

Notice of Decision and Reasons for Decision

Applicant: 'EX1'
Agency: Chisholm Institute
Decision date: 18 November 2022
Exemption considered: Section 29(1)(b)
Citation: 'EX1' and Chisholm Institute (Freedom of Information) [2022] VICmr 238 (18 November 2022)

FREEDOM OF INFORMATION – Australian Skills Quality Authority – complaint evidence analysis – regulation – Technical and Further Education (TAFE) – vocational education and training (VET) – Registered Training Organisations – *National Vocational Education and Training Regulator Act 2011* (Cth) – *Standards for Registered Training Organisations (RTOs) 2015* (Cth)

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.

I am satisfied the document is exempt from release under section 29(1)(b).

As I am not satisfied it is practicable to provide the Applicant with an edited copy of the document in accordance with section 25, access is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

18 November 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to a 2019 Australian Skills Quality Authority (**ASQA**) report into the plumbing program at [a specified location].
2. The Agency located one document falling within the terms of the request and refused access in full under sections 29(1), 33(1), 34(1)(b) and 34(4)(a)(ii).
3. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the document 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.
10. 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 is the 'correct or preferable decision'. This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of making my fresh decision.¹

Review of exemptions

11. As stated above, the Agency refused access to the document in full under sections 29(1), 33(1), 34(1)(b) and 34(4)(a)(ii).
12. In summary and for the reasons set out below, I am satisfied the document is exempt from release under section 29(1)(b).

Section 29(1)(b) – Documents containing matter communicated by any other State

13. Section 29(1)(b) provides a document is exempt if:
 - (a) its disclosure under the FOI Act would be contrary to the public interest; and
 - (b) its disclosure would divulge any information or matter communicated in confidence by or on behalf of the government of another country or of the Commonwealth or of any other State or

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

Territory to the government of the State or Territory or a person receiving a communication on behalf of that government.

14. In deciding whether a document is exempt under section 29(1), an agency must, if practicable, notify the relevant agency, minister or authority and seek its view as to whether the document should be disclosed.²
15. In this case, while the Agency consulted with ASQA in relation to the disclosure of personal affairs information of ASQA officers recorded in the document, it did not do so in relation to section 29(1)(b). Therefore, in making my decision I considered whether consultation with the ASQA was a necessary precondition for me to complete my review. However, given the basis for my decision, as set out below, I am content any such consultation would not have a material impact on my decision.

Would disclosure under the FOI Act be contrary to the public interest?

16. The first requirement to be satisfied under section 29(1)(b) is whether disclosure of a document would be contrary to the public interest.
17. The word 'would' requires certainty that an event will occur, rather than a mere possibility or likelihood.
18. In determining whether disclosure would be contrary to the public interest, I have had regard to the following factors that were accepted by the Victorian Civil and Administrative Tribunal (**VCAT**) in *Millar v Department of Premier and Cabinet*:³
 - (a) protecting uninhibited exchanges between the governments of Australia;
 - (b) encouraging cooperative Federalism within Australia;
 - (c) protecting processes that contribute to high quality policy development by the governments of Australia;
 - (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy; and
 - (e) protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision-making process.
19. I have also had regard to ASQA's role and statutory functions. ASQA is the national regulator of vocational and educational training (**VET**)⁴ and receives complaints about organisations that are alleged not to be meeting the requirements of the *National Vocational Education and Training Regulator Act 2011* (Cth) (**NVETR Act**) and the *Standards for Registered Training Organisations (RTOs) 2015* (the **Standards**).
20. The document subject to review is a 'Complaint Evidence Analysis' produced by ASQA in response to allegations of non-compliance by the Agency with the NVETR Act and the Standards. The Agency obtained the document from ASQA as a part of an investigation process in relation to the allegations made.
21. The Agency submits disclosure of the document would be contrary to the public interest as it would likely impede the Commonwealth from continuing uninhibited exchanges with State governments if

² Section 29(2).

³ [2011] VCAT 1230 at [62].

⁴ Section 155 of the NEVTR Act.

it considers there may be a risk that confidential information shared by and with the Commonwealth will not remain confidential.

22. It also submits disclosure of the document under the FOI Act would be incongruent with the information management framework under the NVETR Act, as follows:

Division 2 of Part 9 to the [NVETR Act] creates an information management framework for the purposes of the [NVETR Act].

Importantly, the document the subject of this review is “VET information” or is a document which contains “VET information” as defined in s 3 of the [NVETR Act]. Disclosure of such information is under s 204 of the NVR Act and prohibited by ASQA or its staff or former staff other than for the purposes of or as permitted by the [NVETR Act]. In those circumstances, it would be incongruent for disclosure to be prohibited in the hands of such persons,⁵ but to be available from Chisholm under the FOI Act. This view is supported by the effect of s 204 of the [NVETR Act]. It is submitted that from the prohibition in s 204 “it is clear that the Commonwealth legislature took the view that the public interest lies in maintaining secrecy of material such as that contained” in the subject Document (ie which contains or comprises VET information).⁶

Further factor in support of this proposition arises from the fact that a person’s right of access under the FOI Act must yield to an inconsistent Commonwealth law. An applicant cannot obtain access under the FOI Act if a Commonwealth law prohibits the release of that information to the applicant.⁷ However, the prohibition under s 204 of the [NVETR Act] does not apply to Chisholm as only certain classes of person are prohibited from disclosure.

