

Notice of Decision and Reasons for Decision

Applicant:	'BC9'
Agency:	Monash University
Decision Date:	20 February 2020
Exemption considered:	Section 30(1)
Citation:	'BC9' and Monash University (<i>Freedom of Information</i>) [2020] VICmr 33 (20 February 2020)

FREEDOM OF INFORMATION – workplace dispute – employment matters – request for flexible work arrangements – internal communications between agency officers

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 am not satisfied certain information exempted by the Agency under section 30(1) is exempt.

As I am satisfied it is practicable to delete exempt and irrelevant information from the documents, in accordance with section 25, I have determined to grant access to certain documents in part.

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
20 February 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents.
2. On 1 October 2019, following consultation with the Agency, the Applicant amended the initial request to the following documents:
 1. All and any email communications referring to [the Applicant] received by or sent by [named person] between [specified period];
 2. And all and any email communications referring [the Applicant] received by or sent by [named person] between [specified period].

Documents are to be confined to communication, conversation, statements or directions contained within the above documents relating to:

 - Flexible and/or work from home arrangements
 - Work performance or work ethic
 - Documents relating to leave, time or attendance (excluding copies of medical certificates)
 - Any complaint or concern or feedback about [the Applicant]
 - Any communications involving a HR representative or the [union] about anything.
3. In its decision, the Agency identified 83 documents falling within the terms of the Applicant's request. It decided to grant access to 46 documents in full and release 37 documents in part.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. On 3 February 2020, the Applicant advised OVIC they do not seek review of:
 - (a) duplicate copies of documents; and
 - (b) the Agency's application of section 33(1) to information in the documents.
6. Accordingly, I have excluded such documents and personal affairs information from my review.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. 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 submission dated 6 December 2019 and information provided with their review application;
 - (c) the Agency's submissions dated 13 December 2019 and 11 February 2020; and
 - (d) correspondence between OVIC staff, the Agency and the Applicant.

10. 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

11. The Agency relied on the exemptions under sections 30(1), 33(1) and 35(1)(b) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

12. 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.
13. The exemption does not apply to purely factual material in a document.¹

Were the documents prepared by an officer of the agency?

14. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed 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 am satisfied the consultant engaged by the Agency is an 'officer' of the Agency for the purposes of the FOI Act.

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?

16. The documents subject to review are internal email communications between Agency officers. I am satisfied they contain material in the nature of opinions, advice, recommendations and consultations.

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?

17. Having reviewed the documents, I am satisfied the above internal communications contain the Agency officers' deliberations in the course of determining an appropriate course of action in response to the Applicant's work from home (WFH) application.

¹ Section 30(3).

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

18. In deciding if release is 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.
19. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:²
 - (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.
20. In its submission, the Agency listed the following additional factors relevant to its consideration of the public interest limb of section 30(1):
 - (a) the disclosure of tentatively expressed or preliminary views on complex employment matters, that were subsequently superseded, would cause unnecessary confusion or debate or mislead the Applicant and public;
 - (b) the disclosure of preliminary views would be unreasonable, given the dispute between the Agency and the Applicant has been resolved; and
 - (c) the disclosure of communications between the Agency's officers in circumstances of dealing with sensitive employment issues raised by employees would be likely to inhibit the frankness and candour of such discussions.
21. In their submission, the Applicant stated:

² *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

[Section] 30 is claimed for all documents where the material decision makers are conversing about my request for assistance. It appears on the face of it the University is seeking to obscure the basis for refusing my reasonable requests for assistance ... the information is sought personally to assist me in deciding with respect to filing a legal complaint for discrimination on the basis of my impairment ...

... I do not understand why the University has treated me differently to other people in very similar circumstances.

22. My decision in relation to the application of section 30(1) is set out in **Annexure 1**.

Deletion of exempt or irrelevant information

23. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁴
25. The Applicant agreed to exclude duplicate copies of documents and information exempt under section 33(1) from the scope of this review. For the purposes of this review, I have determined this information to be irrelevant.
26. I have considered the effect of deleting irrelevant and exempt information from the documents in accordance with section 25. I am satisfied it is practicable for the Agency to delete such information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

27. On the information available, I am satisfied certain documents are exempt under section 30(1).
28. As I am satisfied it is practicable to delete exempt and irrelevant information from the documents, in accordance with section 25, I have determined to grant access to certain documents in part.
29. My decision in relation to each document subject to review is set out in **Annexure 1**.

Review rights

30. 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.⁵
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶

³ *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].

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

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

⁶ Section 52(5).

32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
33. 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.
34. 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.⁸

When this decision takes effect

35. 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.

