

Notice of Decision and Reasons for Decision

Applicant: 'ES6'
Agency: Gordon Institute of TAFE
Decision date: 12 August 2022
Exemption considered: Section 35(1)(b)
Citation: 'ES6' and Gordon Institute of TAFE (Freedom of Information) [2022]
VICmr 197 (12 August 2022)

FREEDOM OF INFORMATION – People Matter Survey – staff survey results – disclosure of information provided to agency in confidence 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 fresh decision to refuse access to a document 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 determined to release additional information in the document.

I am satisfied certain information in the document is exempt from release under section 35(1)(b).

As I am satisfied it is practicable for the Agency to provide the Applicant with an edited copy of the document in accordance with section 25, I have decided to release the document in part.

The Document Schedule in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

12 August 2022

Reasons for Decision

Background to review

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

... To aid my understanding of organisational learning needs in a large regional TAFE Institute, I respectfully request access to and a copy of the 2021 detailed (rather than an executive summary) report and composite raw data and comments for The Gordon Institute of TAFE, Geelong Victoria.
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under sections 30(1), 33(1) and 35(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. 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 in relation to the Applicant's FOI request.
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. In its fresh decision, the Agency identified one additional document and retracted the exemptions applied to the document referred to in the original decision, being the People Matter Survey Results Report, which is publicly available. The fresh decision also advised the Applicant that the composite raw data requested was held exclusively by the Victorian Public Sector Commission (VPSC).
8. Accordingly, my review of the fresh decision concerns the Agency's determination to rely on the exemptions under sections 30(1), 33(1) and 35(1)(b) to refuse access to the newly disclosed document, the People Matter Survey Comments Section, in full.
9. I have examined a copy of the document subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties.
12. 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.
13. 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.

People Matter Survey

14. The People Matter Survey is a survey coordinated annually by the VPSC. It provides an opportunity for Victorian public sector employees to voluntarily share their views on public sector values and

employment principles are demonstrated within their agency by their colleagues, managers and senior leaders.¹

15. Survey responses measure how different employee groups within a Victorian public sector organisation view aspects of their workplace, including organisational culture, equal opportunity, human rights, integrity, career opportunities, psychological and physical safety, diversity and inclusion.
16. The survey helps agencies better understand staff engagement, their level of satisfaction, wellbeing and identify areas for improvement.²
17. Four standard reports are produced for agencies undertaking the People Matter Survey:³
 - (a) Organisation Results Report, which contains a detailed breakdown of results at an organisational level;
 - (b) Benchmark Report/s, which compare organisation level results to like organisations and previous results;
 - (c) Free Text Comment Report, which contains verbatim free text comments from employees; and
 - (d) Employee Group Report, which contains results at the employee group level.
18. The document subject to review is a Free Text Comment report produced by the VPSC following the 2021 People Matter Survey completed by Agency employees.

Applicant's concerns regarding the Agency's original decision

19. As part of their submission in response to the Agency's fresh decision, the Applicant made a complaint to OVIC under section 61A(1)(a) on grounds that the original decision incorrectly identified and made a decision on a document not relevant to the request.
20. In accordance with section 61B(3), OVIC determined the subject matter of this complaint, being concerns that the Agency failed to conduct a thorough and diligent search for documents, could be dealt with [by] this review. The separate complaint was therefore dismissed and OVIC made inquiries with the Agency regarding the Applicant's concerns.
21. Based on subsequent communications between OVIC staff and the Applicant and the substance of the Agency's fresh decision, I am satisfied the Agency undertook a thorough and diligent search for documents using appropriate key word search terms.
22. There is no information before me to suggest the Agency conducted its searches in a manner that would limit the discovery of relevant documents captured by the terms of the Applicant's request. As such, I am satisfied the Applicant's concerns have been pursued to the fullest extent and no further action is required to be taken.

Review of exemptions

23. The Agency relies on the exemptions under sections 30(1), 33(1) and 35(1)(b) to refuse access to the document in full.

¹ Victorian Public Sector Commission, People Matter Survey 2019, *Guide for Organisation Heads and Human Resources Directors*, version 1.1 (February 2019), p 5.

² Ibid.

³ Ibid.

Section 35(1)(b) – Information obtained in confidence

24. A document is exempt from release 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 obtained in confidence?

25. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.⁴
26. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.⁵
27. The document subject to review is a spreadsheet containing the free text comments of staff who undertook the survey.
28. In support of its view the information was communicated to the Agency in confidence, the Agency submits:

The Gordon TAFE is a participant (only) in the VPSC owned and administered People Matter Survey. If the Gordon TAFE were to release the requested information to a member of the public, then The Gordon TAFE would be in breach of its privacy obligations with the VPSC.

The Gordon TAFE is committed to uphold its Privacy obligations to its staff. For Survey comments to be released to the public, we would require to obtain consent from each individual survey participant (408 staff). When staff completed the survey they did not give consent to their comments and opinions being released to the public.

