

## Notice of Decision and Reasons for Decision

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Applicant:	'BL9'
Agency:	Victoria Police
Decision date:	17 April 2020
Exemption considered:	Section 30(1)
Citation:	'BL9' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 115 (17 April 2020)

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FREEDOM OF INFORMATION – recruitment documents – police recruitment process – employment assessment – psychological interview notes – psychological reports – referee reports – internal working documents – 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.

I am satisfied the documents are exempt under section 30(1).

Where it is practicable to provide the Applicant with an edited copy of a document with exempt and/or irrelevant information deleted in accordance with section 25, I have determined to grant access to those 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  
17 April 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents concerning the Applicant's recruitment application with the Agency:
  - (a) [Psychological Report] dated [date];
  - (b) [Psychological Report] compiled by [named person];
  - (c) [Psychological Report] dated [date];
  - (d) [Psychological Report] dated [date];
  - (e) Medical/Psychological Report dated [date]; and
  - (f) 3 referee reports.
2. In its decision, the Agency identified 15 documents falling within the terms of the Applicant's request. It did not locate any documents relevant to parts (b) and (c) of the FOI request.
3. The Agency relied on the exemptions under sections 30(1), 33(1) and 34(1)(b) to refuse access to certain information and granted access to two documents in part and refused access to 13 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.
5. The Applicant also made a complaint on the grounds that several documents could not be located. This office is currently progressing the complaint.
6. By email dated [date], the Applicant removed 'personal affairs information' exempted under section 33(1) and Documents 2, 5, 6 and 7 from the scope of this review. Accordingly, I am not required to assess the application of section 33(1) to the documents.
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) the Applicant's submission dated [date], information provided with the Applicant's review application and correspondence from the Applicant received during this review; and
  - (c) information provided by the Agency during this review.
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; 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.

12. The exemption does not apply to purely factual material in a document.<sup>1</sup>

#### *Were the documents prepared by an officer of the Agency?*

13. The term 'officer of an Agency' is defined in section 5(1). The phrase has been interpreted broadly and includes a member of the agency, a member of the agency's staff, and any person engaged by or for the agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.
14. I accept the words of section 30(1) are wide enough to cover a third party consultant engaged by or on behalf of an agency.<sup>2</sup>
15. In this matter, I am satisfied certain documents were prepared by external consultants engaged by the Agency and these consultants are 'officers' of the Agency for the purposes of section 30(1).

#### *Do the documents contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

16. The term 'deliberative process' has been interpreted widely. In *Re Waterford and Department of Treasury (No. 2)*,<sup>3</sup> the Commonwealth Administrative Appeals Tribunal held:

... "deliberative processes" [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.

17. The documents subject to review can be categorised as follows:

- (a) psychological reports (**Documents 1, 3, 4, 9**);
- (b) psychological interview notes (**Documents 8, 10, 11 and 12**); and
- (c) referee reports (**Documents 13, 14 and 15**).

18. The documents relate to the Applicant's application for recruitment as a sworn police officer.

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Thwaites v Department of Human Services (No 2)* (1998) 14 VAR 347; *Mees v University of Melbourne (General)* [2009] VCAT 782 at [31] and *Koch v Swinburne University* [2004] VCAT 1513 at [15].

<sup>3</sup> [1981] 1 AAR 1.

19. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant material deleted.
20. The interview notes are templated documents to assist interviewers in their assessment of the Applicant's psychological suitability for the role. These documents include information such as interview questions, key areas of assessment, instructions for the interviewer and includes the ability for the interviewers to record their overall comments and contemporaneous observations taken during the interview.
21. The typed and handwritten comments recorded by the interviewers contain evaluative remarks of the interviewers and therefore disclose the interviewers' opinion and thinking process.
22. Further, I consider the notes reflect information the interviewers considered to be relevant to their assessment of the Applicant's suitability for the role during the course of the interview and are not a verbatim or full transcript of the Applicant's responses.
23. While this information appears to be administrative to a degree, I consider it is nonetheless deliberative in nature. Accordingly, I am not satisfied the interview notes are factual in nature.
24. Similarly, the reports also contain evaluation and assessment of the Applicant's psychological suitability as a sworn police officer. As outlined above, I consider the reports reflect information the assessing officers considered relevant to their assessment of the Applicant's suitability for the role.
25. I am satisfied the referee reports contain the opinion, advice and recommendations regarding the Applicant's suitability to progress to the next phase of the recruitment process. However, I am satisfied certain information in the referee reports is purely factual in nature. Accordingly, such information is not exempt under section 30(1) by virtue of section 30(3).
26. Having reviewed the documents, with the exception of certain information that is factual in nature, I am satisfied the documents contain information in the nature of opinion, advice and recommendation with respect to the Applicant's suitability for recruitment to the role.

