

Notice of Decision and Reasons for Decision

Applicant:	'BI4'
Agency:	Department of Education and Training
Decision Date:	25 March 2020
Exemption considered:	Section 30(1)
Citation:	'BI4' and Department of Education and Training (<i>Freedom of Information</i>) [2020] VICmr 82 (25 March 2020)

FREEDOM OF INFORMATION – briefing note – Ministerial briefing – school building project – 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 Document 1 is exempt under section 30(1).

As I am satisfied it is practicable to delete irrelevant information in the documents in accordance with section 25, I have determined to grant access to the 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
25 March 2020

Reasons for Decision

Background to review

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

All advice and written communication that [a named Minister] received, including ministerial briefs, emails and correspondence confirming that [all school councils] had passed a motion supporting the recommendation of [date] of the Strategic Advisory Board as required for the [school name], [location] Education Plan, at a meeting with a quorum.
2. In its decision, the Agency identified seven documents falling within the terms of the Applicant's request and determined to grant access to two documents in full and four documents in part, and refuse access to one document 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. On [date], the Applicant narrowed the scope of the review to the information:
 - (a) on pages 3, 4 and 5 of Document 1 deleted under section 30(1); and
 - (b) on pages 10, 24, 32, 33, 34 and 35 deemed by the Agency to be 'not relevant' to the terms of their request.
5. I have examined copies of the documents subject to review.
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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated [date] and information provided with the Applicant's review application; and
 - (c) the Agency's submission dated [date].
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. Its 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;
- (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. The exemption does not apply to purely factual material in a document.¹

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?

12. Document 1 is a briefing to a Minister. I am satisfied it contains information in the nature of opinion, advice and 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?

13. Having carefully reviewed Document 1, I am satisfied it was made in the course of the Agency's deliberative processes concerning the delivery of educational services in Victoria.

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

14. In deciding if release of the document would be contrary to the public interest, I must consider all relevant facts and circumstances, remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

15. In deciding whether 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 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;

¹ Section 30(3).

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

- (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.
16. In its submission, the Agency stated it would be contrary to the public interest for the information to be released to the Applicant for the following reasons:
- (a) the documents discuss highly sensitive and contentious issues;
 - (b) the release of the information would deter officers from giving frank and fearless advice;
 - (c) the documents do not of themselves contain a complete explanation or reasons as to why the Agency made certain decisions; and
 - (d) the release of this information could be misleading or confusing for the public.
17. On balance, I am not satisfied it would be contrary to the public interest for information in Document 1 to be released to the Applicant for the following reasons:
- (a) I acknowledge the document could be considered as sensitive as it relates to a contentious project. However, I consider any such sensitivity is better addressed by promoting transparency rather than by maintaining secrecy. By providing access to information that demonstrates well-considered decision making, disclosure will serve the public interest and promote openness and accountability in the public sector.
 - (b) Having reviewed the deleted information, I do not consider its release would be likely to stifle internal discussion or debate between Agency officers.
 - (c) I note certain information in Document 1 relates to forecasted information. I consider the Applicant is capable of understanding the nature of predictive analysis and such information is one of a variety of factors used by the Agency in its decision making process. Consequently, I consider there is little likelihood disclosure of the document would cause confusion or mislead the public. Such submissions are not supported by any information provided by the Agency and underestimate the ability of the public to understand information provided by the public sector concerning decisions made by a Minister or government and the reasons for such decisions.
 - (d) In addition to the point above, it is open to the Agency to release the document to the Applicant with any necessary additional information to eliminate or minimise any potential misunderstanding or misinterpretation concerning the document.
18. Accordingly, I am not satisfied disclosure of Document 1 would be contrary to the public interest and have determined Document 1 is not exempt under section 30(1).

Deletion of exempt or irrelevant information

19. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
20. 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
21. I have considered the personal affairs information the Agency determined was irrelevant and deleted in accordance with section 25.
22. On [date], the Applicant wrote to the Agency stating:

I am aware that even should the [Agency] contact all third parties, they are likely to refuse to have personal information passed on.

