VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
ADMINISTRATIVE DIVISION
GENERAL LIST

VCAT REFERENCE NO. G97/2012

CATCHWORDS

General List; *Freedom of Information Act* 1982; briefings to Minister relating to brown coal allocations in Victoria; whether exempt under s 28(1)(ba) and s 30; briefing to Minister relating to the premium solar feed-in tariff scheme; whether exempt under s 30.

APPLICANT	Environment Victoria Inc
RESPONDENT	Department of Primary Industries
WHERE HELD	Melbourne
BEFORE	Jonathan Smithers, Senior Member
HEARING TYPE	Hearing
DATE OF HEARING	25, 26 October, 20 November 2012
DATE OF ORDER	15 January 2013
CITATION	Environment Victoria Inc v Department of Primary Industries (General) [2013] VCAT 39

ORDER

1 Twenty-eight days from today, the applicant is granted access to:

(a) In document 7.1, the first page, plus the three dot points and two following paragraphs at the top of page 2.

(b) Document 19.

2 The respondent's decision is otherwise affirmed.

Jonathan Smithers
Senior Member

APPEARANCES:

For Applicant	Ms Acreman of counsel
For Respondent	Mr Batskos, solicitor

REASONS

INTRODUCTION

1 The applicant is a peak environmental non-Governmental organisation in Victoria. It is the successor to the Conservation Council of Victoria. It has conducted many campaigns in relation to environmental issues. On 15 December 2011 it submitted a request under the *Freedom of Information Act* 1982 (FOI Act) to the respondent (DPI), broadly seeking documents relating to three topics:

- The possible allocation of new licences to mine brown coal in the Latrobe Valley.
- Reductions to the premium solar feed-in tariff paid to consumers who contribute electricity to the power grid from solar panels. (The PFiT Scheme)
- Changes to the planning controls over wind farms.

Thus, the applicant seeks documents which relate to significant issues of policy which are the subject of current debate in the community, and, in relation to the first topic, current consideration by the Government.

2 On 3 February 2012 the applicant commenced this application for review by VCAT following the failure of DPI to respond to the request within the statutory 45 day period.

3 The volume of documents covered by the request was substantial. A number of interlocutory hearings were scheduled and conducted. A compulsory conference was held on 26 June 2012. This narrowed the issues in dispute to some extent. On 16 July 2012 orders were made for sampling and the matter was set down for hearing. A proposed sample of documents was produced on 31 July. This was revised on 16 October. DPI withdrew reliance on three exemptions: Section 28(1)(b), Section 34(1)(b) and Section 34(4)(a)(ii).

4 As a result, by the commencement of the hearing there were nine documents to be considered by the Tribunal. These were in the three subject matter categories referred to above: coal allocations, the PFiT and planning controls over wind farms. During the course of the hearing, and following inspection of the documents by Ms Acreman, counsel for the applicant, pursuant to the usual confidentiality undertaking , this was further reduced from nine documents to six documents and then down to four documents: Documents 4, 7, 7.1 and 19.

5 The exemptions relied on by DPI in this case are those relating to Cabinet documents, specifically s 28(1)(ba) (for documents 4,7, and 7.1- which all relate to coal allocations) and internal working documents (s 30) (for all

four documents). Document 19 relates to the PFiT Scheme. Hence, none of the documents for my consideration relate to wind farms.

APPLICATION UNDER S 56(3) OF THE FOI ACT

6 When the hearing commenced, Ms Acreman had not seen the documents. Nor had she seen confidential witness statements which had been filed by each of DPI's three witnesses, nor the confidential attachments to their witness statements. The applicant had been provided with copies of the non-confidential witness statements of those three witnesses plus some of the attachments to them. However, the confidential witness statements and confidential attachments comprised the bulk of the material filed by DPI. Ms Acreman made an application under s 56(3) of the FOI Act for an order that the sample documents in dispute be provided to her, subject to the usual undertaking to keep the documents confidential, including not disclosing them to her client. She submitted she would be under great difficulty in conducting the case otherwise.

7 Consistent with DPI's refusal to provide the disputed documents to counsel prior to the commencement of the case, Mr Batskos opposed Ms Acreman's application. His primary concern was that provision of the documents to counsel would release material which delved quite deeply into the Cabinet process. He said there was a very strong connection between these documents and the Cabinet process.

8 Ms Acreman indicated she was well aware of the seriousness of the undertaking she would be giving, including that it could continue to operate indefinitely, beyond the completion of this case.

9 I made an order under s 56(3) allowing Ms Acreman to view the sample disputed documents. Mr Batskos' contentions really only amounted to emphasising the importance of maintaining the confidentiality of Cabinet documents[1]. I saw no basis to distinguish this case from the numerous others where counsel for the applicant has been provided with the documents, and this has assisted in the conduct of the review in practical terms.

APPLICATION UNDER S 101 OF THE VCAT ACT

10 Next, Mr Batskos made an application under s 101 of the *Victorian Civil and Administrative Tribunal Act* 1998 (VCAT Act) that the confidential statements of each of the three witnesses, and the confidential attachments to their witness statements not be provided to the applicant's legal representative. Mr Batskos was again concerned about the sensitivity of this material. It includes what Mr Batskos said were, and do appear to be, Cabinet documents which were covered by the application originally made, but in relation to which the applicant had withdrawn its claim during the

[1] Referring in passing to *Conway v Rimmer* [1968] UKHL 2; [1968] AC 910; [1968] 1 All ER 874; [1968] 2 WLR 998 and *Commonwealth v. Northern Land Council* [1993] HCA 24; (1993) 176 CLR 604; 112 ALR 409; (1993) 67 ALJR 405

interlocutory process. These had been included as attachments to the witness statements because, Mr Batskos said, they were necessary to support the arguments that the disputed documents are covered by the exemptions in ss 28(1)(ba) and 28(1)(d)[2], given that the absence of such evidence has been found to be detrimental to agencies' cases in VCAT and the Supreme Court in the past. He was concerned that confidential material had in the past, whether by accident or deliberately, found its way into the public realm. He suggested that to the extent non-provision of this material to counsel for the applicant interfered with the adversarial manner of conducting this dispute before VCAT, the Tribunal itself could take a greater role in the cross-examination of witnesses and the analysis of the documents. Again, he emphasised the highly sensitive nature of the witness statement material, given the current state of play in relation to the topics they cover.