*Were the documents prepared in the course of, or for the purpose of, the deliberative processes involved in the functions of the Agency?*

27. I am satisfied the documents were prepared in the course of and for the purpose of the Agency's deliberative processes with respect to undertaking its recruitment activities for police officers.

*Would it be contrary to the public interest for this information to be released?*

28. 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'.<sup>4</sup>
29. In doing so, 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.
30. In determining whether disclosure would be contrary to the public interest, I have taken the following factors into consideration:<sup>5</sup>
  - (a) the right of every person to gain access to documents under the FOI Act;

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<sup>4</sup> *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].

<sup>5</sup> *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 making 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.

31. In summary, the Agency's decision states disclosure of the exempt information would compromise its psychological assessment processes.

32. I have considered the Applicant's interest in the information and the right of every person to gain access to documents under the FOI Act. I note the Applicant has concerns about the Agency's recruitment process for police officers. In particular, the Applicant raises concerns their application was determined to be unsuccessful through discriminatory means and seeks to determine whether the Agency undertook 'unfair' processes and took into consideration certain matters when determining the Applicant's suitability as a police officer.

33. I also consider there is a strong public interest in the Agency's recruitment processes being as transparent as possible, to ensure compliance with its own processes and procedures, as well as any relevant legislation. Transparency is essential in showing the Agency's decision is fair and based on set criteria and merit.

34. However, in the present matter, I am not satisfied there is information in the documents to show that the Agency did not follow the appropriate protocols or otherwise did not act fairly and appropriately in the assessment of the Applicant's suitability for the role. Accordingly, the Applicant's reason for seeking access to the documents is not a significant factor in favour of disclosure in the circumstances of this case.

35. In its decision letter, the Agency states:

The interview uses a semi-structured template that contains all the questions asked by psychologists to assess psychological suitability. Providing the template would mean disclosing all the questions that were asked in order to assess psychological suitability to a potential future applicant. This process mitigates any risks regarding an applicant's psychological suitability and release of this information would provide clear advantage over other applicants if he/she were to apply in future, making the recruitment process unfair.

The psychological interview contains typed and hand written notations which are incomplete and do not represent the full position. Their release would not allow an informed understanding of the situation and could potentially mislead and confuse and create unnecessary speculation about the interview.

Disclosing such notes could discourage officers of an agency from maintaining such notes which would inhibit good decision making...

36. The Agency must engage appropriately skilled individuals for its police officer positions. Disclosing details of the assessment of candidates routinely under FOI could reasonably expose the selection process for such positions to manipulation. The nature of release of documents under the FOI Act is unconditional and unrestricted. Dissemination of the documents could provide future candidates with an unfair advantage because the documents reveal the specific assessment questions and processes employed during the recruitment process, as well as provide insight into the factors or interview responses that were viewed favourably. A potential future candidate could use this information to manipulate the Agency's recruitment process through adjusting their responses or behaviour to achieve a positive result.
37. Accordingly, I am satisfied disclosure would pose a reasonable risk of undermining the integrity of the Agency's recruitment process, particularly in circumstances where that process involves identifying psychologically suitable candidates for the recruitment of police officers.
38. Agency officers and psychologists are professionally obliged to provide frank advice and opinions in relation to the suitability of a candidate. I accept the need for candour in the assessment of prospective employees, particularly in the context of the recruitment of police officers given the duties and powers they are expected to exercise.
39. I accept disclosure of the conclusions, recommendations and observations as recorded in the documents with respect to the Applicant's recruitment application and overall suitability as a police officer, would be likely to inhibit the detailed recording and openness with which Agency officers evaluate the various aspects of employment, recruitment and applications received. Accordingly, I am satisfied disclosure would be contrary to the public interest.
40. Further, I consider evaluative remarks and opinions recorded in the interview notes are a summary or in short form only. They provide for the interviewer to quickly and conveniently record their contemporaneous opinions and comments. Except for Document 10, I consider the notes recorded contain incomplete views and are a reflection of information the interviewers considered to be relevant to their assessment of the Applicant's suitability for the role during the interview and post-interview.
41. The notes do not appear to be a full and complete record of the Applicant's responses to questions posed at the interview. In this sense, they could be considered an incomplete record of the interviewers' thinking processes recorded during and post-interview.
42. I accept there is a public interest in interviewers being able to quickly and conveniently record their contemporaneous opinions and comments during an interview without concern the 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 and the ability of interviewers to freely record their opinions and comments in such documents.
43. I also consider release of the referee reports would be contrary to the public interest. While I accept in some instances, referees indicate their agreement to the disclosure of a report provided on a candidate, I am satisfied that, in most instances, referees do so with an expectation the details of their responses will be treated confidentially.
44. In this matter, the referee reports contain an 'Introduction' section that advises the referee information provided will be treated in 'strict confidence under the *Privacy Act and Data Protection Act* provisions'. The referee is also advised the 'applicant may view your reference or be made aware of your comments in these circumstances'. The Reports then ask the referee if they are 'prepared to comply if required? Y/N'. Each of the referees in this case indicate they would 'comply', and

