

Notice of Decision and Reasons for Decision

Applicant:	'AG2'
Agency:	Department of Education and Training
Decision Date:	25 June 2019
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'AG2' and <i>Department of Education (Freedom of Information)</i> [2019] VICmr 56 (25 June 2019)

FREEDOM OF INFORMATION – internal working documents – irrelevant information – personal affairs information

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.

Sven Bluemmel
Information Commissioner

25 June 2019

Reasons for Decision

Background to review

1. On 18 March 2019, the Applicant made a request to the Agency for access to:

Any and all documents and records whatsoever in physical form or electronic form, including but not limited to: emails, letters, database entries, memoranda, referrals, records of conversation, file notes, telephone call notes that DECV staff or contractors possess, created, or have known to exist, including but not limited to documents and records held by DECV, created by a staff member or contractor of DECV and received and sent by a staff member or contractor of DECV about, in any way relating to or naming the following people:

(1) [The Applicant]

(2) [The Applicant's child]

2. In its decision letter dated 8 April 2019, the Agency identified 31 documents falling within the terms of the Applicant's request. It decided to grant access to 29 of those documents in full, and two documents (being Documents 10 and 11) in part.

Review

3. On 24 April 2019, the Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refusal to grant access to all documents in full.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated 8 April 2019;
 - (b) the Applicant's review application, dated 24 April 2019;
 - (c) the Applicant's submission, dated 7 May 2019; and
 - (d) the Agency's written submission, dated 6 May 2019 and 22 May 2019.
7. 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

8. The Agency relied on the exemptions under sections 30(1) and 33(1). The Agency's decision letter sets out the reasons for its decision.

Section 30(1) – Internal working documents

9. 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;
- (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.

10. The exemption does not apply to purely factual material.¹

Do the documents disclose matter in the nature of opinion, advice or recommendation, or consultation or deliberation?

11. The Agency has applied section 30(1) to information contained in Document 11.

12. The Document is a record of comments relating to the education of the Applicant's child. It contains recitations of facts, recordings of conversations, and action tasks.

13. It has been held that the words 'opinion, advice or recommendation' convey a meaning of matters in the nature of a 'personal view', 'an opinion recommended or offered' or a 'presentation worthy of acceptance'.² It is not necessary that the document in question be in the nature of opinion, advice or recommendation. Rather, its release must disclose matter of that nature.

14. Notably, it has been held the following do not constitute matter in the nature of opinion, advice or recommendation:

- (a) the recitation of present existing facts³
- (b) the recording of events such as a conversation with the applicant⁴
- (c) a statement of intention,⁵ and
- (d) an internal document by which one officer informed another of a sequence of events.⁶

15. I am not satisfied Document 11 discloses matter in the nature of opinion, advice or recommendation.

16. A document may fall within section 30(1) even if it does not contain matter in the nature of opinion, advice or recommendation if it discloses matter in the nature of consultation or deliberation.

17. The term 'deliberative processes' has a wide meaning. In *Re Waterford and Department of Treasury (No. 2)*, the Commonwealth Administrative Appeals Tribunal held:

... "deliberative process" [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 decision or a course of action.

¹ Section 30(3).

² *Halliday v Office of Fair Trading* (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

³ *Pullen v Alpine Resorts Commission* (unreported, AAT of Vic, Macnamara DP, 23 August 1996).

⁴ *Re City Parking Pty Ltd* (1996) 10 VAR 170.

⁵ *Ibid.*

⁶ *Ibid.* See also *Porter v Police (Vic)* [2005] VCAT 962, where the VCAT stated at [23] that it took the AAT to be saying that 'advice' must be 'something better' than mere 'informing'.

18. I am satisfied Document 11 contains matter in the nature of consultation and deliberation.

Was the consultation or deliberation disclosed in the document provided in the course of, or for the purpose of, the deliberative process of the Agency?

19. I am satisfied the consultation and deliberation disclosed in the document was provided in the course of the Agency's deliberative process regarding stakeholder management.

Would disclosure of the documents be contrary to the public interest?

20. In deciding whether disclosure of the information would be contrary to the public interest, it is necessary to balance relevant considerations, remaining mindful the object of the FOI Act is to facilitate and promote disclosure of information.