The release of the requested information would undermine confidence and participation rates in future People Matter Surveys, not only at the Gordon TAFE but the whole Victorian Public Sector.

29. The Applicant submits:

A “spreadsheet” of free text data that by the VPSO and Agency’s own definition and reassurances cannot identify individuals and protects individual anonymity, is inconsistent with not making those consolidated comments available to survey communicators. The mix of qualitative and quantitative data is what provides the rich and comprehensive information for overall interpretation.

The confidentiality of a specific individual and the confidentiality of collated consolidated data are not the same. If an individual name or identifying data is mentioned, it can be easily lightly redacted without affecting the overall substance of the qualitative data and its relationship to quantitative data.

30. Upon consideration of the above submissions and information published by the VPSC regarding the People Matter Survey,⁶ I am satisfied multiple assurances were made to survey participants that their responses would be held in confidence.
31. I am satisfied it was not practicable for the Agency to consult with third parties in accordance section 33(2B).⁷

⁴ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

⁵ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

⁶ For example, see Victorian Public Sector Commission, ‘People Matter Survey Data-Collection Statement’ at <https://vpsc.vic.gov.au/html-resources/data-collection-statement-people-matter-survey-2/> and ‘Doing the Survey’, at <https://vpsc.vic.gov.au/data-and-research/people-matter-survey/information-survey-participants/>.

⁷ Section 33(2C)(b).

32. In the circumstances, I am satisfied Agency employees undertaking the People Matter Survey provided information to the Agency in confidence based on assurances that their responses to the survey would be held in confidence.
33. However, I am not satisfied the information outlining the theoretical framework that underpins the survey measures, details of response rate and instructions on use of the report, is information or matter communicated to the Agency in confidence for the purposes of section 35(1)(b). Accordingly, such information on the 'How to use' tab of the spreadsheet is not exempt under section 35(1)(b).

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

34. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
35. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. The exemption will not be made out if an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.⁸
36. The document subject to review covers a range of workplace topics, including sensitive matters.
37. Just as in *Johnson*,⁹ where the trust and credibility reposed in those who conducted a survey would likely have been undermined by the release of survey information, so too would the credibility of the Agency and the representations it made as to confidentiality be undermined by the release of Agency staff survey responses.
38. Finally, noting the above potential for identification or reidentification of individual survey participants, it is also the case that some Agency employees can be identified from their position where detailed in a survey response.
39. I acknowledge there is value in an agency publishing the results of its People Matter Survey while also ensuring participants cannot be identified or reidentified. However, in the circumstances of this matter, while the document does not explicitly identify any individual, I am satisfied there is a reasonable possibility participants and other persons could be identified or reidentified by a person who has or would be reasonably likely to have sufficient knowledge of the organisation workforce and employees. Therefore, the number of survey participants is a factor in my decision.
40. Further, the need to ensure candour and honesty in the provision of survey responses in a workplace survey is critical to identifying workplace issues and informing initiatives to drive organisational change and improve staff wellbeing.
41. I am satisfied the disclosure of the document would be contrary to the public interest to disclose the document in full, as to do so would likely inhibit the willingness of Agency staff to participate in similar surveys in the future.
42. Accordingly, I am satisfied information detailing the survey results is exempt from release under section 35(1)(b) and there is no need to consider the Agency's application of sections 30(1) or 33(1).

⁸ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

⁹ *Johnson v Cancer Council of Victoria* [2016] VCAT 1596.

43. The Document Schedule in **Annexure 1** sets out my decision in relation to the document.

Section 25 – Deletion of exempt or irrelevant information

44. 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.

45. 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

46. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted as to do so would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

47. On the information before me, I am satisfied certain information in the document is exempt from release under section 35(1)(b).

48. 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, access is granted in part.

Review rights

49. 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.¹²

50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³

51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴

52. 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.

53. 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

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

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 50(3FA).

Annexure 1 – Document Schedule

Document No.	Date of Document	Title or description of document	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	2021	People Matter Survey Comments Section	N/A	<p>Refused in full</p> <p>Sections 30(1), 33(1), 35(1)(b)</p>	<p>Release in part</p> <p>Sections 35(1)(b), 25</p> <p>The document is to be released except for the following information which is exempt from release under section 35(1)(b) and is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> All content in tabs 'Doing well', 'Issues to address' and 'Creating a more inclusive and respectful workplace' 	<p>Section 35(1)(b): I am satisfied the information detailing the results of the survey is exempt from release under section 35(1)(b) as it was obtained in confidence from participants within a small employee group within the Agency and its release would impair the ability of the Agency to obtain similar information in the future.</p> <p>However, I am not satisfied information relating to the theoretical framework, response rate and instructions on data use contained in the 'How to use' tab was obtained by the Agency in confidence. Accordingly, I am not satisfied this information is exempt from release under section 35(1)(b).</p> <p>Section 25: 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.</p>