accordingly, the referees have agreed to, or at least acknowledged and did not object to, the Applicant obtaining access to the information provided.

45. I accept the Agency relies on referees to provide frank and honest opinions concerning the capabilities and suitability for a role based on their knowledge of a candidate, which is essential in relation to the recruitment of police officers. It is vital referees are not inhibited from discussing sensitive issues where they consider it pertinent to a candidate's suitability for such a role.
46. As noted above, the nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or to use a document as they choose.<sup>6</sup> As such, no conditions or restrictions can be placed on a document released under the FOI Act.
47. I am satisfied future referees may be inhibited from providing referee reports of this nature where such information is disclosed routinely under FOI. Accordingly, I am of the view disclosure of the referee reports would have a detrimental effect on the Agency's ability to assess the suitability of candidates, which is critical to the effective functioning of the Agency, in particular, its ability to carry out its policing and law enforcement functions.
48. Accordingly, I am satisfied it would be contrary to the public interest to disclose the documents to the Applicant and the documents are exempt under section 30(1).
49. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

#### ***Other exemptions relied upon by the Agency***

50. As I have determined the documents are exempt under section 30(1), it is not necessary for me to consider the application of sections 34(1)(b) and 34(4)(c) to Documents 4, 8, 10, 11 and 12.

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

51. 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.
52. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>7</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>8</sup>
53. I have had regard to *McIntosh v Department of Premier and Cabinet*,<sup>9</sup> in which the Victorian Civil and Administrative Tribunal (VCAT) stated:

... if it is reasonably practicable to do so without revealing the deliberative content of a document, it is appropriate to separate the factual material from the deliberative content, and give access to a document containing the former... In deciding whether it is possible to separate the factual material from the deliberative content of a document, so as to give access to the former without revealing the latter, the document has to be considered in its entire circumstances.<sup>10</sup>

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<sup>6</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>7</sup> *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].

<sup>8</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].

<sup>9</sup> [2009] VCAT 1528 at [15]-[16]

<sup>10</sup> *Ibid*, quoting *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139 at [150]-[151].

54. In this matter, I am satisfied it is not practicable to provide the Applicant with edited copies of certain documents with exempt and irrelevant information deleted in accordance with section 25, as to do so would render those documents meaningless.

### **Conclusion**

55. On the information before me, I am satisfied the documents are exempt under section 30(1).
56. Where it is practicable to provide the Applicant with an edited copy of a document with exempt and/or irrelevant information deleted in accordance with section 25, I have determined to grant access to those documents in part.
57. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

58. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>11</sup>
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
60. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
61. 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.
62. 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>14</sup>

### **When this decision takes effect**

63. 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.

