is described as:

The departmental quarterly report provides the basis of the Department of Treasury and Finance (DTF):

- (a) Recommendations to the Minister for Finance and Treasurer on the amount of appropriation revenue that could be certified and applied for each department in the quarter based on their reported output performance against targets.
- (b) Reporting to the Expenditure Review Committee (ERC) and Cabinet on the Government's ownership interest in departments. This includes:
 - implementation of key business strategies and initiatives;
 - progress in major asset investments;
 - occupational health and safety (OH&S) performance;
 - extent to which 2003-04 savings targets are being achieved;

³ *Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11, [13].

⁴ *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965, [80], [82].

⁵ *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965, [20]; *Wilson v Department of Premier & Cabinet* [2001] VCAT 663, [16]; *Asher v Department of Infrastructure* [2006] VCAT 1375, [9], [20]; *Ryan v Department of Infrastructure* [2004] VCAT 2346, [34].

⁶ *Ryan v Department of Infrastructure* [2004] VCAT 2346, [34]; *Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11 [15]; *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965, [19].

⁷ *Ryan v Department of Infrastructure* [2004] VCAT 2346, [34]-[36]; *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965, [22].

⁸ [2007] VSCA 272.

⁹ *Ibid*, [16].

- financial performance; and
- identification of budget pressures and emerging risks to future output, asset or financial performance.

... As the departmental reports form the basis of advice to Cabinet, they must be marked Cabinet-in-Confidence.

...

The advice from departments forms the basis of a quarterly report to the Treasurer and ERC on major issues impacting on departmental performance. The report to the Treasurer aims to assist Government in making timely strategic decisions.¹⁰

26. In relation to the purpose for the preparation of the documents in the Asher decision, the Victorian Court of Appeal observed:

It is clear enough from the evidence, as the Tribunal held with respect to each of the documents, that it was prepared in order to enable the creation of another and quite separate document and it was the latter that was to be submitted for Cabinet consideration. The initial reports were to be used by Mr Monforte's department in the preparation of the actual submission. They could have been incorporated in whole or part, or edited, recast, reformatted or reworded.

None of the documents in issue were directed to be prepared in the expectation that they would themselves necessarily be submitted to Cabinet. At most, they were to be included in or annexed to another document that was to provide the framework for possible Cabinet consideration of the progress, developments and issues described or detected. As it transpired, almost all of the content of five of the reports was set out 'verbatim', but reformatted and edited into a 'seamless' document to which was added DTF analysis and advice. It is reasonable to assume that it was this advice and analysis of the data and issues contained in the reports, that constituted the core of the 'whole of Government' submission and was contemplated would form the basis of their deliberations and, as Mr Monforte put it, 'assist Government in making timely decisions'.¹¹

27. Importantly, the test for whether a document is exempt from release under section 28(1)(b) was described as follows:

Bearing in mind that the Freedom of Information Act has been accepted as remedial legislation designed to assist in ensuring open and accountable government, I am unpersuaded that the words in s 28(1)(b) should be attributed with anything other than their ordinary meanings and consider that they were intended to confine exemption from disclosure to the particular documents which it was contemplated would be placed before Cabinet for their consideration. Preliminary or preparatory material, not constituting a draft or copy, would accordingly not be encompassed. [footnote redacted].¹²

28. In the matter before me, I am satisfied Attachment A is not exempt from release under section 28(1)(b) for the following reasons:

- As described above, the FOI Act must be interpreted so as to further the object of the FOI Act and any discretions conferred by the FOI Act must be exercised, as far as

¹⁰ Ibid, [19]-[20].

¹¹ Ibid, [36]-[37].

¹² Ibid, [40].

possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

- It is necessary to consider the purpose for which the document was created, not the use to which the document was put.
- For section 28(1)(b) to apply, the actual document must have been prepared for the purpose of submission to the Cabinet. The document subject to review was not prepared for this purpose. On the information before me, and similar to the circumstances of the Asher decision, I am satisfied Attachment A was created for the purpose of submission to DTF to enable DTF to assess and create another and separate document/s, which would then be submitted for consideration by the Cabinet.

29. Accordingly, I am satisfied Attachment A to Document 7 was not prepared for the purpose of submission for consideration by the Cabinet, and it is therefore not exempt from release under section 28(1)(b).

