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## Notice of Decision and Reasons for Decision

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Applicant: 'CM7'  
Agency: Department of Health and Human Services  
Decision date: 6 January 2021  
Exemptions considered: Sections 30(1), 35(1)(b), 34(4)(a)(ii)  
Citation: 'CM7' and Department of Health and Human Services (*Freedom of Information*) [2021] VICmr 6 (6 January 2021)

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FREEDOM OF INFORMATION – workplace review – workplace investigation – external consultant report – service fee

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied certain information in Document 1 is exempt under sections 30(1) and 35(1)(b). However, I am not satisfied information in Documents 2 and 3 is exempt under section 34(4)(a)(ii).

Accordingly, I have decided to release additional information in the 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

6 January 2021

## Reasons for Decision

### Background to review

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

...documents relating to an independent review into the workplace culture among [description of] staff in the [location] area by [consultant name] from [date] until the date of this request. Specifically, I am [seeking]:

(1) reports of the independent review, (2) contracts, invoices and receipts relating to the provision of services by [consultant name] and (3) emails to, or from [consultant name] to an @minstaff.vic.gov.au address.
2. In its decision, the Agency identified three documents, totalling 46 pages, falling within the terms of the Applicant's request.
3. The Agency refused access to one document in full and two documents in part, relying on the exemptions in sections 30(1), 33(1), 35(1)(b) and 34(4)(a)(ii). The Agency's decision letter sets out the reasons for its decision.
4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

### *Complaint concerning adequacy of search and missing documents*

5. Alongside their review request, the Applicant raised a concern regarding the adequacy of the Agency's document searches. Specifically, the Applicant raised concerns the Agency's decision did not identify 'emails to or from the consultant at an @minstaff.vic.gov.au address'.
6. In accordance with section 61B(3), I have determined to address these concerns as part of my review.
7. OVIC staff made inquiries with the Agency regarding the Applicant's concern, which confirmed no such documents exist. The Applicant was advised of the findings following those inquiries.
8. In the circumstances, I am satisfied the Applicant's concerns have been addressed to the fullest extent possible in that I am satisfied the Agency conducted a thorough and diligent search and no further action is required in regard to the Applicant's concerns.

### Review

9. In consultation with OVIC staff, the Applicant advised they do not seek a review of the Agency's application of section 33(1) to the documents. As this information is no longer subject to review, I am satisfied it can be treated as irrelevant information in accordance with section 25.
10. I have examined a copy of the documents subject to review.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I have considered all communications and submissions received from the parties.
13. 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.

14. 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

## **Review of exemptions**

### ***Section 30(1)***

15. 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;
- (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.

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

17. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person engaged by or on behalf of an agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.

*Does the document 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?*

18. Document 1 is a report authored by an external consultant who was engaged by the Agency to conduct an independent review into workplace culture of [description of] staff employed by the Agency. In these circumstances, I am satisfied the external consultant is an 'officer' of the Agency for the purposes of the FOI Act.

19. Accordingly, having reviewed the document, I am satisfied it contains opinion, advice and recommendations prepared by an officer of the Agency.

*Was the document 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?*

20. I am satisfied the document was created in the course of the deliberative processes involved in the functions of the Agency, namely as an employer with obligations under workplace legislation.

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

21. In determining if disclosure of the document would be contrary to the public interest, 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.

22. In this case, I have given weight to the following factors:

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

- (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 document and the broader context giving rise to the creation of the document;
- (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 document 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 document 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 document; 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.

23. On balance, I have determined disclosure of certain information in the document would be contrary to the public interest for the following reasons:

- (a) The document was prepared in the course of a review into workplace culture of [description of a particular] office. The assessment examined the individual experiences of Agency officers regarding their workplace environment. Having reviewed the document and considered the subject matter, I am satisfied the broader context to which the document relates is sensitive.
- (b) I consider an external review process conducted by an external consultant engaged by the Agency relies on free and fulsome information being provided by review participants. In this case, I am of the view the Agency officers who participated would have provided information to the external consultant on the basis it would be held in confidence or be utilised for the internal processes of the Agency to address any workplace issues. Given the nature of disclosure under the FOI Act, which is unrestricted and unconditional, I do not consider the review participants would have contemplated or been as engaged in the process had they known documents prepared in relation to the review would be disclosed under the FOI Act, or otherwise be available publicly.
- (c) It is important that public sector agencies have the ability to undertake a thorough and considered review process in relation to workplace incidents, culture and conflict. Without an open flow of relevant and sufficient information from review participants, such workplace reviews are unlikely to be able to obtain clearly identify and advise on all relevant matters. Such an outcome, in my view, may result in flawed or incomplete review findings which would be contrary to the public interest.
- (d) While in certain circumstances it could be said the disclosure of such information is critical to ensuring public scrutiny of the way in which an agency carries out its statutory responsibilities and meets legislative obligations, having reviewed the document and considered its contents, I consider disclosure of the document would impair the Agency's ability to properly identify and address similar matters in the future by disclosing information obtained from Agency officers in relation to sensitive workplace issues. As such, I consider there is an essential public interest in maintaining a robust review process by ensuring the confidentiality of the Agency's consultations.