⁷ Section 52(9).

⁸ 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]	Email chain	43	Released in part Section 30(1)	Release in full	<p>The document relates to correspondence between Agency officers in relation to the Applicant's WFH request.</p> <p>Section 30(1): I am not satisfied it would be contrary to the public interest to disclose the document as it sets out the information, policies and factors considered in relation to the Applicant's WFH request.</p> <p>While I acknowledge the concerns submitted by the Agency, I am not satisfied on the information before me that disclosure of this document would reasonably inhibit correspondence given the nature of the discussions and Agency staff are required to provide their professional advice as part of their professional duties based on applicable legislation, workplace employee agreements and entitlements, and the Agency's policies and procedures for handling such requests.</p>
2	[date]	Email chain	11	Released in part Section 30(1)	<p>Release in part Section 25</p> <p>The document is to be released except for any names which are irrelevant and to be deleted in accordance with section 25.</p>	<p>The document relates to correspondence between the Agency's officers in relation to the Applicant making an online post.</p> <p>Section 25: Any staff names in the document are irrelevant to this review and are to be deleted.</p> <p>Section 30(1): See comments for Document 1.</p>
3	[date]	Email chain	14	Released in part Section 33(1)	Not subject to review	<p>The Applicant does not seek review of personal affairs information. This document does not fall within the scope of the review.</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
4	[date]	Email chain	26	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
7	[date]	Email chain	4	Released in part Sections 30(1), 33(1), 35(1)(b)	Release in part Sections 30(1), 25	<p>The document relates to correspondence between the Agency officers seeking assistance in relation to the Applicant's WFH request.</p> <p>Section 30(1): I acknowledge certain deliberations between Agency officers are more sensitive and complex in nature. In such circumstances, it is desirable for the Agency's officers to seek advice and exchange opinions in an open and candid way. I consider the release of such communications would be likely to stifle internal discussion and necessary deliberation.</p> <p>Section 25: See comments for Document 3.</p> <p>Section 35(1)(b): Given my decision in relation to section 30(1), it is not necessary for me to consider the application of section 35(1)(b) to the same information.</p>
8	[date]	Email	16	Released in part Sections 30(1), 33(1)	<p>Release in part Section 25</p> <p>The email dated [date], sent at [time], is to be released in full with any Agency officer names, which are irrelevant, deleted in accordance with section 25.</p>	<p>The document relates to correspondence between the Agency officers in relation to union involvement in relation to the Applicant's WFH request.</p> <p>Section 25: See comments for Document 3.</p> <p>Section 30(1): See comments for Document 1.</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
9	[date]	Email	12	Released in part Sections 30(1), 33(1)	<p>Release in part Section 25</p> <p>The following emails are to be released in full:</p> <ul style="list-style-type: none"> dated [date], sent at [time] and [time]; and dated [date] at [time]; <p>except for any Agency officer names, which are irrelevant, deleted in accordance with section 25.</p>	<p>The document relates to correspondence between the Agency officer in relation to the Applicant's working hours.</p> <p>Section 25: See comments for Document 3.</p> <p>Section 30(1): See comments for Document 1.</p>
10	[date]	Email chain	12	Released in part Section 30(1)	<p>Release in part Section 25</p> <p>The document is to be released as follows:</p> <ul style="list-style-type: none"> the email dated [date] at [time] is to be released in part except for paragraph 3 and 4, which are exempt under section 30(1), deleted in accordance with section 25; the email dated [date] at [time] is exempt in under section 30(1); and 	<p>The document relates to correspondence between the Agency's staff in relation to the Applicant's working hours.</p> <p>Section 25: See comments for Document 3.</p> <p>Section 30(1): See comments for Documents 1 and 7.</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> any names in the emails, which are irrelevant, are to be deleted in accordance with section 25. 	
11	[date]	Email chain	3	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
14	[date]	Email chain	7	Released in part Sections 30(1) and 33(1)	Release in part Section 25 The email dated [date] sent at [time] is to be released in part with any names, which are irrelevant, to be deleted in accordance with section 25.	The document relates to correspondence between the Agency's staff. Section 25: See comments for Document 3. Section 30(1): See comments for Document 1.
16	[date]	Email chain	1	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
18	[date]	Email chain	3	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
19	[date]	Email chain	2	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
20	[date]	Email chain	14	Released in part Sections 30(1) and 33(1)	Release in part Section 25 The document is to be released except for any names, which	The document relates to correspondence between Agency officers drafting a response to the Applicant's union representative. Section 25: See comments for Document 3.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					are irrelevant, deleted in accordance with section 25.	Section 30(1): While the document contains draft versions of a proposed response, I note the final response was sent to the union representative on [date] and this document was released to the Applicant in full. Additionally, see comments for Document 1. In my view, the drafts do not contain particularly sensitive information.