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

30. The Agency exempted Document 7 in full under section 28(1)(ba), including Attachment A described above.
31. Section 28(1)(ba) exempts from release a document that was prepared for a Minister to brief them about an issue to be considered by the Cabinet.
32. The exemption has two limbs that must be satisfied:
- whether the document was prepared for the purpose of briefing a Minister
 - whether the briefing of the Minister was in relation to an issue that was, assessed objectively at the time the briefing occurred, an issue that was to be considered by the Cabinet.¹³
33. The document must have been created for the sole, substantial or dominant purpose of briefing a Minister.¹⁴
34. The exemption is limited to documents that have the character of briefing material.¹⁵ A briefing is a short accurate summary of the details of a plan, operation, or policy. The purpose of a briefing is to ‘inform’, and it will generally contain information or advice prepared for the purpose of being read by, or explained to, a Minister.¹⁶

¹³ *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822, [22]; *Department of Premier and Cabinet v Newbury* [2021] VCAT 331, [14].

¹⁴ *Ryan v Department of Infrastructure* [2004] VCAT 2346, [34]; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924, [72].

¹⁵ *Ryan v Department of Infrastructure* [2004] VCAT 2346, [41].

¹⁶ *Ryan v Department of Infrastructure* [2004] VCAT 2346, [41]; *Department of Premier and Cabinet v Newbury* [2021] VCAT 331, [15].

35. I must objectively assess whether the briefing relates to an issue to be considered by the Cabinet at the time the briefing occurred. The subjective purpose of the document's author is not relevant.¹⁷
36. It must be more than just 'likely' that the Cabinet will consider the issues outlined in the briefing. There must be an intention or expectation that the issue will be considered by the Cabinet (even if not ultimately considered).¹⁸
37. The purpose of briefing a Minister in relation to an issue to be considered by the Cabinet must be 'immediately contemplated' when the document is created. The exemption cannot apply:
 - merely because Cabinet ultimately considers the issue¹⁹ or
 - it is expected Cabinet is likely to consider the relevant issues in the future or from time to time.²⁰
38. Document 7 is a briefing to the relevant Minister seeking their approval to submit the attached [name] Report (Attachment A, discussed above) to DTF.
39. In support of its decision that Document 7 inclusive of Attachment A is exempt in full under section 28(1)(ba), the Agency provided a statement from a senior Agency officer who has been coordinating AIP reporting for the Agency for several years.
40. The Agency officer stated that the purpose of the document "has always remained consistent, which is, to brief a minister about matters to be considered by cabinet".
41. The Agency also provided several attachments to the Agency officer's statement in support of its view.
42. I acknowledge the information provided by the Agency to assist with my decision making. Having considered the requirements of section 28(1)(ba), the Asher decision, a past OVIC decision,²¹ the content of the document subject to review, the Agency's submission and documents it provided to assist me with my review, I am not satisfied the document is exempt from release under section 28(1)(ba).
43. Departments are required to submit quarterly information on assets and major project delivery to support DTF's reporting to Cabinet Committees on departments' performance in project delivery.
44. I consider the [name] report (Attachment A) was primarily prepared by the Agency to fulfill the reporting request of DTF. I accept that the DTF process would likely have been to subsequently use or collate relevant content from Attachment A to then report to Cabinet in a separate document or documents.

¹⁷ *Department of Premier and Cabinet v Newbury* [2021] VCAT 331, [31].

¹⁸ *Mildenhall v Department of Treasury and Finance* (unreported, AAT, Macnamara DP, 18 March 1996), 14.

¹⁹ *Thwaites v Department of Health and Community Services* (unreported, AAT of Vic, Macnamara DP, 4 April 1996), 17.

²⁰ *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39, [38]-[41].

²¹ *'ET5' and Department of Premier and Cabinet* (Freedom of Information) [2022] VICmr 205 (26 August 2022).

45. I again acknowledge the Agency's position regarding the purpose of the briefing. Even if the content in Attachment A ultimately was included in some form within DTF's submission to Cabinet, I consider the primary purpose of the briefing was to seek the Minister's approval to provide Attachment A to DTF for its further use. Thus, while I accept there is an undeniable connection to Cabinet, in my view, the fact the document subject to review was prepared to support DTF's process of reporting to Cabinet is not sufficient to establish that both the AIP report itself (Attachment A), and the ministerial briefing (Document 7), were created for the sole or dominant purpose of briefing a Minister for the purpose of section 28(1)(ba).
46. Accordingly, I am not satisfied Document 7 including Attachment A were prepared for the sole or substantial purpose of briefing a Minister in relation to issues to be considered by the Cabinet, and I find they are therefore not exempt from release under section 28(1)(ba).

Section 30(1) – Internal working documents

47. To be exempt under section 30(1), three conditions must be satisfied:
- the document or information is matter in the nature of
 - opinion, advice or recommendation prepared by an agency officer or a Minister or
 - consultation or deliberation that has taken place between agency officers or Ministers
 - the matter was created during the deliberative process of an agency, Minister, or the government's functions
 - disclosure of the matter would be contrary to the public interest.
48. The exemption does not apply to purely factual material in a document.²²
49. Section 30(1) has been applied by the Agency to Documents 1 and 4 in part and to Attachment A in Document 7 in full.

