

## Notice of Decision and Reasons for Decision

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| Applicant:             | 'AH2'  |
| Agency:                | Austin Health  |
| Decision Date:         | 18 July 2019   |
| Exemptions considered: | Section 30(1)  |
| Citation:              | 'AH2' and Austin Health ( <i>Freedom of Information</i> ) [2019] VICmr 65 (18 July 2019) |

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FREEDOM OF INFORMATION – recruitment process documents – internal working documents – public interest considerations

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 is the same as the Agency's decision in that I have decided to refuse access to the documents in full.

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

18 July 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to documents regarding the Applicant's unsuccessful application for employment.
2. By an undated letter, the Agency notified the Applicant it had identified reference assessments and an interview record as falling within the terms of the Applicant's request. It decided to refuse access to the documents 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. I have examined copies of the documents subject to review.
5. The documents comprise two Interview Assessment Records (Documents 1 and 2) and two referee checks (Documents 3 and 4).
6. During the review, the Agency advised additional documents to those outlined above were identified when processing the Applicant's request which would be released to the Applicant in full, following the Applicant's payment of access charges. The Agency advised that the Applicant was provided with these additional documents in early July 2019. The additional documents are not subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Applicant's review application, dated 10 March 2019; and
  - (c) the Agency's submission, dated 3 April 2019.
9. 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

10. The Agency relied on the exemptions under sections 30(1), 35(1) and 36(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

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

11. 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 the agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

12. The exemption does not apply to purely factual material.<sup>1</sup>

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

13. Documents 1, 2, 3 and 4 (the Documents) contain:

- (a) the panellists' scores, ratings, notes and comments concerning the Applicant's performance in the interview and suitability for the role, and
- (b) the panellists' notes and comments concerning the referee checks conducted.

14. I am satisfied the Documents disclose the individual views and opinions of the panellists.

15. I am also satisfied the Documents disclose matters in the nature of consultation and deliberation with respect to the recruitment of clinical staff.

*Was the opinion, advice, recommendation, consultation or deliberation disclosed in the documents provided in the course of, or for the purpose of, the deliberative process of the Agency?*

16. 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.

17. I am satisfied the opinions and views expressed by the panellists in the documents were provided in the course of, and for the purpose of, the Agency's deliberative process regarding the recruitment of clinical staff.

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

18. 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.

19. I have considered the following matters in determining release of the information would be contrary to the public interest:

- (a) I have considered the Applicant's interest in the information. I note the Applicant has concerns about the recruitment process. In particular, the Applicant raises concerns they may have been 'unfairly disparaged by a former employer'.

I accept it may be in the public interest to release documents containing information relating to systemic issues within an agency's recruitment processes. I also consider there is a strong public interest in the Agency's recruitment processes being as transparent as possible, to

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

ensure compliance with its own processes and procedures, as well as any relevant legislation. Transparency is essential in showing the Agency's decision is fair and based on merit.

In the present matter, I am not satisfied there is information in the documents to show that the recruiters did not follow the appropriate protocols or otherwise did not act fairly and appropriately in the assessment of the Applicant's suitability for the role. Accordingly, the Applicant's reason for seeking access to the documents is not a significant factor in favour of disclosure in the circumstances of this particular case.

- (b) The nature of 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.<sup>2</sup>
- (c) I have considered the nature of the information. In particular, the information is less than 12 months old, contains handwritten notes and summaries, and discloses specific aspects of the Agency's criteria for assessing applicants for clinical positions.

The Agency must engage appropriately skilled and experienced staff to care for its patients. Disclosing details of the assessment of candidates under FOI could reasonably expose the selection process for clinical positions to manipulation. I accept the Agency's submission disclosure of the documents would compromise the integrity of the Agency's recruitment process and expose patients to the risk of unsuitable clinical staff being engaged and responsible for their clinical care. This factor weighs against disclosure.

- (d) The notes taken by the panellists are mostly handwritten and are brief. Therefore, I consider the documents contain the incomplete views of the panellists. They are a reflection of information the panellists considered to be relevant to their assessment of the Applicant's suitability for the role during the course of the interview. The notes do not appear to be a full and complete record of the Applicant's responses to the questions posed at interview, or of the references provided to the Agency. This weighs against disclosure.
- (e) Releasing the panellist's notes may inhibit the frankness and candour of information provided to the Agency in relation to the suitability of job candidates. While Agency officers and recruitment consultants are professionally obliged to provide frank advice when providing references, I accept the need for candour in the assessment of prospective employees – particularly in the context of medical care – is vital.

20. In light of the above, I am satisfied the Documents are exempt in full under section 30(1).

21. As I am satisfied the Documents are exempt in full under section 30(1), it is not necessary for me to consider the additional exemptions relied on by the Agency.

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

22. 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.

23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>3</sup> and the effectiveness of the deletions. Where

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<sup>2</sup> [2008] VSCA 218 at [68].

<sup>3</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>4</sup>

24. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the documents meaningless.

### **Conclusion**

25. In summary, my decision is the same as the Agency's decision in that I have decided to refuse access to the documents in full.
26. On the information available, I am satisfied the documents are exempt under section 30(1).
27. As I have determined it would not be practicable for the Agency to provide a copy of the documents with exempt information deleted, I have determined to refuse access to the documents in full.

### **Review rights**

28. 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>5</sup>
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>6</sup>
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>7</sup>
31. 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.
32. 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>8</sup>

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

33. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>4</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

<sup>5</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>6</sup> Section 52(5).

<sup>7</sup> Section 52(9).

<sup>8</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

| Document No. | Date of Document | Document Description         | Number of Pages | Agency's Decision   | OVIC Decision                           |
|--------------|------------------|------------------------------|-----------------|---|---|
| 1.           | [Date]           | Interview Assessment Records | 8               | <b>Refuse in full</b><br>Sections 30(1), 36(1)(b)           | <b>Refuse in full</b><br>Sections 30(1) |
| 2.           | [Date]           | Interview Assessment Records | 8               | <b>Refuse in full</b><br>Sections 30(1), 36(1)(b)           | <b>Refuse in full</b><br>Sections 30(1) |
| 3.           | Undated          | Reference Checks             | 3               | <b>Refuse in full</b><br>Sections 30(1), 35(1)(b), 36(1)(b) | <b>Refuse in full</b><br>Section 30(1)  |
| 4.           | Undated          | Reference Check              | 3               | <b>Refuse in full</b><br>Sections 30(1), 35(1)(b), 36(1)(b) | <b>Refuse in full</b><br>Section 30(1)  |