11 Mr Batskos relied on s 101(4)(a)(ii), (v) and s 101(4)(b). These empower the Tribunal to order non-publication to any specified persons of evidence and documents put before it to avoid, relevantly, prejudicing the administration of justice, revealing confidential information, or for any other reason in the interests of justice.

12 Ms Acreman opposed this application on the basis that without access to this documentation, and without being present during the hearing of evidence on the confidential matters, she would not effectively be able to conduct the case on behalf of the applicant. She also indicated her seeing the material might lead to some documents being no longer pursued. She contended that as a matter of natural justice the applicant's counsel should have access to the case put by the respondent, and not have to rely on the Tribunal, acting in an inquisitorial manner, to run its case for it. As a secondary point she indicated she would prefer her instructing solicitor, from the Environmental Defender's Office, to have access as well.

13 I ruled that I would not make an order preventing the applicant's counsel from having access to any of the material put on behalf of DPI. In view of the sensitivity of the witness statement material, which includes documents such as Cabinet submissions, and minutes of the deliberations of Cabinet, I made an order with the effect that the confidential witness statement material not be disclosed to any person, save for DPI representatives, the Tribunal and its staff and counsel for the applicant (subject to the usual confidentiality undertaking).

14 The order also provided that the hearing would be conducted in camera whilst evidence and submissions were given which disclosed the confidential material. In fact, most of the hearing was conducted in open session, with evidence and submissions being given in a way which did not disclose the confidential material. The hearing was conducted in camera for 17 minutes on the first day.

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[2] As a result of the applicant's narrowing of its request, s 28(1)(d), is not longer in issue.

15 In the event, the issues in the hearing were narrowed following the applicant's counsel viewing the disputed documents and the confidential evidentiary material: the number of sample documents in dispute was reduced to four.

16 As stated, the evidentiary material included documents such as Cabinet submissions and Cabinet decisions, which were covered by the request as originally made, but which the applicant did not pursue. Thus, the documents the subject of the this hearing were those created at an earlier stage of the process of consideration of the coal allocation and PFiT issues by the new government- before they reached Cabinet.

17 In writing this decision, I have sought to avoid disclosing evidentiary material which was designated by the respondent as confidential, as far as possible. I note, however, that whilst material such as formal Cabinet submissions and decisions of Cabinet is clearly identifiable, the line between material designated as confidential and other material was not always clear, and on some occasions, submissions made and evidence given which were said to be on non-confidential matters, crossed over slightly into areas covered by the confidential material.

THE FOI REGIME

18 The starting point under the FOI Act is a presumption that a person has the right to obtain documents from Government agencies subject only to exceptions and exemptions set out in the FOI Act. Section 3(2) states that it is the intention of Parliament that the provisions of the Act be interpreted so as to further that object, and that any discretions conferred by the Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

19 Accordingly, DPI bears the onus of proof in seeking to establish that the disputed documents are exempt[3].

DOCUMENTS 4, 7 AND 7.1 – LA TROBE VALLEY BROWN COAL ALLOCATION

20 Mr James Turnbull Hider, the Executive Director of the Policy Strategy and Performance Division at DPI, gave evidence in relation to these three documents. In his non-confidential witness statement he said:

> [7] Victoria has the second biggest brown coal resource in the world, which has potential to provide significant benefits to the State. The Minister for Energy and Resources ('Minister') has responsibility for managing Victoria's brown coal resources under the *Mineral Resources (Sustainable Development) Act* 1990 (Vic) ('the Act').
>
> [8] Part of Victoria's coal reserve is currently unallocated and accessible. The Government has the power to allocate coal

[3] FOI Act s 55(2)

> under the Act. Coal in the Latrobe Valley is exempt from the normal application process for exploration and mining licences, instead allocations can occur through tender processes which are designed to deliver the greatest benefit to Victorians by ensuring this resource is developed in an orderly manner.
>
> [9] Coal allocation was being considered by the Department before 2009, however any formalisation of policy was put on hold in 2009 due to unauthorised release of cabinet documents. Through 2010 a substantial amount of further work was done to develop a Coal Development and Allocation Strategy ('Strategy'). The Strategy seeks to maximise the benefits to Victoria of our brown coal resourcing including a clear process for identifying the company or companies that will best develop the coal resource through a competitive tender process.
>
> [10] I was involved with a Strategy under the former government. Through discussions with the previous Minister I understood that he expected the Strategy to be considered by Cabinet and the Department worked towards that expectation prior to the election. The Department's intention was to develop and provide a Strategy to Cabinet for consideration under the previous Government, however this was not able to be fully completed before the election and change of Government.
>
> [11] After the election the Department continued to develop a Strategy with the same expectation that it would be considered by Cabinet. No indication was given that the new Minister would have a different approach to the Strategy. Therefore all documentation continued to be developed with an expectation that Cabinet would consider the Strategy.
>
> …
>
> [13] Although the genesis of the Strategy occurred over a significant period of time, there is a strong link between the documents presented to Cabinet and the exempt documents.

21 Mr Hider said that the Department had a meeting with the new Minister on 2 February 2011 (the new Government having been elected in late November 2010) about the Strategy. He said the new government did not have a policy in relation to coal allocation going into the 2010 election, and the Department had not had a chance to talk to the Minister about this issue before that meeting.

22 Mr Hider said document 4 is an eight page PowerPoint presentation on Coal Allocation and Development which was given at the meeting on 2 February 2011. It provides an overview of the Strategy and talking points so that the new Minister for Energy and Resources was aware of the work that had been done on the Strategy.

23 Document 7 is a three page briefing note to the Minister about the Strategy. It was given to him for the purpose of the meeting on 2 February 2011, and approved by him on 1 February 2011.

24 Document 7.1 is a four page document entitled 'Legislative and Regulatory Environment for Victorian Brown Coal' and is the first attachment to the briefing which is Document 7. Mr Hider's non-confidential witness statement said:

> [30] While a lot of work had already been done to develop the Strategy, the finer detail was still being developed. Document 7.1 is the starting point in the exempt documents of the evolution of finer detail of the Strategy...
>
> [32] Document 7.1 is advice to the Minister on the legislative and regulatory environment for Victorian Brown coal. It provides an overview and analysis of the legislation, previous action of government in relation to brown coal and options available to the Minister and context on the development of the Strategy.