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

50. I am satisfied that the Documents 1 and 4 contain advice and recommendation.
51. While information in Attachment A to Document 7 is primarily factual, taken broadly, I accept it can be considered in the nature of advice as it provides updates on the status of projects.

²² Section 30(3).

Second requirement – deliberative process

52. 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.
53. ‘Deliberative process’ is widely interpreted to include most processes undertaken by an agency or Minister in relation to their functions.²³
54. I am satisfied the information in Documents 1 and 4 was prepared in the course of the deliberative processes of the Minister, with respect to matters within their portfolio.
55. I am satisfied Attachment A to Document 7 was prepared in the course of the deliberative processes of the Agency, that of part of compulsory reporting on the status of certain projects.

Third requirement – disclosure would be contrary to the public interest

56. I must consider all relevant facts and circumstances, remaining mindful that the intention of the FOI Act is to promote the disclosure of information.
57. There are many factors that may be relevant to determining whether it would be contrary to the public interest to disclose a document or information.²⁴ These are not a fixed or determinative set of criteria.²⁵ Such factors include:
 - the right of every person to gain access to documents under the FOI Act
 - the sensitivity of the issues involved and the broader context of how the documents were created
 - the stage of a decision or policy development at the time the communications were made
 - whether disclosure of the documents 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)
 - whether disclosure of the documents 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

²³ *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.

²⁴ For example, see *Coulson v Department of Premier and Cabinet* [2018] VCAT 229, [25]; *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483, 488; *Secretary to Department of Justice v Osland* (2007) 26 VAR 425, [77].

²⁵ *Landes v Vic Roads* [2009] VCAT 2403, [46].

- the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions
- the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes
- 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
- whether there is controversy or impropriety around the decision or the decision-making process.

Document 1

58. Document 1 is a brief to [a Minister] and makes recommendations for the reprioritisation of surplus funds from major capital projects managed by the Community Safety Building Authority to enable the delivery of key government commitments and priority projects to support the justice system. It includes an attached letter to [a Minister] seeking approval to reprioritise surplus funds.

59. The Agency submits:

The amount available to be reprioritised to other portfolio priorities and the range of options developed for consideration were based on estimates and assumptions by the department, including potential findings from the Coroner's Court, and the department's opinion and advice on priorities within the portfolio for alternative investment.

The funding for the major project at issue falls within the Minister for Corrections' portfolio, and therefore the amount of funds available and any priorities for redirection were subject to consultation and deliberation between [Ministers]. Ultimately some of the options were not supported and did not progress for the [year] budget cycle. Government's ultimate budget/funding decisions are disclosed in the State Budget Papers.

...

As the final decision on the redirection of funding differed from that recommended in the brief and attached letter to the [Minister], the department maintains that the release of these documents in full would be contrary to the public interest as it would be misleading and cause unnecessary public debate, including on the respective positions of ministers on the relevant recommendations. Release of the information would only provide, at best, a partial explanation for the ultimate decision made by the government and reflected in the State Budget Papers.

The briefing and attached letter to the [Minister] does not reflect the consultation between ministers or the decision-making process that went into the ultimate decision on whether to release the full funds originally proposed from the major project early, nor on the priorities for the re-allocation of funds. It is expected that ministers' deliberations will have had regard to a broader range of considerations than those outlined by the department in its briefing.

60. During the review, OVIC provided the Agency with an initial view that section 30(1) may not apply for the following reasons:
- The exempted information concerns potential business cases.
 - Modern government assumes that members of the public can understand that documents are produced at particular points in time and that a document, in isolation, may not represent the complete or final position or decision of an agency or Minister.
 - In this instance, even though there may be recommendations that were ultimately not adopted, or business cases that may not have eventuated, the document records the Minister's view on whether to agree with the proposed recommendations at that point in time.
 - Disclosure of the document would not be reasonably likely to lead to confusion, misunderstanding or misinterpretation because it may not reflect what eventuated after the briefing.
61. In response, the Agency maintained its view that section 30(1) applies and considers the points raised by OVIC only form part of a range of considerations in this circumstance. In addition, the Agency sought to rely on section 28(1)(d) over the same exempted information, which I will consider below.
62. The Agency also sought to rely on various cases²⁶ to support its view that releasing documents or briefs where a Minister did not adopt the advice, took no action or did not pursue the matters is against the public interest.
63. The Agency referred to *Monash University v Naik*,²⁷ where Senior Member Jenkins noted:
- A particular exchange, which clearly falls within the first and/or second limb of s 30, might otherwise appear to be inconsequential. However, the document places the relevant officers 'in the frame' capturing a moment at an early stage of deliberations in what may become a more prolonged process. It is clearly essential to the preservation of a full and frank exchange between officers that all communications remain confidential.
64. The Agency submits:
- This reasoning can be applied to the exempt information in the brief in question. In this instance, the department made a recommendation to the [Minister], in [their] capacity as lead minister for the department, and while the [Minister] accepted that recommendation, this was in effect to agreeing to support a recommendation to the [another Minister] for [their] consideration – the broader government decision making process meant that the recommendations in question were not ultimately adopted.

