

Notice of Decision and Reasons for Decision

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| Applicant: | 'BD2' |
| Agency: | Bairnsdale Regional Health Service |
| Decision Date: | 21 February 2020 |
| Exemption considered: | Section 35(1)(b) |
| Citation: | 'BD2' and Bairnsdale Regional Health Service (<i>Freedom of Information</i>) [2020] VICmr 35 (21 February 2020) |

FREEDOM OF INFORMATION – People Matter Survey – staff survey results – information provided to agency in confidence

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied certain information in the document is exempt under section 35(1)(b).

As I am satisfied it is practicable for the Agency to provide the Applicant with an edited copy of the document in accordance with section 25, I have decided to release the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
21 February 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. Documents including emails pertaining to the results of the recent “People Matter Survey” with particular references to [an employee group of a subsection of the Agency]. Names may be redacted, with the exception of my name.
 2. Documents and emails pertaining to any changes to senior personnel within [the employee group] from [date] to date. Names may be redacted.
2. In its decision, the Agency identified the *Employee Group Benchmark Results Report – People Matter Survey 2019* [specific to the subsection of the Agency] falling within the terms of the Applicant’s request. It decided to refuse access in full. The Agency did not locate any documents within the scope of point 2 of the Applicant’s request.

The People Matter Survey

3. The People Matter Survey is a survey coordinated annually by the Victorian Public Sector Commission (VPSC) to provide an opportunity for Victorian public sector employees to voluntarily provide their views on how shared public sector values and employment principles are demonstrated within their agency by their colleagues, managers and senior leaders.¹
4. Survey responses measure how different employee groups within an organisation view aspects of their workplace, including equal opportunity, human rights, integrity, opportunities for learning and development, psychological and physical safety, as well as diversity and inclusion.
5. The survey also helps agencies better understand staff engagement, level of satisfaction, wellbeing, identification of areas for improvement.²
6. Four standard reports are produced for agencies undertaking the People Matter Survey, as follows:³
 - (a) Organisation Results Report, which contains a detailed breakdown of results at an organisational level;
 - (b) Benchmark Report/s, which compare organisation level results to like organisations and previous results;
 - (c) Free Text Comment Report, which contains verbatim free text comments from employees; and
 - (d) Employee Group Report, which contains results at the employee group level.

Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency’s decision to refuse access.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

¹ *People Matter Survey 2019 Guide for Organisation Heads and Human Resources Directors* version 1.1 (February 2019), Victorian Public Sector Commission, p 5.

² *Ibid.*

³ *Ibid.*, p 11.

9. 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; and
 - (c) the Agency's submission dated 2 December 2019 and further information provided by the Agency during this review.
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 exemption under section 35(1)(b) to refuse access to the document in full.
12. The Agency's decision letter sets out the reasons for its decision.
13. I am satisfied the Agency does not possess documents within the scope of point 2 of the Applicant's request.

Section 35(1)(b)

14. A document is exempt under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Was the information or matter communicated in confidence to the Agency?

15. When determining whether information was communicated to an agency in confidence, it is necessary to consider the position from the perspective of the communicator.⁴ Further, confidentiality can be express or implied from the circumstances of the matter.⁵
16. The document subject to review is the Employee Group Benchmark Results for [the subsection of the Agency]. It compares the results of [the employee group] to the results of the Agency as a whole (organisation result).
17. In support of its view the information was communicated to the Agency in confidence, the Agency submits:

In the present case, the instructions provided to participants responding to the survey provides significant evidence of multiple representations that responses will be treated confidentially, and that anonymity will be protected.

Members of [the employee group] who responded to the survey would all have read the instructions and would have proceeded to provide their responses on the basis that those responses were being

⁴ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

⁵ *Ibid.*

provided confidentially. They would have been effectively accepting a representation that they could not be identified by their participation in the survey or by the responses they provided.

18. In support of this, the Agency advised:

The responses were provided in circumstances where the employees were given instructions prior to answering the questions, those instructions including:

The Victorian Public Sector Commission is committed to protecting your privacy and identity, in accordance with the *Privacy and Data Protection Act 2014* and the *Health Records Act 2001*.

- The reports provided to your organisation will include summarised survey results for groups of employees i.e. for your organisation and teams with 10+ responses, not for individuals.
- Free-text or written responses are provided to your organisation, word for word. To protect your identity, they are not provided with any of your other survey responses. If you provide written comments, please do not include words that may identify you or anyone else.
- The record of your individual survey responses will not be provided to your organisation.

Additional statements provided on behalf of BRHS emphasising the confidentiality and anonymity of survey responses were made to participants, including:

The statement by the BRHS Chief Executive Officer in a memorandum to all staff dated 15 May 2019 that:

"Your completed survey will be confidential and anonymous and your responses cannot be individually identifiable";

The statement in a document titled "People Matter Survey Guidelines" that:

"Your survey responses are completely anonymous";

The following statement in the BRHS information flyer:

"Anonymous. Quick. Simple".

19. Upon consideration of the above submissions and information published by the VPSC regarding the People Matter Survey,⁶ I am satisfied multiple assurances were made to participants that their responses to the survey would be held in confidence.
20. I am satisfied it was not practicable for the Agency to consult with third parties in accordance section 33(2B).⁷
21. In the circumstances, I am satisfied Agency employees undertaking the People Matter Survey provided information to the Agency in confidence based on assurances that their responses to the survey would be held in confidence.
22. However, I am not satisfied the information outlining the theoretical framework that underpins the survey measures is information or matter communicated to the Agency in confidence for the purposes of section 35(1)(b). Accordingly, such information is not exempt under section 35(1)(b).

