

Notice of Decision and Reasons for Decision

Applicant: 'EM3'
Agency: Department of Health
Decision date: 26 May 2022
Exemptions considered: Sections 35(1)(a), 35(1)(b)
Citation: 'EM3' and Department of Health (*Freedom of Information*) [2022]
VICmr 139 (26 May 2022)

FREEDOM OF INFORMATION – COVID-19 pandemic – internal correspondence – information provided in confidence – 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 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 am satisfied certain information in the document subject to review is not exempt from release under section 35(1)(a) or 35(1)(b).

As 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, access to the document is granted in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

26 May 2022

Reasons for Decision

Background to review

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

A copy of all emails containing, and emails where the attachments also contained (but excluding the attachments themselves) the keywords: [other government agency] and or hotel quarantine and or control agency sent or received by [third party] between [date].

2. The Agency identified 397 pages falling within the terms of the Applicant's request and refused access to information under sections 28(1)(c), 28(1)(d), 30(1), 32(1), 33(1), 35(1)(a) 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. The Applicant seeks review of the Agency's application of sections 35(1)(a) and 35(1)(b) on page 292 only (the **Document**). Accordingly, all other information exempted by the Agency is not subject to my review.
5. I have examined a copy of the Document.
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.

Review of exemptions

Section 35(1)(a)

10. A document is exempt under section 35(1)(a) 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) the information would be exempt matter if it were generated by an agency or Minister.
11. The Document is an email received by the Agency from another government agency.
12. The Agency submits:

The confidential nature of the relevant correspondence is evident, given the senior level of agency officers included in the correspondence and the sensitive, high-level information contained. It can be

reasonably implied from the correspondence and context that this information was communicated confidentially, even if it is not expressly stated.¹

13. Having reviewed the information and considered the circumstances in which it was communicated to the Agency, I accept the information exempted by the Agency under section 35(1)(a) was communicated with an expectation of confidentiality by a third party.
14. As I am satisfied the document was provided in confidence, I have considered whether the document would be exempt under section 30(1).
15. 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.
16. The exemption does not apply to purely factual material in a document.²
17. Determining whether the disclosure of the relevant information would be contrary to the public interest requires a 'process of the weighing against each other conflicting merits and demerits'.³
18. The Agency exempted certain information in an email containing correspondence from a third-party government agency. This information was exempted under section 35(1)(a) on the basis that, had it been generated by the Agency, the relevant information would be exempt from release under section 30(1).

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

19. I am satisfied the document discloses matter in the nature of opinion, advice and recommendations, prepared by agency officer.

Was the opinion, advice, recommendation, consultation or deliberation provided in the course of, or for the purpose of, the deliberative processes of the Agency?

20. I am satisfied the information in the document was provided in the course of, and for the purpose of, the Agency's deliberative processes in response to the COVID-19 pandemic.

Would disclosure of the document be contrary to the public interest for this information to be released?

21. Determining whether disclosure of information would be contrary to the public interest requires a 'process of weighing against each other conflicting merits and demerits'.⁴
22. In determining if disclosure of a 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

¹ *Ryder v Booth* [1985] VR 869

² (2004) VCAT 2346 at [33].

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].

promote the disclosure of government information subject to the protection of an essential public, personal or business interest.

23. In considering whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors in the context of this matter: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.

24. In relation to whether disclosure of the information in the Document would be contrary to the public interest, the Agency submits:

In determining whether disclosure of the documents would be contrary to the public interest, the department has considered the factors set out in *Hulls v Victorian Casino and Gaming Authority*,⁶ *Howard v Treasurer*⁷ and *Friends of Mallacoota Inc v Department of Planning and Community Development*.⁸ The following public interest factors identified in these authorities are of particular relevance to the documents at hand:

- *whether the information is sensitive and contentious* – this email correspondence took place at the end of [Date], just at the start of the pandemic in Australia, when the first public health measures were being discussed and implemented. Therefore, the discussions behind these initial measures is clearly sensitive and contentious.
- *the possibilities or advice raised may not have been adopted* – at the time, the discussion and implementation of public health measures was occurring at an incredibly fast pace as the department attempted to manage the impact of the rapidly evolving health crisis in Victoria. As such, the relevant email correspondence was urgent and informal, with input and feedback from senior officers required at a moment's notice. Therefore, there are many possibilities and advice included in the correspondence that may not have been adopted during this tumultuous period;
- *disclosure would merely give a part explanation rather than a complete explanation for a particular decision and whether the information may mislead, or lead to confusion or unnecessary*

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

⁶ (1998) 12 VAR 483.

⁷ (1985) 3 AAR 169 at (177-178).

