

Notice of Decision and Reasons for Decision

Applicant:	'BP2'
Agency:	Department of Justice and Community Safety
Decision date:	27 May 2020
Exemptions considered:	Sections 30(1), 33(1), 25
Citation:	'BP2' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2020] VICmr 145 (27 May 2020)

FREEDOM OF INFORMATION – recruitment documents – panel interview notes – panel scores – internal working documents – public interest considerations – personal affairs information of third parties

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 in that I have determined additional information in the documents should be released.

I am satisfied certain information in the documents is exempt under section 33(1), and information deleted by the Agency in accordance with section 25 is irrelevant to the Applicant's request and is to remain deleted.

However, I am not satisfied certain information in the documents is exempt under section 30(1).

Where I am satisfied it is practicable to delete irrelevant or exempt information in the documents in accordance with section 25, I have determined to grant access in part to those documents.

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
27 May 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to recruitment selection and interview documents in relation to their application for employment in a specific Agency position. The Applicant seeks access to the following documents:

First three rounds of recruitment: Specifically, I am seeking all selection panel notes and all interview notes from all 3 panel members and feedback notes from the panel chair [third party name and position] related to my selection, shortlisting, interview and feedback for that position from [month year]

Fourth round of Recruitment: Specifically, I am seeking ALL selection panel notes and ALL interview notes from all 3 panel members for the final round of recruiting conducted by [third party name and position] related to my selection, shortlisting and interview for that position from [specified date].

2. In their request, the Applicant raised concerns their interview scores were adjusted by the panel chair following the interview and seeks access to the ‘...original scores as well as the adjusted score notes’.
3. The Agency relied on the exemptions under sections 30(1) and 33(1) to refuse access to parts of the documents. 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.
5. During the review, the Applicant advised they do not seek access to the names of other candidates or the email addresses of Agency staff involved in the interview process. However, all other personal affairs information is sought.
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 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 submission dated [date].
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.

Review of exemptions

Section 33(1)

10. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;¹ and
- (b) such disclosure would be 'unreasonable'.

11. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.²

Do the documents contain personal affairs information?

12. Having reviewed the documents, I am satisfied information in the documents relates to the personal affairs of persons other than the Applicant (a **third party**), including their names, position titles, signatures, interview scores and rankings. Certain parts of the documents also contain information relating to the Applicant's personal affairs.

Would disclosure be unreasonable in the circumstances?

13. In deciding whether the requirements for section 33(1) are met, it is necessary to determine whether disclosure of the personal affairs information in the documents would be unreasonable in the circumstances.

14. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a person's personal privacy in the circumstances.

15. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their views on the disclosure of such information.³

16. However, this obligation does not arise if:

- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
- (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
- (c) it is not practicable to do so.⁴

17. I have considered the weight the following factors in the context of this matter:

- (a) The nature of the personal affairs information

The information in the documents was recorded as part of the Agency's recruitment processes. Given the content of the information and the context in which it was recorded, I am of the view that part of the information was provided in confidence. This weighs against disclosure.

¹ Sections 33(1) and (2).

² Section 33(9).

³ Section 33(2B).

⁴ Section 33(2C).

(b) The extent to which the information is available to the public

I do not consider the information exempted by the Agency is available to the public. This weighs against disclosure.

(c) Whether any public interest would be promoted by release of the information

I note the Applicant's personal interest in seeking access to this information; however, I do not consider there is a public interest in the disclosure of the information such that the public interest would be promoted by release of the personal affairs information of third parties in the documents. This weighs against disclosure.

(d) Whether the individuals to whom the information relates object or would be likely to object to the release of the information

I do not have any information before me to suggest the Agency consulted with the individuals to whom the information relates.

The documents contain information relating to third parties' contact details, interview scores, experiences and other identifying information. This information was obtained by the Agency for the purpose of applying for a position within the Agency and was done so in confidence. With this in mind, it is likely the third party would be reasonably likely to object to the release of their personal affairs information to the Applicant. This weighs against disclosure.

(e) Whether disclosure of the information would, or would be reasonably like to, endanger the life or physical safety of any person

There is no information before me to suggest this is a relevant factor in this matter.

18. In balancing the above factors, I have determined it would be unreasonable to release the personal affairs information to which the Agency has refused access under section 33(1).

Section 30(1)

19. 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.

20. 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'.⁵

21. The exemption does not apply to purely factual material in a document.⁶

⁵ *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].

⁶ Section 30(3).

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

22. 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.
23. 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?

24. In *Re Waterford and Department of Treasury (No. 2)*,⁷ 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.

25. 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?

26. I must also be satisfied disclosure of this information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁸
27. In deciding whether disclosure of the documents would be contrary to the public interest, I have given weight to the following relevant factors:⁹
 - (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;

⁷ [1981] 1 AAR 1.

⁸ *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].

⁹ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.