25 Mr Hider's witness statement went on to deal with two other documents which are no longer subject to dispute. The first is document10. It is stated to be a brief to the Minister dated 5 October 2011 for the purpose of putting *'the proposed Strategy to him for his comment prior to completion of the Cabinet submission'*. The witness statement indicates that releasing this briefing *'would reveal what Cabinet deliberated on'*.

26 The second is document 14. This is a briefing to the Minister dated 15 December 2011. It is stated that release of this briefing *'would disclose deliberations of Cabinet as the document reflects on the Strategy and the further work that subsequently occurred at Cabinet's request'*.

27 Mr Hider said that at that time of the creation of documents 4, 7, and 7.1 (early February 2011) he was confident the issue of the Strategy would go to Cabinet. This was for the following reasons: The previous Minister had said this matter would go to Cabinet. The Department had continued to develop the Strategy after the formalisation of the Strategy had been put on hold in 2009 for political reasons following the leaking of Cabinet documents about it. The inference was that with the November 2010 State election getting closer, the government wanted to defer public debate about the issues relating to brown coal allocations until after the election. Throughout 2010, Mr Hider said, it was the intention and expectation of the previous Minister and the Department, that this matter would be taken to Cabinet. Mr Hider said that from his experience it was clear that a decision of such magnitude and political sensitivity (ie to adopt a strategy for the development and allocation of brown coal resources) *'was always going to be made by Cabinet, rather than the Minister alone'*.

Section 28(1)(ba)- Cabinet documents

Legal Principles

28 Section 28 of the FOI Act relevantly states:

> (1) A document is an exempt document if it is—

(a) the official record of any deliberation or decision of the Cabinet;

(b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet;

(ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;

(c) a document that is a copy or draft of, or contains extracts from, a document referred to in paragraph (a), (b) or (ba); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

…

(3) Subsection (1) does not apply to a document referred to in a paragraph of that subsection to the extent that the document contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.

…

(7) In this section—

(a) ***Cabinet*** includes a committee or sub–committee of Cabinet;

29 In interpreting and applying Section 28(1)(ba), the following considerations are relevant:

- The general principle referred to above that documents should be available to the public unless an exemption applies.
- That the FOI Act is remedial legislation and where ambiguity is encountered the rights given by the Act should be construed liberally and exceptions narrowly.[4]
- Section 28(1)(ba) is in some ways an extension of the concept of Cabinet documents contained in Section 28(1)(a), (b), (c) and (d). It goes beyond official records of Cabinet decisions, documents prepared for the purpose of submission for consideration by Cabinet, or documents which would involve the disclosure of Cabinet deliberations. It adds to those categories documents prepared *'for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet'*. That is, Section 28(1)(ba) relates to documents which neither were prepared for the purpose of going into the Cabinet room, nor record what occurred in the Cabinet room.

[4] *Ryder v Booth* [1985] VR 869 at 877

- In her second reading speech relating to the bill which introduced s 28(1)(ba), the then Attorney General, Mrs Jan Wade relevantly said:

> CABINET DOCUMENTS
>
> Under accepted principles of Westminster government it is vital that the decision making processes of Cabinet be able to operate freely and without fear of premature or irresponsible disclosure.
>
> In terms of freedom of information that means it must be absolutely beyond doubt that any Cabinet document exemptions will provide complete protection from release of all documents connected with the deliberations to Cabinet.
>
> The Bill makes the important distinction between the confidentiality attached to Cabinet documents and information of purely statistical, technical or scientific nature. These latter documents will not attract Cabinet exemption unless they disclose the deliberations of Cabinet.[5]

- In applying Section 28(1)(ba), the task is simply to apply the words of that provision. The document(s) must fit squarely within one of the exemptions in s 28(1)[6]. Some indirect connection with Cabinet, or the fact that a document has some Cabinet 'aroma' about it are not sufficient.[7] Nor is there any additional requirement of public interest to be satisfied. It is simply a matter of whether the document complies with the description in Section 28(1)(ba) or not.

30 Further, in *Ryan*, Justice Morris said (footnotes included):

> [34] However the following principles have clearly emerged concerning the exemptions in paragraphs (b) and (ba) of section 28(1) of the Act:
>
> - The exemptions turn upon the purpose for which a document has been prepared.
> - It is not necessary to prove that the document was actually submitted to Cabinet or a minister.[8]
> - The actual use made of the document may be relevant in ascertaining the purpose for which the document has been prepared, but is not decisive of this question.[9]
> - A document will only be exempt if the sole purpose, or one of the substantial purposes, for which the document was prepared was an exempt purpose.[10]

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5 *Hansard*, Legislative Assembly, 7 May 1993, page 1739.
6 *Birnbauer v Department of Industry Technology and Resources* (1986) 1 VR 279 at 286.
7 *Peter Ryan MP v Department of Infrastructure* [2004] VCAT 2346 at [33].
8 *Asher v Department of Premier and Cabinet* [2002] VCAT 499, at [9]; *Wilson v Department of Premier and Cabinet* [2001] VCAT 663; (2001) 16 VAR 455, at 459
9 As counsel for the respondent put it, what happens to a document throws light upon the purpose for which it was prepared.

> [35] It has also been said that having regard to the context of section 28(1) of the Act the expression "consideration by the Cabinet" suggests consideration as a step in a deliberative process. On this basis, the exemption would not apply to documents circulated to all ministers forming the Cabinet merely for information purposes.[11]
>
> …
>
> [41] … It is not enough for a document to be exempt [under s 28(1)(ba)] for it to be placed before a minister and be in relation to issues to be considered by the Cabinet. Rather it is necessary that it be prepared for the purpose of *briefing* a minister; and this means much more than for the purpose of placing a document before a minister. In general parlance the word "briefing" means a short, accurate summary of the details of a plan or operation. The purpose of a briefing is to inform the person being briefed. Hence the exemption ought be limited to documents that have the character of briefing material. Generally a document will have such a character if it contains information or advice and is prepared for the purpose of being read by, or explained to, a minister. However a document will not have the character of briefing material merely because the document was prepared with the intention of physically placing the document before a minister.

