

## Notice of Decision and Reasons for Decision

---

Applicant:	'BO1'
Agency:	Department of Health and Human Services
Decision date:	14 May 2020
Exemptions considered:	Sections 30(1), 35(1)(b)
Citation:	'BO1' and Department of Health and Human Services ( <i>Freedom of Information</i> ) [2020] VICmr 135 (14 May 2020)

---

FREEDOM OF INFORMATION – complaint investigation report – external consultant – Behaviour Change Program – information communicated in confidence – 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 satisfied the documents are exempt under sections 30(1) and 35(1)(b).

As I am satisfied it is not practicable to delete exempt information from the documents in accordance with section 25, I have decided to refuse access to the documents in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

14 May 2020

## Reasons for Decision

### Background to review

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

Please refer to [OVIC case reference] a copy of the investigation report, excluding any annexures and enclosures, into complaints made against [the Applicant], [named individual] or the [named business], in relation to our role as [program] providers.
2. In its decision, the Agency identified two documents, comprising 157 pages, falling within the terms of the Applicant's request.
3. The Agency relied on the exemptions in sections 32(1), 33(1) and 35(1)(b) to refuse access to the documents in full. The Agency's decision letter sets out the reasons for its decision.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

### Preliminary view

5. I have examined copies of the documents subject to review and note the documents are the same documents subject to an OVIC review involving the Applicant which I determined on [date] (**recent decision**). [Redacted – Further background to the recent decision].
6. Given the above, on [date] OVIC staff wrote to the Applicant to seek consent to have the review withdrawn on the basis a recent decision on the documents had been made. The Applicant declined to withdraw the review.
7. By email dated [date], the Applicant was notified by OVIC staff of my preliminary view that a formal decision on the documents is likely to be the same as my recent decision. The Applicant was invited to either withdraw the review application, provide a submission detailing new and relevant information for my consideration, or make an application to VCAT for a review of the Agency's decision.
8. By email dated [date], the Applicant confirmed they wished to proceed with a formal review by OVIC.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Applicant's review application; and
  - (c) all communications between this office and the Applicant and the Agency.
11. 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

12. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.
13. The Agency relied on section 32(1) to refuse access to the documents in full. However, given my recent decision, where I was satisfied the documents are exempt under sections 30(1) and 35(1)(b), I do not consider it is necessary to review the Agency's application of section 32(1) in the circumstances. My examination of sections 30(1) and 35(1)(b) follows.

### Section 30(1)

14. A document is exempt under section 30(1) if the following three conditions are met:
  - (a) the document discloses 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, Minister 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.
15. The exemption does not apply to purely factual matter in a document.<sup>2</sup>
16. The term 'officer of an agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
17. An external consultant, engaged by an agency to carry out a designated function or perform a task on behalf of the agency is an officer of an agency for the purposes of the FOI Act.<sup>3</sup>
18. I am satisfied the external investigators, who authored each report, fall within the definition of 'officer of an agency' for the purposes of section 30(1).

*Do the documents disclose matter in the nature of opinion, advice or recommendation, or consultation or deliberation?*

19. Prior to the current Behaviour Change Program (**BCP**) scheme, the Agency was responsible for managing and approving driver education program providers under the former arrangement, known as the Victorian Accredited Driver Education Program (**VADEP**).
20. The VADEP supported the requirements of the *Road Safety Act 1986* (Vic) in relation to individuals undergoing mandatory licence restoration relating to drug and alcohol driving offences. Only providers approved by the Agency could provide education and assessment services.
21. The Applicant operated an accredited drink driver program under the VADEP and [then] the BCP.
22. The documents are investigation reports concerning complaints received by the Agency regarding the Applicant's driver education program. The first report concerns a complaint received and

---

<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

<sup>2</sup> Section 30(1).

<sup>3</sup> See *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services* (No 2) (1998) 14 VAR 347.

investigated in [year] and the second report concerns various complaints received and investigated in [year].

23. Both reports were written by an investigator engaged by the Agency and prepared for the purpose of advising whether aspects of complaints made against the Applicant's program were substantiated. Having regard to the content and purpose of the reports, I am satisfied the documents disclose matter in the nature of opinion, advice and recommendation.
24. I also note the documents contain information that could be considered factual in nature. However, having carefully reviewed the information I am satisfied the factual information is heavily intertwined with opinion, advice and recommendations such that it cannot be reasonably separated. Accordingly, it is not purely factual for the purposes of section 30(3).

*Was the opinion, advice, recommendation, consultation or deliberation disclosed in the documents provided in the course of, or for the purpose of, the deliberative processes of the Agency?*

25. I am satisfied the documents were provided in the course of, and for the purpose of, a deliberative process of the Agency. Namely, the deliberative processes involved in the supervision and the management of complaints made against approved program providers under the VADEP.

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

26. Set out below, are my considerations in relation to the public interest factors under section 30(1) taken from a recent related decision:

In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>4</sup>

- (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;
- (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.

I consider the process of investigating a complaint is an inherently sensitive and confidential process. I also consider that whenever an allegation is raised, it is imperative an agency is able to thoroughly investigate the matter. A complete investigation relies on free and fulsome information being provided

---

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

to an investigator. Without an open information flow, an investigation may not be successful in obtaining accurate and detailed information, resulting in flawed or biased findings.