28. Having consider the above factors, I have determined disclosure of certain parts the documents would be contrary to the public interest on the following grounds:

- (a) 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. This factor is contrary to the public interest.

- (b) 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 panel member notes are mostly handwritten, taken in summary or short form and provide for an interview panel member to quickly and conveniently record their contemporaneous opinions and comments. 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 may not be decipherable from the documents. This factor is contrary to the public interest.

29. Accordingly, documents of this nature generally do not capture all relevant information presented to or considered by an interview panel member. In this sense, they can be considered an incomplete record of a selection panel member's thinking processes recorded during and at the end of an interview. For example, a number of factors may impact upon the detail of notes taken, including the particular approach of a selection panel member to either take detailed or brief notes, or the number and length of interviews being undertaken over a period of time. Further, comments recorded by an interview panel member in such a document will generally be subject to further discussion and deliberation between all panel members.

30. While noting the right of every person to seek access to documents under the FOI Act, I consider it would be contrary to the public interest to disclose certain information due to the likelihood it would undermine the Agency's recruitment processes and the ability of selection panel members to freely record their opinions and comments in such documents.

31. While Agency officers and recruitment consultants, who are interview panel members, are professionally obliged to provide their opinions and comments in a recruitment process, I accept there is a public interest in them being able to quickly and conveniently record their contemporaneous opinions and comments during an interview without concern that will often be brief and short form notes will be disclosed to the candidate. Therefore, I am satisfied the impact of routinely disclosing documents of this nature would undermine the robustness and integrity of the Agency's recruitment process.
32. Having carefully reviewed the documents, I am not satisfied it would be contrary to the public interest for information concerning the Applicant's overall performance in respect to the Agency's recruitment process, being their final interview scores and the final panel summary only, to be disclosed for the following reasons:
- (a) In light of the Applicant being aware of the outcome of the recruitment process, I consider the opinion contained in the Applicant's overall scores and the panel's final typed summary only, where provided, are not sensitive and disclosure would not have an adverse effect on the integrity or effectiveness of future decision-making.
 - (b) I have considered whether releasing the Agency officers' final opinion and recommendations would inhibit the frankness and candour of information provided to the Agency in relation to the suitability of future candidates. As Agency officers are obliged to provide frank advice when considering suitability for recruitment, I am not satisfied release of this particular content as recorded in the documents would inhibit Agency officers in the future.
 - (c) I do not consider disclosure of the Applicant's overall scores and final panel summary comment will necessarily cause ill-informed debate given the capacity of the Applicant to understand the nature of an agency's requirement to consider and rank every job candidate on the basis of their interview. This function is well-understood and, in my view, will not cause confusion or ill-informed debate.
 - (d) With regard to the summary comment relating to the Applicant's performance, I am of view there is a reasonable expectation that unsuccessful applicants would be provided with this type of considered overall feedback upon request at the conclusion of a recruitment process.
 - (e) In any case, it is open to the Agency to release the information with any necessary explanation required to eliminate or minimise any potential misunderstanding or misinterpretation concerning the information in the document.
33. Accordingly, I am satisfied it would be contrary to the public interest to release certain parts of the recruitment documents and the relevant information in the document is exempt under section 30(1). I am not however satisfied the exemption in section 30(1) applies to information relating to the Applicant's overall recruitment scores and the panel's final typed summary contained in the documents. Accordingly, I have decided to grant access to certain documents in part.
34. **Annexure 1** sets out my decision with respect to section 30(1) and each of the documents.

Deletion of exempt or irrelevant information

35. 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.

36. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
37. I have considered the information in Document 5 that the Agency determined as irrelevant. I am satisfied it falls outside the scope of the Applicant's request as it does not concern the Applicant's recruitment and selection process notes or scores as specified in the Applicant's request.
38. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

39. On the information before me, I am satisfied certain information in the documents is exempt under section 33(1), and information deleted by the Agency in accordance with section 25 is irrelevant to the Applicant's request and is to remain deleted.
40. However, I am not satisfied certain information in the documents is exempt under section 30(1).
41. Where I am satisfied it is practicable to delete irrelevant or exempt information in the documents in accordance with section 25, I have determined to grant access in part to those documents.
42. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

43. 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.¹²
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
46. 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.
47. 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.¹⁵

When this decision takes effect

48. My decision does not take effect until the relevant Agency review period (stated above) expires.
49. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁰ *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].

¹¹ *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].