Determination on s 28(1)(ba)

31 In terms of the requirements of Section 28(1)(ba), it was quite clear from the evidence that Documents 4, 7 and 7.1 were prepared for the substantial,[12] if not the sole purpose, of *briefing* the Minister in relation to the Strategy. They are clearly documents which serve that purpose in the way described by Morris J in *Ryan* (referred to above). Document 7 is a formal briefing note to the Minister. Document 7.1 is an attachment to it. And document 4 is a briefing, or explanatory document in a different form, namely, a PowerPoint presentation, about the same matters. They are not, for example, stand alone reports prepared for the purpose of informing further policy development or future legislation (contrary to the situation in *Re Cole and Department of Justice*[13] and *Re Della-Riva and Department of Treasury and Finance*[14]).

32 Nor is there any suggestion that they were they prepared merely for the purpose of being physically placed before the Minister (as with some of the

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[10] *Mildenhall v Department of Premier and Cabinet (No 2)* (1995) 8 VAR 478, at 290; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924, at [72].

[11] *Olexander v Department of Premier Cabinet* [2002] VCAT 497, at [46].

[12] It is enough if the sole purpose, or one of the substantial purposes, was to brief the Minister in relation to issues to be considered by Cabinet- *Ryan*, at [34].

[13] (1994) 8 VAR 114 at 126.

[14] (2005) 23 VAR 296 AT 412; [2005] VCAT 2083 at [48]. Note- This decision of Judge Davis VP was overturned by the Court of Appeal ([2007] VSCA 11) but in relation to the way in which the evidence was dealt with and the reasons expressed, rather than as to the legal test applicable.

documents in *Ryan* where the notion of documents not otherwise exempt under s 28 being sought to be brought within the Cabinet exemption merely by the device of physically placing them before a minister or Cabinet was referred to. That is definitely not the case here. Documents 4, 7 and 7.1 clearly contain high level advice about issues of great significance to the State, and they were clearly prepared for the purpose of being read by, or explained to, the Minister.

33 The key question here is whether the Strategy was an issue *'to be considered by the Cabinet'*. During the hearing, I queried whether, in the light of the fact that it took many months before Cabinet did consider the Strategy (and then only in part) the issues remained the same as when the briefing was prepared. Might it be the case that 'the issues' the subject of these February 2011 briefings further evolved over the course of 2011, such that it could not be said that the 'issues' considered by Cabinet when it did come to consider the Strategy, were not the same as those dealt with in the briefings?

34 Mr Hider's confidential witness statement noted that the headings used in the PowerPoint presentation (document 4) listing policy issues requiring consideration were taken up in the actual cabinet submission of 12 December 2011. It also contained a table which, paragraph by paragraph, drew attention to the similarity of content between substantial parts of document 7 and the actual cabinet submission of 12 December 2011.

35 However, it is clear, when comparing the two documents, that while the components of the briefing (and of documents 4 and 7.1) did make their way into the documents submitted to Cabinet, the latter were much more developed and extensive.

36 Further, and in my view more significant in the consideration of whether s 28(1)(ba) applies, is the level of certainty which the respondent had as to the Minister's position in relation to the Strategy. In my view, the situation was simply too uncertain in February 2011 for s 28(1)(ba) to apply.

37 Mr Hider said that when the Department prepared the documents, its purpose was to brief the Minister about issues which it had a reasonable expectation would be considered by the Cabinet. From the content of the documents and from the nature of the subject matter I can understand Mr Hider's statement that given the sensitivity of the issue, and the scale of the economic impact on the State, a decision on the Strategy was *'always going to the made by Cabinet'*, rather than being left for decision by the Minister alone. And (although it is not determinative[15]) that is what in fact transpired. The confidential witness statement of Mr Hider, and the confidential attachments to it, include Cabinet documents reflecting the process by which the matter was in due course dealt with by the Cabinet.

[15] *Ryan*, at [34].

38 Ms Acreman submitted however, that the respondent did not have the requisite intention and expectation that the Strategy would be considered by Cabinet. She submitted that because (as Mr Hider said in evidence) the incoming Coalition government did not have a policy in relation to coal allocation coming into the 2010 election, and it was not known what the Minister's position was prior to the 2 February 2011 meeting with him, it would be stretching s 28(1)(ba) too far (especially given the general principle in favour of disclosure underlying the FOI Act) to conclude that at that point the Strategy would be considered by Cabinet.

39 I agree. The words of Deputy President Macnamara (as he then was) in *Thwaites v Department of Health and Community Services*[16] (there in reference to the Metropolitan Ambulance Service) are equally applicable here, in relation to the issue of coal allocation: It too is a

> most controversial subject, both for the present government and its predecessor. There is every reason to think its problems will be discussed by Cabinet from time to time. However, this does not advance the status of this document beyond the status of the background reports considered by Ms Preuss in Cole's case[17]

40 Again similarly to *Thwaites*[18], there is nothing in the terms of documents 4, 7 and 7.1 here to suggest that they were prepared in the *'immediate contemplation'* of a discussion in Cabinet. I accept Mr Batskos' submission that as long as the terms of s28(1)(ba) are satisfied, the effluxion of time does not prevent it from applying. Nor is it necessarily fatal that no decision had been formally made that this matter would be taken to Cabinet. However, I find that in the uncertain circumstances of the initial meeting with the Minister in February 2011 described above, it cannot objectively be concluded that these documents were prepared for the purpose of briefing the Minister in relation to issues *'to be considered'* by Cabinet, in the sense required by s28(1)(ba). These documents were simply too early in the process, and the circumstances were too uncertain for them to fall within the expanded concept of Cabinet documents in s 28(1)(ba).

