

Notice of Decision and Reasons for Decision

Applicant:	'CR6'
Agency:	Department of Education and Training
Decision Date:	18 February 2021
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'CR6' and <i>Department of Education and Training</i> (Freedom of Information) [2021] VICmr 51 (18 February 2021)

FREEDOM OF INFORMATION – workplace matter – performance review – external review – access to report recommendations

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 fresh decision to refuse access to a document requested by the Applicant under the FOI Act.

I am satisfied certain information in the document is exempt under section 33(1). While I am not satisfied information in the document is exempt under section 30(1), in certain cases I am satisfied the information is exempt under section 33(1).

Accordingly, my decision on the Applicant's request differs from the Agency's decision in that I have determined to grant additional information to the Applicant.

As 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, I have granted access to the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
18 February 2021

Reasons for Decision

Background to review

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

[Name of workplace] Review Conducted in [Month Year] by [name of reviewer]. The review was for the [name of workplace] which is located at [location]. The reviewer was external to the [workplace] and I believe was appointed by [specified] staff members.

2. The Agency identified one document falling within the terms of the Applicant's request and granted access to the document in part. The Agency relied on sections 30(1) and 33(1) to refuse access to parts of the document. The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
5. On [date], the Agency made a fresh decision and determined to release a substantial amount of information in the document.
6. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
7. The Applicant advised they do not seek access to comments made by third parties to the reviewer. Where I have identified direct quotes of third parties in the document, I have determined they are irrelevant and are to be deleted in accordance with section 25.
8. I have examined a copy of the document 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.

Review of exemptions

Applicant's submission

13. The applicant submits:

I made the FOI application to see the review documents as I am a member of the [redacted] team which was the subject of the review.

I contributed to the review believing that we would see the recommendations made by [named person] as that is what occurred when the previous review was conducted approximately [specified timeframe]. I thought the process would be the same.

After the time and cost taken for the review to be completed – I don't understand why we would not have access to the recommendations as this could be used by our team to review our practices and to make improvements.

...

There were, I believe, a number of recommendations made and given that they are only recommendations and not binding or in any way government policy, I don't see why they cannot be released to the stakeholders. Seeing as the [redacted] unit is still operating the [specified] service - maybe our service could be improved or even reviewed if we were given access to the information in the official review document.

Agency's submission

14. The Agency provided its submission to OVIC in confidence. In my view certain information in the submission is not sensitive. Further, in order to properly record the reasons for my decision, I have determined to refer to parts of the submission in relation to the application of section 30(1).

15. The Agency submits:

I am advised the final decision encompassing the entirety of the review has not been finalised. The Department is currently working its way through implementing the findings and recommendations.

...

Additionally, the disclosure of the exempted information could potentially undermine the Department's decision-making ability related to future reviews.

...

Further, I note that it is well established that in relation to investigations conducted in an education context, there is a need for full co-operation in the gathering of information such that disclosure of information obtained during investigations could cause the quality of future audits and investigations to be compromised by apprehension by future participants of disclosure occurring.

...

The Department concedes a private interest on the part of the Applicant to receive access to the document unredacted. The Department has been mindful of this and has sought to share as much information as possible with the Applicant as a result throughout the overall process, in order to ensure that any decisions made by the Department were made with the highest degree of procedural fairness and ample opportunity to engage with matters relating to the [name of workplace].

16. In relation to section 33(1), the Agency submits:

... in this instance, the personal affairs information has been collected for the purposes of the review into the overall performance of the [name of workplace], which collectively includes the performance of other employees other than the Applicant. I note the VCAT have previously found that the release such personal affairs information would be unreasonable irrespective of their professional standing.

... the information was obtained in confidence for the purpose of an internal review of the operations of the [name of workplace].

...

... disclosure may cause stress and anxiety for the individuals who provided information voluntarily to the Department for the purpose of the review.

Section 30(1) – internal working documents

17. 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.
18. The exemption does not apply to purely factual material in a document.¹
19. 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 employed by or for an agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.
20. 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.
21. In this case, I have given weight to the following relevant factors:²
- (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 or 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;
 - (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.
22. My decision in relation to section 30(1) is set out in the Schedule of Documents at **Annexure 1**.

¹ Section 30(3).

² *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

Section 33(1) – personal affairs information of third parties

23. 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;³ and
 - (b) disclosure of the document would be ‘unreasonable’ in the circumstances.
24. 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.⁴
25. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of an individual other than the applicant (a **third party**), in the particular circumstances of a matter.
26. In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.⁵ However, I do not consider this is a relevant factor in these circumstances.
27. 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 view as to whether disclosure of the document should occur.⁶ However, this obligation does not arise in certain circumstances, including when it is not practicable to do so.⁷
28. The Agency advised OVIC it did not consult with the relevant third parties as it did not consider it was practicable to do so.
29. My decision in relation to section 33(1) is set out in the Schedule of Documents at **Annexure 1**.

Deletion of exempt or irrelevant information

30. 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.
31. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁸ 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 25.⁹
32. I have considered the effect of providing the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25. I am satisfied it is practicable to provide an edited copy of the document as to do so would not require substantial time and effort, and the edited document would retain meaning.

³ Sections 33(1) and (2).

⁴ Section 33(9).

⁵ Section 33(2A).

⁶ Section 33(2B).

⁷ Section 33(2C).