21. I have considered the following matters in determining release of the information would not be contrary to the public interest:

- (a) The nature of the information - I am satisfied a significant portion of the information contained in the Document is already known to the Applicant; it refers to email and other correspondence between the Applicant and Agency officers. I consider the remaining information to be an uncomplicated and innocuous recording of fact relating to stakeholder management and administrative process. I consider this factor to weigh in favour of disclosure.
- (b) Frankness and candour - Having considered the mostly factual and innocuous nature of the information, I do not consider release would have an impact on the way in which Agency officers might express themselves in the future. I consider this factor to weigh in favour of disclosure.
- (c) Consequences of disclosure - Disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose. Having considered the nature of the information and the nature of the Documents, I do not consider the consequences of disclosure to be contrary to the public interest.

22. In light of the above, I am not satisfied any part of Document 11 is exempt under section 30(1).

Section 33(1) – Documents containing personal affairs information

23. The Agency has applied section 33(1) to information contained in Documents 10 and 11.

24. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicants;⁷ and
- (b) such disclosure would be 'unreasonable'.

25. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.⁸ It has also been held information relates to a person's personal affairs if it 'concerns or affects that person as an individual'.⁹

⁷ Sections 33(1) and (2).

⁸ Section 33(9).

⁹ *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

26. The Victorian Civil and Administrative Tribunal (**VCAT**) has held a document will disclose personal affairs information if the document is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.

Do the documents contain the 'personal affairs information' of individuals other than the Applicant?

27. The Documents contain the names of individuals other than the Applicant, being the names of Agency officers.

Would release of the personal affairs information be unreasonable?

28. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
29. I have determined disclosure of the personal affairs information contained in the documents is not unreasonable for the following reasons:

- (a) Nature of the personal affairs information and the circumstances in which it was obtained –
The personal affairs information comprises the names of six Agency officers.

I do not consider there to be anything particularly sensitive or confidential about the names of the individuals contained in the present Documents. The individuals were carrying out their usual employment duties.

- (b) Whether the individuals to whom the information relates object, or would be likely to object to the release of the information –

Agency Officer 1: The Agency submits an attempt was made to consult, and no response was received. The Agency submits the individual is a junior member of staff, and as such, the information would be unreasonable to release.

Agency Officers 2 and 3:

The Agency submits no attempt was made to consult, as the information had been exempted under section 30(1).

Agency Officers 4, 5 and 6:

There is no information before me to suggest the Agency consulted with these officers.

- (c) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved –

The FOI Act provides a general right of access that can be exercised by any person regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.

There is no information before me in relation to the Applicant's motive or purpose for seeking the information.

30. Accordingly, I have determined that the personal affairs information of the six Agency officers be released to the Applicant.

Deletion of exempt or irrelevant information

31. 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.
32. The Agency assessed information in Document 11 as being irrelevant because it post-dated the day the Applicant's request became valid.
33. I have considered the heading under which the date of the entries appear is entitled 'last altered date'. Consultation with the Agency confirmed the 'last altered date' reflects the date and time the entry was updated, not the date and time the entry was first recorded in the system.
34. The Agency submits it is not possible to wind back the clock to seek a copy of the Document as it existed on the date the Applicant's request became valid.
35. I am satisfied the information contained in Document 11 and assessed as being irrelevant by the Agency is not subject to exemption.
36. In light of the above and having regard to the object of the FOI Act, I have determined to release the information contained in Document 11 which was previously assessed as being irrelevant by the Agency.

Conclusion

37. On the information available, I am satisfied the exemptions in sections 30(1) and 33(1) do not apply to the Documents.
38. Accordingly, I have decided to grant access to additional information contained in the Documents to the Applicant.
39. The Schedule of Documents in **Annexure 1** contains details of my decision with respect to each document.

Review rights

40. 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.¹⁰
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
43. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.

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

¹¹ Section 52(5).

¹² Section 52(9).

44. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹³

When this decision takes effect

45. I have decided to release documents that contain information relating to the personal affairs of third parties.
46. 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.
47. 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.

¹³ Sections 50(3F) and (3FA).

Annexure 1 –Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision
10.	Various	Student Summary – [name of student]	2	Release in part Section 33(1)	Release in full
11.	Various	Student Comments – Maintain – [name of student]	3	Release in part Sections 30(1), 33(1), 25	Release in full