41 Nor do I accept that the documents in this particular case form part of a continuum of material in relation to issues *'to be considered by the Cabinet'*[19], which commenced with the intention of the former Minister to take the Strategy to Cabinet in 2009, and continued on until the consideration by the Cabinet of the new government in December 2011 (and indeed, would continue up until the time when the matter is finally definitively dealt with by Cabinet). Whilst Mr Hider might be confident in

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[16] Unreported, (No 1995/25696), AAT of Victoria, per Macnamara DP, Austlii reference [1995] VICCAT 58, under the heading 'Document 4'.
[17] *Re Cole and Department of Justice* (1994) 8 VAR 114.
[18] Unreported, (No 1995/25696), AAT of Victoria, per Macnamara DP, Austlii reference [1995] VICCAT 58, under the heading 'Document 4'.
[19] An argument might also conceivably be made that the use of the definite article has the effect that the provision can only be taken to refer to the Cabinet in the present government, not the previous government, however, this was not mentioned in the hearing, and I place no reliance on this point.

view of his knowledge of the history and practical implications of the Strategy that it would be taken up by the new government, it is stretching the meaning of s 28(1)(ba) too far to say it applies in circumstances where the new government had in fact given no indication of what its policy was. Mr Hider said that in the briefing he was in effect suggesting in a 'polite' way that this is a matter which should go to Cabinet.[20] This approach reflects the fact that he was waiting for a decision by the Minister as to what course the government wanted to take in relation to the Strategy - which, as a public servant, he would then implement.

42 Accordingly, Documents 4, 7 and 7.1 are not exempt under s28(1)(ba).

Section 30- internal working documents

43 Section 30 relevantly states:

> (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—
>
> (a) would 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, 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
>
> (b) would be contrary to the public interest.
>
> …
>
> (3) This section does not apply to a document by reason only of purely factual material contained in the document.

44 The applicant conceded that the requirements of s 30(1)(a) are satisfied. That is, it conceded that documents 4, 7 and 7.1 did contain matter in the nature of opinion, advice or recommendation prepared by officers of DPI, for the purpose of the deliberative processes of that agency. This concession was properly made. It is clear that s 30(1)(a) is satisfied.

45 So the key question is whether it would be contrary to public interest to release documents 4, 7 and 7.1.

Evidence for DPI

46 The following parts of Mr Hider's non-confidential Witness Statement are relevant to this question:

> [19] I was one of the Departmental officers who attended the briefing meeting with the Minister on 2 February 2011. Document 4 provided a broad

[20] This was not a situation like that in *Marple v Department of Agriculture* (1995) 9 VAR 29, where the decision had already been made to go to Cabinet, and the documents concerned the means of bringing the issue before Cabinet.

framework for the discussion but does not outline the full extent of the discussion.

[20] While the Minister had power under the Act to make a decision in relation to brown coal, the sensitivity of coal allocation and impact across various ministerial portfolios and the scale of potential economic impact on the State meant that the decision was *always going to be made by Cabinet*, rather than the Minister alone.

…

[26] The Strategy was still being developed and part of that development was to inform the Minister on the progress of the Strategy to the date of the document[21] and obtain his views on the Department's continued development of the Strategy.

[27] It would be contrary to the public interest to release this document as it would reveal high level development of government policy, which is still underway and has not yet been finalised.

[32] Document 7.1 is advice to the Minister on the legislative and regulatory environment for Victorian Brown Coal. It provides an overview and analysis of the legislation, previous action of government in relation to brown coal and options available to the Minister and context on the development of the Strategy.

[33] As stated previously, the Strategy was being deliberated on by government and was within the functions of the Department to develop.

[34] It would be contrary to the public interest to release documents which were prepared for the purpose of informing the Minister in relation to issues to be considered by both a sub-committee of Cabinet and Cabinet.

[35] Revealing the documents would reveal considerations that may or may not have led to decisions made by Cabinet. Disclosure of documents being considered at the highest levels of government that do not reflect actual decisions could produce ill-informed debate and confusion.

47 As stated, Mr Hider's Witness Statement, in dealing with Documents 10 and 14 (which are no longer the subject of dispute) indicated that Cabinet did subsequently proceed to deliberate on matters the subject of the requested documents. However, those deliberations only disposed of part of the matters covered by the Strategy (and that further work subsequently occurred at the Cabinet's request).

48 In his oral evidence, Mr Hider said that no final decision has been made about the matters contained in documents 4, 7 and 7.1. However, the Department has commenced the 'market assessment process'. This was made publicly known during 2012 via the DPI website.

[21] being 1 February 2011. Paragraph 26 appears in the part of Mr Hider's Witness Statement dealing with document 7. However, if applies equally to all three documents; 4, 7 and 7.1, which were prepared at or around the same time.

49 In his confidential evidence, Mr Hider made reference to concerns about the Government's commercial interests being prejudiced by the release of information, and possible probity concerns in the conduct of any future tender processes.

Evidence for the applicant

50 On behalf of the applicant, a witness statement and supplementary witness statement were provided by Mr Mark Wakeham, the campaign director of the applicant. Mr Wakeham also gave oral evidence. Mr Wakeham's Witness Statement said:

Climate Change and Energy Policy

[11] Climate change is a serious environmental threat.

[12] Measures to mitigate the effects of climate change by cutting carbon emissions have attracted much public attention, both internationally and at Federal and State-level.

[13] In Victoria, there has been a process spanning several years, in which policy and legislation about climate change have been developed with significant public engagement and consultation.

[14] The Premier's April 2008 Climate Change Summit was attended by more than 100 Victorian leaders from across different sectors. I attended the Summit on behalf of EV as acting Chief Executive Officer.

[15] In November 2008, following the Summit, EV published a report titled '*Turning it around: climate solutions for Victoria*'. A fact sheet summarising the report is annexed to my statement and marked 'MW-5'. The full report is available on the EV web-site. The report shows that significant reductions in Victoria's greenhouse gas emissions are possible and that government policy and investment is critical in achieving any reductions.

[16] EV participated in the Victorian Premier's ad hoc Round Tables on climate change in April 2008, April 2009 and July 2010 during development of the Victorian Government's Climate Change White Paper.

[17] On 3 June 2009 the Victorian Government released its Climate Change Green Paper for public comment. EV published a report titled *'The People's Climate White Paper'* in response to the Green Paper. This report was based on the report referred to in paragraph 15, above, and was supported by climate action groups and experts. This report is also publicly available on our web-site.

[18] In June 2009, the Victorian Government released the Climate Change Green Paper. This paper contains data outlining the contribution of electricity generation from brown coal to total greenhouse gas emissions of Victoria. Annexed to my statement and marked "MW-6" is a copy of the Climate Change Green Paper.

[19] In October 2010 the Victorian Government released its Climate Change White Paper - The Implementation Plan titled 'Taking Action for Victoria's Future'. This document recognises the significant role renewable energy technologies could play in reducing Victoria's greenhouse gas emissions. Annexed to my statement and marked 'MW-7' is a copy of The Implementation Plan.