...

²⁶ *Bracks v Department of State Development* (unreported, AAT, 10 September 1996); *Tee v Department of Planning and Community Development* [2013] VCAT 1150; *Country Fire Authority v Lockyer (Review and Regulation)* [2019] VCAT 667.
²⁷ [2021] VCAT 557, [38].

Judge Hampel VP noted in *Friends of Mallecoota Inc v Department of Planning and Community Development*,²⁸ that additional principles for consideration in the public interest argument include the nature of the information, the nature of the document and that “*the more sensitive or contentious the issues involved ... the more likely it is that the communication should not be disclosed.*”

In *Tucker*,²⁹ Justice Quigley, citing *Friends of Mallecoota*, summarised the relevant principles that apply, including that it is contrary to the public interest to disclose documents reflecting possibilities considered but not eventually adopted, as such disclosure would be likely to lead to confusion and ill-informed debate; and that decision-makers should be judged on their final decisions and their reasons for them, not on what might have been considered or recommended by others in preliminary or draft internal working documents.

...

The department believes that the release of information that has not been approved or yet come to pass is not in the public interest whilst the government continues to examine the coroners’ recommendations.

65. In *Bracks v Department of State Development*,³⁰ the Administrative Appeals Tribunal of Victoria (AAT) found a ministerial brief would be contrary to the public interest to disclose as it would cause confusion and unnecessary debate on possibilities considered. The AAT noted that in relation to one of the documents, the author of the briefing in that matter had repeated assertions contained in a report and set out his view of possible responses to those assertions.³¹ The AAT stated:

There is no evidence that the matters have been articulated by the Minister since, there is no evidence he acted on the advice and in any event the report merely represent the views of a senior officer - the document in no way indicates that these are the views of the Minister or that he subscribed them in any way. Any future debate in relation to the minister and the report itself can only be based on mere supposition and conjecture.³²

66. One of the documents in dispute in *Tee v Department of Planning and Community Development*³³ was a ministerial briefing that included recommendations that were not accepted by the Minister. The material exempted in the document was a description of a rejected option and analysis and comment leading up to the rejected recommendations.³⁴ VCAT accepted evidence from a witness that:

...full release of the ministerial briefing would be contrary to the public interest because: it would promote pointless debate about what might have been rather than what actually happened; it might contribute to unnecessary public concern in relation to an option which was considered but rejected and because the minister should be judged on his final decision and his reasons for it not what might have been recommended by departmental officers in internal working documents.

²⁸ *Friends of Mallecoota Inc. v Department of Planning and Community Development* [2011] VCAT 1889, [51].

²⁹ *Tucker v Commissioner of State Revenue* [2019] VCAT 2018.

³⁰ (unreported, AAT, 10 September 1996).

³¹ *Ibid*, 9.

³² *Ibid*, 10.

³³ *(Review and Regulation)* [2013] VCAT 1150.

³⁴ *Ibid*, [9].

...full release of a ministerial briefing would be likely to result in a change in departmental practices so that in future less detail would be included in briefs and this might result in the minister having less information on which to base his decision and in slower processes.³⁵

67. VCAT accepted that disclosure of the ministerial briefing in full would be contrary to the public interest because:

Release of the department's reasoning would not illuminate the Minister's decision. Even though there were only two options for him to consider (to call in the proceeding or not to do so) it does not follow that he rejected the department's recommendation because his reasoning was the opposite of that set out in the document. His reasons may well have been unrelated to those in the department's briefing. Thus disclosure of the material would simply introduce into public debate irrelevant material about what might have been. This would be contrary to the public interest.³⁶

...