Subject to the prohibition on disclosure in s 204 of the [NVETR Act], the disclosure of information is authorised in other limited circumstances.⁸ Section 209 of the [NVETR Act] relevantly provides that:

209 Release of information to the public by the National VET Regulator

(1) The National VET Regulator may release information to the public if the Regulator is satisfied that the release of the information:

(a) would reasonably inform a person’s choice to enrol as a VET student with a registered training organisation; or

(b) would encourage improvement in the quality of vocational education and training services provided; or

(c) would encourage compliance with the VET Quality Framework.

(2) The National VET Regulator may provide for the release of information under subsection (1) by authorising a person or body mentioned in paragraph 205(1)(b), (c), (d) or (f) to release the information.

It is submitted that ASQA is best placed to determine if the Document should be disclosed or released to the public having regard to the information management framework under the [NVETR Act]. Accordingly, the FOI Act is not the proper framework for a person to be entitled to obtain access where the disclosure of information to the public is subject to criteria under another enactment. To the best of our knowledge, ASQA has not disclosed or released the Document the subject of this review to the public or otherwise, except that ASQA informed Chisholm when it provided the Document that [redacted].

23. Section 204 of the NEVTR Act provides:

A person commits an offence if:

- (a) the person discloses VET information or produces a document; and
- (b) the person has the VET information or document because he or she is, or was, any of the following (an entrusted person):
 - (i) the National VET Regulator;

⁵ Noting that section 38 of the FOI Act does not apply to Commonwealth enactments: *Rich v Victoria Police* (Unreported, Victorian AAT, 14 February 1997), pp 43-4, per Preuss PM.

⁶ *Rich v Victoria Police* (Unreported, Victorian AAT, 16 May 1997), p 4, per Preuss PM.

⁷ *XYZ v Victoria Police* [2010] VCAT 255 at [49] per President Bell J; *Selzer v Victoria Police* [2005] VCAT 2593 at [14] per Coghlan DP.

⁸ Sections 205-210C of the NVETR Act.

- (ii) a member of the staff of the Regulator;
- (iii) a consultant engaged under section 172; and
- (c) none of the following circumstances apply to the disclosure or production:
 - (i) it is made for the purposes of this Act or the *Education Services for Overseas Students Act 2000*, or otherwise in connection with the performance of the person's duties as an entrusted person;
 - (ii) it is required or authorised by or under a law of the Commonwealth or a State or Territory.

Penalty: Imprisonment for 2 years.

24. Section 3 of the NVETR Act defines 'VET information' as:

information that is held by the National VET Regulator and relates to the performance of the Regulator's functions, including information and documents collected by the Regulator in the course of:

- (a) the exercise of a power, or the performance of a function, under [the NVETR Act]; or
- (b) the administration of [the NVETR Act].

25. I accept the document was prepared by ASQA and is 'VET information' for the purposes of section 3 of the NVETR Act, as the document is information held by ASQA and it concerns ASQA's functions in carrying out compliance audits of registered training organisations.
26. I accept section 204 of the NVETR Act would prohibit ASQA from disclosing the document subject to review, except for limited permitted purposes, as outlined in the Agency's submission.
27. Having carefully considered the above provisions of the NVETR Act and the Agency's submission, as excerpted above, I accept there is a clear intention by the Commonwealth Parliament that 'VET information' is not to be disclosed, except in limited circumstances. While I accept section 204 of the NVETR Act would not prohibit the Agency from disclosing the document under the FOI Act, I accept the Agency's submission that disclosure of this document under the FOI Act would be inconsistent with the Commonwealth Parliament's intention for the management of such information in the context of ASQA in its role and functions as the National VET regulator under the NVETR Act. In this regard, I also note the imposition of a penalty for a breach of section 204 of the NVETR Act, which indicates the Parliament's intention that the management of VET information be strictly enforced.
28. In addition, I consider my decision is in harmony with section 109 of the *Australian Constitution* which provides that, where there is an inconsistency in laws between Commonwealth and State legislation, the Commonwealth legislation will prevail.
29. In these circumstances, I am satisfied disclosure of the document under the FOI Act would be contrary to the public interest.

Does the document divulge any information or matter communicated in confidence by or on behalf of the government?

30. Having carefully considered the nature of the information in the document, the purpose for which it was created and provided by ASQA to the Agency, and the information management scheme for 'VET information' under the NVETR Act, I am satisfied the document was provided to the Agency by ASQA with an expectation of confidentiality.
31. Accordingly, I am satisfied the document divulges information communicated in confidence by the government of the Commonwealth to the government of the State or person receiving a communication of behalf of that government.
32. Accordingly, I am satisfied the requirements for section 29(1)(b) are met and the document is exempt from release.

Section 25 – Deletion of exempt or irrelevant information

33. 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.
34. 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
35. The Applicant indicated they do not seek access to personal affairs information in the document. Accordingly, this information is irrelevant information for the purposes of section 25.
36. I have considered the effect of deleting exempt and irrelevant information from the document. In my view, it is not practicable to so do as the remaining document would be devoid of meaning.

Conclusion

37. On the information before me, I am satisfied the document is exempt from release under section 29(1)(b).
38. As I am not satisfied it is practicable to provide the Applicant with an edited copy of the document in accordance with section 25, access is refused in full.

Review rights

39. 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
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
42. 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.
43. 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
44. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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], [155].

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).