⁸ *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].

⁹ *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].

Conclusion

33. On the information before me, I am satisfied certain information in the document is exempt under section 33(1). While I am not satisfied information in the document is exempt under section 30(1), in certain cases I am satisfied the information is exempt under section 33(1).
34. Accordingly, my decision on the Applicant's request differs from the Agency's decision in that I have determined to grant additional information to the Applicant.
35. As 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, I have granted access to the document in part.
36. The document is therefore to be released to the Applicant in accordance with the marked up version I have provided to the Agency with this decision.

Review rights

37. 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.¹⁰
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
40. 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.
41. 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.¹³

When this decision takes effect

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

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Page no.	Agency Decision	OVIC Decision	OVIC comments
Document 1 - [Name of workplace], [location], dated [Month Year]			
4	Release in part Section 30(1)	Release in part Section 33(1), 25 The document is to be released with exempt information deleted in accordance with section 25.	<p>Section 30(1): The information the Agency determined to be exempt under section 30(1) contains matter in the nature of opinion, advice and recommendation that was prepared by the Agency during a deliberative process. Namely, the conducting a review into the performance of a [name of workplace].</p> <p>I have determined it would not be contrary to the public interest to release most of the information exempted by the Agency as:</p> <ul style="list-style-type: none"> • The views are not attributed to any particular individual consulted during the review. • It is clear the views expressed in the document are those of the reviewer. • While the Agency states the review is yet to be finalised and any recommendations adopted, I do not consider disclosure would reasonably affect the Agency's ability to consider and/or adopt or decline any of the recommendations or to conduct similar reviews in the future. • In my view, the public interest weighs in favour of disclosure to enable members of the community to contribute to discussion regarding improvements to the [name of workplace]. <p>Section 33(1): I have determined however that certain information on page 4 is exempt under section 33(1). In my view the comments are specific enough that, with knowledge of the [workplace] and its staff, that individuals could be identified from it. This information is therefore personal affairs information. I have determined it would be unreasonable to release this information because:</p>

Annexure 1 – Schedule of Documents

Page no.	Agency Decision	OVIC Decision	OVIC comments
			<ul style="list-style-type: none"> The information is sensitive as it relates to a performance review of a workplace. As such, I consider the information is relates to both their personal and professional lives. I am not aware whether it is generally known, or known to the Applicant, whether certain individuals took part in the review. I consider it is reasonably likely individuals who participated in the review could be identified from their position titles. I consider it likely that individuals who participate in such reviews would consider their participation and comments provided to the reviewer are confidential to the extent their identity and comments attributed to them is apparent from the document. <p>The information in the attached marked up version of the document is therefore exempt under section 33(1).</p>
5	<p>Release in part</p> <p>Section 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with exempt information deleted in accordance with section 25.</p>	<p>Section 33(1): See my comments for page 4.</p> <p>The information in the attached marked up version of the document is therefore exempt under section 33(1).</p>
6	<p>Release in part</p> <p>Sections 30(1), 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with exempt information deleted in accordance with section 25.</p>	<p>Section 30(1): See comments for page 4.</p> <p>Section 33(1): See comments for page 4.</p> <p>The information in the attached marked up version of the document is therefore exempt under section 33(1).</p>

Annexure 1 – Schedule of Documents

Page no.	Agency Decision	OVIC Decision	OVIC comments
8	Release in part Sections 30(1), 33(1)	Release in full The document is to be released with exempt and irrelevant information deleted in accordance with section 25.	Section 30(1): See comments for page 4. Section 33(1): See comments for page 4. The information in the attached marked up version of the document is therefore exempt under section 33(1). Section 25: Page 8 contains a direct quote not sought by the Applicant and is therefore irrelevant to the request.
9	Release in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released with exempt information deleted in accordance with section 25.	Section 30(1): See comments for page 4. Section 33(1): See comments for page 4. The information in the attached marked up version of the document is therefore exempt under section 33(1).
10	Release in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released with exempt and irrelevant information deleted in accordance with section 25.	Section 30(1): See comments for page 4. Section 33(1): See comments for page 4. The information in the attached marked up version of the document is therefore exempt under section 33(1). Section 25: Page 10 contains a direct quote not sought by the Applicant and is therefore irrelevant to the request.
11	Release in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released	Section 30(1): See comments for page 4. Section 33(1): See comments for page 4. The information in the attached marked up version of the document is therefore exempt under section 33(1).

Annexure 1 – Schedule of Documents

Page no.	Agency Decision	OVIC Decision	OVIC comments
		with exempt and irrelevant information deleted in accordance with section 25.	Section 25: Page 11 contains direct quotes not sought by the Applicant and is therefore irrelevant to the request.
12	Release in part Section 30(1)	Release in full	Section 30(1): See comments for page 4.
19	Release in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with exempt information deleted in accordance with section 25.	Section 33(1): See my comments for page 4. The information in the attached marked up version of the document is therefore exempt under section 33(1).
20	Release in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with exempt information deleted in accordance with section 25.	Section 33(1): See my comments for page 4. The information in the attached marked up version of the document is therefore exempt under section 33(1).
21	Release in part Sections 30(1), 33(1)	Release in full Sections 33(1), 25	Section 30(1): See comments for page 4. Section 33(1): See comments for page 4. The information in the attached marked up version of the document is therefore exempt under section 33(1).