

Notice of Decision and Reasons for Decision

Applicant:	'DS8'
Agency:	Department of Health
Decision date:	6 October 2021
Exemptions considered:	Sections 30(1), 34(1)(b)
Citation:	'DS8' and Department of Health (Freedom of Information) [2021] VICmr 297 (6 October 2021)

FREEDOM OF INFORMATION – COVID-19 pandemic – Contact Centre Review – draft documents – disclosure not contrary to the public interest– varied decision

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

Notice of Decision

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

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the documents to the Applicant.

I am not satisfied that any information in the documents is exempt under sections 30(1) or 34(1)(b).

As the Applicant does not seek access to personal affairs information, the names of third parties in the documents are to be deleted in accordance with section 25.

As I am satisfied it would be practicable to edit the documents to delete irrelevant information in accordance with section 25, access to the documents is granted in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

6 October 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to:

All the reports prepared by [a specified business undertaking] for the Department of Health and Human Services [DHHS] in the last 12 months from the date of this request.
2. The Agency identified three documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full, relying on the exemptions under sections 30(1), 33(1) and 34(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Applicant agreed to the removal of personal affairs information from the scope of their request.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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.

Additional document located during the review

10. During the review, OVIC made inquiries with the Agency about whether it had located all versions of Document 3, given the version control indicated further versions of the document were in the Agency's possession.
11. Following inquiries by OVIC, the Agency located two additional documents falling within the terms of the FOI request that it claims are exempt under section 30(1). These are Documents 4 and 5 in the Schedule of Documents in **Annexure 1**.
12. The version control in the final document (Document 3) records a fourth version of the document. However, the Agency confirmed that the version control in the document is incorrect and 'version 0.4' is the 'Final Report V.1' (Document 3).

Review of exemptions

Section 30(1) – internal working documents

13. 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.

14. The exemption does not apply to purely factual material in a document.¹

Were the documents prepared by an officer of the Agency or a Minister?

15. 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 subject to the *Public Administration Act 2004* (Vic).

16. The documents were prepared by a commercial or business undertaking (the **Undertaking**), commissioned on behalf of the Agency.

17. For the purpose of section 30(1), I am satisfied employees of the business undertaking are ‘officers’ of the Agency in that they were engaged by the Agency.

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

18. For the requirements of section 30(1) to be met, the document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.

19. It is not necessary for a *document* to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose *matter* of that nature.²

20. 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, where it is practicable to do so.

21. I am satisfied the documents contain information in the nature of opinion and recommendation.

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

22. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

³ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

23. In *Re Waterford and Department of Treasury (No.2)*,⁴ the 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.

24. I am satisfied the documents were made in the course of, and for the purpose of, the Agency’s deliberative processes in how to shape government response to the COVID-19 pandemic in Victoria.

Would disclosure of the documents be contrary to the public interest?

25. 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.

26. The Agency’s decision letters set out the reasons it considers disclosure of the documents would be contrary to the public interest in accordance with section 30(1):

This section has been used to exempt the documents in their entirety, as the requested reports contain preliminary advice, opinions and recommendations intended for deliberative processes only. It is considered that the release of the material would be contrary to the public interest as the relationship between recommendations and final actions taken remains an ongoing process and as a result the release of the material could lead to ill-informed debate among the public.

27. In determining if disclosure would be contrary to the public interest, I must consider all relevant factors remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have given weight to the following factors:⁵

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency’s functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
- (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

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1at [58].

