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Notice of Decision and Reasons for Decision

Applicant: 'CK7'
Agency: Department of Education and Training
Decision Date: 8 December 2020
Exemptions considered: Sections 31(1)(a), 31(1)(b)
Citation: 'CK7' and Department of Education and Training (*Freedom of Information*) [2020] VICmr 345 (9 December 2020)

FREEDOM OF INFORMATION – schools – incidents – break in and enter – vandalism – arson – loss or damage – graffiti – CCTV footage – costs – claims

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 is the same as the Agency's decision.

I am satisfied certain parts of the documents are exempt under sections 31(1)(a) and 31(1)(b).

I am satisfied it is practicable to provide the Applicant with an edited copy of Document 2 with exempt information deleted in accordance with section 25, and have determined to grant access to this document in part. In relation to Documents 5 to 14, I am satisfied it is not practicable to delete exempt information in the documents, and access is refused in full.

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

9 December 2020

Reasons for Decision

Background to review

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

I am specifically seeking documents containing the following information about schools: 1. separately for each financial year from [year] to present, the number of break and enter incidents at schools and the total cost of claims made by schools as a result of break and enter incidents. 2. separately for each financial year from [year] to present, the number of vandalism/malicious damage incidents at schools and the total costs of claims made by schools as a result of incidents of vandalism/malicious damage. 3. separately for each financial year from [year] to present, the number of arson incidents at schools, broken down by the number of reported cases and major arson incidents, and the cost of claims made by schools as a result of arson incidents. 4. separately for each financial year from [year] to present, the total number of incidents causing loss or damage at schools that have resulted in claims being made by schools and the total costs of those claims.
2. The Agency determined information regarding the cost of claims was not available to it in a central database, rather, such information would be available by contacting individual schools only. As there are over 4000 incidents, this would amount to a substantial and unreasonable diversion of resources from its operations.
3. The Agency wrote to the Applicant, in accordance with section 25A(6) and requested the Applicant reduce the scope of their request to remove information relating to costs. The Agency also provided details as to how the incident data would be provided.
4. On [date], the Applicant wrote to the Agency advising they agreed to refine the request terms relating to incident data, but continued to seek access to cost information and added an additional item to their request for CCTV footage relating to the most recent five incidents.
5. On [date], the Agency wrote to the Applicant stating it would not be able to process the request for claims cost information. No response was received from the Applicant and the Agency determined to process the request with that item removed from the scope.
6. In its decision, the Agency produced two documents in accordance with section 19 and identified three photographs and ten CCTV files falling within the terms of the Applicant's request. It granted access to three documents in full, one document in part and refused access to the remaining documents in full relying on the exemptions under sections 31(1)(a), 31(1)(b) and 33(1). The Agency's decision letter sets out the reasons for its decision.

Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access. The Applicant also complained that the Agency failed to provide access to the claims cost information described in their original form request, and refined request dated [date]. The Applicant's complaint is addressed below.
8. I have examined copies of the documents subject to review.
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 and submissions received from the parties.

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.
12. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Section 25A(1)

13. While the Agency did not refuse access to the requested documents under section 25A(1), the Agency initially determined processing the Applicant's request would substantially and unreasonably divert its resources from its other operations.
14. From my review of correspondence between the parties, it is necessary to clarify the purpose of both section 25A(1) and section 19 in this matter.
15. Section 25A(1) provides:

Requests may be refused in certain cases

- (1) The agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency or Minister is satisfied that the work involved in processing the request—
 - (a) in the case of an agency—would substantially and unreasonably divert the resources of the agency from its other operations; or...
- (6) An agency or Minister must not refuse to grant access to a document under subsection (1) unless the agency or Minister has—
 - (a) given the applicant a written notice—
 - (i) stating an intention to refuse access; and
 - (ii) identifying an officer of the agency or a member of staff of the Minister with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and
 - (b) given the applicant a reasonable opportunity so to consult; and
 - (c) as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.

Section 19

16. The Agency also determined certain parts of the Applicant's request were not available in discrete form and produced two documents (Documents 1 and 2) in accordance with section 19.
17. Section 19 sets out the circumstances in which an agency must create a document in response to an FOI request where the requested information does not exist in discrete document form:

Requests involving use of computers etc.

- (1) Where—
 - (a) a request is duly made to an agency;
 - (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and
 - (c) the agency could produce a written document containing the information in discrete form by—
 - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
 - (ii) the making of a transcript from a sound recording held in the agency— the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.
18. The phrase ‘document of the agency’ is defined in section 5 to mean ‘a document in the possession of an agency, or in the possession of the agency concerned, as the case requires, whether created in the agency or received in the agency’.
19. Importantly, section 19 does not require an agency to create a document through a manual search, collation or assembly of information or data. Rather, it applies where an agency can ‘produce a written document containing the information in discreet form by use of a computer or other equipment’ (e.g. by conducting a search of a database).