[20] In November 2010, the Coalition, then in opposition, released its 'Energy and Resources' Policy. A copy of this document is annexed to my statement and marked 'MW-8'.

[21] Understanding the basis on which the government formulated its policy is essential to ensure public confidence in the accountability of government decision-making on this issue of considerable environmental; social; economic and fiscal significance to Victorians.

Coal allocations: advice/briefings/communication on coal allocations and correspondence between Exergen and Minister O'Brien and the Department of Primary Industries

[22] The Latrobe Valley is exempt from the ordinary exploration and mining licensing process under the *Mineral Resources (Sustainable Development) Act* 1990, on the basis that this will enable the orderly and optimal development of the Valley's coal resources. If an area is exempt from the ordinary licensing process, the Minister can allocate an exploration or mining licence to an applicant only after there has been a competitive tender process, or the Governor in Council can allocate a licence if she or he forms a view that it is in the 'State interest'. This process is known as the 'coal allocation' process.

[23] The Latrobe Valley has a vast supply of brown coal. According to the Department of Primary Industries (DPI) web-site, Victoria has the second largest brown coal resource in the world, with 13 billion tonnes of economic brown coal remaining unallocated. The DPI web-site also states that the government is currently conducting a 'market assessment' to inform its decision about whether to issue further coal allocations. A copy of the relevant page from the DPI web-site is annexed to this statement and marked 'MW-9'.

[24] On 20 March 2012, an article appeared in The Age stating that a draft cabinet submission revealed that the State Government proposed to issue new coal allocations in the Latrobe Valley. Annexed to my statement and marked 'MW10' is a copy of this article.

[25] In 2009 the Brumby Government had been considering undertaking a coal allocation from the Latrobe Valley, according to several newspaper articles. An example of such a newspaper article is annexed to my statement and marked 'MW-11'. Several companies, including Exergen and the Australian Energy Company, were reportedly actively seeking a coal allocation. EV led a campaign against the issue of further coal allocations. The campaign was

ultimately successful, with the Brumby Government deciding not issue a coal allocation to Exergen in late 2009. A copy of a media brief prepared by me as part of this campaign, which includes an extract from a report prepared on behalf of the previous government, as well as a letter signed by leaders of community and environment groups as well as climate scientists and climate change experts is annexed to this statement and marked 'MW-12'.

[26] On 14 December 2011 the Exergen CEO presented evidence to a Parliamentary Inquiry and outlined that his company was again seeking a coal allocation. A copy of the transcript of this hearing, which was before the Economic Development and Infrastructure Committee, is annexed to my statement and marked 'MW-13'. It was this evidence, presented to the hearing before the Parliamentary inquiry, which led me to make the request under the Freedom of Information Act seeking correspondence with Exergen, the Minister for Energy and Resources and the Department of Primary Industries. In the Public Hearing Exergen's CEO states that his company has been seeking a coal allocation since 2002 highlighting that this issue and Exergen's lobbying activities pre-date Cabinet consideration of a coal allocation.

[27] On 1 June 2012, an article appeared in the Herald Sun entitled 'Jobs bonanza in the new coal rush'. This article revealed that the Government had been in secret talks with various international power companies about coal allocations. Annexed to my statement and marked 'MW-14' is a copy of this article.

[28] Documents received pursuant to our FOI request to date also indicate that Exergen and other power companies have been having meetings and submitting material to the government in relation to the issue of further coal allocations. The material we have seen indicates for that several years these power companies have been lobbying government ministers in an effort to be awarded a coal allocation.

[29] Exploitation of the coal resources in the Latrobe Valley will have significant environmental and economic impacts on the State. Environmentally, the burning of an additional 13 billion tonnes of brown coal (whether in Victoria or internationally) would produce significant greenhouse gas emissions that would contribute to climate change.

51 Mr Wakeham's Supplementary Statement referred to petitions to the Premier which the applicant had organised, opposing further coal allocations, and supporting the strengthening of the feed-in tariffs. It also contained an estimate that burning of the unallocated brown coal in the Latrobe Valley would generate the equivalent of over 20 years worth of Australia's annual greenhouse gas emissions.

Submissions

52 The applicant submitted that DPI had not discharged its onus in demonstrating that release of these documents would be contrary to the public interest. It referred to the cautionary words of Gleeson C.J and Kirby J (in dissent, but not on this point) in *McKinnon v Secretary to the Department of Treasury*[22] to the effect a starting point should be that there is a general right of access to information, limited only be exceptions and exemptions necessary for the protection of public interests, and that any reference to a *'balancing exercise'* must commence from that starting point. The applicant also referred to the statement in *Maloney v Department of Human Services*[23] that the list of factors in *Re Howard*[24] is not a test, rather it is simply a list of useful matters to be taken into consideration (see below). The applicant submitted that the public interest in s 30(1) is largely directed towards protecting democratic processes, and that scrutiny of Government actions is an important aspect of this.

53 The applicant relied on the public interests in:

- Accountability of Government decision making.
- Monitoring the proper and lawful exercise of Government's duties, powers and functions under legislation.
- Community understanding of the way Government policy is formulated and applied, the bases for Government decisions and the manner in which public funds are expended.
- The public interest in the free availability and public disclosure of information about those matters and the management of state owned natural resources (including allocations to private interests) and the Government's response to climate change.
- The public interest in, relevantly, enabling community members and organisations to participate in an informed and meaningful way in debate about Victoria's energy supply, use of renewable energy resources and policy in response to climate change.

54 DPI referred to the description by the President of the Court of Appeal, Maxwell P in *Secretary, Department of Justice v Osland*[25] of the public interest considerations underlying s 30(1) as:

> 'the efficient and economical conduct of government, protection of the deliberative processes of government, particularly at high levels of Government and in relation to sensitive issues, and the preservation of confidentiality so as to promote the giving of full and frank advice'

[22] 2006 228 CLR 423 at [19]
[23] (2001) 18 VAR 238
[24] *Howard v Treasurer of the Commonwealth* (1985) 17 ALD 626
[25] 2007 VSCA 96 at [77]

55 The key public interest relied upon by the applicant is the promotion of informed public debate about issues of paramount importance to Victorians. It pointed to Mr Hider's evidence about the very large scale of potential economic impact on the State of the issue of brown coal allocation. The issue is also important in terms of providing jobs to Victorians. And of course, the applicant emphasised the issue of climate change. It stated Victorians are deeply concerned about climate change, and there is strong support for emission reduction targets.

