

Notice of Decision and Reasons for Decision

Applicant: 'DN9'
Agency: COVID-19 Quarantine Victoria
Decision date: 20 August 2021
Exemptions considered: Sections 30(1), 34(1)(b), 25
Citation: 'DN9' and COVID-19 Quarantine Victoria (*Freedom of Information*) [2021] VICmr 253 (20 August 2021)

FREEDOM OF INFORMATION – COVID-19 pandemic – hotel quarantine program – COVID-19 Accommodation Program - ventilation design and performance – engineering services review – information acquired from business undertaking – disclosure not contrary to the public interest

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

Notice of Decision

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

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

I am not satisfied sections 30(1) or 34(1)(b) apply to the documents.

As the Applicant does not seek access to personal affairs information, and it is practicable to delete this information from the documents in accordance with section 25, I have granted access to the documents in part.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
20 August 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 1. Assessment reports relating to the Health and complex care hotels (named hotels). These hotels were inspected by engineers and health experts who looked at the fresh air exchange rates for resident rooms and determined the pressure gradients between the resident rooms and the floor corridors. I am seeking access to the full reports that were produced by these experts anytime between June 2020 and December 2020 and are held by Victoria's Department of Health and Human Services.
 2. The full ventilation advice given by hotel engineers in relation to the other nine quarantine hotels (including but not limited to: named hotels) between August 2020 and December 2020.
2. The Agency identified two documents falling within the terms of part 1 of the Applicant's request and refused access to the documents in full under sections 30(1), 33(1) and 34(1)(b). The Agency's decision letter sets out the reasons for its decision.
3. The Agency did not identify any documents relevant to part 2 of the request.
4. The Agency is an Administrative Office in relation to the Department of Justice and Community Safety (**DJCS**), created by order of Executive Council on 1 December 2020.¹ It is responsible for the oversight of Victoria's quarantine program in response to the COVID-19 pandemic.²

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant does not seek access to any information from which an individual can be identified.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
11. 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.

¹ <http://www.gazette.vic.gov.au/gazette/Gazettes2020/GG2020S622.pdf>

² <https://www.premier.vic.gov.au/stronger-quarantine-program-protect-what-weve-built>

Review of exemptions

Section 30(1) – Internal working documents

12. 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.
13. The exemption does not apply to purely factual material in a document.³
14. 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 engaged by an agency, whether or not they are subject to the *Public Administration Act 2004* (Vic).
15. I must also be satisfied disclosure of the information would not be contrary to the public interest. This requires a ‘process of the weighing against each other conflicting merits and demerits’.⁴

Do the documents 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?

16. The Agency describes its functions and the two documents subject to review as follows:

[The Agency] contracts with hotel suppliers and healthcare service providers to support its operations. [Specified health agency] was engaged in the COVID-19 Accommodation Program initially by DJCS in September 2020 to manage operations and provide health care services at hotels designated for accommodating positive and symptomatic returned travellers (Health Hotels) and certain returned travellers assessed as having complex needs, including additional mental health and medical support (Complex Care Hotels).

In October 2020 [the specified health agency] began assessing hotels already contracted in the program for use as a Health Hotel and Complex Care hotels. During this period, it engaged its [role description] to inspect [named hotels], to prepare expert reports in relation to the fresh air exchange rates for resident rooms appropriate for a healthcare setting.

17. I am satisfied the person who prepared the reports is an ‘officer of the Agency’ for the purposes of the FOI Act, in that they were carrying out a function of the DJCS which, at that time, had carriage of the functions of the Agency.
18. While I note much of the information in the documents is factual, I accept the documents also contain the opinion, advice and recommendations of the expert engaged to conduct the inspections and prepare the reports the subject of this review.

³ Section 30(3).

⁴ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

Were the documents 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?

19. I note the documents were created prior to the creation of the Agency. However, as the function passed from DJCS to the Agency, I am satisfied the documents were made in the course of the deliberative processes involved in the functions of the Agency, that of overseeing the Government's quarantine program in response to the COVID-19 pandemic.

