



Office of the Victorian
Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'BN6'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	8 May 2020
Exemption considered:	Section 31(1)(a)
Citation:	'BN6' and Department of Jobs, Precincts and Regions (<i>Freedom of Information</i>) [2020] VICmr 131 (8 May 2020)

FREEDOM OF INFORMATION – complaint investigation – internal working documents – email correspondence – prejudice an ongoing investigation

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 31(1)(a).

As I am not satisfied it is practicable to delete exempt information in the documents 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

8 May 2020

Reasons for Decision

Background to review

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

Communication/s to the Minister of Racing and the [specified executive Agency officer] of Sport, Recreation & Racing arising from the meeting between [named person], [named person] & [the Applicant], inclusive of notes of that meeting. This meeting was held at [address] on [date].
2. The Applicant submits they made a disclosure to the Agency concerning a third party. The Applicant contends their identity and details of their disclosure were provided to the third party and other persons community without the Applicant's consent.
3. In its decision, the Agency identified three documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 30(1) and 33(1).
4. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received, including:
 - (a) the Agency's decision on the FOI request;
 - (a) the Applicant's submission provided with their application for review, dated [date] and information provided during the review; and
 - (b) the Agency's submissions dated [date] and [date], and information provided during the review.
9. 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.

Scope of review

10. Section 25 permits an agency to grant access to an edited copy of a document, deleting exempt or irrelevant information, if it is practicable to delete such information, and the applicant is agreeable to receiving such a copy.
11. The Agency's decision identified three email chains, for which the Agency deleted certain emails and attachments in accordance with section 25 as it determined they did not fall within the scope of the Applicant's request.

12. During the review, the Agency was provided with my preliminary view the information deleted under section 25 was relevant to the Applicant's request and should be assessed as part of the request. The Agency was afforded an opportunity to respond to the preliminary view.
13. In submissions dated [date] and [date], the Agency maintained its view the communications were not within the scope of the request.
14. Firstly, the Agency submits the deleted communications, including the attachments, were not addressed to the Minister of Racing or the [specified executive Agency officer] of Sport, Recreation and Racing. The Agency states:

... A plain English reading of the request would suggest this material is clearly out of scope. I also refer to the Professional Standards and in particular Practice Note 3, which requires the common and ordinary use of words used in a request to be accepted. With respect, looking at emails to individuals not named in the request appears to go against these standards.
15. Second, in its submission dated [date], the Agency submits:

The picking up and forwarding of an email chain that predates this meeting does not in and of itself create a nexus between those emails and the meeting. The treating of documents as being relevant to an event simply because they are forwarded after an event takes place would have very serious implications for the efficient conduct of government and would require the department to review the manner in which it creates all documents going forward.
16. I have considered the information deleted by the Agency from the documents as irrelevant and the Agency's response to the preliminary view. I also note section 3(2) which provides:

It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.
17. In my view, an email chain sent to a recipient during the relevant time period that includes preceding emails is a 'document' within the meaning of the FOI Act. As such, I do not agree emails in the email chain sent prior to the relevant time period can be deleted in accordance with section 25 as to do so would mean viewing each of the emails in the chain as separate documents.
18. Further, I consider the sender of an email chain sent at the relevant time, should be taken to intend for the preceding emails to be included as part of their email, for example, they may provide context to their contribution to the email chain or to avoid needing to repeat content set out in previous emails in the chain.
19. Accordingly, I am satisfied the emails as a whole are subject to review.
20. In relation to the Agency's view the interpretation I have adopted 'would require the department to review the manner in which it creates all documents going forward', suggests an agency might consider changing its work practices to potentially avoid documents being captured by an FOI request. In my view, the creation of documents by an agency and the general right of access to documents provided for under the FOI Act can coexist without necessarily undermining the efficient and proper conduct of government. In any case, such an approach adopted by an agency subject to the FOI Act would be contrary to the object of the FOI Act and Parliament's intention¹ and the good administration of government.

