

## Notice of Decision and Reasons for Decision

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Applicant:	'GG1'
Agency:	Department of Premier and Cabinet
Decision date:	5 April 2024
Exemption considered:	Section 30(1)
Citation:	'GG1' and Department of Premier and Cabinet ( <i>Freedom of Information</i> ) [2024] VICmr 63 (5 April 2024)

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FREEDOM OF INFORMATION – inter-agency communications – emails – agency officers – deliberative process – not contrary to the public interest

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 Document 10 is exempt from release under section 30(1).

As 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, I have determined to grant access to the document in part.

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

A marked-up copy of Document 10 showing exempt or irrelevant information in accordance with my decision has been provided to the Agency.

Please refer to pages 7 and 8 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

If review is not sought at VCAT, this decision takes effect when the review period expires.

When the review period expires, the Agency will provide the Applicant with the marked-up document in accordance with my decision unless my decision is subject to review by the VCAT.

My reasons for the decision follow.

Sean Morrison  
**Information Commissioner**

5 April 2024

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Department of Justice and Community Safety. This request was originally transferred to the Department of Government Services, and was subsequently transferred to the Agency seeking access to the following documents:

...any modelling, estimates or presentations the Department of Justice has done, made or received in relation to the proposed new dispute resolution body flagged in last week's housing statement. Specifically, I'm interested to know how many employees the new tribunal can expect to have, whether cases will be heard by current judicial members, when the tribunal could be up and running by, how much it will cost taxpayers per year and where the tribunal can expect to be located...

2. The Agency identified 10 documents falling within the terms of the Applicant's request and refused access to all documents in full, relying on exemptions under sections 28(1)(d) and 30(1). 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. The Applicant advised that the scope of their review was limited to the document denied in full under section 30(1) of the FOI Act and that they do not seek access to personal affairs information of third parties. Accordingly, this review only concerns Document 10.
5. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered communications and submissions received from the parties.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
9. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

### Review of exemption

#### *Section 30(1) – Internal working documents*

10. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

11. The exemption does not apply to purely factual material in a document.<sup>1</sup>

*Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?*

- 12. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
- 13. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>2</sup>
- 14. On 20 September 2023, the Government published *Victoria's Housing Statement*, which announced the intention to establish Rental Dispute Resolution Victoria (RDRV).<sup>3</sup>
- 15. Document 10 is an email thread between officers of public sector agencies with respect to the establishment of the RDRV, where the Agency has provided advice to an officer of another agency about the RDRV.
- 16. As such, I am satisfied the document was prepared by Agency officers and while it contains some high-level factual information, I am satisfied it nevertheless contains matter in the nature of advice.

*Was the document made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?*

- 17. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>4</sup>
- 18. In *Re Waterford and Department of Treasury (No.2)*,<sup>5</sup> the former Victorian Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>3</sup> *Victoria's Housing Statement*, available at [https://content.vic.gov.au/sites/default/files/2023-09/DTPO424\\_Housing\\_Statement\\_v6\\_FA\\_WEB.pdf](https://content.vic.gov.au/sites/default/files/2023-09/DTPO424_Housing_Statement_v6_FA_WEB.pdf) at pg. 27.

<sup>4</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

<sup>5</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

decision or a course of action.

19. I am satisfied the document was prepared during the Agency's deliberative process involved in consulting with other public sector agencies with respect to the establishment of the RDRV.

*Would disclosure of the document be contrary to the public interest?*

20. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances, remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

21. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>6</sup>

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the document and the broader context giving rise to the creation of the document;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the document would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
- (e) whether disclosure of the document would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents; and
- (f) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.

22. The Agency's decision letter states:

Information exempt under this section is advice prepared by an officer to consider issues on a preliminary proposal. 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 about what might have happened rather than what did.

Similarly, decision makers should be judged on the final decision rather than what might have been considered or recommended in preliminary or draft internal working documents.

...

Disclosure of the documents would be contrary to the public interest as it would reveal a range of options and considerations which form the deliberative processes of the department but may not

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<sup>6</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

accurately reflect the ultimate position adopted in relation to the subject matter of your request. Disclosure would be likely to inhibit the ability of agency officers to exchange frank and candid advice on such matters and would cause confusion and ill-informed debate regarding the proposal.

23. Having reviewed the document and considered its content and context, I am satisfied disclosure would not be contrary to the public interest for the following reasons:
- (a) I acknowledge the information in the document may not accurately reflect the final position concerning the establishment of the RDRV, and clearly reflects that it is in its preliminary stages at the time in which the document was created. However, while the document discloses preliminary and early considerations with respect to the RDRV, the information within is consistent with public messaging concerning the establishment of the RDRV. Therefore, I do not consider the information is contentious or sensitive due to its preliminary nature.
  - (b) The document discloses consultation between agencies with respect to the establishment of the RDRV. I consider there is a strong interest in ensuring agencies can consult on matters to make informed and well-considered decisions, however, I do not consider disclosure of the document will inhibit consultation in future.
  - (c) As stated above, the issues discussed in the document are preliminary in nature, however, this is clear on the face of the document, and as such, is unlikely to mislead the Applicant or members of the public or lead to ill-informed debate. If the Agency considers the information would mislead the Applicant or members of the public, it can release additional information to explain the meaning of the information in the document.
  - (d) On matters of frankness and candor, public servants have a duty to provide frank and candid advice, and in most cases, an officer would continue to discharge their professional and ethical obligations to provide such advice irrespective of disclosure of a document. Given the nature of the advice provide by an agency officer in relation to the RDRV in the document subject to review, which is factual and high-level, I do not consider disclosure would unduly impact the willingness of agency officers to provide information of that nature in the future.
24. Accordingly, I am not satisfied disclosure of the document would be contrary to the public interest and therefore, it is not exempt from release under section 30(1).

***Section 25 – Deletion of exempt or irrelevant information***

25. 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.
26. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>7</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’ and release

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<sup>7</sup> *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].

of the document is not required under section 25.<sup>8</sup>

27. As discussed above, the Applicant does not seek access to personal affairs of third parties. Accordingly, such information is irrelevant for the purposes of my review.
28. I have considered the effect of deleting irrelevant information from the document. In my view, it is practicable for the Agency to delete the irrelevant information because it would not require substantial time and effort, and the edited document would retain meaning.

### Conclusion

29. On the information before me, I am not satisfied the document is exempt from release under section 30(1).
30. As 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, access is granted in part.
31. A marked-up copy of Document 10 indicating irrelevant information in accordance with my decision has been provided to the Agency.

### Timeframe to seek a review of my decision

32. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>9</sup>
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
35. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
36. 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.<sup>12</sup>

### When this decision takes effect

37. 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.

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<sup>8</sup> *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].

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

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> 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.	Undated	Working Document – [title]	11	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	
2.	Undated	[title]	1	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	
3.	[Date]	Working Document – [title]	4	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	
4.	[Date]	Working Document – [title]	3	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	
5.	[Date]	Working Document – [title]	3	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
6.	[Date]	Working Document – [title]	1	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	
7.	[Date]	Working Document – [title]	12	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	
8.	[Date]	Working Document – [title]	33	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	
9.	[Date]	Working Document – [title]	1	Refused in full Sections 28(1)(d), 30(1)	Not subject to review	
10.	[Date]	Email	2	Refused in full Section 30(1)	Release in part Section 25 The document is to be released in accordance with	<b>Section 30(1):</b> I am not satisfied disclosure of information in the document would be contrary to the public interest for the reasons outlined in the Notice of Decision above.

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					the marked-up copy provided to the Agency.	Accordingly, I consider this information is not exempt from release.  <b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25.