Complaint regarding creation of documents under section 19

20. At the time of making their review application, the Applicant made a complaint that the Agency did not provide documents relating to the claims cost information for certain incidents (**claims information**). I note this formed part of the original request and was not out scoped from the terms of the request by the Applicant. However, from my review of the correspondence exchanged between the parties, I am satisfied the Agency notified the Applicant it was unable to provide the requested information and proposed to remove this aspect of the Applicant’s request. It appears the Applicant did not respond to the Agency’s correspondence in relation to this aspect of their request.
21. In its submission to OVIC in relation to the claims information, the Agency advises:

The Department liaised with the [relevant division] in relation to these request terms, and determined that a section 19 document could be produced from the [named] database with information relating to the incident numbers of the categories mentioned. [The relevant division] noted that cost/claim information does not form part of the input data fields when recording an incident, and so they do not hold that information within the [named] database.

The FOI Unit subsequently asked where that information would be stored. [The relevant division] noted that schools operate semi-independently from the Department, and in most cases would manage their own repairs/maintenance/claims for damage sustained at the school. Therefore, relevant schools would hold their own documents relating to the costs incurred as a result of one of the relevant incidents. In order to get that information, each school with a relevant recorded incident (as per the documents provided to the Applicant) would need to be identified, and independently asked for invoices, insurance claims etc. that relate to the relevant repairs/maintenance/replacements for damages sustained in that given incident. This information is not held centrally, and while schools are part of the Department, the central Department does not have remote access to school computer systems or records.

It is possible in certain instances that the central Department would be advised of cost amounts in response to incidents, or provide assistance in larger claims, but this would not be:

1. universal, in that all claims/costs would not run through, or necessarily even be paid by, the central Department;
2. recorded in a central repository in such a way that a section 19 document could be created; or
3. equated to the relevant data point in the [named] database. It would not be possible without manual examination to know whether a certain insurance claim/invoice for repair of damage related to a specific incident recorded in [named database], as these two pieces of information are managed separately and for different purposes.

...

I note that the Applicant has claimed that [they have] had success in other Australian jurisdictions in relation to obtaining this information. DET is not privy to the capabilities of systems in other states in relation to this issue, and the production of comparative documents on this issue is not an exercise that the Department completes for its own purposes. I also note that Victorian schools have historically (since the 1990s at least) had a quasi-independent school system whereby schools harbour greater financial independence from the Department than may be the case in other states. This may also be a factor in the Applicant's belief that the central Department would be expected to hold this information or at the very least have access to it.

22. I accept the Agency's submission and, based on the information above, it was open to the Agency to determine the documents sought by the Applicant in relation to claims information did not exist in discreet form.
23. In my view, the Applicant seeks access to a document that would need to be created from a database, rather than individual receipts, invoices or other similar types of documents for each claim.
24. Given the terms of the Applicant's request, and based on further inquiries made by OVIC staff with the Agency, I accept a database containing the requested information does not exist. Nor does a document exist in discreet form that would satisfy the terms of the Applicant's request.
25. Further, given the Agency's description of the steps required to create a document meeting the terms of the request, I accept it would not be possible for the Agency to do so in accordance with section 19. Rather, the task of producing such a document would involve a number of manual steps that go beyond the obligation imposed on the Agency to create a document under section 19.
26. Accordingly, I am satisfied the Applicant's complaint has been investigated by OVIC staff to the fullest extent, the Agency has provided an adequate response to the complaint that I accept, and the Agency is not obliged to create a document in accordance with section 19.
27. As such, I consider the application of section 25A(1) is not relevant in this matter.

Review of exemptions

Section 31(1)(a)

28. Subject to this provision, section 31(1)(a) provides a document is an exempt document if its disclosure 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'.
29. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.
30. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.

31. 'In a particular instance' does not require a single specific investigation. It can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.
32. The Agency consulted with Victoria Police regarding the documents subject to review, as required by section 31(1)(5). Victoria Police advised certain matters referred to in the documents were the subject of an ongoing investigation and disclosure of the information could jeopardise the investigation.
33. On the information before me, I am satisfied:
 - (a) the documents contain evidence that relates to a police investigation;
 - (b) that investigation is ongoing; and
 - (c) disclosure would be 'reasonably likely' to prejudice the investigation of a breach or possible breach of the law.
34. Based on the advice of Victoria Police that certain matters referred to in the documents are the subject of an ongoing law enforcement investigation, I am satisfied this information in the documents is exempt under section 31(1)(a).