I was satisfied it would be contrary to the public interest to release the information...because it contains analysis and comment by the department on a recommendation made by the department but rejected by the Minister. Its release would be likely to create confusion about the Minister's reasons for not calling in the decision and would not illuminate the Minister's reasons for that decision. I was also satisfied, taking Ms Monk's evidence into account, that in the respondent department, where Ministerial decisions about sensitive issues can become the subject of public debate and controversy, release of this material would have the effect of discouraging the department from including useful detail in Ministerial briefings.³⁷

68. In *Country Fire Authority v Lockyer*,³⁸ the disputed documents concerned the investigation of complaints made by the applicant. The Agency in its submission refers to the following paragraphs of that matter:

I am satisfied that the respondent's personal interest in the matter does not satisfy the threshold test of what is in the public interest. I accept, as the applicant submitted, that it is important to protect the integrity of confidential investigatory processes to ensure that complaints of this nature are ventilated and investigated in confidence. I take into account the fact that Snake Valley is a small community and the sensitivities attached to an investigation of this nature in a small community brigade are heightened. I also accept that disclosure of preliminary views or opinions would lead to confusion and unnecessary debate and might have a chilling effect on the making of similar complaints or participation in future investigations of similar matters.³⁹

...

I start therefore with the general proposition that draft internal working documents or preliminary advices or opinions are inappropriate for release. The issues involved are sensitive and contentious and the passages in respect of which exemption is sought are in my view properly to be characterised as addressing these sensitive and contentious matters. I am of the opinion, having read the documents and considered the evidence and submissions of the parties, that the disclosure of draft internal working documents and preliminary advices or opinions in

³⁵ Ibid, [10] – [12].

³⁶ Ibid [16].

³⁷ Ibid, [18].

³⁸ (*Review and Regulation*) [2019] VCAT 667.

³⁹ Ibid at [33].

issue here would likely lead to confusion and ill-informed debate. Release may well give spurious standing to the expression of the opinions in the documents and promote pointless and captious debate about what might have happened.

69. Having carefully considered the relevant documents, the above case law, and the Agency's submissions, I am not satisfied disclosure would be contrary to the public interest for the following reasons:

- Most of the above case law relied on by the Agency concern recommendations that were not supported by the relevant ministers or do not represent the relevant minister's view. This is distinguishable from the situation in this matter, as the recommendations were agreed to by the [Minister] and therefore reflect their views at that point in time. As such, I consider disclosure of this document would not cause confusion and unnecessary debate around the [Minister's] position at that point in time.
- It is evident on the face of the document that it only contains preliminary advice about the projects to which surplus funds were being sought. Therefore, the Applicant and the public more generally would understand that funding for major projects go through extensive deliberation and decision-making processes beyond what is communicated within the briefing subject to review and attached letter to the [Minister]. They would not be misled to believe that the requested reprioritisation of surplus funds was agreed to by the [Minister] without further extensive deliberation.
- While the recommendation may not have ultimately been adopted by the [Minister], it is important that the Government is transparent around, and accountable for, their decision-making processes, not only for decisions that are ultimately adopted, but also those that were supported at a particular point in time.
- The third recommendation in the document, in particular, concerns a matter that is sensitive and important to the community. I acknowledge the above cited case law supports a view that the more sensitive or contentious an issue is, the more likely it would be contrary to the public interest to disclose. In this instance, I consider the public interest is supported by disclosing what the [Minister] supported in relation to a sensitive issue impacting the community, irrespective of the Government's current position. While disclosure may have the potential to lead to debate or scrutiny, debate and scrutiny of Government decision making on sensitive issues supports democracy and is important. It may be a matter of public interest for the Government to explain why it may have adopted a particular recommendation at a point in time that is no longer supported.
- In my view, the seventh recommendation does not concern a sensitive issue.

70. Accordingly, I have decided that section 30(1) does not apply to Document 1.

Document 4

71. Document 4 is a briefing to the [Minister] in relation to a joint position paper entitled *Budget Independence for Victoria's Independent Officers of Parliament*. The purpose of the briefing is to inform them that the recommendations in the paper are matters to be considered by the incoming government.

72. The Agency claims certain information in the document is exempt for the following reasons:

...release of this information would give rise to unnecessary debate and misinterpretation regarding additional funding as certain recommendations may be subject to further deliberation or may never come to realisation, which is contrary to the public interest.

*AB v Department of Human Services*⁴⁰ observed that it is vital that executive officers be able to report to their ministers with complete frankness and candour. Further, the fact that they do so may, in a particular case, give rise to a need to exempt a document from disclosure.

In addition, as the recommendations in the brief were always going to be subject to the outcome of the state election, the department maintains that it is not in the public interest to release recommendations made in this instance and again refer to *Bracks v Department of State Development*⁴¹ and *Tee v Department of Planning and Community Development*⁴².

