

## Notice of Decision and Reasons for Decision

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Applicant:	'AK2'
Agency:	Department of Justice and Community Safety
Decision Date:	3 September 2019
Exemptions considered:	Sections 30(1), 31(1)(a) and 31(1)(d)
Citation:	'AK2' and Department of Justice and Community Safety ( <i>Freedom of Information</i> ) [2019] VICmr 92 (3 September 2019)

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FREEDOM OF INFORMATION – security incident report – officer of an agency – advice and deliberations between agency officers – security incident

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.

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

3 September 2019

## Reasons for Decision

### Background to review

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

Copy of the full brief of evidence from the investigation into the breach of security protocols at [Building location on a specific date].

Copy of a document (if any exists) of why [name] was allowed into a [Victorian Government agency] [redacted] room to have an appointment with [role description] who was not there and whose office and staff are not located in that building.

Copy of the review into the into building security that was held after the security was breached.

2. In its decision, the Agency identified a document falling within the terms of the Applicant's request (**Document 1**). During the handling of the review, the Agency identified an additional document falling within the terms of the request (**Document 2**). It decided to refuse access to both 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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request dated 5 June 2019;
  - (b) the Applicant's submissions via telephone on 12 July, 8 August and 12 August 2019; and
  - (c) the Agency's submission dated 10 July 2019.
6. 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

7. The Agency originally relied on the following exemptions in sections 30(1) and 33(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.
8. In the Agency's submission provided during the review, it also claimed Document 2 was exempt under sections 30(1), 31(1)(a), 31(1)(d) and 33(1).
9. I have examined a copy of Document 1 and have been briefed by OVIC staff who inspected a copy of Document 2 claimed to be exempt by the Agency under section 31(1).<sup>1</sup>

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<sup>1</sup> 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.

10. On 12 July 2019, the Applicant indicated they do not seek review of the Agency's decision in relation to 'personal affairs information' in the documents. Accordingly, information relating to the personal affairs of persons other than the Applicant will be deleted as irrelevant information in accordance with section 25 and I do not consider the application of section 33(1) to the documents.

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

11. In order for the exemption under section 30(1) to be met, the following requirements must be satisfied:
  - (a) The document must be prepared by an officer of the relevant agency;
  - (b) 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
  - (c) 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
  - (d) disclosure of the matter would be contrary to the public interest.
12. The exemption does not apply to purely factual material in a document.<sup>2</sup>

### *Were the documents prepared by an officer of the Agency?*

13. Section 5(1) defines an 'officer' as including 'a member of the agency, a member of the staff of the agency, and any person employed by or for the agency'.
14. The phrase has been interpreted broadly and includes a member of the agency, a member of the agency's staff, and any person engaged by or for the agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.
15. I note the Victorian Civil and Administrative Tribunal (**Tribunal**) has recognised the words of section 30(1) are wide enough to cover a third party consultant engaged by or on behalf of an agency.<sup>3</sup>
16. Document 1 is a 'Security Incident Report' prepared by a staff member of the security company that provides security services in the building in which the Agency is a tenant. The Agency submits the security company is contracted by another Victorian Government agency (Department of Treasury and Finance (**DTF**)). Therefore, I accept there is a contract between DTF and the security company for the provision of security services. However, it is clear from the face of Document 1 the report was received by the Agency and not DTF.
17. Having carefully considered the relationship between the Agency and the security company, in circumstances where the Agency is the direct recipient of the company's security services as a building tenant and the security company is accountable to the Agency for the provision of security services, I am satisfied the staff member of the security company, who prepared Document 1, is an 'officer' for the purposes of section 30(1) on the basis the security company staff member is a person employed 'for the agency'.

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<sup>2</sup> Section 30(3).

<sup>3</sup> *Thwaites v Department of Human Services (No 2)* (1998) 14 VAR 347; *Mees v University of Melbourne (General)* [2009] VCAT 782 at [31] and *Koch v Swinburne University* [2004] VCAT 1513 at [15].

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

18. In order for section 30(1) to be met, the documents must also contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.
19. Having reviewed the document, I note certain material in Document 1 provides a factual account of the interaction between the Applicant and a security officer during the Applicant's entry into the building.
20. With the exception of the final sentence in Document 1, I am not satisfied the factual information constitutes information in the nature of opinion, advice, recommendation, consultation or deliberation by virtue of section 30(3).
21. In relation to the final sentence in Document 1, however, I am satisfied it constitutes information in the nature of the officer's opinion in relation to responding to the security incident.
22. Document 2 contains an email chain between Agency officers and security staff which I am satisfied contains advice and constitutes deliberation in relation to security measures in place at the time of the incident and future security measures for the purpose of preventing unauthorised access to the relevant building.
23. Accordingly, I am satisfied Document 2 contains advice and constitutes deliberation between officers regarding building security measures.

