

## Notice of Decision and Reasons for Decision

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Applicant:	'AF8'
Agency:	Monash University
Decision Date:	13 June 2019
Exemptions considered:	Sections 30(1), 35(1)(b)
Citation:	'AF8' and Monash University ( <i>Freedom of Information</i> ) [2019] VICmr 53 (13 June 2019)

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FREEDOM OF INFORMATION – investigation into alleged student misconduct – internal working documents – information communicated in confidence

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 in that I have decided to release additional information in the documents.

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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
13 June 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to:

All documents, including but not limited to, correspondence, witness statement, notes of records of meetings, conversations or telephone conversations, file notes, emails and transcripts of text messages relating to complaints made against me in or about [specified time period] relating [to]:

- (a) an allegation that on [date] I saw a patient at [specified hospital] for a [medical procedure], and in the course of the consultation, that I [list of allegations]; and
- (b) [allegation].

All documents, including but not limited to, correspondence, witness statements, notes of records of meetings, conversations or telephone conversations, file notes emails and transcripts of text messages relating to any investigation(s) carried out into allegations (a) and (b) above.

2. In its decision, the Agency decided to release 72 pages of outside the FOI Act and the remaining information was released in part or refused in full.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. On 25 March 2019, the Applicant advised OVIC [they do] not seek review of documents subject to legal professional privilege exempted by the Agency under section 32. Accordingly, these documents are not subject to review.
5. I have examined copies of the documents 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 all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application;
  - (c) the Agency's submission dated 20 March 2019; and
  - (d) communications between OVIC staff and the Applicant.
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.

## Review of exemptions

9. The Agency relied on the exemptions under sections 30(1), 32(1) and 35(1)(b) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

### **Section 30(1)**

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>

*Do the documents contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

12. Having reviewed the documents, I am satisfied they contain the corresponding Agency officers' opinions, recommendations and consultations in the course of the Agency managing the allegations raised against the Applicant.

*Were the communications made in the course of the Agency's deliberative processes?*

13. I am satisfied the above information was provided in the course of the Agency's deliberative processes relating to the investigation and management of complaints relating to the professional conduct of students while on placement.

*Would release of the information be contrary to the public interest?*

14. In its submission, the Agency stated disclosure would be contrary to the public interest due to:

- (a) the sensitive nature of the communications in the documents;
- (b) disclosure of various possibilities considered by the Agency – but not eventually adopted – would be likely to lead to confusion and ill-informed debate;
- (c) disclosure of deliberative information in the documents would inhibit frank and candid communications between the Agency's staff when managing similar situations in the future; and
- (d) the necessity of the Agency to have comprehensive discussions relating to internal issues when investigating the professional behaviour of students while on external placements.

15. Having reviewed the documents, I acknowledge inquiries conducted into student behaviour are sensitive in nature and depend on receipt of candid information and discussions to determine a fair and appropriate outcome. Having carefully reviewed the emails and the context in which they were provided, I am satisfied it would be contrary to the public interest to release the documents. The following factors have informed my decision:

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

- (a) Release of the documents would disclose the deliberative processes of the Agency in determining how to approach behavioural issues concerning students. I note the sensitivity of the documents and I consider students, the subject of a complaint, are entitled to understand the outcome of a process conducted by an agency that concerns them. However, this does not equate to a right of access to all documents prepared by an agency, where release may undermine the integrity of the agency's processes designed specifically to address conduct of its students.
  - (b) I appreciate the Applicant has a strong personal interest in obtaining access to the information. The information to which [they are] denied concerns [them] and [their] work performance as a student on an external placement. Further, I acknowledge a broader public interest in disclosure where it is clear from the face of a document there may be a miscarriage of process or legitimate questions are raised as to the appropriateness or fairness of an outcome reached. However, in this case, there is nothing in the documents to suggest there was anything unusual about the way in which the Agency conducted the process. Therefore, I am not satisfied there is a broader public interest that would be promoted by disclosure of the document.
  - (c) I consider the Agency's internal assessment and deliberative process requires its officers to discuss a number of relevant issues before deciding on an outcome. In such circumstances, it is desirable for the officers involved to seek and exchange opinions in an open and candid way. I consider the release of preliminary deliberations and consultations would reasonably discourage Agency officers from recording similar communications in the future. This would be contrary to the public interest as it would have a detrimental effect on the ability of an agency to conduct a thorough and considered process, which in turn would compromise the outcome of any similar process.
16. However, I also note certain information in the documents is procedural or administrative in nature and the release of this information would not be contrary to the public interest as it is unlikely to mislead the public or stifle internal discussion and debate.
17. Section 30(3) excludes purely factual matters from being exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt (or irrelevant) matter deleted. I am of the view certain factual information in the documents is intertwined with deliberative material such that deleting exempt information would render the document meaningless.
18. Accordingly, I have determined certain information in the documents is exempt from release under section 30(1). The Schedule of Documents in **Annexure 1** provides further details on my decision.

