

Notice of Decision and Reasons for Decision

Applicant: 'EW3'
Agency: Department of Health
Decision date: 17 October 2022
Exemption considered: Section 30(1)
Citation: 'EW3' and Department of Health (Freedom of Information) [2022]
VICmr 231 (17 October 2022)

FREEDOM OF INFORMATION – health infrastructure project – Alfred Health – Alfred Hospital redevelopment – Victorian Health Building Authority – building – Public-Private Partnership (PPP) – meeting minutes – steering committee – [section 49KA(2)(b)]

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 information in the documents subject to review is exempt from release under section 30(1).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of Documents 5 to 7 with irrelevant information deleted in accordance with section 25, access to these documents is granted in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
17 October 2022

Reasons for Decision

Background to review

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

All meeting notes, minutes, memoranda and briefs concerning the redevelopment of the Alfred Hospital, including correspondence to and from Alfred Health and references to Public-Private Partnership or PPP from [date] to the date of this request....

[P]ersonal affairs information of non-executive staff, such as names and addresses, is not required...
2. The Agency identified four documents falling within the terms of the Applicant's request and refused access to the documents in part under sections 28(1)(ba), 30(1) and 33(1). 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. I have examined a copy of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. 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.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Notice under section 49KA(2)(b) – Power to require a further search for documents

10. An agency must ensure its document searches in response to an FOI request are thorough and diligent. This involves the agency by taking all reasonable steps to identify all relevant documents in its possession, custody or control.
11. If I reasonably believe an agency has failed to undertake an adequate search for documents, I may give notice to the agency under section 49KA(2)(b) requiring it to undertake a further search for documents in its possession, custody or control (**Notice**).
12. Following preliminary inquiries made by OVIC staff with the Agency, I was not satisfied it had conducted a thorough and diligent search for documents falling within the terms of the Applicant's

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

FOI request. Accordingly, I issued a Notice requiring the Agency to conduct a further search for relevant documents. In doing so, I specified the means and method for the Agency undertaking the further search pursuant to section 49KA(5).

13. In accordance with sections 49KA(3) and 49KA(7)(b), the Agency confirmed it conducted a further search for documents and located three additional documents, which it submitted are exempt from release under section 30(1).
14. I have considered the three additional documents to complete my review in accordance with section 49F. These documents are recorded as Documents 5, 6 and 7 in the Schedule of Documents in **Annexure 1**.

Scope of review

15. During the review and prior to issuing the Notice, the Agency made a submission that certain information in the documents is irrelevant to the terms of the Applicant's FOI request as it falls outside the date range specified in the request.
16. Having reviewed Documents 2, 3 and 4, I am satisfied they were created outside the date range specified in the request. This view was communicated to the Applicant during the review.
17. All information in Document 1, with the exception of the Microsoft Teams meeting invitation, also falls outside of the date range specified in the Applicant's request. The Applicant confirmed during this review that they do not seek access to this information.
18. Accordingly, Documents 1 to 4 are not subject to review, and my review concerns Document 5 to 7 only.

Review of exemption

Section 30(1) – Internal working documents

19. 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.
20. The exemption does not apply to purely factual material in a document.²

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?

21. 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 on behalf of an agency regardless of whether they are subject to the provisions of the *Public Administration Act 2004* (Vic).

² Section 30(3).

22. To meet the requirements of section 30(1), a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
23. 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.³
24. Documents 5, 6 and 7 are meeting minutes of the Victorian Health Building Authority (**VHBA**) – Alfred Health Steering Committee (**Steering Committee**). The contents of the minutes are brief in nature and summarise information with respect to each agenda item. A significant number of the agenda items in the meeting minutes do not relate to redevelopment of the Alfred Hospital, which I further discuss below.
25. Whether meeting minutes will satisfy the requirements of section 30(1)(a) depends on their content and character. As observed in *Re Collins v Greyhound Racing Board*:⁴

...minutes do not of themselves have some special characteristic which brings them under the ambit of s 30(1)(a). The character of the minutes in question determines whether or not they fall within the ambit of the section. Where minutes reveal the thought processes of Board members, they would, in my view, fall within the subsection. However, where they disclose factual matters or motions passed at a meeting which record the final decision of the meeting in relation to a particular matter, as distinct from a preliminary decision, they do not fall within s 30(1)(a).
26. In *Re Birnbauer v Inner and Eastern Health Care Network*,⁵ the Victorian Civil and Administrative Tribunal (**VCAT**) observed ‘minutes by their nature are records of fact rather than constituting opinion, recommendation or advice ... however, they may record the terms, opinion, recommendation or advice which is given’.
27. The information in Documents 5 and 6 that relates to the redevelopment of the Alfred Hospital does not record deliberations with respect to the project. Rather, it discloses factual information. Accordingly, I am not satisfied it meets the requirements of section 30(1)(a).
28. Document 7 also contains brief information; however, it contains greater detail than Documents 5 and 6, and to an extent, contains the Steering Committee’s deliberation. Accordingly, I am satisfied the information meets the requirements of section 30(1)(a).

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?

29. The term ‘deliberative process’ is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.⁶
30. In *Re Waterford and Department of Treasury (No.2)*,⁷ the former Victorian 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.

³ *Mildenhall v Department of Education* (1998) 14 VAR 87 at 90.

⁴ (1990) 4 VAR 65 at 70.

⁵ (1999) 16 VAR 9 at [46].

⁶ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁷ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

31. I am satisfied the documents were made in the course of, and for the purposes of, the deliberative processes with respect to planning and other matters considered by the Steering Committee.

