

Notice of Decision and Reasons for Decision

Applicant:	Auto and General Services Pty Ltd
Agency:	Melbourne Water
Decision date:	30 March 2020
Exemption considered:	Section 30(1)
Citation:	<i>Auto & General Services Pty Ltd and Melbourne Water (Freedom of Information)</i> [2020] VICmr 95 (30 March 2020)

FREEDOM OF INFORMATION – water authority – service request – Incident Cause Analysis Method (ICAM) – investigation report – draft documents – disclosure not contrary to the public interest.

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 am not satisfied the documents are exempt under section 30(1).

As I am satisfied it is practicable to delete irrelevant information from the documents in accordance with section 25, I have determined to grant access to Documents 2, 3 and 4 in part with personal affairs information of third parties deleted.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 March 2020

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency for access to the following documents:
 - (a) All documents relating to the service request made by [named individual] in [month, year], and the subsequent action taken by Melbourne Water, including but not limited to service request, claim data, notes, telephone recordings and notes, and reports.
 - (b) Where not included in (a) above, all documents relating to the Incident, including notes, recordings, loss adjusters' reports, investigation reports and work orders.
 - (c) All service or maintenance records in relation to the Main for the 7 year period preceding the incident.
 - (d) All documents relating to prior instances of failure of the Main for the 7 year prior preceding the incident, including but not limited to, notes, electronic records, service requests, work orders, quotations, invoices, loss adjuster reports and investigation reports.
2. In its decision, the Agency identified 82 documents falling within the terms of the Applicant's request. It decided to grant access to 70 documents and refuse access to 12 documents in full.
3. 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.
4. As the Applicant did not seek access to the personal affairs information of third party individuals, the Agency granted access to documents in part with names, addresses, telephone numbers, position titles, signatures and email addresses deleted in accordance with section 25.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to Documents 2, 3 and 4.
6. On 28 February 2020, the Agency advised this office it no longer relied on section 34(4)(a)(ii) to refuse access to the documents. Therefore, this review concerns the Agency's application of section 30(1) to Documents 2, 3 and 4.
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) information provided with the Applicant's review application; and
 - (c) the Agency's submissions dated 24 December 2019 and 28 February 2020.
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

Section 30(1)

11. 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;
- (a) 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
- (b) disclosure of the matter would be contrary to the public interest.

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

Does the document 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?

13. Documents 2, 3 and 4 are draft versions of an 'ICAM Investigation Report'. Each differs slightly from the other.

14. Incident Cause Analysis Method (**ICAM**) is a common investigation tool utilised by a number of industries to identify the root cause analysis of an incident. The documents in this matter were prepared by the Agency in response to a burst water main, which caused flood damage to a number of properties (the **incident**). Agency officers attended the incident as first responders.

15. Having examined the documents, I am satisfied they contain information in the nature of opinion, advice and recommendations exchanged and consultation between Agency officers. However, I note they contain factual information.

Were the documents prepared 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?

16. I am satisfied the documents were produced for the purpose of the Agency's deliberative processes, being an assessment of the incident conducted in accordance with the Agency's professional and ethical obligations to respond to, investigate and manage flood matters.

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

17. In deciding if release 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, rather than commencing from a position that Parliament intended the Act to operate so as to facilitate non-disclosure of government information. With this in mind, 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;

¹ Section 30(3).

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

- (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 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.

Applicant's submission

- 18. The Applicant is an insurance company representing an affected party. In their review application, the Applicant advised access to Documents 2, 3 and 4 is sought to assist a recovery claim made against the Agency.
- 19. With respect to the Agency's application of section 30(1), the Applicant submits the disclosure of documents could not be contrary to the public interest as it is in the public's interest to understand the cause and failure of the incident, noting the damage which resulted.

Agency submission

- 20. In summary, the Agency stated the following in relation to its application of section 30(1) to the documents:
 - (a) The documents are early versions of an internal draft report, that was compiled by employees of the Agency.
 - (b) The documents comprise, at various points in time, the thinking processes of Agency officers, which formed merely part of, or one factor of the decision making process of the Agency.
 - (c) It would be contrary to the public interest to release the documents as the opinions within are considered misleading and do not represent the Agency's final opinions that, if disclosed, the information could be incorrectly interpreted.
 - (d) Documents 2, 3 and 4 are early drafts and 'subsequent iterations of this document have overtaken its currency'. Document 4 contains visible mark-ups and track changes. To release these documents would render them meaningless once exempt matter is removed. Therefore, the whole of the document is exempt.

21. As noted above, the documents are ICAM reports, prepared as part of the Agency's response to the incident. Having carefully considered the context and content of the documents, I am not satisfied release would be contrary to the public interest, having regard to the following matters:
- (a) The documents contain factual information, including photographs, incident description and sequence, maps and technical information relating to the affected pipes and water main system. In my view, this information is factual in nature and not exempt by virtue of section 30(3).
 - (b) The fact a document is a draft or earlier version may be relevant but is not determinative as to whether disclosure of the document would be contrary to the public interest. Each disputed document must be examined within its own context, irrespective of whether it is a draft or incomplete version.³ Where a draft document does not raise contentious issues or matters that could easily be addressed through supplementary explanation by an agency, I do not consider it would be confusing or misleading to release. This is particularly relevant in this case where the Applicant is an insurance company and more likely to have at its disposal the ability to obtain advice and seek further information regarding any information that is 'confusing or misleading' based on the document being in draft. In any case, it is open to the Agency to explain any such aspects of the document at the time of release to avoid or minimise any such outcome.
 - (c) Having reviewed the documents, I consider there is nothing inherently confidential or sensitive about the actual purpose and content of the reports. They were prepared to assist the fulfillment of the Agency's obligation to respond to an issue regarding flooding, which was considered at an operational level. This circumstance is distinct from matters involving senior level government deliberation and decision making, the disclosure of which may be reasonably likely to disrupt the efficient conduct of government.
 - (d) Nor do I consider release is likely to inhibit the independence of Agency officers from continuing to provide their expert opinions and observations during an investigation of a similar nature, nor do I consider it would affect the Agency's decision making processes when forming a final conclusion or outcome based on such investigations.
 - (e) While the documents record views and opinions of the Agency made at a particular point in time and those views were not ultimately adopted by the Agency, I do not consider it necessarily follows disclosure of these early views would lead to an incorrect or misleading interpretation. It is clear from the face of the documents they are an early response document and subject to change following receipt of more up to date and/or reliable evidence. Therefore, I do not consider the reports would be misleading in terms of their sequence in the Agency's investigative process.
 - (f) As discussed above, if the Agency feels strongly the information will be misinterpreted by the Applicant, it can release additional information to assist with providing a better understanding of the documents to the Applicant.
 - (g) I note the Applicant's interest in seeking access to the documents can be construed as one that is pecuniary. However, I also consider there is a public interest in members of the community being able to better understand decisions made by government agencies, which directly affect them. This is consistent with the objects of the FOI Act in section 3, which is to create a general right 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'.

³ *Penhalluriack v Glen Eira City Council* [2012] VCAT 370 at [25].

22. Accordingly, I am not satisfied disclosure of the documents would be contrary to the public interest, and the documents are not exempt under section 30(1).

Conclusion

23. On the information before me, I am not satisfied the documents are exempt under section 30(1).
24. As I am satisfied it is practicable to delete irrelevant information from the documents in accordance with section 25, I have determined to grant access to Documents 2, 3 and 4 in part with personal affairs information of third parties deleted.

Review rights

25. 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.⁴
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
28. 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.
29. 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.⁷

When this decision takes effect

30. 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.

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).