56 In short, both parties agreed that the issues dealt with by the disputed documents are of high public interest, and more importantly for FOI purposes, high public importance. Where they differed, was as to the implications of this under s 30(1)(b).

57 Mr Batskos also referred to well known statement in *Howard v Treasurer of the Commonwealth*[26] in relation to s 36 of the *Freedom of Information Act* 1982 (Cth) (the Commonwealth equivalent of s 30 of the FOI Act) that, while each case must be determined on its own facts, the following general propositions can be made:

(a) the higher the office of the person between whom the communications pass and the more sensitive the is-sues involved in the communication, the more likely it will be that the communication should not be disclosed;

(b) disclosure of communications made in the course of the development and consequent promulgation of policy tends not to be in the public interest;

(c) disclosure which wilt inhibit frankness and candour in future pre-decisional communications is likely to be contrary to the public interest;

(d) disclosure, which will lead to confusion and unnecessary debate resulting from disclosure of possibilities considered, tends not be in the public interest;

(e) disclosure of documents which do not fairly disclose the reasons for a decision subsequently taken may be unfair to a decision maker and may prejudice the integrity of the decision-making process.

58 Mr Batskos also stated that the Supreme Court has previously held that there is no reason why a document falling outside s 28 but having, in a general sense, the character of a Cabinet document, might not fall within one of the other exemptions such as s 30[27].

Determination on s 30

59 With the exception of the first one and a third pages of document 7.1, I find that the respondent has discharged its onus of showing that it is contrary to

[26] (1985) 7 ALD 626
[27] *Department of Premier and Cabinet v Birrell (No.2)* [1990] VR 51 per Gobbo J

the public interest for documents 4, 7 and 7.1 to be released. These documents are clearly for the purpose of briefing the new Minister for Energy and Resources in the new government elected in November 2010 on issues of the utmost importance to Victorians. Not surprisingly, the evidence indicates the issue of coal allocations is one of great sensitivity and complexity, including in relation to the way in which information is disseminated in the public realm. In mid-2012, the Government announced that it had commenced a 'market assessment process' for the allocation of brown coal. It is significant, however, that the decision making process in this instance is otherwise still ongoing.

60 I accept Mr Hider's evidence that there is some danger that the preliminary comments of officers in the briefings could be misconstrued as representing the views of the government. Also, as explained in evidence, the dates which appear on document 7 are misleading. I further accept that given the high stakes involved, there is a danger that some of the content might prejudice the position of the government in dealing with commercial entities- Mr Hider said that if the respondent knew that the briefing was to be released, it would have been expressed in less 'stark' terms. I also accept the statements in Mr Hider's confidential witness statement in this regard.

61 Having reviewed the disputed documents, I note that some of their content is reasonably 'big picture' in nature, as might be expected for an initial briefing to a new minister on a major topic in his portfolio. However, such broader type statements in the documents have the potential to mislead, as they are not statements of the government, but rather, summaries of the views of the Department officers for the purpose of briefing the Minister about aspects of the 'landscape' in relation to coal allocations.

62 They also contain a reasonable amount of factual information. With the exception of the first one and a third pages of document 7.1, however, I have concluded it is not possible to separate out the factual material from the non-factual material in a way which produces a redacted document in coherent form. That is, the factual matters are so intertwined with the analysis, advice, strategic considerations and references to future options that the documents produced would not be meaningful in terms of the request made by the applicant.[28]

63 I accept that the public interest considerations relating to the provision of information held by the government to the public, the promotion of debate on matters of vital public interest and the scrutiny of government decision-making. However, in relation to these three documents (except for part of document 7.1) I find that interest is outweighed by the public interest in the Minister being able to receive briefing material of this nature confidentially without concerns that it will be ventilated in the public arena.

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[28] *Honeywood v Department of human Services* [2006] VCAT 2048 at [26];

64 The importance of the subject matter dealt with in the disputed documents raises the significance of the public interest factors relied on by the applicant. But at the same time, it raises the significance of the public interest factors relied on by the respondent as well.

65 The evidence of the formalisation of policy being put on hold in 2009 due to a leak of Cabinet documents, in my view is an indication of how difficult and complex for Government, management of policy development in this area is. The Tribunal's role is of course to make an objective judgement about the public interest in each case which comes before it. Where an applicant is opposed to a particular policy direction by government, or seeks to influence it, it may perceive it to be in its interests, and in the public interest, to have publicised information which makes it more difficult for a government to progress that policy in the world of real politics.

66 However, the Tribunal must always seek 'to play a straight bat' in making a judgement in a particular instance about where the public interest lies, in the context of our democratic system of government. It is true nowadays, as much as ever, that the public interest will sometimes be in favour of restricting the release of information, and sometimes be in favour of release.

67 In this case, the first of the 'Howard factors' – the high level of these briefings, and the sensitive issues involved, in my view, here constitutes a public interest against disclosure. These are briefings to the Minister by the most senior officers of the Department. And they relate to matters which are the subject of ongoing consideration.

68 The similarity of the content of these documents with the subsequent Cabinet documents on these issues supports the conclusion that these are high level communications dealing with sensitive issues. Whilst I have found that these documents do not satisfy the requirements of section 28(1)(ba), their reasonably proximate relationship to the Cabinet process supports the application of s 30 to them.[29] In relation to 28(1)(ba), I found in effect that these documents were at too early a stage to be exempt. However, those same 'preliminary' characteristics tend to favour exemption under s 30.

69 The applicant indicated it did not pursue the public interest override under s 50(4) of the FOI Act in relation to the s 30 claims. I agree the override does not apply.

DOCUMENT 19 – THE PFIT SCHEME

70 Document 19 is a four page briefing by the Department to the Minister dated 4 January 2011. It relates to the PFiT scheme.

71 In his non-confidential witness statement, Peter John Clements, the Principal Policy Officer, Energy Sector Development at DPI said:

[29] *Department of Premier and Cabinet v Birrell (No.2)* [1990] VicRP 5; [1990] VR 51, and *Re Evans and Ministry for the Arts* (1986) 1 VAR 315 at 322.