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

32. In determining if release of a document would be contrary to the public interest, it is necessary to consider all relevant facts and circumstances 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:⁸
- (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.

33. The Agency submits:

Minutes of the Steering Committee regarding the Alfred Hospital Redevelopment describe the form and function of the development of a proposal being put to government for funding. It also pertains to the willingness of potential parties to the project to pursue the submission and the various technical logistics that may arise to prepare the site for the next stage.

These details are not in the public interest to disclose as their details do not provide further information regarding items such as governance protocols or public health and safety.

The disclosure of these minutes is likely to impact on the willingness of members of the committee to provide frank thoughts or opinions, which is important in committees such as these.

The disclosure of these details is against the public interest as there is a risk that releasing these details may be taken out of the context within which decisions are made around this project. Releasing these details may have impacts on commercial in confidence material later, should the projects be funded by government.

34. Having reviewed the documents and based on the information before me, I am not satisfied disclosure of Documents 5 to 7 would be contrary to the public interest for the following reasons:

⁸ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483 at 488Ag.

- (a) As noted above, most of the information is a record of fact rather than opinion, recommendation or advice.
 - (b) The level of detail in the documents with respect to the redevelopment of the Alfred Hospital is minimal. As such, I am not persuaded disclosure in this instance will impact the way committee members express their thoughts and opinions in the future. Nor am I satisfied disclosure would impact the recording of similar information in future meeting minutes, particularly given the limited detail recorded in the minutes.
 - (c) There is no information before me to suggest disclosure would impact the relationship between Alfred Health and the VHBA with respect to the project nor the future progress of the project.
 - (d) Responsible government calls for an adequate degree of transparency to enable informed public debate. I consider disclosure of the documents would increase information available to the public upon which any debate is based. Public engagement and participation promote better informed government policy and decision making, which is particularly important for significant public infrastructure projects. 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.
 - (e) I am of the view members of the public are capable of understanding that these documents may contain information that could be subject to change. I consider the Agency, in releasing the documents, would be able to provide any further explanatory information to assist the Applicant and the public in understanding the information in the documents given the current status of the project or further information that has become available since the documents were created.
 - (f) The Applicant, [occupation redacted], is exercising their right to access information and has a valid interest in scrutinising government decision making and holding the government to account.
35. Accordingly, I am not satisfied information in Documents 5 to 7 is exempt from release under section 30(1). My decision is set out in the Schedule of Documents in **Annexure 1**.

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’⁹ 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 25.¹⁰
- 38. With respect to Documents 5 to 7, I am satisfied the information the Agency deleted from the documents as irrelevant falls outside of the scope of the Applicant’s request, as it is either personal affairs information of non-executive staff or concerns matters that do not relate to the Alfred Hospital redevelopment.

⁹ *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].

¹⁰ *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].

39. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete this information, because it would not require substantial time and effort, and the edited documents would retain meaning.
40. My decision on the application of section 25 to each document is set out in the Schedule of Documents in **Annexure 1**.

Conclusion

41. On the information before me, I am not satisfied Documents 5 to 7 are exempt from release under section 30(1).
42. As I am satisfied it is practicable to provide the Applicant with an edited copy of Documents 5 to 7 with irrelevant and exempt information deleted in accordance with section 25, access to these documents is granted in part.
43. The Schedule of Documents in **Annexure 1** sets out my decision on each of the documents subject to review.

Review rights

44. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
47. 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.
48. 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.¹⁴

When this decision takes effect

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

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	N/A	Meeting invitation	1	Released in part Sections 33(1), 25	Not subject to review	<p>Section 25: The Applicant advised they do not seek review of the information exempted in the Microsoft Teams meeting.</p> <p>The date range of the Applicant’s FOI request is [date range]. Accordingly, the remaining information in this document does not fall within this date range, and access is refused on that basis.</p>
2.	[Date range]	Email thread	2	Released in part Sections 28(1)(ba), 33(1), 25	Not subject to review	<p>Section 25: The date range of the Applicant’s FOI request is [date range]. Accordingly, this document does not fall within the date range of the Applicant’s request and access is refused on that basis.</p>
3.	[Date]	Alfred Hospital Redevelopment – Stage 1 Technical Review Advice (TRA) Steering Committee Information	2	Refused in full Section 30(1)	Not subject to review	<p>Section 25: During the review, the Agency advised the document was created on [date]. See comments for Document 2.</p>
4.	[Date]	PPP delivery model – Operating term implications	5	Refused in full Section 28(1)(ba)	Not subject to review	<p>Section 25: See comments for Document 2.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
5.	[Date]	VHBA – Alfred Health Steering Committee	8	Released in part Sections 30(1), 25	Release in part Section 25 The information the Agency exempted from release under section 30(1) is to be released.	Section 30(1): I am not satisfied the information the Agency exempted from release under section 30(1) falls within the scope of section 30(1)(a). Accordingly, it is not exempt information. Section 25: I am satisfied the information the Agency marked up as irrelevant information does not fall within the terms of the Applicant’s FOI request, as it is the name of a non-executive Agency officer or information that does not relate to the redevelopment of Alfred Hospital.
6.	[Date]	VHBA – Alfred Health Steering Committee	8	Released in part Sections 30(1), 25	Release in part Section 25 The information the Agency exempted from release under section 30(1) is to be released.	Sections 25 and 30(1): See comments for Document 5.
7.	[Date]	VHBA – Alfred Health Steering Committee	7	Released in part Sections 30(1), 25	Release in part Section 25 The information the Agency exempted from release under section 30(1) is to be released.	Section 30(1): I am not satisfied the document contains information exempt from release under section 30(1). Sections 25: See comments for Document 5.