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

20. In determining if disclosure of the documents 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: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
 - (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. The Agency submits the following reasons for determining disclosure of the documents would be contrary to the public interest:

...the information provides a point-in-time assessment of the hotel quarantine program, and disclosure of this preliminary data would invite harmful speculation as to certain works or decisions not pursued;

...the conclusions expressed in the reports is based on the limited observations of the engineer, and create an unfair picture of hotel quarantine facilities as a whole, which would be apt to mislead the public;

...harm to public confidence in hotel quarantine that would be occasioned by disclosure may create risk to public health;

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

...the topics of information contained in the report is in the process of being summarised into a high-level public report;

...conclusions in the report have since been found to be incorrect, and this has been addressed with Alfred Health, such discussion not being apparent on the face of the document.

23. 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) While the documents contain sensitive information, and they represent a preliminary assessment, given the documents relate to the Government's response to COVID-19 pandemic which concerns important matters of public health and is the subject of intense public interest and debate, I consider the public interest weighs in favour of disclosure.
 - (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.
 - (c) Members of the public are capable of understanding the preliminary nature of the information in the documents; the circumstances in which they were created and any changed circumstances or public health policy changes that may now apply.
 - (d) Hotel quarantine has been the topic of considerable public debate, and the subject of a public government inquiry (the COVID-19 Hotel Quarantine Inquiry), the report of which is publicly available.⁶
 - (e) In particular, I note the subject of ventilation and other aspects of design in quarantine hotels was dealt with in the final report of the COVID-19 Hotel Quarantine Inquiry, in particular noting:
 - But, as the Program unfolded, there were aspects of hotel facilities that provided challenges for infection prevention and control:
 - A. the carpets and soft furnishings that made people in quarantine more comfortable may also have made it more difficult to clean surfaces
 - B. structurally, hotels were not designed for infection prevention and control; they do not typically have features, such as wide corridors and oversized lifts, that allow for physical distancing
 - C. handwashing stations and clinical waste disposal facilities were not readily available in a hotel environment
 - D. ventilation and air flow within hotels were not designed with a focus on infection prevention and control.⁷
 - (f) The shortcomings of hotel quarantine are well-documented in the COVID-19 Hotel Quarantine Inquiry report, meaning that the documents subject to this request are less sensitive.
 - (g) In this respect, information that hotels are typically not designed with a focus on clinical standards and for quarantine purposes is a fact that I consider would generally be understood by members of the public following the COVID-19 Hotel Quarantine Inquiry.

⁶ COVID-19 Hotel Quarantine Inquiry at <https://www.quarantineinquiry.vic.gov.au/>.

⁷ COVID-19 Hotel Quarantine Inquiry, *Report of the Covid-19 Hotel Quarantine Inquiry*, page 217 https://content.royalcommission.vic.gov.au/sites/default/files/2020-12/0387_RC_Covid-19%20Final%20Report_Volume%201%2B2_Digital.pdf (accessed 20 August 2021).

- (h) Certain information in the documents is largely factual and publicly available, for example photographs of the hotels and other aspects of their design.
- (i) Should the Agency consider disclosure of the documents would lead to any misunderstanding by the Applicant or the public, it is open to the Agency to provide further information to the Applicant or the public on the information in the reports.

24. Accordingly, I am not satisfied the documents are exempt from release under section 30(1).

Section 34(1)(b) – Documents relating to trade secrets etc.

25. Section 34(1)(b) provides a document is an exempt document if its disclosure under the FOI Act would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking and:

- (a) the information relates to other matters of a business, commercial or financial nature; and
- (b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.

26. In *Thwaites v Department of Human Services*,⁸ the Victorian Civil and Administrative Tribunal (VCAT) observed the phrase ‘information acquired’ in section 34(1) signifies the need for some positive handing over of information in some precise form.

27. VCAT has also recognised the words ‘business, commercial or financial nature’ have their ordinary meaning.⁹

28. The Agency advised it consulted with the third party undertakings.

29. 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 which in the opinion of the agency or Minister is relevant.

30. In summary, one hotel provided the following reasons for objecting to disclosure of the documents:

- (a) any criticism in the report relates to the standard of a clinical environment, which is not a reasonable comparison for a building not built for that purpose;

⁸ (1999) 15 VAR 1.

