

Notice of Decision and Reasons for Decision

Applicant:	'AU7'
Agency:	Department of Education and Training
Decision Date:	5 December 2019
Exemption considered:	Section 30(1)
Citation:	'AU7' and Department of Education and Training (<i>Freedom of Information</i>) [2019] VICmr 188 (5 December 2019)

FREEDOM OF INFORMATION – risk register – education plan – living document

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.

I have decided:

- pages 1 to 24 and page 30 of Document 1 are irrelevant to the terms of the Applicant's FOI request;
- section 30(1) does not apply to the remaining information in Documents 1; and
- Document 2 is not exempt under section 30(1) and is to be released to the Applicant.

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

5 December 2019

Reasons for Decision

Background to review

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

A copy of the complete [location] Education Plan – Secondary 'Risk Management Plan and/or Risk Register. Where a discrete document does not exist, yet the information requested could be generated in the form of a report, I request the production of a document pursuant to s19 of the Act. Please note that personal information of non-executive staff, such as names and addresses, is not required. Accordingly, documents can be edited to redact such information.

2. In its decision, the Agency identified two documents that fell within the scope of the Applicant's request. The Agency decided part of Document 1 was irrelevant to the Applicant's request, and denied access to the remaining document and Document 2 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. I have examined copies of the documents subject to review.
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) the Applicant's review application; and
 - (c) the Agency's submission dated 7 November 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 exemption in section 30(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.
9. Document 1 is dated [month year] and is titled, '[location] Education Plan'. Having reviewed the document and considered the terms of the Applicant's request, I agree the majority of the document falls outside the scope of the Applicant's request, which refers to a risk management plan or register. Therefore, this review relates to pages 25 to 29 of the document titled, 'risk management'.
10. I note the overview of Document 1 provides the following general statement (which I am satisfied is not exempt information):

The purpose of this document is to identify governance arrangements, actions, timelines and responsibilities for the implementation of the Secondary stage of the [location] Education Plan. It is a living document, reflecting actual, current arrangements, and can be used by governance groups to monitor implementation progress and risks.

11. Document 2 is titled, 'Place-Based Education Plan: [location]' and is dated [month year].
12. Both documents contain similar tables, with headings commonly used in project planning documents, including descriptions of risks, strategies to control risks and risk ratings.

Section 30(1)

13. 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 an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
14. The exemption does not apply to purely factual material in a document.¹
15. I must also be satisfied releasing this information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.²

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. I am satisfied the documents were prepared by an Agency officer, and contain matters in the nature of opinion, advice or recommendation.

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. I am satisfied the documents were prepared for the deliberative processes involved in the functions of the Agency, namely, its implementation of the [location] Education Plan.

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

18. In deciding if release 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.
19. The Agency provided a confidential submission in this matter. In accordance with its decision letter, the Agency advised it would be contrary to the public interest to release the documents as:
 - (a) disclosure would be likely to inhibit frankness and candour in the making of communications and would deter public servants from giving frank and fearless advice where the advice is necessary to ensure appropriate treatments are put in place to mitigate risks;
 - (b) disclosure would lead to confusion having regard to possibilities discussed;

¹ Section 30(3).

² *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485] applied in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

- (c) disclosure of the documents would give merely a part explanation rather than a complete explanation for a particular decision;
- (d) disclosure of the documents would inhibit the independence of officers of making proper and detailed research and submissions by them;
- (e) disclosure would create mischief in one way or another, such as a risk of mischievous interpretation; and
- (f) the document is a draft, and at the time of the request, contained misleading and out of date content, that was set for revision in late [month year].

20. The Applicant is a Member of Parliament and the local Member for the [named] Region and to which the [location] Education Plan and requested documents relate. The Applicant advised:

The [location] Education Plan will directly impact the lives of hundreds of families in greater [location], in fact every family that has a child in the State Education system at secondary level will be impacted by this plan. These families have the right to be fully informed and the departments response has not demonstrated that release of the documents requested would not be in the public interest.

21. Having reviewed the documents and considered the Agency's reasons for decision and the Applicant's and the Agency's submissions, on balance, I have determined disclosure of the documents would not be contrary to the public interest. In reaching this decision, 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.