Further, I am of the view release of information, which may undermine the investigative process and the free flow of information is likely to be contrary to the public interest. If investigations cannot be conducted in a comprehensive manner, relevant learnings may not be identified, and improvements not implemented. This may have serious negative implications for public sector bodies given that investigations are dependent on candid input from those involved.

Therefore, the 'essential public interests' that limit release of information under the FOI Act, to my mind, includes the integrity of investigative processes for these reasons.<sup>5</sup>

I appreciate the Applicant has a private interest in obtaining access to the documents. The denied information concerns complaints lodged against the delivery of the Applicant's program.

Further to this private interest, I acknowledge there is a broader public interest in disclosure where it is clear from the face of the documents there may be the lack of a fair and independent process or legitimate questions arise about the handling of a matter, or fairness in an outcome reached by an agency. However, having carefully examined the documents, there is no information before me to suggest there is anything unusual about the manner in which the investigations were conducted. Therefore, I am not satisfied there is a broader public interest that would be promoted by release of the documents.

On balance, I am satisfied it would be contrary to the public interest to disclose documents that would have an adverse effect on the integrity or effectiveness of a decision-making and investigative process of an agency.

27. Having considered the information before me, and similarly for the reasons set out above, I am satisfied the documents are exempt under section 30(1).

### **Section 35(1)(b)**

28. 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 communicated in confidence?*

29. Whether information communicated by an individual was communicated in confidence is a question of fact.<sup>6</sup> When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>7</sup>
30. Both documents contain information provided by third parties to the relevant investigator. Having considered the nature of the information and the circumstances in which it was communicated, I am satisfied it was provided in circumstances in which confidentiality could reasonably be implied. Therefore, disclosure of the documents would divulge information communicated in confidence, meeting the first limb of the exemption.

### *Would disclosure be contrary to the public interest?*

---

<sup>5</sup> Section 3.

<sup>6</sup> *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>7</sup> *Ibid*, XYZ at [265].

31. Set out below, are my considerations in relation to the public interest under section 35(1)(b), taken from my recent decision:

The exemption in section 35(1)(b) also requires consideration of whether an agency would be impaired from obtaining similar information in the future if the documents were to be disclosed under the FOI Act. For example, whether others in the position of the communicator or communicators would be reasonably likely to not provide similar information to the Agency in the future should the information be disclosed.

Further, the public interest test in regard to section 35(1)(b) is narrow. It is directed toward the impact release would have on an agency's ability to obtain the same or similar information in the future. The provision does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which an applicant's personal interest in the document would be served by gaining access to the information.

The words 'similar information' refer to information of the class or character obtained in the case under consideration and the precise contents of the material are not relevant.<sup>8</sup> Similarity in this context also refers to the similarity of the source of information.<sup>9</sup>

As discussed above, I accept there exists a public interest in the appropriate management of complaints by an agency and that investigations into matters of this nature are dependent on fulsome admissions or information being provided by witnesses and third parties on a voluntary basis in order to inform an investigation or inquiry. Without an open flow of communication, an investigation may not appropriately identify all key issues, which could result in flawed or incomplete outcomes.

I consider individuals need to feel confident that the information they provide, including their identity, will be held in confidence by the Agency. I consider release of the information has the potential to dissuade individuals from raising concerns of a similar nature given release of information under FOI is unrestricted and unconditional. I consider this to be a significant and detrimental outcome that would impede the free flow of information provided to the Agency who is responsible to ensure those who provide driver education programs to the community are suitable to do so.

Further, the fact the confidential material was provided by one agency to another ought not to destroy the confidential character of the material. In this case, the Agency received the investigation reports to assist the undertakings of its functions involving the Applicant's company. I do not consider the information has been circulated widely that it would be considered release to 'the world at large'.<sup>10</sup>

32. Similarly, for the above reasons, I am satisfied the documents are exempt under section 35(1)(b).

### ***Deletion of exempt or irrelevant information***

33. 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.
34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>11</sup> 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.<sup>12</sup>

---

<sup>8</sup> *Richards v Law Institute of Victoria* (unreported, County Court, Dixon, J, 13 August 1984).

<sup>9</sup> *Ryder v Booth* [1985] VR 869.

<sup>10</sup> *Marke v Victoria Police* [2006] VCAT 1364 at [98].

<sup>11</sup> *Mickelburgh 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].

<sup>12</sup> *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].

35. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am not satisfied it is practicable for the Agency to delete the exempt information, as doing so would render the documents meaningless.

### **Conclusion**

36. On the information before me, I am satisfied the documents are exempt under sections 30(1) and 35(1)(b).
37. As I am not satisfied it is practicable to delete exempt information in accordance with section 25, I have determined to refuse access to the documents in full.

### **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.<sup>13</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>14</sup>
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>15</sup>
41. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto: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.<sup>16</sup>

---

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

<sup>14</sup> Section 52(5).

<sup>15</sup> Section 52(9).

<sup>16</sup> Sections 50(3F) and (3FA).