***Section 35(1)(b)***

19. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

*Was the information in the documents communicated in confidence?*

20. Whether information communicated by an individual was communicated in confidence is a question of fact.<sup>2</sup> When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>3</sup> Confidentiality can be express or implied from the circumstances of a matter.<sup>4</sup>
21. As discussed above, the information in the documents was communicated between the Agency officers in course of the Agency's investigation and management of a complaint relating to the Applicant's professional behaviour while on placement. I accept certain information in the documents was obtained by and provided to the Agency in confidence.

*Would disclosure of the confidential information impair the Agency's ability to obtain similar information in the future?*

22. In its submission, the Agency submitted:

There is a real chance that people would be unwilling to provide relevant information and expertise or to communicate with their colleagues and supervisors in a full and frank manner during deliberative processes if they believed that their confidential communications could be released under the FOI Act.

23. In my consideration of section 30(1), I have discussed my views on the importance of the Agency's deliberative processes concerning the management of complaints about its students. I accept the Agency's submission release of this information could impact on the Agency's ability to receive detailed information in the course of its investigations.
24. However, I also am of the view the release of information that is procedural or administrative in nature would not have an adverse impact on the Agency's investigative processes because disclosure of such information would not impair the Agency's ability to obtain similar information in the future. Accordingly, I have determined procedural or administrative information in the documents is not exempt under section 35(1)(b).

### ***Deletion of exempt or irrelevant information***

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister 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>5</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>6</sup>
27. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request because, on 15 January 2019, the Applicant advised the Agency [they were] agreeable to receiving de-identified documents. Accordingly, the Agency deleted personal affairs information as being irrelevant. Additionally, the Applicant has agreed to exclude any information subject to legal professional privilege from the scope of this review.

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<sup>2</sup> *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>3</sup> *Ibid*, XYZ at [265].

<sup>4</sup> *Ibid*.

<sup>5</sup> *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 [82].

<sup>6</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

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

## ***Conclusion***

29. Having considered the relevant exemptions, I am satisfied certain information is exempt under section 30(1) and 35(1)(b). However, I have determined that some information in the documents is not exempt under these exemptions.
30. As it is practicable to delete exempt information from the documents, I have determined to release additional information in the documents to the Applicant.
31. The Schedule of Documents in **Annexure 1** contains a brief summary of my decision with respect to each document.

## **Review rights**

32. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>7</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>8</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>9</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>10</sup>

## ***When this decision takes effect***

37. I have decided to release documents that contain information provided in confidence by third parties.
38. The relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.
39. For that reason, my decision does not take effect until that 60 day period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

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

<sup>8</sup> Section 52(5).

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

<sup>10</sup> Sections 50(3F) and (3FA).

## Annexure A – Schedule of Documents

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	[Date]	Email	2	Refused in full Section 32(1)	Not subject to review	Out of scope of the review: On 25 March 2019, the Applicant excluded from review documents subject to legal professional privilege and exempted under section 32(1). Accordingly, this document is not subject to review.
2	[Date]	Email	8	Released in part Sections 32(1), 25	Release in part Section 25	Out of scope of the review: See comments for Document 1.  Section 25: The decision letter states, on 15 January 2019, the Applicant agreed to accept documents with redactions and for documents to be de-identified. As this information is out of scope of the FOI request, it is irrelevant to the review.
3	[Date]	Email	3	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
4	[Date]	Email	3	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
5	[Date]	Email	1	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.



Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
6	[Date]	Email	3	Released in part Sections 32(1), 25	Release in part Section 25	See comments for Document 2.
7	[Date]	Email	3	Released in part Sections 32(1), 25	Release in part Section 25	See comments for Document 2.
8	[Date]	Email	7	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
9	[Date]	Email	1	Released in full	Not subject to review	This document has been released to the Applicant in full.
10	[Date]	Email	5	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
11	[Date]	File Note	4	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
12	[Date]	Email	10	Released in part Sections 32(1), 25	Release in part Section 25	See comments for Document 2.
13	[Date]	Email	3	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
14	[Date]	Email	3	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
15	[Date]	Email	7	Released in part Sections 32(1), 25	Release in part Section 25	See comments for Document 2.

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
16	[Date]	Email	9	Released in part Sections 32(1), 25	Release in part Section 25	See comments for Document 2.
17	[Date]	Email	1	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
18	[Date]	Email	4	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
19	[Date]	Email	5	Released in part Sections 32(1), 25	Release in part Section 25	See comments for Document 2.
20	[Date]	Email	1	Released in part Sections 32(1), 25	Release in part Section 25	See comments for Document 2.
21	[Date]	Email	6	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
22	[Date]	Email	1	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
23	[Date]	Phone file note	1	Refused in full Section 32(1)	Not subject to review	This is a file note drafted by the Agency's legal officer. See comments for Document 1.
24	[Date]	Email	2	Refused in full Section 32(1)	Not subject to review	See comments for Document 1.
25	[Date]	Email	3	Released in part	Release in part	See comments for Document 2.