73. I am not satisfied that disclosure of certain information in the document would be contrary to the public interest for the following reasons:
- The document itself does not contain recommendations made by the Agency, rather, it advises the Minister on factual matters.
 - The Agency has not sufficiently explained why it considers disclosing the information in this document would inhibit the frankness and candour of Executive-level staff in future. There is no information before me or within the document to support that disclosure would have this effect.
74. However, I am satisfied that one sentence in the document would be contrary to the public interest to disclose as I am satisfied, based on a confidential submission made by the Agency, that disclosure would likely be misleading.
75. Accordingly, only certain information in Document 4 is exempt from release under section 30(1) and I have decided to release additional information in the document.

Attachment A to Document 7

76. While there is a relationship to a Cabinet process, I have nevertheless determined disclosure of Attachment A to Document 7 would not be contrary to the public interest for the following reasons:
- For the most part, it contains factual information prepared by the Agency about its progress in project delivery.
 - While certain information or parts of Attachment A may have been incorporated into a separate document that was submitted to Cabinet, the disclosure of the attachment would not involve the disclosure of any deliberation or decision of the Cabinet, nor would objectively interfere or undermine the Cabinet process.

⁴⁰ [2001] VCAT 2020.

⁴¹ (unreported, AAT, 10 September 1996).

⁴² [2013] VCAT 1150, [16], [18].

- I do not consider the information is particularly sensitive from the public's perspective. It relates to quarterly reporting by the Agency on project delivery progress, including timing, estimated and actual budgeted costs, and status of projects.
- As the document is part of a reporting process coordinated by DTF, I do not consider its disclosure would have any detrimental effect on that process. In the same way the Victorian Auditor-General undertakes audits of major government projects, such independent oversight contributes to strengthening agency processes and performance with a view to improving the performance of agencies in the way in which they carry out their functions and implement the policies and programs of the government of the day.
- Attachment A contains information in its final form for the purpose of submission to DTF. It provides a progress report at a particular point in time and, given it is prepared with a view to being included in a document to be provided to the Cabinet, should be taken as containing considered and accurate information.
- In this case, there is a strong public interest in disclosure of the financial performance and progress of Agency major projects, including actual costs against budgeted expenditure of public funds. The disclosure of such information is in the public interest as it provides for greater transparency and accountability in the progress and performance of government projects. While I acknowledge agencies and government may be hesitant for such information to be publicly disclosed, I consider that the disclosure of such information falls squarely within the scope of information the Victorian Parliament intends be made available and released under the FOI Act. I consider it also meets the expectations of the Victorian public that a democratically elected government will be open, transparent and accountable.

77. In short, I am not satisfied refusal of access to the document under the FOI Act is necessary to protect an essential public interest, rather its disclosure would serve an essential public interest in building public trust through increased openness, transparency and accountability.

78. Accordingly, I am satisfied disclosure of Attachment A to Document 7 would not be contrary to the public interest, and the document is not exempt from release under section 30(1).

Section 28(1)(d) – Documents that disclose any deliberation or decision of the Cabinet

79. Following OVIC's initial view that section 30(1) does not apply to Document 1, the Agency sought to also rely on section 28(1)(d).

80. Section 28(1)(d) provides that a document is exempt if it discloses any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

81. The Agency submits:

The brief is a request for funding to prepare business cases seeking Cabinet Committee consideration for potential future projects of the department. The brief records the position of the [Minister's] general support in both matters.

The purpose of developing a business case is that the resulting report is put before Cabinet (the Budget Finance Committee (BFC) specifically) for consideration and Cabinet deliberation. The

rationale for the recommendations and the fact that business cases are intended to be prepared for the two subjects identified reflects the intention that the projects themselves would ultimately be considered by Cabinet.

82. The Agency also submits:

In this instance, the department believes that the question of disclosing a 'deliberation of Cabinet' is included in Buchanan JA's advice wherein:

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. The former would say nothing as to Cabinet's deliberations; the latter might say a great deal.⁴³

It is the department's position that this document falls at the latter end of the described spectrum where the Cabinet requires information of a particular type (in this situation a business case) to enable Cabinet to deliberate and determine the appropriate course of action.

*Honeywood v Department of Innovation, Industry and Regional Development*⁴⁴ found that reports prepared an external provider/contractor, regarding the viability of a project were exempt under s 28(1)(d) by inference that the documents were considered by a Cabinet committee and by the Cabinet itself. Taking this example, the department believes that any business case documents, including the considerations for the funding/preparation of them, infer that the matters at hand are to be considered by Cabinet in the future.

When considering the concept of deliberations and decisions of Cabinet, we can look more broadly to issues considered in other state and federal jurisdictions.