22. In summary, I do not consider disclosure of the information would reasonably be considered to have a significant impact on the project such that its disclosure would be contrary to the public interest.

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

23. Based on media reports, I acknowledge there is concern within the local community in relation to the [location] Education Plan.⁴ As such, I consider there is a degree of sensitivity in relation to issues discussed in the documents.
24. However, having carefully reviewed the requested information in the documents, I do not consider the specific information sought by the Applicant is particularly sensitive or controversial. Rather, it describes, in general terms, possible risks affecting the project and how those risks may be mitigated. I consider such information is what would reasonably be expected in relation to a public sector project, as managing risk is a critical aspect of public sector governance.
25. On balance, I consider the public interest in the community being informed about the way in which the Agency performs its statutory functions weighs in favour of release, where disclosure of the risks identified will likely contribute to greater public scrutiny, and community participation in the implementation of the [location] Education Plan.
26. I also note, particularly in relation to Document 2, certain information in the document would be reasonably known to the community as it describes information provided to it about the [location] Education Plan.
27. While I acknowledge the Agency's concern the documents are subject to change as a 'living document', I do not see this factor weighs against disclosure. If 'living documents' were to be routinely exempt, it would allow for the exemption to be applied more broadly than I consider is the intention of this provision. While I accept the risks and associated mitigation strategies may be subject to change and updating as the project progresses, or risks subside or new or different risks emerge, from my review of the documents, they appear to be well developed and sufficiently finalised such they can be relied upon at a relevant point in time and distributed by the Agency to 'governance groups'.
28. The Agency submits disclosure of the documents would likely affect the frankness and candour of Agency officers. However, as the Agency officers were engaged in their required duties, I do not accept disclosure would have any material or lasting effect on future advice where they are required to provide advice to the Agency in accordance with their employment responsibilities and relevant public sector values in the *Code of Conduct for Victorian Public Sector Employees* issued by the Victorian Public Sector Commissioner under section 61 of the *Public Administration Act 2004* (Vic).⁵
29. The Agency submits it has concerns about the document providing a part explanation only, and outdated information. However, I consider any such concerns can be addressed by the Agency providing additional or supporting information to the Applicant at the time the document is released to provide any necessary context to the information.
30. For the reasons set out above, I am not satisfied disclosure of the requested information in the documents would be contrary to the public interest.
31. Accordingly, I am not satisfied the documents are exempt under section 30(1).

⁴ See, for example, [named media corporation], '[named article]', published on [date] at <[web address]> (accessed 3 December 2019).

⁵ See, for example, the public sector value of 'Responsiveness' which requires Victorian public sector employees to demonstrate responsiveness by 'providing frank, impartial and timely advice to the Government'.

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 or Minister 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'⁶ and the effectiveness of the deletions. Where deletions would render a document meaningless they will not be 'practicable' and release of an edited copy of the document is not required in accordance with section 25.⁷
34. I have considered information the Agency deleted from the documents as irrelevant. I am satisfied it falls outside the scope of the Applicant's request because it does not relate to risk management, as described in the Applicant's request.
35. I have also considered the effect of deleting irrelevant information from the documents. In my view, it is practicable to provide an edited copy of the documents with irrelevant information deleted in accordance with section 25 as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

36. On the information before me, I am satisfied the documents are not exempt under section 30(1).
37. I have decided to grant access to the documents in part as I am satisfied it is practicable to provide an edited copy of the documents with irrelevant information deleted in accordance with section 25.

Review rights

38. 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.⁸
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
41. 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.
42. 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.¹¹

⁶ *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].

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

When this decision takes effect

43. 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.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[month year]	[location] Education Plan	30	Refused in full Section 30(1)	Release in part Section 25 The document is to be released with the following irrelevant information deleted in accordance with section 25: <ul style="list-style-type: none"> • pages 1 to 24; • page 30. 	Section 30(1): The document is not exempt under section 30(1) for the reasons set out above. Section 25: I agree pages 1 to 24 and page 30 are irrelevant to the request.
2.	[month year]	Place based education plan: [location]	3	Refused in full Section 30(1)	Release in full	Section 30(1): The document is not exempt under section 30(1) for the reasons set out above.