

Notice of Decision and Reasons for Decision

Applicant:	'AM3'
Agency:	Department of Health and Human Services
Decision Date:	17 September 2019
Exemption considered:	Section 30(1)
Citation:	'AM3' and Department of Health and Human Services (<i>Freedom of Information</i>) [2019] VICmr 111 (19 September 2019)

FREEDOM OF INFORMATION – Child Protection records – out of home carer suitability assessment – internal working document – 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 release the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

19 September 2019

Reasons for Decision

Background to review

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

... to acquire the report made of me by DHHS in [location] by [named persons].

This is in connection with me acknowledging how much I would love to care for the [gender], [named children], my [relation].

...

I seek documents pertaining to me in regards to the interview conducted on [date]... The document I am endeavouring to find is the one in which deems me unfit... their written, or typed interview notes are the ones in which they made to assess me

2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to that document in part.

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 been briefed by OVIC staff who inspected parts of the document claimed to be exempt under section 31(1).¹
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;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated 16 August 2019; and
 - (d) information provided by the Agency on 11 September 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), 31(1)(a) and 33(1) to refuse access to parts of the document. The Agency's decision letter sets out the reasons for its decision.

¹ Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

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 the 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.²

Does the document disclose matter in the nature of opinion, advice or recommendation, or consultation or deliberation?

- 11. In *Halliday v Office of Fair Trading*,³ the former Administrative Appeals Tribunal of Victoria held 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’.
- 12. The document is a preliminary carer assessment prepared by an officer of the Agency. It contains the Agency officer’s notes, observations, assessments and analysis of the Applicant’s responses, and the Agency officer’s opinion with respect to the Applicant’s suitability to be an out of home carer.
- 13. I am satisfied the document discloses matters in the opinion and deliberation of an Agency officer.⁴

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

14. In *Re Waterford and Department of Treasury (No. 2)*,⁵ 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.

15. I am satisfied the opinions and deliberation expressed in the document were provided in the course of, and for the purpose of, the Agency’s deliberative process regarding the suitability of the Applicant as an out of home carer.⁶

² Section 30(3).

³ (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

⁴ The opinion, advice or recommendation must be generated by an officer or Minister. Matters coming from another source, such as a complainant, witness or third party are not within section 30(1). See *Deasey v Geschke* (unreported, Vic County Court, Hassett J, 1 November 1984); *Ryder v Booth* [1985] VR 869.

⁵ (1984) 5 ALD 588; 1 AAR 1 at [606].

⁶ Section 77 of the *Children, Youth and Families Act 2005* (Vic) prescribes the matters that need to be considered regarding out of home carers.

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

16. In deciding whether disclosure of the document 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.
17. I have considered the following factors in determining whether release of the document would be contrary to the public interest:
- (a) The nature of the document: The document was created by officers of the Agency's Child Protection service. The Child Protection service is specifically targeted to children and young people at risk of harm or where families are unable or unwilling to protect them.

I accept the Agency's submission the document is preliminary in nature and was prepared to assist in the eventual decision making process regarding the placement of children. The document does not constitute the final decision with respect to the suitability of the Applicant to be an out of home carer.

I consider the document is sensitive in nature in that it relates to the care of children who have previously required or currently require the involvement of Child Protection. This factor weighs against disclosure.

- (b) The nature of the information: If the information is innocuous, dated or already known to the Applicant, it is more likely its disclosure would not be contrary to the public interest. If the information is sensitive, tentatively expressed or unclear, it is more likely its disclosure would be contrary to the public interest.⁷

In the decision of *Howard v Treasurer*,⁸ the Commonwealth Administrative Appeals Tribunal held the more sensitive the issues involved in a communication, the more likely it will be that the communication should not be disclosed.

The document in this matter consists of disclosures made by the Applicant about themselves and third parties, and the Agency officer's notes, observations, assessments and analysis with respect to the Applicant's suitability to be an out of home carer. I consider the information to be sensitive in nature. This factor weighs against disclosure.

As stated above, the document does not constitute the final decision with respect to the suitability of the Applicant to be an out of home carer. Accordingly, the information in the document is not a complete record of all matters considered by the Agency in reaching its decision. It gives a partial explanation of the decision made by the Agency only. This factor weighs against disclosure.

- (c) Disclosure of the information in the document may have an adverse effect on the integrity or effectiveness of future out of home carer assessments conducted by the Agency in that individuals seeking to become out of home carers may alter their responses or change their behaviour during a suitability assessment process to influence the Agency's decision. This factor weighs against disclosure.
- (d) The Applicant's interest in the information: The Applicant states they seek the information to understand why they were not 'given guardianship' of the children.

⁷ *Thomas v Department of Natural Resources and Environment* [2002] VCAT 533 at [27].

⁸ (Cth) (1985) 7 ALD 626; 3 AAR 169.

The Agency submits the Applicant was provided substantive information about why the children were not placed with the Applicant. I consider this factor weighs neither in favour nor against disclosure.

- (e) Nature of disclosure under FOI: 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.⁹

I do not have any information before me to suggest the Applicant intends on broadly disseminating the document if disclosed to them in full. However, having considered the nature of the document and the information it contains, I consider this factor weighs against disclosure.

Purely factual material

18. Section 30(3) provides the exemption under section 30(1) does not apply to a document by reason only of purely factual material in a document.
19. Factual material is not purely factual if its release would have the consequence of disclosing what is not factual and what the legislation aims to exempt; namely, an agency's deliberative process.¹⁰
20. Having been briefed on the content of the document, I accept the Agency's submission that any factual material within the document is intertwined with deliberative content in the document and is therefore not purely factual for the purposes of section 30(3).¹¹
21. Accordingly, based on the above factors, I am satisfied the exemption in section 30(1) applies to the document. Given my decision in relation to section 30(1), there is no requirement for me to consider the further exemptions claimed by the Agency under sections 31(1)(a) and 33(1).

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'¹² 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 25.¹³
24. I have considered the information the Agency deleted from the documents as exempt. I agree with the deletions made by the Agency.

⁹ [2008] VSCA 218 at [68].

¹⁰ *Brog v Department of Premier & Cabinet* (1989) 3 VAR 201.

¹¹ *McIntosh v Department of Premier & Cabinet* (2009) 32 VAR 371; [2009] VCAT 1528 at [45].

¹² *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].

¹³ *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].

Conclusion

25. On the information available, I am satisfied the exemption in section 30(1) applies to the document. My decision is the same as the Agency's decision in that I have decided to grant access to the document in part in accordance with section 25.

Review rights

26. 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.¹⁴
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
29. 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.
30. 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.¹⁷

When this decision takes effect

31. 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.

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

¹⁶ Section 52(9).

¹⁷ Sections 50(3F) and (3FA).