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

- (b) disclosure would cause unreasonable reputational damage; and
 - (c) disclosure of the drawings and descriptions of functions could affect security and the commercial dealings of the hotel.
31. In summary, the second hotel provided the following reasons for objecting to disclosure of the documents:
- (a) information in the report regarding an air discharge point is incorrect;
 - (b) the hotel provided maps in support of its view the report contained incorrect information;
 - (c) there is a range of other information in the report that is not correct; and
 - (d) disclosure would cause damage to the hotel's reputation.
32. I am satisfied the documents contains information acquired from two business undertakings.
33. Furthermore, I am satisfied that considered broadly, the information is of a business, financial or commercial nature. That is, it provides certain information about the design of two hotels. Therefore, I must consider whether disclosure would expose the business undertakings unreasonably to disadvantage, taking into consideration the factors described in section 34(2).
34. I have determined disclosure of the documents would not expose the business undertakings unreasonably to disadvantage for the following reasons:
- (a) The information is not generally available to the business undertaking's competitors; however, given the design relates to specific buildings, with specific features and limitations, I do not consider this information could be usefully used by competitors to seek competitive advantage.
 - (b) I acknowledge the objections received from the business undertakings, however, I am not persuaded disclosure of the documents would expose either unreasonably to disadvantage in the nature of commercial harm. However, information about the business undertakings' participation in the hotel quarantine program, and concerns regarding hotel quarantine have been the subject of significant public interest and are publicly known.
 - (c) As described above, should the business undertakings consider the reports are misleading, they or the Agency may provide the Applicant with further or updated information to assist in their understanding of the information in the documents.
 - (d) As described above, members of the public are capable of understanding the hotels were not designed for the specific purpose of hotel quarantine.
 - (e) Disclosure of business, financial or commercial information is not unreasonable where its disclosure is in the public interest, as described above, in relation to the application of section 30(1). In these circumstances, I consider it is in the public interest to disclose the documents.
35. Accordingly, I am not satisfied the documents are exempt from release under section 34(1)(b).

Section 25 – Deletion of exempt or irrelevant information

36. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
37. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁰ 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 25.¹¹
38. I have considered the effect of deleting irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable to do so as editing the documents will not require substantial time and effort, and the edited documents will retain meaning.

Conclusion

39. On the information before me, I am not satisfied sections 30(1) or 34(1)(b) apply to the documents.
40. As the Applicant does not seek access to personal affairs information, and it is practicable to delete this information from the documents in accordance with section 25, I have granted access to the documents in part.
41. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
45. 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.
46. 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.¹⁵

When this decision takes effect

47. As I have determined to release documents that contain information of a business, commercial or financial nature relating to the business undertakings, if practicable, I am required to notify the

¹⁰ *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].

¹¹ *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].

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).

undertakings of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁶

48. In this case, I am satisfied it is practicable to notify the business undertakings of their third party review rights and confirm they will be notified of my decision on the date of decision.
49. I have decided to release documents that contain matters of a commercial nature relating to third party business undertakings.
50. The relevant third parties will be notified of my decision and are entitled to apply to VCAT for a review within 60 days from the date they are given notice.
51. 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.

¹⁶ Sections 49P(5), 50(3A) and 52(3).

Annexure 1 – Schedule of Documents

Doc. No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated (circa late October 2020)	[Specified health agency] Engineering Services review of [named hotel] quarantine ventilation system design and performance v1.6	22	Refused in full Sections 30(1), 33(1), 34(1)(b)	Release in part Section 25 The document is to be released with the following irrelevant information deleted: <ul style="list-style-type: none"> the names and position titles on page 1 as identified by the Agency. 	Section 30(1): The document is not exempt under section 30(1) for the reasons outlined above in this Notice of Decision. Section 34(1)(b): The document is not exempt under section 34(1)(b) for the reasons outlined above in this Notice of Decision. Section 25: The Applicant is not seeking information which could identify individuals. Personal affairs information is therefore irrelevant to the request and is to remain deleted under section 25.
2.	Undated (circa November 2020)	[Specified health agency] Engineering Services review of [named hotel] quarantine ventilation system design and performance v1.3	7	Refused in full Sections 30(1), 33(1), 34(1)(b)	Release in part Section 25 The document is to be released with the following irrelevant information deleted: <ul style="list-style-type: none"> the names and position titles on page 1 as identified by the Agency. 	Section 30(1): See comments for Document 1. Section 34(1)(b): See comments for Document 1. Section 25: See comments for Document 1.