In light of that I am prepared to accept the written confirmation, including ministerial briefs, emails and correspondence, that all school councils had passed a motion supporting the recommendation of [date] of the Strategic Advisory Board as required for the [school name], [Education Plan] at a meeting with a quorum, with a breakdown of all attendees at the school council meetings, including all who voted as School Council [Agency] members (including those that are noted as parents on one school council who are [Agency] members at another school, but who would be considered as [Agency members] for the purposes of determining a quorum); all School Council Parents; all School Council Community Members; all School Council Student members; and all stakeholders/visitors present at each school council meeting, by blanking out the names of individuals.
23. The Applicant informed OVIC they only agreed to the deletion of the individuals' names on condition the Agency released certain other information in the documents.
24. Having reviewed the Applicant's email dated [date], I do not consider the Applicant's agreement to deleting individuals' names was conditional on other information being released to them. Accordingly, I agree the names of individuals fall outside the scope of the Applicant's request and this information is irrelevant.
25. However, I note the Applicant only agreed to delete the names of individuals. I do not consider the Applicant agreed to exclude descriptive information, such as whether an individual was [an Agency] or non-[Agency] member, from the scope of the review. Therefore, I consider this information to be within the scope of the request and is to be released to the Applicant.
26. I have considered the effect of deleting irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable for the Agency to delete such information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

27. On the information before me, I am not satisfied Document 1 is exempt under section 30(1).
28. As I am satisfied it is practicable to delete irrelevant information in the documents in accordance with section 25, I have determined to grant access to the documents in part.

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 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

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

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

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.

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

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Reference number] Ministerial Briefing	6	Released in part Sections 30(1), 25	Release in full Information on pages 3, 4 and 5 is not exempt and is to be released in full.	On [date], the Applicant advised OVIC they seek a review of information on pages 3, 4 and 5 of the document exempted by the Agency under section 30(1). Section 30(1): I am not satisfied this information is exempt under section 30(1) for the reasons set out in the notice of decision above.
2.	[Reference number]: Attachment 1	17	Released in part Sections 30(1), 34(1)(b), 25	Release in part The names of individuals are irrelevant to the Applicant's request and to be deleted in accordance with section 25.	On [date], the Applicant advised OVIC they seek a review of information on page 10 determined by the Agency to be irrelevant to the Applicant's request. Section 25: I agree with the Agency's decision to delete individuals' names in accordance with section 25 as the Applicant excluded such information from the scope of their request on [date].
3.	[Reference number] Attachment 2	8	Released in part Sections 30(1), 25	Release in part The names of individuals are irrelevant to the Applicant's request and to be deleted in accordance with section 25.	On [date], the Applicant advised OVIC they seek a review of information on page 24 determined by the Agency to be irrelevant to the Applicant's request. Section 25: See comments for Document 2 above.
4.	[Reference number] Attachment 3	2	Released in full	Release in part The names of individuals are irrelevant to the Applicant's request and to be deleted in accordance with section 25.	On [date], the Applicant advised OVIC they seek a review of information on pages 32 and 33 determined by the Agency to be irrelevant to the Applicant's request. Section 25: On [date], the Applicant only agreed to delete the names of individuals from the scope of the request. This information is to be deleted in accordance with section 25.

Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					I consider the descriptive information, following the names of individuals, is within scope and it is to be released.
5.	[Reference number] Attachment 4	2	Released in full	Release in part The names of individuals are irrelevant to the Applicant's request and to be deleted in accordance with section 25.	On [date], the Applicant advised OVIC they seek a review of information on pages 34 and 35 determined by the Agency to be irrelevant to the Applicant's request. Section 25: See comments for Document 2 above.
6.	[Reference number] Attachment 5	3	Refused in full Section 30(1)	Not subject to review	The Applicant does not seek review of this document.
7.	[Reference number] Attachment 6	4	Released in part Section 30(1)	Not subject to review	The Applicant did not seek a review of this document.