⁸ [2011] VCAT 1889 at [51].

debate – the relationship between recommendations and final actions is an ongoing process and as a result the release of the material, could lead to ill-informed debate among the public comparing the final decision with the informal, frank deliberation detailed in these emails, which is essential in the making a well-considered decision;

- *the need for frankness and candour to be maintained* – this frankness is critical in urgent crisis such as the start of the pandemic, and inhibiting this would impair the department’s time-sensitive response for future similar situations; and
- *whether disclosure would have an adverse effect on the integrity or effectiveness of a decision-making, investigative or other process.*

25. Having reviewed the content of the email correspondence, the purpose and the Agency’s submission, I am not satisfied disclosure of the information in the Document would be contrary to the public interest for the following reasons:

- (a) Some of the information is publicly available (for example, regarding government measures undertaken in relation to the COVID-19 pandemic and penalties to refuse or failing to comply with an authorised officer).
- (b) While I note the topic of the Document, the information is general in nature and therefore not sensitive.
- (c) Opinion, advice and recommendations provided by an agency officer are not automatically exempt under section 30(1). Rather, each document must be considered in terms of its content and context, and an agency must demonstrate disclosure of the document would be contrary to the public interest.
- (d) In this matter it is clear a third party Agency is providing advice and requesting further discussion on the subject at hand. In my view transparency around these types of discussions enhances trust in government – that relevant advice is sought and thoughtfully considered.
- (e) There is no objective evidence before me that demonstrates disclosure of the information in the email correspondence would have a negative impact on the nature and quality of advice provided by agency officers in the future. In this regard, I accept the view expressed by the Victorian Civil and Administrative Tribunal (VCAT) in *Graze v Commissioner of State Revenue*,⁹ that the possibility of public scrutiny may improve the quality of advice provided by agency officers.
- (f) I do not consider disclosure would inhibit communications between agency officers as they are required to discharge their duty to provide impartial and fulsome advice to decision makers, given this requirement is a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic) (**Public Administration Act**).

Accordingly, I am not persuaded disclosure of the information in the email would ‘inhibit’ the ability of Agency officers to provide advice of this nature or ‘inhibit the ability of officers across different departments to collaborate and provide advice to each other. The provision of opinion, advice and recommendations to an agency, a Minister or government goes to the heart of the duties and responsibilities of public sector employees on behalf of their departments and Ministers.

- (g) Finally, there is significant public interest in relation to enforcement and restrictions arising from the COVID-19 pandemic, which is evident from the substantial public discussion and debate regarding government decision making during this period. I consider the disclosure of this information will assist in increasing the public’s understanding of government decision

⁹ [2013] VCAT 869.

making through disclosure of those processes and considerations that have a substantial impact on the general public.

26. For the above reasons, I am not satisfied disclosure of the information in the Document would be contrary to the public interest, and the Document is not exempt by way of section 30(1).
27. Accordingly, I am not satisfied information in the Document is exempt from release under section 35(1)(a).

Section 35(1)(b)

28. A document is exempt 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.
29. As described above, I am satisfied the document was provided to the Agency in confidence.
30. However, I have determined disclosure of the relevant information would not be likely to impair the ability of the Agency to obtain similar information in the future for the following reasons:
 - (a) For the most part, section 35(1)(b) applies to information provided by members of the public, or business undertakings to an Agency where that information is provided voluntarily and where those external parties do not have a legal obligation to provide the information.
 - (b) In this matter, the Agency, and the entity that provided the information to the Agency, have statutory obligations to provide specific services to the community. This places them under an obligation to cooperate where their functions overlap.
 - (c) In my view, and as discussed above, all Agency officers, as public servants, are required to discharge their duties to provide impartial and fulsome advice to decision makers and this requirement is a core aspect of their professional responsibilities and accords with their obligations under the Public Administration Act, including the Public Sector Values under section 7(1) of that Act,¹⁰ and the codes of conduct for public sector employees.¹¹ As such, I do not consider the officers in either agency would be able to properly discharge their duties without cooperating on matters the subject of this request.
 - (d) I also consider the requested information is not sensitive, rather, the Document contains general information and commentary, some of which is publicly available. In particular, isolation for returning travellers and whether it is an offence to refuse or fail to comply with a direction of an authorised officer. I consider this information not particularly sensitive and is readily available to the public.
31. Accordingly, I am not satisfied information in the Document is exempt from release under section 35(1)(b).

¹⁰ Victorian Public Sector Commissioner, *Public Sector Values* at <https://vpsc.vic.gov.au/ethics-behaviours-culture/public-sector-values/>. See for example, in the context of Victorian Public Sector employees providing advice to government and its ministers Responsiveness, Impartiality and Accountability.

¹¹ Victorian Public Sector Commissioner, *Code of Conduct for Employees* at <https://vpsc.vic.gov.au/resources/code-of-conduct-for-employees/>.

Section 25 – Deletion of exempt or irrelevant information

32. 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.
33. 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 a document meaningless, they are not ‘practicable’, and release of the document is not required under section 25.¹³
34. The Document contains information determined exempt under section 33(1). As the Applicant is not seeking this information, it is irrelevant to the request.
35. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25. I am satisfied it is practicable to do so as to do so would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

36. On the information before me, I am satisfied certain information in the document subject to review is not exempt from release under section 35(1)(a) or 35(1)(b).
37. As 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, access to the document is granted in part.

Review rights

38. 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
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
41. 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.
42. 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

¹² *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].

¹³ *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].

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 50(3FA).

Third party review rights

43. As I have determined to release information in the document that the Agency determined is exempt under sections 35(1)(a) and 35(1)(b), if practicable, I am required to notify the relevant third party of its right to seek review by VCAT within 60 days from the date they are given notice of my decision.¹⁸
44. I am satisfied it is practicable to notify the third party of its review rights and confirm they will be notified of my decision.

When this decision takes effect

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

¹⁸ Sections 49P(5), 50(3AB) and 52(3).