24. However, while the document contains highly sensitive aspects of the assessment process, I consider where it sets out recommendations made, I am of the view disclosure would support a broader public interest in transparency and accountability in relation to the Agency's obligations under workplace legislation. Further, I consider release of certain information in the document would build trust in the Agency's fulfilment of its obligations as a public sector employer and its ability to effectively and efficiently carry out its [description of] statutory responsibilities.
25. On balance, I am satisfied the document is exempt under section 30(1) subject to disclosure of certain information that I am satisfied would not be contrary to the public interest.
26. My decision regarding section 30(1) with respect to Document 1 is set out in **Annexure 1**.

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

27. The Agency also relies on the exemption in section 35(1)(b) to refuse access to information in Document 1.
28. A document is exempt under section 35(1)(b) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

*Was the information communicated in confidence?*

29. The report sets out various responses obtained from one on one interviews with Agency officers, written documents, such as notes taken of Agency officer exit interviews and recent staff survey responses.
30. The Agency advised it deemed consultation under section 35(1A) impractical, due to the time and effort that would be required to attempt to identify individual staff. The Agency also submits contacting individual Agency officers would be likely to cause staff distress in circumstances where they believed the information they provided as part of the review process was confidential. In the circumstances of this matter, I accept consultation by the Agency was not practicable.
31. As stated above, I am satisfied information was provided to the external consultant by Agency officers on a voluntary basis and confidentially. Accordingly, I am satisfied the information was obtained by the external consultant from Agency staff in confidence.

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

32. It is also necessary to consider whether disclosure of the document would be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future.
33. The need to ensure candour and honesty in the provision of feedback by Agency officers in such workplace reviews is of crucial importance where the results collected will be used to identify issues and inform relevant recommendations.
34. In my view, it would be contrary to the public interest to disclose information provided by Agency officers on a voluntarily basis, as well as information obtained through internal workplace documents concerning current and former Agency officers, as to do so may significantly impact the willingness of Agency officers to participate in any future review, staff survey or interviews on grounds the

information they provide to the Agency or an external consultant may be disclosed under the FOI Act and from which their identity may be discernible based on particular information or comments made and recorded.

35. Accordingly, I am satisfied Document 1 is exempt under section 35(1)(b). However, as discussed above, where the document sets out general recommendations, which do not divulge individual experiences recorded in confidence, I am satisfied section 35(1)(b) would not apply.

### **Section 34(4)(a)(ii)**

36. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, 'in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage'.
37. In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*, the Federal Court of Australia held, '[t]he terms "trade" and "commerce" are not terms of art. They are expressions of fact and terms of common knowledge"<sup>2</sup> and are terms 'of the widest import'.<sup>3</sup>
38. The fact an agency's predominant activities may be described as 'governmental' does not preclude it from relying on the exemption under section 34(4)(a)(ii).<sup>4</sup> An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency's other functions.<sup>5</sup>
39. The High Court of Australia has determined 'trade and commerce' means 'dealings in the course of those activities or transactions which of their nature bear a trading or commercial character'.<sup>6</sup>
40. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself or part of its operations in a manner similar to a commercial entity.
41. The Agency relies on section 34(4)(a)(ii) to exempt the costs involved in the engagement of the external consultant for the workplace review.
42. While I accept the Agency engaged an external consultant to provide a professional service for a fee, I consider such transactions are not commercial in nature where it involves a public sector agency undertaking an investigation into its workplace culture and which is funded by the public.
43. As such, I am not satisfied the Agency is involved in a commercial enterprise or is acting in a business or commercial capacity by merely incurring a financial fee as part of responding to internal workplace matters.
44. Accordingly, I am not satisfied the first limb of the exemption is met. Therefore, I am not satisfied the documents are exempt under section 34(4)(a)(ii).

### **Deletion of exempt and irrelevant information**

45. 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.