In *Commonwealth v Construction, Forestry, Mining and Energy Union*,⁴⁵ the Full Court of the Federal Court held that a document was protected by the public interest immunity, not because it revealed a matter placed before Cabinet, but because it revealed the position taken by the minister in Cabinet.

In that case, it was considered that disclosure of the information would operate to reveal the nature of the matters considered by Cabinet and at least part of the Cabinet's deliberation of those matters. It was also concluded that a position taken by a minister in Cabinet forms part of Cabinet's deliberations.

83. There is no information before me to indicate the Cabinet required the information within the document subject to review for the purpose of the Cabinet deliberating business cases. Rather, the business cases were only being contemplated at that point in time, and the document merely reveals that the [Minister] was supportive of business cases being developed. It does not reveal the Cabinet's deliberation, as the matter had not been considered by Cabinet, there is little information about what would be included in the potential business cases, and there is no information before me to indicate that preparation of business cases had commenced.

84. I also do not accept the Agency's argument that revealing the position of a Cabinet Minister would thereby disclose the deliberations of the Cabinet. This matter is distinguishable from the

⁴³ *Secretary, Department of Infrastructure v Asher* [2007] VSCA 272 [8], [61].

⁴⁴ [2004] 21 VAR 1453; [2004] VCAT 1657.

⁴⁵ [2000] FCA 453; [2000] 98 FCR 31.

circumstance of *Commonwealth v Construction, Forestry, Mining and Energy Union*,⁴⁶ referred to in the Agency's submission. In that matter, the relevant document was a letter from a Minister to the Prime Minister about issues that the Minister sought to have considered by Cabinet, the Minister's proposed course of actions in relation to those issues and arguments to be put by the Minister.⁴⁷ The Court accepted:

Although the letter does not in terms **record** actual deliberations at a Cabinet meeting, it was circulated amongst Ministers in the Cabinet room at the meeting, and the matters in it were discussed and considered by those present. In that sense it reveals what would in the ordinary course be discussed by Cabinet. Some possible contingencies might be imagined whereby the letter was not in fact considered at the meeting, such as a last minute withdrawal or an adjournment, but the evidence is that the matters in it were discussed.

Disclosure of the contents of the letter would, in our view, operate to reveal the nature of the matters considered by Cabinet and at least part of the Cabinet's deliberation of those matters. On the evidence it can reasonably be assumed, in the circumstances of this case, that the Minister would have attended the meeting and put before Cabinet the position and arguments as set out in the letter. Disclosure of the contents of the letter would therefore disclose the position of the Minister, the arguments he wished to advance, and the topic which in all probability was discussed at the meeting. Otherwise it is not possible to envisage why the letter would have been handed out to the Cabinet members at the Cabinet meeting. The position taken by the Minister in Cabinet is part of the Cabinet's deliberations. Disclosure of the Minister's position in this context would not only be contrary to the convention of the collective responsibility of Cabinet, because it identifies a particular Minister's views, but would also be contrary to the objective of ensuring that decision-making and policy development by Cabinet is uninhibited, because members of Cabinet could be hampered in the performance of their functions to candidly and comprehensively consider Cabinet proposals if subjected to publication of the details of discussions within the Cabinet room: see *Northern Land Council* at 615-616.⁴⁸

85. The distribution of a letter within the Cabinet room and discussed by the Cabinet is a very different scenario to the present matter, which is merely a ministerial briefing recording a Minister's approval of recommendations and a letter to another Minister, to which there is no evidence that it was deliberated on by the Cabinet or distributed to other Cabinet Ministers.
86. I do not accept that the briefing to the [Minister], which records their approval of various recommendations, is equivalent to a submission to Cabinet, such that it would reveal the deliberation of Cabinet or a Cabinet Minister.
87. Accordingly, I am satisfied section 28(1)(d) does not apply to Document 1.

Section 33(1) – personal affairs information

88. The Agency did not apply section 33(1). However, it removed telephone numbers of senior staff as 'irrelevant information'. I do not consider the information is irrelevant information, as the Applicant confirmed he sought access to personal affairs information of 'senior executives'.
89. A document or information is exempt under section 33(1) if two conditions are satisfied:

⁴⁶ [2000] FCA 453.

⁴⁷ *Ibid*, [6].

⁴⁸ *Ibid*, [42]-[43].

- the document or information relates to the ‘personal affairs’ of a natural person (living or deceased)
- disclosure of that personal affairs information is unreasonable in all the circumstances.

90. The telephone numbers are personal affairs information.

91. I am satisfied it would be unreasonable to disclose the telephone numbers in circumstances where I am releasing all other information within the document, including the names of the third parties. The telephone numbers do not add any additional meaningful information and will not fulfil a public interest purpose.