¹ Section 3(2).

Review of exemptions

21. 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'.² This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of my decision.
22. As stated above, the Agency exempted the documents in full under sections 30(1) and 33(1).
23. In its submission dated [date], the Agency claimed the attachments are also exempt under sections 31(1)(a) and 31(1)(d).

Section 31(1)(a) – Law enforcement documents

24. Section 31(1)(a) provides a document is an exempt if its disclosure under the FOI Act would, or would be reasonably likely to, 'prejudice the investigation of a breach or possible breach of the law' or 'prejudice the enforcement or proper administration of the law in a particular instance'.
25. 'Reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.³
26. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴
27. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁵
28. The Applicant seeks access to the documents to understand why the Agency did not refer the allegations the Applicant made to the Agency to the Independent Broad-Based Anti-Corruption Commission, and to understand the nature of the alleged disclosure of information the Applicant provided to the Agency to third parties.
29. I acknowledge the Applicant's interest in the documents. I accept there is a strong public interest in the Agency's investigative processes regarding allegations of this nature to be as transparent as possible, to ensure a thorough and diligent investigation is conducted in compliance with relevant processes and procedures.
30. However, I must also consider whether granting the Applicant access to the information would, or would be reasonably likely to, prejudice the Agency's investigation, which it has advised is ongoing.
31. Document 1 is an email between Agency officers containing a file note of a meeting between the Applicant and Agency officers. It contains a summary of allegations made by the Applicant, a preliminary assessment of the allegations and deliberation as to any course of action to be taken by the Agency.
32. Documents 2 and 3 are email chains concerning the Applicant's allegations for the purpose of substantiating those allegations in the context of an investigation.

² *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

³ *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

⁴ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁵ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

33. In its submission dated [date], the Agency submits disclosure of the documents would 'disclose the manner of investigating breaches' of relevant polices and 'would undermine the ongoing investigation'.
34. I accept the Agency's submission the investigation is currently ongoing and persons who make allegations of this nature are generally not kept apprised of developments in an investigation. To do so would substantially undermine and likely prejudice an investigation.
35. Given the nature of the allegations made by the Applicant and the fact an investigation is ongoing, I consider the documents are inherently sensitive. The Agency's process of managing allegations of this nature requires Agency officers to discuss, deliberate, and record relevant issues in a thorough and considered manner. It is crucial agencies are able to conduct a thorough and considered investigation with the necessary degree of confidentiality required. As stated above, to otherwise do so would compromise the integrity and outcome of investigations.
36. Further, the FOI Act does not impose any conditions or restrictions on an applicant's use or further dissemination of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the documents by the Applicant and others.
37. I am satisfied the nature of the allegations, if proven, would constitute a breach, or possible breach, of the law. Therefore, given the investigation is ongoing, I am satisfied disclosure of the documents would prejudice the Agency's ongoing investigation.
38. Accordingly, I am satisfied the documents are exempt under section 31(1)(a).

Deletion of exempt or irrelevant information

39. 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.
40. 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 are not 'practicable', and release of the document is not required under section 25.⁷
41. Having reviewed the documents, I am not satisfied it would be practicable to delete exempt information from the documents as it would render them meaningless.

Sections 30(1), 33(1) and 31(1)(d)

42. In light of my decision in relation to section 31(1)(a), it is not necessary for me to also consider the application of sections 30(1), 33(1) or 31(1)(d) to the documents.

Conclusion

43. On the information before me, I am satisfied the documents are exempt under section 31(1)(a).
44. As I am not satisfied it is practicable to delete exempt information from the documents in accordance with section 25, I have determined to refuse access to the documents in full.

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].

Review rights

45. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
47. The Agency may apply to VCAT for a review up to 14 days the date it is given this Notice of Decision.¹⁰
48. 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.
49. 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

When this decision takes effect

50. My decision does not take effect until the review periods (stated above) expire. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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).