21	[date]	Email chain	3	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
22	[date]	Email chain	5	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
23	[date]	Email chain	5	Released in part Sections 30(1) and 33(1)	Release in part Section 25 The document is to be released except for any names, which are irrelevant, deleted in accordance with section 25.	The document relates to correspondence between the Agency officers. Section 25: See comments for Document 3. Section 30(1): See comments for Document 1.
24	[date]	Email chain	5	Released in part Section 30(1)	Release in part Section 30(1), 25 The document is to be released except for the email sent on [date] at [time] which is exempt under section 30(1), deleted in accordance with section 25.	The document relates to correspondence between Agency officers in response to drafting a response to the Applicant. Section 25: See comments for Document 3. Section 30(1): See comments for Documents 1 and 7.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
31	[date]	Email chain	11	Released in part Sections 30(1) and 33(1)	Release in part Section 25 The document is to be released to the Applicant with exception to any names which are to be deleted under section 25.	The document relates to correspondence between the Agency's staff in response to drafting a response to the Applicant. Section 25: See comments for Document 3. Section 30(1): See comments for Document 1.
32	[date]	Email chain	4	Released in part Section 30(1)	Release in full	The document relates to correspondence between the Agency officers in relation to the Applicant's WFH application. Section 30(1): See comments for Document 1.
35	[date]	Email chain	13	Released in part Sections 30(1), 33(1) and 35(1)(b)	Not subject to review	The Applicant does not seek review of duplicate versions of the same document. This document contains the same information as Documents 7 and 32.
35a	[date]	Email chain	2	Released in part Section 30(1)	Release in full	The document relates to correspondence between the Agency officers in relation to the Applicant's WFH application. Section 30(1): See comments for Document 1.
35b	[date]	Email chain	2	Released in part Section 30(1)	Not subject to review	The Applicant does not seek review of duplicate versions of the same document. This document contains the same information as Documents 32.
39	[date]	Email chain	10	Released in part Section 33(1)	Not subject to review	See comments for Document 3.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
40	[date]	Email chain	4	Released in part Sections 30(1) and 33(1)	Release in part Section 25 The document is to be released except for any names, which are irrelevant, deleted in accordance with section 25.	The document relates to correspondence between the Agency officers drafting a response to the Applicant. Section 25: See comments for Document 3. Section 30(1): While the document contains draft versions of a proposed response, I note the final response was sent to the Applicant on [date]. Additionally, see comments for Document 1. In my view, the drafts do not contain particularly sensitive information.
41	[date]	Email chain	22	Released in part Sections 30(1) and 33(1)	Not subject to review	The Applicant does not seek a review of duplicate versions of the same document. This document contains the same information as Documents 9.
42	[date]	Email chain	21	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
43	[date]	Email chain	4	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
44	[date]	Email chain	8	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
46	[date]	Email chain	30	Released in part Sections 30(1) and 33(1)	Release in part Section 25 The document is to be released to the Applicant with exception	The document relates to correspondence between the Agency's staff in response to the Applicant's WFH application. Section 25: See comments for Document 3.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					to any names which are to be deleted under section 25.	Section 30(1): See comments for Document 1.
48	[date]	Email chain	5	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
56	[date]	Email chain	5	Released in part Section 33(1)	Not subject to review	See comments for Document 3.
58	[date]	Email chain	8	Released in part Sections 30(1) and 33(1)	Not subject to review	The Applicant does not seek a review of duplicate versions of the same document. This document contains the same information as Documents 23.
61	[date]	Email chain	2	Released in part Section 30(1)	Release in part Sections 30(1), 25 The document is to be released with the third and fourth paragraphs, which are exempt under section 30(1), deleted in accordance with section 25.	The document relates to correspondence between the Agency officers. Section 30(1): See comments for Document 7.
63	[date]	Email chain	43	Released in part Section 30(1)	Release in part Section 25 The document is to be released except for any names, which are irrelevant, deleted in accordance with section 25.	The document relates to correspondence between the Agency's staff. Section 25: See comments for Document 3. Section 30(1): See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
66	[date]	Email chain	12	Released in part Section 30(1)	Not subject to review	The Applicant does not seek a review of duplicate versions of the same document. This document contains the same information as Documents 24.
70	[date]	Email chain	13	Released in part Section 30(1)	Release in full	Section 30(1): See comments for Document 1.