92. Therefore, the telephone numbers are to remain deleted as they are exempt under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

93. 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.

94. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁴⁹ 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 25.⁵⁰

95. I have considered the information the Agency deleted from the documents as irrelevant. I do not agree the telephone numbers fall outside the scope of the Applicant’s request, as they are personal affairs information relating to senior executives, which the Applicant confirmed they sought access to.

96. However, Document 4 contains personal affairs information of an external third party which I am satisfied is irrelevant personal affairs information.

97. I have considered the effect of deleting exempt and irrelevant information from the documents. In my view, it is practicable for the Agency to delete the exempt and irrelevant information because it would not require substantial time and effort, and the edited documents would retain meaning.

⁴⁹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁵⁰ *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155].

Conclusion

98. On the information before me, I am satisfied:
- Document 1 is not exempt under sections 28(1)(d) or 30(1); however, telephone numbers are exempt under section 33(1)
 - Document 4 is exempt in part under sections 30(1) and 33(1)
 - Document 7 is not exempt under sections 28(1)(b), 28(1)(ba) or 30(1); however, telephone numbers are exempt under section 33(1).
99. I am satisfied it is practicable to edit each of the documents to delete exempt and irrelevant information in accordance with section 25.
100. A marked-up copy of Document 4 indicating exempt and/or irrelevant information in accordance with my decision has been provided to the Agency.
101. The Schedule of Documents in **Annexure 1** sets out my decision on Documents 1, 4 and 7 further.

Timeframe to seek a review of my decision

102. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁵¹
103. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵²
104. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵³
105. 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.
106. 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.⁵⁴

Third party review rights

107. I have decided to release Document 7 to the Applicant in part, which the Agency refused in full, and my decision includes to release the names and position titles of several senior Agency officers. I note the Agency did not claim the names and position titles of the third parties as

⁵¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵² Section 52(5).

⁵³ Section 52(9).

⁵⁴ Sections 50(3F) and 50(3FA).

exempt under section 33(1), nevertheless, I have considered whether is practicable and appropriate to notify them.

108. On careful consideration, I have decided it is practicable to notify relevant third parties of their review rights. I confirm steps will be taken to do this as soon as possible post my decision.

When this decision takes effect

109. 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.

Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Brief 22088963 – Reprioritisation of surplus funding to deliver key priority initiatives (1 x attachment)	7	Released in part Sections 28(1)(d), 30(1)	Release in part Sections 33(1), 25 The document is to be released, with the name of the third party in paragraphs 1.1 and 2.4, and in the attached letter deleted as irrelevant information. The telephone numbers are exempt under section 33(1) and should also be deleted.	Section 28(1)(d): I am satisfied information in this document is not exempt under section 28(1)(d). Section 30(1): I am satisfied information in this document is not exempt under section 30(1). Section 33(1): I am satisfied the telephone numbers are exempt under section 33(1). Section 25: I am satisfied it is practicable to edit the document to delete exempt and irrelevant information in accordance with section 25.
2.	[Date]	Brief 22115979 – [name redacted]	2	Refused in full Sections 28(1)(ba) and 28(1)(d)	Not subject to review	
3.	[Date]	Brief 22116270 – [name redacted]	2	Refused in full Sections 28(1)(ba) and 28(1)(d)	Not subject to review	
4.	Undated	Brief 22104096 – Budget independence	22	Released in part	Release in part	Section 30(1): I am satisfied that only one sentence in this document is

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		for Victoria's Independent Officers of Parliament (1 x attachment)		Section 30(1)	Sections 30(1), 33(1) The document is to be released in accordance with the marked-up copy provided to the Agency with my decision.	exempt from release under section 30(1). Section 33(1): See comments for Document 1. Section 25: I am satisfied it is practicable to edit the document to delete exempt information.
5.	[Date]	Brief 22094631 – [name redacted]	2	Refused in full Section 28(1)(ba)	Not subject to review	
6.	[Date]	Brief 22087982 – [name redacted]	2	Released in full	Not subject to review	
7.	Undated	Brief 22023780 – [name redacted]	7	Refused in full Sections 28(1)(b), 28(1)(ba) and 30(1)	Release in part Section 33(1) The document is to be released with telephone numbers deleted in accordance with section 25.	The Agency refused access to the briefing in full under section 28(1)(ba), and the attachment (Attachment A) was refused in full under sections 28(1)(b), 28(1)(ba) and 30(1). Section 28(1)(ba): I am satisfied that the document is not exempt under section 28(1)(ba). Sections 28(1)(b): I am satisfied that the document is not exempt under section 28(1)(b).

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 30(1): See comments for Document 1. Section 33(1): See comments for Document 1. Section 25: See comments for Document 4.