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.
28. The documents subject to review were created at a time in which the COVID-19 pandemic in Victoria was rapidly evolving and despite the passage of time since the creation of the documents, matters raised in the documents remain sensitive. However, having reviewed the documents and considered the Agency's submission, I have determined that disclosure of the documents would not be contrary to the public interest for the following reasons:
- (a) The documents relate to the Government's response to COVID-19 pandemic which concerns important matters of public health and is, rightly, the subject of intense public interest and debate.
 - (b) Disclosure serves the public interest where it can assist members of the public in their understanding and scrutiny of public health responses implemented by the Government in response to COVID-19. I am of the view that where documents concern sensitive matters affecting the community, the public and government is better served by transparency and rather than maintaining secrecy.
 - (c) Consequently, I do not accept the Agency's contention that disclosure of the documents would lead to ill-informed debate among the public or undermine the public's confidence with respect to the Agency's management and decision-making with respect to the COVID-19 pandemic. Rather, I consider public engagement and participation promotes better informed government policy and decision making and accountability, which is particularly important in the current circumstances where COVID-19 has impacted the public's health, civil liberties and economic participation.⁶ In any event, I consider the question of whether debate is necessary or not, or whether the public have confidence in the actions and decisions of government agencies, should be left to the public rather than to government.
 - (d) I consider the Applicant, [redacted description], is capable of understanding the documents were produced at a particular point in time and may not represent a final decision reached by the Agency.
 - (e) The Applicant is exercising their right to access information and has a valid interest in scrutinising government decision making and holding the government to account.
 - (f) I also consider members of the public can understand the preliminary nature of the information in the documents.
 - (g) Should the Agency consider disclosure of the documents would lead to any misunderstanding by the Applicant or the public more generally, it is open to the Agency to release the documents to the Applicant with any necessary additional information to eliminate or minimise any confusion or misunderstanding concerning the documents or to place the documents into a fuller context.
 - (h) The Agency did not submit disclosure of the documents would inhibit communications between Agency officers. However, it has stressed that at the time in which the documents were created, it was imperative that it was able to receive frank and forthcoming advice and recommendations to respond to the rapidly evolving situation of COVID-19.

⁶ See Joint Statement of the Australian Information Access Commissioners, 'Proactive publication of information relating to the COVID-19 pandemic' available at <https://www.informationcommissioners.org/icic-signs-joint-statement-on-proactive-publication-of-information-relating-to-the-covid-19-pandemic>.

I note the views of the Victorian Civil and Administrative Tribunal (VCAT) in *Graze v Commissioner for State Revenue*,⁷ which observed the possibility of public scrutiny in some circumstances would provide for better administrative decision making. In the present matter, the information was prepared by a consultancy engaged by the Agency, presumably on commercial terms and with a professional obligation to provide accurate advice to the Agency. In my view, disclosure of the documents would not inhibit the Agency from obtaining fulsome analysis, opinions and recommendations concerning COVID-19 or similar matters in the future, particularly where a third-party undertaking is commissioned to provide such information.

In any case, the Agency is responsible for ensuring advice provided to it is accurate, complete and properly considered. It is the role of government, supported and informed by analysis and advice undertaken by agency officers or contractors, to make decisions and act in the best interests of the public – a role that is necessarily and appropriately the subject of public scrutiny.

- (i) Whilst the content within draft documents differs from the final version, the draft documents do not reveal substantive information that differs from the final versions and in most cases, additional information was included in the final version of the document rather than previously included information being removed.

- 29. Given the strong public interest in disclosing documents concerning the COVID-19 pandemic, and consideration of other factors addressed above, I am not satisfied disclosure of the documents would be contrary to the public interest.
- 30. Accordingly, I am not satisfied the documents are exempt under section 30(1).
- 31. The Schedule of Documents in **Annexure 1** outlines my decision on section 30(1) to each document.

Section 34(1)(b) – Documents containing business, commercial or financial information of a business undertaking

- 32. A document will be an exempt document under section 34(1)(b), if the document contains information:
 - (a) acquired from a business, financial or commercial undertaking;
 - (b) that relates to matters of a business, commercial or financial nature; and
 - (c) the disclosure of which, having regard to the matters listed in section 34(2), would be likely to expose the undertaking unreasonably to disadvantage.

Was the information acquired from a business, commercial or financial undertaking?