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<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> 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]	[Psychological Report]	1	Released in part Sections 30(1), 33(1)	<b>Release in part</b>  Section 25  This document is to be released with the name and position title of a third party, which is irrelevant, deleted in accordance with section 25	<b>Section 30(1):</b> This document is a report prepared for the purpose of communicating the outcome of the Applicant's psychological screening process to [specified Agency business unit]. The information deleted by the Agency is a letter code relating to recommendation made by the Agency officer in the report.  I am satisfied it concerns the opinion of the Agency officer regarding the Applicant's suitability for the position. However, I am not satisfied its disclosure would be contrary to the public interest. The code is provided without context. Accordingly, it is unlikely its release will provide the Applicant or future candidates with insight into the Agency's recruitment processes in relation to psychological suitability. Accordingly, I am not satisfied this document is exempt under section 30(1).  <b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25.
2.	[date]	[Company name] Personality [report title]	11	Refused in Full Section 34(1)(b)	<b>Not subject to review</b>	By email dated [date], the Applicant advised they do not seek review of this document.
3.	[date]	[Psychological report]	2	Released in part	<b>Release in part</b>	<b>Section 30(1):</b> I am satisfied the information deleted by the Agency concerns the assessing

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Sections 33(1), 30(1)	Section 30(1), 25  The information exempted by the Agency under sections 33(1) and 30(1) is to remain deleted in accordance with section 25.	psychologist's opinion regarding the Applicant's suitability for progression to the next phase of the recruitment process.  I am satisfied it would be contrary to the public interest to disclose the information for the reasons outlined above in the Notice of Decision. Accordingly, I am satisfied the information is exempt under section 30(1).  <b>Section 25:</b> See comments for Document 1.
4.	[date]	[Recruitment report]	5	Refused in full  Sections 30(1), 33(1), 34(1)(b)	<b>Refuse in full</b>  Section 30(1)	<b>Section 30(1):</b> See comments for Document 3.
5.	[date]	[Personality report]	10	Refused in full  Section 34(1)(b)	<b>Not subject to review</b>	By email dated [date], the Applicant advised they do not seek review of this document.
6.	[date]	[Company name] [report title]	14	Refused in full  Section 34(1)(b)	<b>Not subject to review</b>	By email dated [date], the Applicant advised they do not seek review of this document.
7.	[date]	[Company name] [report title]	10	Refused in full  Section 34(1)(b)	<b>Not subject to review</b>	By email dated [date], the Applicant advised they do not seek review of this document.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
8.	[date]	Psychological Interview Notes	20	Refused in full Sections 30(1), 34(4)(c)	Refuse in full Section 30(1)	<b>Section 30(1):</b> I am satisfied release of this document would be contrary to the public interest for the reasons outlined above in the Notice of Decision. Accordingly, this document is exempt under section 30(1).
9.	[date]	Medical/Psychological Interview Summary Report	2	Refused in full Section 30(1)	Refuse in full Section 30(1)	<b>Section 30:</b> See comments for Document 3.
10.	[date]	Medical/Psychological Interview Notes	6	Refused in full Sections 30(1), 34(4)(c)	Refuse in full Section 30(1)	<b>Section 30(1):</b> This document is a hybrid between interview notes and a report. It contains the interviewer's typed evaluation and comments in relation to key areas of assessment and an overall assessment of the Applicant's psychological suitability for the role. The Applicant's responses to interview questions are embedded throughout the document.  I am satisfied its disclosure would be contrary to the public interest for reasons outlined above in the Notice of Decision. Accordingly, I am satisfied it is exempt under section 30(1).
11.	[date]	Medical/Psychological Interview Notes	11	Refused in full Sections 30(1), 34(4)(c)	Refuse in full Section 30(1)	<b>Section 30:</b> See comments for Document 8.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
12.	[date]	Med/Psych Interview Template and notes	9	Refused in full Sections 30(1), 34(4)(c)	Refuse in full Section 30(1)	Section 30: See comments for Document 8.
13.	[date]	Referee Report	3	Refused in full Section 30(1)	Refuse in full Section 30(1)	Section 30: I am satisfied disclosure of this document would be contrary to the public interest for the reasons outlined above in the Notice of Decision. Accordingly, I am satisfied it is exempt under section 30(1).
14.	[date]	Referee Report	3.	Refused in full Section 30(1)	Refuse in full Section 30(1)	Section 30: See comments for Document 13.
15.	[date]	Referee Report	3	Refused in full Section 30(1)	Refuse in full Section 30(1)	Section 30: See comments for Document 13.