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<sup>2</sup> *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 [1978] FCA 50; [1978] 22 ALR 621 at 44.

<sup>3</sup> *Ibid* at 45.

<sup>4</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

<sup>5</sup> *Marple v Department of Agriculture* [1995] 9 VAR 29 at [47].

<sup>6</sup> *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 690, *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

46. 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>
47. As the Applicant does not seek access to information exempted by the Agency under section 33(1), I am satisfied this information is irrelevant and it is practicable for it to be deleted from the documents in accordance with section 25.
48. In relation to the exempt information I have determined is exempt, I am satisfied it is practicable to delete this information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

49. On the information before me, I am satisfied certain information in Document 1 is exempt under sections 30(1) and 35(1)(b). However, I am not satisfied information in Documents 2 and 3 is exempt under section 34(4)(a)(ii).
50. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt or irrelevant information deleted in accordance with section 25, I have granted access to the documents in part.
51. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

52. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>9</sup>
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
55. 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.
56. 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>12</sup>

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

57. 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>7</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [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 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</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]	Final report	30	Refused in full  Sections 30(1), 35(1)(b), 33(1)	<p><b>Release in part</b></p> <p>Sections 30(1), 35(1)(b), 25</p> <p>The document is to be released subject to the following directions:</p> <p><u>Page 27:</u></p> <ul style="list-style-type: none"> <li>• paragraph 2, the first two words are exempt;</li> <li>• paragraph 3 is exempt in full (including dot points);</li> <li>• paragraph 4 is exempt in full;</li> <li>• paragraph 5 is exempt in full (including dot points); and</li> <li>• paragraph 6, the first two words are exempt.</li> </ul> <p><u>Page 28:</u></p> <ul style="list-style-type: none"> <li>• paragraph 2 is exempt in full (including dot points);</li> <li>• paragraph 3 is exempt in full;</li> </ul>	<p><b>Section 30(1):</b> For the reasons outlined in the Notice of Decision, I am satisfied it would be contrary to the public interest to release the detailed information relating to the workplace assessment. However, where the document does not disclose information of this nature, I am satisfied such information is not exempt under section 30(1).</p> <p><b>Section 35(1)(b):</b> For the reasons set out in the Notice of Decision, I am satisfied confidential information provided by Agency officers as well as information provided to the consultant in written documents would be contrary to the public interest to disclose. However, where the document does not reveal information communicated by individuals in confidence, I am satisfied section 35(1)(b) does not apply.</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in</p>



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>• paragraph 4, the first 3 lines and the first 9 words of line 4 are exempt;</li> <li>• paragraph 5, the first two words are exempt;</li> <li>• paragraph 6 is exempt in full;</li> <li>• paragraph 7 is to be released except for the second dot point which is exempt.</li> </ul> <p><u>Page 29:</u></p> <ul style="list-style-type: none"> <li>• paragraph 1, the first two words are exempt. However, line 2, from the second word to the end of the paragraph is not exempt;</li> <li>• paragraph 2, the first sentence is not exempt;</li> <li>• paragraph 3 is exempt in full;</li> <li>• paragraph 5 is exempt in full;</li> <li>• paragraph 6 is exempt in full (including dot points); and</li> <li>• paragraph 9, the first two</li> </ul>	<p>accordance with section 25.</p> <p>A marked up copy of Document 1 will be provided to the Agency with my decision.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>lines are exempt.</p> <p><u>Page 30:</u></p> <ul style="list-style-type: none"> <li>the first two lines are not exempt;</li> <li>paragraph 2 is exempt in full;</li> <li>paragraph 3, the first two words and the last three words on line 3 to the end of the paragraph are exempt.</li> </ul>	
2.	[date]	Contract	15	Refused in part Sections 34(4)(a)(ii), 33(1)	Release in part Section 25	<p><b>Section 34(4)(a)(ii):</b> For the reasons set out in the Notice of Decision, I am not satisfied the Agency is engaged in trade or commerce for the purpose of section 34(4). Therefore, I am not satisfied the first limb of this exemption is made out. Accordingly, I am not satisfied the document is exempt under section 34(4)(a)(ii).</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.</p>

**Annexure 1 – Schedule of Documents**

<b>Document No.</b>	<b>Date of Document</b>	<b>Document Description</b>	<b>Number of Pages</b>	<b>Agency's Decision</b>	<b>OVIC Decision</b>	<b>OVIC Comments</b>
3.	[date]	Purchase Order	1	Refused in part Sections 34(4)(a)(ii), 33(1)	Release in part Section 25	See comments for Document 2.