[9] The PFiT scheme commenced on 1 November 2009 and offered eligible households, businesses and community organisations with solar systems of 5 kilowatts or less a credit of at least 60 cents per kilowatt hour for excess electricity fed back into the grid. Customers who formally participate in the Premium FiT scheme are entitled to receive the 60 cent credit until 1 November 2024.

[10] Section 40FE of the PFiT Act provided the Minister for Energy Resources ("Minister") with power to declare the PFiT scheme at the capacity if he or she was satisfied that either:

(a) a capacity of qualifying solar energy generating facilities as equal to or greater than 100 megawatt had been reached; or

(b) the average cost per customer of electricity every year arising out of the operation of the PFiT scheme was $10 or more;

whichever occurred first.

….

[11] The documents in dispute in this proceeding were created in anticipation of the PFiT scheme reaching at least one of its statutory thresholds during calendar year 2011…

[12] At the start of 2011, the Department could see indications of strong take-up of the PFiT scheme, and that the rate of take-up was increasing. In particular, the Department increasingly believed that the capacity threshold outlined in the PFiT Act would be reached towards the end of the 2011 calendar year. The Department wanted to assist the Minister managing the potential closure of the PFiT scheme.

72 DPI did not claim that Document 19 was exempt under Section 28(1)(ba). Mr Clements said:

[16] … While it was not evident at the commencement of 2011 that the minister would go to Cabinet with any proposals to close the scheme, it was evident to the Department in early May 2011 that the Minister wished to do so…

73 In relation to document 19, Mr Clements said:

[18] Document 19 is a briefing dated 4 January 2011 and prepared by an officer of the Department under my supervision. It is the first document in the series of briefings that were created to inform the Minister about the status of the PFiT scheme and provide him with advice on potential courses of action on the scheme's future.

[19] Document 19 includes review, commentary and recommendations on the PFiT scheme. It was created and endorsed by the Department to inform the Minister in his decision making.

[20] The PFiT Act had a number of reporting points in time where industry was required to provide figures to the Minister on several aspects of PFiT scheme activity, including the number and capacity of solar installations. The Department also obtained informal data from the distributors, which assisted in interpreting the formal figures (that is the figures required under statutory reporting requirements) provided by distributors and retailers.

[21] Document 19 advised the Minister of the figures obtained from the November 2010 distributor reports and indicated the State's progression toward the PFiT legislative cap.

[22] The Minister did not 'approve' the briefing and it was returned to the Department unsigned but with a handwritten note indicating that the briefing had been overtaken by events. The note was written by a person I know to be a senior advisor in the Minister's office.

[23] If document 19 were released it would reveal information, comment and recommendations made by the Department to the Minister but not approved by him. The Department wanted to obtain the Minster's view on a proposed course of action but no view was given.

[24] The Department made two recommendations to the Minister which are identified at paragraphs 12 and 13 of Document 19. As there was no approval of this briefing by the Minister, its recommendations were not implemented. Release of this document would potentially mislead the public as to the Minster's views at this time.

[25] Paragraph 12 of document 19 contemplates a Government decision to close the PFiT scheme when the capacity threshold is reached, and hence directly reflects the development of Government policy on the matter. This aspect of policy was in its initial stage at the time of drafting. Revealing the recommendations made may mislead the public on the Minister's views at the time, and create a false impression as to the decisions made subsequently by Cabinet in relation to the PFiT scheme.

74 In his witness statement Mr Wakeham said that in January 2012, the Government reduced feed-in tariffs from the 'premium feed-in tariff' of 60 cents per kilowatt power of electricity fed back into the electricity grid, to the 'transitional feed-in tariff' of 25 cents per kilowatt power fed into the electricity grid. He referred to the publication on the DPI website of details of this decision. These include updated figures as to the take-up of solar panels in Victoria, and information for consumers about the new standard feed-in tariff of 25 cents per kilowatt-hour.

75 The applicant again conceded (properly) that document 19 contained matter in the nature of opinion, advice or recommendation, prepared by officers of

DPI, for the purpose of deliberative processes of the agency. This leaves to be determined the question under section 30(1)(b) – whether release of the briefing would be contrary to the public interest.

76 The respondent contended that release of document 19 would be contrary to the public interest because it would potentially mislead the public. In support of this, it referred to the fact that the briefing was not signed by the Minister, but was returned six months later, bearing an annotation by Senior Ministerial advisor that it had been 'overtaken by events'. None of the three boxes on the document had been ticked: 'Approved', 'Not Approved' and 'Returned for Review'. Thus, it was contended this was the equivalent of a possible parliamentary question (PPQ) - it reflected the views of officers of the Department, but not of the Minister.

77 There was no evidence one way or the other as to whether the Minister read document 19. It is possible he did not read it. Equally, it is possible that he did read it, but that it was not returned in accordance with the Departmental processes. In any event, I do not think the analogy with PPQs is apt. It was a briefing in relation to actual policy development, rather than a suggested answer to a question in parliament, and it does not appear out of kilter, or at odds with events which transpired.

78 I find that the respondent has not discharged its onus of showing that it would be contrary to public interest to release document 19. A key consideration is that the policy on PFiT was announced in January 2012, and so, in contrast to the coal allocation briefing, the decision-making process it refers to has been completed. Further, much of the document comprises factual material which is not exempt under s 30(3). Where it comprises opinion, this consists of conclusions which are obvious from the factual material.

79 In cross examination, Mr Clements conceded that if readers were aware that the document was dated 4 January 2011 (that is, 12 months before the final decision was made) they would not be confused. In fact, readers *would* be aware of that, because the document bears the date 4 January 2011 on page 2. To the extent that it contains figures about the rate of take-up of solar panels by electricity consumers which differ from those subsequently released to the public, the differences are not significant and would not mislead.

80 The phrase 'overtaken by events' might ordinarily suggest that the document went off in a different direction to the way in which events transpired. That is not the case here however. I do not see anything of significance in document 19 which differs from the course of events which actually occurred. Hence, I see that notation as referring more to the fact that the formal processes for dealing with the briefing note in January 2011 were not followed through, rather than that the briefing note had proceeded in a different direction to the actual development of Government policy.

81 I find that document 19 is not exempt under s 30.

Jonathan Smithers
Senior Member

JS:RB