- 33. The phrase ‘information acquired’ in section 34(1) signifies the need for some positive handing over of information in some precise form.⁸
- 34. The phrase ‘business, commercial or financial undertaking’ generally refers to an entity, such as a company or organisation, that is engaged in business, trade, or commerce for a financial profit or gain.
- 35. I am satisfied the information to which the Agency refused access under sections 34(1)(b) was obtained by the Agency from a commercial or business undertaking (the **Undertaking**).

⁷ [2013] VCAT 869 at [26].

⁸ *Thwaites v Department of Human Services* (1999) 15 VAR 1.

Does the information relate to matters of a business, commercial or financial nature?

36. The phrase 'information of a business, commercial or financial nature' is not defined in the FOI Act. Therefore, the words 'business, commercial or financial nature' should be given their ordinary meaning.⁹
37. I am satisfied the information exempted by the Agency under section 34(1)(b) in Document 2 references other work undertaken by the Undertaking for other customers, which I am satisfied is information that relates to matters of a business, commercial or financial nature.
38. However, the information exempted by the Agency under this exemption in Document 3 is a graph and model, which I am not satisfied is information that relates to matters of a business, commercial or financial nature. I have therefore not further considered this information under this exemption.

Would disclosure of the information be likely to expose the Undertaking unreasonably to disadvantage?

39. Section 34(2) provides that in deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of section 34(1)(b), an agency or Minister may take account of any of the following considerations:
- (a) whether the information is generally available to competitors of the undertaking;
 - (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
 - (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
 - (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—
- and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.
40. I have also had regard to the decision in *Dalla-Riva v Department of Treasury and Finance*,¹⁰ in which VCAT held documents are exempt under section 34(1)(b) if their disclosure would:
- (a) give competitors of a business undertaking a financial advantage;
 - (b) enable competitors to engage in destructive competition with a business undertaking; and
 - (c) would lead to the drawing of unwarranted conclusions as to a business undertaking's financial affairs and position with detrimental commercial and market consequences.
41. I consider the phrase 'expose the undertaking unreasonably to disadvantage' in section 34(1)(b), contemplates disclosure of documents under the FOI Act may expose a business undertaking to a certain measure of disadvantage. By the introduction of the word 'unreasonably' in section 34(1)(b), I consider Parliament determined this exemption applies where an undertaking would be exposed 'unreasonably' to disadvantage only, rather than where disclosure would result in any measure of exposure to disadvantage.
42. Accordingly, section 34(1)(b) contemplates a business undertaking may be exposed to a certain level of disadvantage. The question is whether any such disclosure would expose the undertaking unreasonably to disadvantage.

⁹ *Gibson v Latrobe CC (General)* [2008] VCAT 1340 at [25].

¹⁰ [2007] VCAT 1301 at [33].

43. In determining whether disclosure of commercially sensitive information in a document would expose an undertaking unreasonably to disadvantage, if practicable, an agency must notify an undertaking and seek its views on disclosure.¹¹
44. Following consultation, in accordance with section 34(3), the Undertaking advised the Agency it objected to disclosure of information in the documents on grounds release of the information would disclose:
- (a) Confidential personal information relating to the Undertaking's employees, that may cause them concern and anxiety, and in turn have an adverse impact on the Undertaking's relationship with these employees.
 - (b) Confidential information relating to and/or obtained from the Undertaking's customers which is not in the public domain, to which release is likely to be of concern to these customers and adversely impact the Undertaking's relationship with these customers.
 - (c) Confidential information about the products and services the Undertaking offers to its customers and the methodologies it adopts, that is not publicly available, and to which disclosure would be likely to provide its competitors with a commercial advantage and cause the Undertaking commercial disadvantage.
45. Having reviewed the document and decision of the Agency and views of the Undertaking, based on the information before me, I am not satisfied disclosure of the information to which the Agency refused access would expose the Undertaking unreasonably to disadvantage, for the following reasons:
- (a) There is no evidence to demonstrate, other than in the most general terms as expressed by the Undertaking, how disclosure of the information in the documents would enable its competitors to engage in destructive competition with the Undertaking or gain a commercial advantage over the Undertaking, from the disclosure of this information to the Applicant under the FOI Act.
 - (b) There is no evidence to demonstrate how disclosure of the information would lead to the drawing of unwarranted conclusions as to the Undertaking's financial affairs and position with detrimental commercial or market consequences.
 - (c) While I acknowledge the nature of release under the FOI Act is unrestricted and unconditional, I do not consider the documents are being sought by a commercial competitor of the business undertaking. Rather, the Applicant is exercising their right to access information in accordance with their role as the opposition to scrutinise the government and holding it to account.
46. On balance, while it is possible the Undertaking may be exposed to a certain measure of disadvantage if Document 1 is disclosed, I am not satisfied any such exposure would be unreasonable given the circumstances of this matter.
47. Accordingly, I am satisfied information in the documents is not exempt under section 34(1)(b).