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Section 25	Section 25	
26	[Date]	Email	8	Released in part Section 25	Release in part Section 25	See comments for Document 2.
27	[Date]	Email	14	Released in part Sections 32(1), 25	Release in part Section 25	See comments for Document 2.
28	[Date]	Email	1	Released in part Sections 25	Release in part Section 25	See comments for Document 2.
29	[Date]	Email	24	Released in part Sections 30(1), 32, 33, 25	Release in part Section 25	See comments for Document 2.
30	[Date]	Email	2	Released in part Section 25	Release in part Section 25	See comments for Document 2.
31	[Date]	Email	1	Released in full	Not subject to review	This document has been released in full to the Applicant.
32	[Date]	Email	2	Released in part Section 25	Release in part Section 25	See comments for Document 2.
33	[Date]	Email	3	Released in part Section 25	Release in part Section 25	See comments for Document 2.
34	[Date]	Email	2	Released in part Section 25	Release in part Section 25	See comments for Document 2.

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
35	[Date]	Email	41	Released in part Section 25	Release in part Section 25	See comments for Document 2.
36	[Date]	Email	2	Released in part Section 25	Release in part Section 25	See comments for Document 2.
37	[Date]	Email	13	Released in part Sections 30(1), 35(1)(b), 25	<p>Release in part Sections 30(1), 35(1)(b), 25</p> <p>The following information is exempt from release under section 30(1):</p> <ul style="list-style-type: none"> <li>- Emails sent on [specified date and times].</li> </ul> <p>The following information is exempt from release under section 35(1)(b):</p> <ul style="list-style-type: none"> <li>- Email sent on [specified date and time]</li> <li>- Email sent on [specified date and time]</li> </ul> <p>The following information is not exempt and is to be released to the Applicant:</p> <ul style="list-style-type: none"> <li>- Emails sent on [specified date and times]</li> </ul>	<p>Section 25: See comments for Document 2.</p> <p>Section 35(1)(b): The information provided to the Agency in confidence by a third party during the investigation is exempt under section 35(1)(b). However, any administrative or procedural information is not exempt under section 35(1)(b).</p> <p>Section 30(1): It is contrary to the public interest to release information related to the Agency's deliberative processes in the course of managing a complaint about the Applicant's conduct. However, any administrative or procedural information is not exempt under section 30(1).</p>

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>- Emails sent on [specified date and times]</li> <li>- Email sent on [specified date and time] .</li> </ul> <p>Irrelevant information relating to personal affairs information is exempt under section 25.</p>	
38	[Date]	Email	16	Released in part Sections 30(1), 35(1)(b), 25	<p>Release in part Sections 30(1), 25</p> <p>The following information is exempt under section 30(1):</p> <ul style="list-style-type: none"> <li>- Email sent on [specified date and times];</li> <li>- Email sent on [specified date and time]</li> <li>- Emails sent on [specified date and times]</li> <li>- Email sent on [specified date and times]</li> <li>- Email sent on [specified date and time]</li> <li>- Email sent on [specified date and times]</li> </ul>	<p>Section 25: See comments for Document 2.</p> <p>Section 30(1): See comments for Document 37.</p>

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>- Email sent on [specified date and time]</li> </ul> <p>The following information is not exempt and is to be released to the Applicant:</p> <ul style="list-style-type: none"> <li>- Emails sent on [specified date and times].</li> </ul> <p>Irrelevant information relating to personal affairs information is exempt under section 25.</p>	
39	[Date]	Email	2	Released in part Sections 32, 25	Released in part Section 25	See comments for Document 2.
40	[Date]	Email	1	Refused in full Sections 30, 25	Refuse in full	Section 30(1): See comments for Document 37.
41	[Date]	Letter	3	Released in part Section 30	Release in full	Section 30(1): The Applicant has the final version of the document. The draft version has minor differences compared to the final version. Disclosure would not be misleading.
42	[Date]	Letter	3	Released in part Section 30	Release in full	See comments for Document 41.
43	[Date]	Email	4	Released in part	Release in part	See comments for Document 2.

Doc	Date	Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Section 25	Section 25	
44	[Date]	Email	2	Released in part Section 25	Release in part Section 25	See comments for Document 2.
45	[Date]	Email	4	Released in part Section 25	Released in part Section 25	See comments for Document 2.
46	[Date]	Email	5	Released in part Sections 30, 25	<p>Release in part Sections 30(1), 25</p> <p>The following information is exempt from release under section 30(1):</p> <ul style="list-style-type: none"> <li>- The emails sent on [specified date and times].</li> </ul> <p>Irrelevant information relating to personal affairs information is exempt under section 25.</p>	<p>Section 25: See comments for Document 2.</p> <p>Section 30(1): See comments for Document 37.</p>
47	[Date]	Email	3	Released in part Section 25	Release in part Section 25	See comments for Document 25.
48	[Date]	Email	1	Released in part Section 25	Release in part Section 25	See comments for Document 25.
49	[Date]	Email	2	Released in part Section 25	Release in part Section 25	See comments for Document 25.