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Interview Guide Position Number [number]	13	Released in part Sections 30(1), 33(1)	Release in part Sections 30(1), 33(1), 25 Information exempted by the Agency under sections 33(1) and 30(1) is exempt and is to remain deleted in accordance with section 25 except for the following information, which is not exempt under section 30(1): <ul style="list-style-type: none"> Page 1: numbers appearing in table titled, 'Overall evaluation' under the column titled, 'Rating (1-5)'. 	<p>Section 30(1): Having reviewed the information exempted by the Agency, I am not satisfied it would be contrary to the public interest for the Agency to release the Applicant's overall scores in relation to the assessment criteria. Accordingly, I am satisfied this information is not exempt under section 30(1).</p> <p>However, I am satisfied it would be contrary to the public interest to release certain information in the document that concerns Agency officers' written opinions and notes taken down during the interview. Accordingly, I am satisfied this information is exempt under section 30(1).</p> <p>Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons set out in the above Notice of Decision above. Accordingly, I am satisfied this information is exempt under section 33(1).</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>
2.	[date]	Interview Guide	9	Released in part	Release in part	Section 30(1): I am satisfied it would be

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		Position Number [number]		Sections 30(1), 33(1)	Sections 30(1), 33(1), 25 Information exempted by the Agency under sections 33(1) and 30(1) is exempt and is to remain deleted in accordance with section 25.	contrary to the public interest to release certain information in the document that concerns Agency officers' written opinions and notes taken down during the interview. Accordingly, I am satisfied this information is exempt under section 30(1). Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.
3.	[date]	Interview Guide Position Number [number]	9	Released in part Sections 30(1), 33(1)	Release in part Sections 30(1), 33(1), 25 Information exempted by the Agency under sections 33(1) and 30(1) is exempt and is to remain deleted in accordance with section 25.	Section 30(1): See comments for Document 2. Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.
4.	[date]	Recruitment and Selection Report	2	Released in part Sections 30(1), 33(1)	Release in part Sections 30(1), 33(1), 25 Information exempted by the Agency under sections 33(1) and 30(1) is exempt and is to remain deleted in accordance with section 25	Section 30(1): See comments for Document 1. Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>except for the following information, which is not exempt under section 30(1):</p> <ul style="list-style-type: none"> Page 1: in the table under, 'Interview and Assessment details', the Applicant's name and corresponding 'Interview Assessment' numerical score. 	
5.	[date]	Email chain: [description]	5	Released in part Sections 30(1), 33(1)	<p>Release in part</p> <p>Sections 30(1), 33(1), 25</p> <p>Information exempted by the Agency under sections 33(1) and 30(1) is exempt and is to remain deleted in accordance with section 25.</p>	<p>Section 30(1): See comments for Document 2.</p> <p>Section 33(1): See comments for Document 1.</p> <p>Section 25: I am satisfied the information removed as irrelevant in the document is irrelevant to the Applicant's request and is to remain deleted.</p>
6.	[date]	Interview Guide Position Number [number]	8	Released in part Sections 30(1), 33(1)	<p>Release in part</p> <p>Sections 30(1), 33(1), 25</p> <p>Information exempted by the Agency under sections 33(1) and 30(1) is exempt</p>	<p>Section 30(1): See comments for Document 1.</p> <p>Section 33(1): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>and is to remain deleted in accordance with section 25 except for the following information, which is not exempt under section 30(1):</p> <ul style="list-style-type: none"> Page 1: numbers that appear in the table titled, 'Overall evaluation' under the column titled 'Rating (1-5)' and the handwritten number equating the total. 	
7.	[date]	Interview Guide Position Number [number]	8	Released in part Sections 30(1), 33(1)	<p>Release in part</p> <p>Sections 33(1), 30(1), 25</p> <p>Information exempted by the Agency under sections 33(1) and 30(1) is exempt and is to remain deleted in accordance with section 25, except for the following information, which is not exempt under section 30(1):</p> <ul style="list-style-type: none"> Page 1: the numbers 	<p>Section 30(1): See comments for Document 1.</p> <p>Section 33(1): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					that appear in the table titled, 'Overall evaluation' under the column titled, 'Rating (1-5)'.	
8.	[date]	Interview Guide Position Number [number]	8	Released in part Sections 30(1), 33(1)	Release in part Sections 33(1), 30(1), 25 Information exempted by the Agency under sections 33(1) and 30(1) is exempt and is to remain deleted in accordance with section 25, except for the following information, which is not exempt under section 30(1): <ul style="list-style-type: none"> Page 1: the numbers in the table titled, 'Overall evaluation' under the column titled 'Rating (1-5)'. 	Section 30(1): See comments for Document 1. Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.
9.	[date]	Recruitment and Selection Report	3	Released in part Sections 30(1), 33(1)	Release in part Sections 33(1), 30(1), 25 Information exempted by	Section 30(1): See comments for Document 1. Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>the Agency under sections 33(1) and 30(1) is exempt and is to remain deleted in accordance with section 25, except for the following information, which is not exempt under section 30(1)</p> <ul style="list-style-type: none"> • Page 1: in the table under 'Interview and Assessment details', the Applicant's name and corresponding 'Interview Assessment' numerical score; and • Page 2: in the table under, 'Additional information', the panel's overall summary paragraph relating to the Applicant only. 	