Section 31(1)(b)

35. Subject to this provision, section 31(1)(b) provides a document is an exempt document if its disclosure would, or would be reasonably likely to, 'prejudice the fair trial of a person or the impartial adjudication of a particular case'.
36. Section 31(1)(b) can apply to a document that concerns current or contemplated litigation.
37. The 'impartial adjudication of a particular case' includes the enforcement of criminal and civil rights and the use of the common law by agencies to recover damages. This phrase is not limited to criminal law or the regulatory powers of government agencies.
38. As stated above, the Agency consulted with Victoria Police regarding the documents subject to review, as required by section 31(1)(5). Victoria Police advised certain matters referred to in the documents are before the courts and disclosure of information in the documents could prejudice the fair trial of the accused person.
39. On the information before me, I am satisfied:
 - (a) the documents contain evidence that relates to a criminal matter;
 - (b) the matter is currently before the courts; and
 - (c) disclosure would prejudice the fair trial of the individual concerned.
40. Based on the advice of Victoria Police that certain matters referred to in the documents are before the courts, I am satisfied certain information in the documents is exempt under section 31(1)(b).

Deletion of exempt or irrelevant information

41. 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.

42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹ 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 25.²
43. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. I am satisfied it is not practicable for the Agency to delete exempt information in Documents 5 to 14. Accordingly, I have determined these documents are exempt in full. However, I am satisfied it is practicable to delete exempt information in Document 2 as I am satisfied to do so will not require a significant effort and the document will retain meaning.

Conclusion

44. On the information before me, I am satisfied the exemption in sections 31(1)(a) and 31(1)(b) apply to some of the documents.
45. As it is practicable to edit Document 2, I have determined to release it in part.
46. As it is not practicable to delete exempt information from Documents 5 to 14, I have determined to refuse access to those documents in full.

Review rights

47. 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.³
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
50. 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.
51. 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.⁶

When this decision takes effect

52. My decision does not take effect until the Agency's 14 day review period expires.
53. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹ *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].

² *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].

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

⁴ Section 52(5).

⁵ Section 52(9).

⁶ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document Number	Date of document	Title or description of document	Number of pages	Agency decision	OVIC decision	OVIC comments
1	Undated	Freedom of Information request pages created pursuant to section 19	3	Released in full	Not subject to review	
2	Undated	Five most recent Incident Reports	1	Released in part Sections 31(1)(a), 31(1)(b)	<p>Release in part Sections 31(1)(a), 31(1)(b), 25</p> <p>The document is to be released with the following exempt information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> information in the incident description for [named database] number [redacted], which is exempt under section 31(1)(a); and information in the incident description for [named database] number [redacted], which is exempt under section 31(1)(b). 	<p>Section 31(1)(a): I am satisfied certain information in the document is subject to an ongoing investigation by Victoria Police and its disclosure would be reasonably likely to prejudice the ongoing law enforcement investigation. Accordingly, I am satisfied the document is exempt under section 31(1)(a).</p> <p>Section 31(1)(b): I am satisfied certain information in the document relates to a criminal matter currently before the courts and its disclosure would be reasonably likely to prejudice a person's right to a fair trial. Accordingly, I am satisfied the document is exempt under section 31(1)(b).</p>
3	[date]	CCTV footage	1	Released in full	Not subject to review	

Annexure 1 – Schedule of Documents

Document Number	Date of document	Title or description of document	Number of pages	Agency decision	OVIC decision	OVIC comments
4	Undated	Photographs from a primary school	3	Released in full	Not subject to review	
5	[date]	CCTV footage	1	Refused in full Sections 31(1)(b), 33(1)	Refuse in full Section 31(1)(b)	Section 31(1)(b): See comments for Document 1.
6	[date]	CCTV footage	1	Refused in full Sections 31(1)(b), 33(1)	Refuse in full Section 31(1)(b)	Section 31(1)(b): See comments for Document 1.
7	[date]	CCTV footage	1	Refused in full Sections 31(1)(b), 33(1)	Refuse in full Section 31(1)(b)	Section 31(1)(b): See comments for Document 1.
8	[date]	CCTV footage	1	Refused in full Sections 31(1)(b), 33(1)	Refuse in full Section 31(1)(b)	Section 31(1)(b): See comments for Document 1.
9	[date]	CCTV footage	1	Refused in full Sections 31(1)(a), 33(1)	Refuse in full Section 31(1)(a)	Section 31(1)(a): See comments for Document 1.
10	[date]	CCTV footage	1	Refused in full Sections 31(1)(a), 33(1)	Refuse in full Section 31(1)(a)	Section 31(1)(a): See comments for Document 1.

Annexure 1 – Schedule of Documents

Document Number	Date of document	Title or description of document	Number of pages	Agency decision	OVIC decision	OVIC comments
11	[date]	CCTV footage	1	Refused in full Sections 31(1)(a), 33(1)	Refuse in full Section 31(1)(a)	Section 31(1)(a): See comments for Document 1.
12	[date]	CCTV footage	1	Refused in full Sections 31(1)(a), 33(1)	Refuse in full Section 31(1)(a)	Section 31(1)(a): See comments for Document 1.
13	[date]	CCTV footage	1	Refused in full Sections 31(1)(a), 33(1)	Refuse in full Section 31(1)(a)	Section 31(1)(a): See comments for Document 1.
14	[date]	CCTV footage	1	Refused in full Sections 31(1)(a), 33(1)	Refuse in full Section 31(1)(a)	Section 31(1)(a): See comments for Document 1.