Deletion of exempt or irrelevant information

48. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

¹¹ Section 34(3).

49. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹² and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹³
50. As the Applicant has removed personal affairs information from the scope of this review, names of third parties are to be deleted from the documents, as it is irrelevant information for the purposes of this review.
51. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

52. On the information available, I am satisfied the exemptions under sections 30(1) and 34(1)(b) do not apply to the documents.
53. As the Applicant removed personal affairs information from the scope of this review, I have made no finding on the application of section 33(1) to information in the documents.
54. Where 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, I have determined to grant access to a document in part.
55. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

56. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁴
57. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
58. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
59. 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.
60. 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.¹⁷

Third party review rights

¹² *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].

¹³ *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].

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

¹⁶ Section 52(9).

¹⁷ Sections 50(3F) and (3FA).

61. I have decided to release documents that contain information relating to a third party business undertaking.
62. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
63. The Agency is required to forward the notice to the third party undertaking provided with this Notice of Decision without delay.

When this decision takes effect

64. My decision does not take effect until the Undertaking's 60-day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Annexure 1

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	DHHS Covid Contact Centre Review v1 – initial draft and recommendations	40	Refused in full Section 30(1)	Release in part Section 25 This document is to be released to the Applicant with names of third parties deleted in accordance with section 25.	Section 30(1): I am satisfied the document is not exempt under section 30(1) for the reasons provided in the Notice of decision, above. Section 25: This document contains personal affairs information that is to be deleted in accordance with section 25. I am satisfied it is practicable to edit the document to delete irrelevant personal affairs information in accordance with section 25.
2.	[Date]	DHHS COVID-19 Program Final v.1.0	56	Refused in full Sections 30(1), 33(1), 34(1)(b)	Release in full Section 25 This document is to be released to the Applicant with names of third parties deleted in accordance with section 25.	Section 30(1): See comments for Document 1. Section 34(1)(b): I am satisfied the document does not contain information that is exempt under section 34(1)(b) for the reasons provided above in the Notice of Decision. Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC Decision	OVIC Comments
3.	[Date]	DHHS COVID Contact Centre Review – FINAL DRAFT 1.0	62	Refused in full Sections 30(1), 33(1), 34(1)(b)	Release in part Section 25 This document is to be released to the Applicant with names of third parties deleted in accordance with section 25.	See comments for Document 2.
4.	[Date]	DHHS COVID Contact Centre Review [date range] V (0.2) – Pre-final report polished draft – including initial DHHS feedback	65	Refused in full Section 30(1)	Release in part Section 25 This document is to be released to the Applicant with names of third parties deleted in accordance with section 25.	See comments for Document 1.
5.	[Date]	DHHS COVID Contact Centre Review [date range] V (0.3) – Final report from Author	68	Refused in full Section 30(1)	Release in part Section 25 This document is to be released to the Applicant with names of third parties deleted in accordance with section 25.	See comments for Document 1.