

Notice of Decision and Reasons for Decision

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| Applicant: | 'BC2' |
| Agency: | Department of Health and Human Services |
| Decision Date: | 13 February 2020 |
| Exemption considered: | Section 30(1) |
| Citation: | 'BC2' and Department of Health and Human Services (<i>Freedom of Information</i>) [2020] VICmr 25 (13 February 2020) |

FREEDOM OF INFORMATION – recruitment documents – panel interview notes – panel scores – internal working documents – public interest considerations

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.

I am satisfied the documents are exempt under section 30(1). As I am not satisfied it is practicable to delete exempt information in the document in accordance with section 25, I have determined to refuse access to the documents in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
13 February 2020

Reasons for Decision

Background to review

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

.... panel interview notes and individual scoring from my recent interview
2. In its decision, the Agency identified 14 pages of documents falling within the terms of the Applicant's request. It decided to refuse access to the 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. I have examined a copy of the documents subject to review.
5. The documents comprise the notes of three recruitment panel members.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. 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 received on [date] and information provided with their review application; and
 - (c) communications between the Applicant, the Agency and OVIC staff during the review.
8. 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

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

Section 30(1)

10. 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.

11. Determining whether disclosure of the documents would be contrary to the public interest, requires a 'process of the weighing against each other conflicting merits and demerits'.¹
12. The exemption does not apply to purely factual material in a document.²

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by agency officers?

13. The documents contain scores, ratings, notes and comments recorded by interview panel members concerning the Applicant's performance during the interview and the panel members' views on the Applicant's overall suitability for the role.
14. I am satisfied the documents disclose the individual views and opinions of the panellists. I am further satisfied the panel members are Agency officers for the purpose of the FOI Act.

Were the documents made in the course of, or for the purpose of, the deliberative processes involved in the functions of the agency?

15. In *Re Waterford and Department of Treasury (No. 2)*,³ the Commonwealth Administrative Appeals Tribunal held:

... "deliberative process" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ... its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

16. I am satisfied the opinions and views recorded in the documents by the panel members were provided in the course of, and for the purpose of, a recruitment process as part of the functions of the Agency.

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

17. 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.
18. In deciding whether disclosure of the documents would be contrary to the public interest, I have given weight to the following relevant factors:⁴
 - (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 of 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

¹ *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].

² Section 30(3).

³ [1981] 1 AAR 1.

⁴ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

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.

19. Having considered the above factors, I have determined disclosure of the documents would be contrary to the public interest on the following grounds:

I note the Applicant's FOI request arises from their concerns about the Agency's recruitment process. In particular, the Applicant submitted, 'It is in the public interest to ensure the recruitment process is free from bias, transparent, fair and ethical'.

I accept there is a public interest in disclosure of documents that demonstrate bias and unfairness in a public sector agency's recruitment processes. I also acknowledge there is a strong public interest in an agency's recruitment processes being as transparent as possible to ensure confidence an agency has complied with its recruitment processes and procedures, as well as any relevant legislation. Transparency in recruitment processes is essential in demonstrating an appointment or recruitment decision made by an agency is fair, free from bias and based on merit.

Having carefully reviewed the documents subject to review and considered information provided by the Applicant and Agency, I am not satisfied information in the documents supports the public interest concerns raised by the Applicant. This factor is contrary to the public interest.

- (a) The documents contain handwritten notes made by panel members. Often notes of this nature are brief and do not convey all responses provided by a candidate or notes recorded by a panel member as to responses provided and other considerations.

Such notes do not constitute a transcript of an interview. Rather, they generally constitute notes made by the writer for consideration following the completion of the interview and overall assessment of a candidate's performance during the interview and suitability for the role.

In this case, the notes taken by the panel members are mostly handwritten and brief in nature. Therefore, I consider the documents contain the incomplete views of the panel members recorded during or shortly after the interview. I consider they reflect information the panel members noted as relevant to their assessment of the Applicant's suitability for the role during the interview. The notes do not appear to be a full and complete record of the Applicant's responses to the questions posed at interview. As such, I consider the full meaning and intent of the notes would not be decipherable from the documents. This factor is contrary to the public interest.

20. In light of the above factors, I am satisfied the documents are exempt under section 30(1).

Deletion of exempt or irrelevant information

21. 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.
22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ 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 25.⁶
23. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable to delete the exempt information, as to do so would render the documents meaningless.

Conclusion

24. On the information before me, I am satisfied the documents are exempt under section 30(1).
25. As I am not satisfied it is practicable to delete exempt information in the document in accordance with section 25, I have determined to refuse access to the documents in full.

Review rights

26. 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
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
29. 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.
30. 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

⁵ *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].

⁶ *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].

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

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).

When this decision takes effect

31. 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.