⁶ For example, see 'People Matter Survey Data-Collection Statement' at < <https://vpsc.vic.gov.au/html-resources/data-collection-statement-people-matter-survey-2/>> and 'Doing the Survey', *Victorian Public Sector Commission* at <<https://vpsc.vic.gov.au/data-and-research/people-matter-survey/information-survey-participants/>>.

⁷ Section 33(2C)(b).

Would disclosure be contrary to the public interest?

23. The second condition to be met under section 35(1)(b) is that disclosure of the information would be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future.
24. This means I must be satisfied, if the information were to be disclosed, it would impair the ability of the Agency to obtain similar information in the future. For example, whether future Victorian public sector employees would be reasonably likely to not provide responses to the People Matter Survey in the future.
25. In support of its view, the Agency submits:

Overtly, the document does not provide certain information which expressly identifies individual members of [the employee group]. Specifically, it does not:

- identify individuals by name;
- identify the number of staff classified as [staff of the employee group];
- identify the number of staff who responded to the survey.

However, the enquiry as to whether the ability to obtain similar information in the future does not end merely with what is contained in the document.

Information which is not included in the document is also relevant to the assessment of impairment. Such information includes knowledge that:

- [the employee group] is a small section of the BRHS.
- The staff of [the employee group] at BRHS numbers [specified number of] members.⁸
- The applicant is a former staff member of [the employee group] at BRHS and would be aware of the numbers of staff in [that group].
- The applicant would also likely have knowledge of the individuals who made up the memberships of [the employee group] at the time of the survey which on account of its small number would allow some individuals to be identified.
- It is likely that the applicant and other members of the [employee group] would have discussed their responses to the survey, with the result that the pool of unidentified responses would be further limited.

The smaller numbers of staff in [the employee group] make the potential for identification of respondents greater. In so far as the Document refers to responses in percentages, every three percent relates to one member of staff.

The Document covers a range of workplace topics, including sensitive matters such as sexual harassment and bullying.

Just as in *Johnson*⁹, where the trust and credibility reposed in those who conducted a survey would likely have been undermined by the release of survey information, so too would the credibility of BRHS and the representations it made as to confidentiality be undermined by the release of information relating to survey responses of the [employee group] members.

Finally, noting the above potential for identification of individuals, it is also the case that some individuals referred to in the Document can be identified by reference to their position, albeit not in their capacity as respondents to the survey...

⁸ The Agency also submit the number of participants in the survey.

⁹ *Johnson v Cancer Council of Victoria* [2016] VCAT 1596.

26. In considering whether release of the information would impair the ability of the Agency to obtain similar information in the future, I have also considered the extent to which the document was distributed and discussed within the Agency. On the information before me, I am satisfied:
- (a) the document was not distributed generally;
 - (b) the document was distributed to certain executive staff and senior management only;
 - (c) the results were discussed in more detail with certain managerial staff; and
 - (d) a representation on the results was provided to Agency staff with a four-page document as an aid to the presentation.¹⁰ The aid provides the 'People Outcome Results' for the Agency extracted from the Benchmark Results Report for the Agency as a whole.
27. Accordingly, while the Agency presented the survey results to staff, I am not satisfied a full and unedited copy of the document was distributed.
28. I acknowledge there is value in an Agency presenting the results of its People Matter Survey to its employees transparently while also ensuring participants cannot be identified or reidentified. However, in the circumstances of this matter, while the document itself does not explicitly identify any individual, I am satisfied there is a reasonable possibility participants and other persons could be identified or reidentified by a person, such as the Applicant, who has or would be reasonably likely to have sufficient knowledge of the organisation workforce and employees. Therefore, the smaller number of staff in [the employee group] and the number of participants is a factor in my decision.
29. Further, the need to ensure candour and honesty in the provision of feedback by staff to such surveys is of critical importance where the results collected will be used to inform initiatives to drive organisational change and improve workplace participation and wellbeing.
30. In my view, it would be contrary to the public interest to disclose the document in full, as to do so may impact the willingness of Agency staff to participate in the survey in future and would result in a loss of confidence. A reluctance by staff to participate in the survey would have an impact on the data that the Agency would be able to rely on in promoting continuous improvement throughout the organisation.
31. Accordingly, I am satisfied information detailing the survey results is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

32. 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.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ 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 25.¹²
34. I am satisfied it is practicable to edit the document by deleting exempt information in accordance with section 25, as the work involved will not be substantial and the document will retain meaning.

¹⁰ The Agency provided OVIC with a copy of this document.

¹¹ *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].

¹² *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

35. On the information before me, I am satisfied certain information in the document is exempt under section 35(1)(b).
36. As I am satisfied it is practicable for the Agency to provide the Applicant with an edited copy of the document in accordance with section 25, I have decided to release the document in part.

Review rights

37. 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.¹³
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
40. 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.
41. 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.¹⁶

When this decision takes effect

42. 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.

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ 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. | 2019 | Employee Group Benchmark Results Report – People Matter Survey 2019 for [the employee group] | 91 | Refused in full Section 35(1)(b) | Release in part Section 35(1)(b), 25 Pages 1-5, 15-16, 27- 28, 31, 45, 46, 55-56, 79-80, 83-91 are to be released. The remainder of the document is exempt under section 35(1)(b) and is to be deleted in accordance with section 25. | Section 35(1)(b): I am satisfied the information detailing the results of the survey is exempt under section 35(1)(b) as it was obtained in confidence from participants within a small employee groups within the Agency and its release would impair the ability of the Agency to obtain similar information in the future. However, I am not satisfied the theoretical framework information in the document was obtained by the Agency in confidence. Accordingly, information of this nature is not exempt under section 35(1)(b). Section 25: I am satisfied it is practicable to delete exempt information from the document in accordance with section 25. |