

Notice of Decision and Reasons for Decision

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| Applicant: | 'AS2' |
| Agency: | Department of Education and Training |
| Decision date: | 15 November 2019 |
| Exemptions considered: | Section 30(1) |
| Citation: | 'AS2' and Department of Education and Training (<i>Freedom of Information</i>) [2019] VICmr 165 (15 November 2019) |

FREEDOM OF INFORMATION – Public Accounts and Estimates (PAEC) briefing – PAEC inquiry – 2018-19 Budget Estimates

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 fresh 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 the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
15 November 2019

Reasons for Decision

Background to review

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

A copy of the PAEC briefing folder provided to and used by the Minister for Training and Skills, Gayle Tierney when appearing before the PAEC Inquiry into the 2018-19 Budget Estimates.

2. The Public Accounts and Estimates Committee (**PAEC**) is a joint investigatory committee of the Parliament of Victoria.

3. Following consultation with the Agency, the Applicant amended the request.

4. The amended request was for access to the following documents:

Based on the index provided could we please receive the following 5 chapters:

- 3.07 Lapsing Programs
- 3.08 Free TAFE for Priority Courses
- 3.17 BP3 Performance Measures – issues
- 3.24 TAFE sector investment and outcomes (TAFE supplementary funding, TAFE Funding Boost)
- 3.36 Glenormiston Site

5. In its decision, the Agency identified documents falling within the terms of the Applicant's request. It decided to grant access to the documents in part.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. The Applicant indicated they are not seeking the names of non-executive Agency staff.
8. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
9. On 18 September 2019, the Agency made a fresh decision to release further documents. This is within the required 28 day time period under section 49M(2).
10. The Applicant did not agree with the Agency's fresh decision. As required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
11. I have examined copies of the documents subject to review.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's fresh decision on the FOI request;
 - (b) the Applicant's review application; and
 - (c) the Agency's submissions dated 7 and 29 October 2019.

14. 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

15. The Agency relied on section 30(1) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

16. 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.

17. The exemption does not apply to purely factual material in a document.¹

18. The document subject to review is a document prepared for a Minister in preparation for their attendance at the PAEC Inquiry into the 2018-19 Budget Estimates.² In its fresh decision, the Agency decided four sections of the documents are exempt from release under section 30(1).

Do the documents 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?

19. While I am satisfied certain information in the document was prepared by an officer of an agency, and discloses matter in the nature of opinion, advice or recommendation, I consider some information exempted by the Agency in the documents is purely factual and, therefore, is not exempt by way of section 30(3).

Were the documents 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?

20. I am satisfied certain information in the documents was prepared for the deliberative functions of the Agency, being the provision of advice regarding a particular matter within the Minister's portfolio.

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

21. In deciding if disclosure of the documents 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.

¹ Section 30(3).

² I note PAEC recently published its report into the Inquiry into the 2019-20 Budget Estimates on 29 October 2019. The report is publicly available at https://www.parliament.vic.gov.au/images/stories/committees/paec/2019-20_Budget_Estimates/PAEC_59-03_Report_on_the_2019-20_Budget_Estimates.pdf.

22. In deciding whether disclosure of information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:³
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (c) the stage or a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the agency would not otherwise be able to explain upon disclosure of the documents;
 - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the agency at the conclusion of a decision or process; and
 - (g) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
23. The Agency advised its submission on this matter is confidential. However, I note however its main contention is that disclosure would be contrary to the public interest because the information presented in the documents has significantly changed.
24. On balance, I am not satisfied it would be contrary to the public interest to release the four sections exempted by the Agency for the following reasons:
- (a) The first and second redactions contain information that is publicly available.⁴
 - (b) Much of the information was selected for inclusion by Agency officers with the knowledge it may be disclosed during a PAEC inquiry public hearing.
 - (c) It is unlikely disclosure of the information would have any effect on the preparation of similar briefings in the future as the Agency officers who prepare such documents would be aware of how the information may be disclosed at a public hearing.
 - (d) Much of the information in the documents does not appear to be contentious. In fact, most of the information that could be considered advice or opinion consists of broad, generic statements. For this reason, I do not agree disclosure of this information would have a negative impact on any future government or Agency negotiations about the matter.

³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

⁴ See for example press release from the Premier's office, <https://www.premier.vic.gov.au/returning-education-and-training-to-glenormiston/>

- (e) I do not agree disclosure of the information would cause confusion or unnecessary debate about the matter. Rather, it is open to the Agency to provide further information about the current status of information provided in the briefing.
- (f) There is considerable public interest in the disclosure of information relating to public education services. These services are publicly funded and serve the broader community. Therefore, the public interest would be served by additional transparency and accountability with disclosure of this information by the Agency in respect to the carrying out of its governmental functions.

Section 33(1)

25. 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 Applicant;⁵ and
 - (b) such disclosure would be 'unreasonable'.
26. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.⁶
27. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
28. The document contains the personal affairs information, being the name, of a person other than the Applicant. I note this information has already been provided to the Applicant in the parts of the document already released to them.
29. In these circumstances, and where the person's involvement in the matters discussed is publicly known, I have decided it would not be unreasonable to release the information and it is not exempt under section 33(1).

Conclusion

30. On the information before me, I am not satisfied the document is exempt under section 30(1). Accordingly, I have decided to release the document in full to the Applicant.

Review rights

31. 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.⁷
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹

⁵ Sections 33(1) and (2).

⁶ Section 33(9).

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

⁸ Section 52(5).

⁹ Section 52(9).

34. 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.
35. 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.¹⁰

Other matters

36. Section 49P(5) states if I decide to disclose a document exempted under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
37. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹¹

38. In the circumstances, I have decided to notify the relevant third party in this matter would be an unnecessary intrusion for the following reasons the information is already publicly known. I am therefore not satisfied it is practicable to notify that individual of their right of review.

When this decision takes effect

39. 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.

¹⁰ Sections 50(3F) and (3FA).

¹¹ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].