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

24. In relation to Document 1, having reviewed the document and on the information before me, I am not satisfied it was provided in the course of, or for the purpose of, the deliberative processes of the Agency but rather was created by the security company to document the incident immediately or soon after it occurred.
25. In relation to Document 2, having reviewed the document and on the information before me, I am satisfied the advice and recommendations in the document were provided in the course of, or for the purpose of, the deliberative processes of the Agency.

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

26. I must also be satisfied disclosure of the documents is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>4</sup>
27. In deciding if disclosure would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
28. In deciding whether disclosure of the documents would be contrary to the public interest, I have taken the following into consideration:<sup>5</sup>
  - (a) the right of every person to gain access to documents under the FOI Act;

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<sup>4</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 485, adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

<sup>5</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (b) the degree of sensitivity of the issues involved;
  - (c) the state of the policy development process at which the communication was made;
  - (d) whether the disclosure would be likely to inhibit frankness and candour in the making of communications;
  - (e) whether disclosure would lead to confusion or unnecessary debate having regard to the possibilities discussed;
  - (f) whether the disclosure will give merely a part explanation rather than a complete explanation for the taking of a particular decision;
  - (g) the likelihood disclosure of the documents would inhibit the independence of officers or the making of proper and detailed research and submissions by them;
  - (h) the likelihood disclosure would create mischief in one way or another such as a risk of mischievous interpretation; and
  - (i) the significance of the document, for example whether it is or is not merely a draft document.
29. In relation to Document 1, I am not satisfied the release of the information contained in this document would be contrary to the public interest for the following reasons:
- (a) it merely discloses what would appear to be standard security procedures that operate in most secured office buildings (i.e. checking a visitor's identity and calling ahead to the relevant agency or minister to confirm the visitor is an expected or otherwise authorised visitor);
  - (b) it does not identify weaknesses in the security measures nor suggest improvements; and
  - (c) disclosure is unlikely to inhibit the ability of officers to freely and candidly report a future security incident, as to do otherwise would be unlikely to fulfil their contracted role as security providers.
30. Accordingly, I am not satisfied Document 1 is exempt under section 30(1).
31. In relation to Document 2, I am satisfied the public interest weighs strongly in favour of maintaining the integrity of the security measures put in the place to manage the security of the relevant building for the following reasons:
- (a) the document contains detailed and sensitive deliberative information regarding the security incident, security measures in place at the time of the incident and the reinforcement of such measures in the future; and
  - (b) disclosure of such information would be likely to subvert or diminish the effectiveness of future improved security measures arising from the security incident.
32. Therefore, I am satisfied Document 2 is exempt under section 30(1).
33. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each document.
34. In light of my decision, it is not necessary for me to consider the additional exemptions relied on by the Agency in relation Document 2.

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

35. 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.
36. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</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>7</sup>
37. I have considered the effect of deleting irrelevant information, being personal affairs information in this instance, from the documents. In my view, it is practicable for the Agency to delete the irrelevant information from Document 1, because it would not require substantial time and effort, and the edited document would retain meaning.
38. 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 from Document 2, because deleting the exempt information would render the document meaningless.

### ***Conclusion***

39. On the information available, I am not satisfied the exemption in section 30(1) applies to Document 1. However, I am satisfied the exemption in section 30(1) applies to Document 2.
40. Also, as previously discussed, any personal affairs information is irrelevant to the review and is to remain deleted. As it is practicable to delete the irrelevant information, I have determined to grant access to Document 1 in part.
41. As it is not practicable to delete exempt material in Document 2, I have determined to refuse access to Document 2 in full.

### ***Review rights***

42. 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>8</sup>
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
45. 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.
46. 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>11</sup>

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<sup>6</sup> *Mickelburgh 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].

<sup>7</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>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

***When this decision takes effect***

47. 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>11</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	OVIC Comments
1.	[Date]	Security Incident Report	2	Refused in full Sections 30(1) and 33(1)	Release in part Section 25  This document is to be released with exception of the names of persons other than the Applicant, which is irrelevant information and is to be deleted in accordance with section 25.	Section 30(1): I am not satisfied this document is exempt under section 30(1) for the reasons outlined above.  Section 25: The Applicant does not seek access to the personal affairs information in the document. Accordingly, personal affairs information is to be deleted as it is irrelevant to the review.
2.	[Date range]	Email chain	6	Refused in full Sections 30(1), 31(1)(a), 31(1)(d) and 33(1)	Refuse in full Section 30(1)	Section 30(1): I am satisfied this document is exempt under section 30(1) as disclosure would be contrary to the public interest, as outlined above.