

## Notice of Decision and Reasons for Decision

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Applicant:	'DR4'
Agency:	Department of Health
Decision date:	21 September 2021
Exemption considered:	Section 30(1)
Citation:	'DR4' and Department of Health ( <i>Freedom of Information</i> ) [2021] VICmr 284 (21 September 2021)

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FREEDOM OF INFORMATION – Medically Supervised Injecting Rooms (MSIR) – survey results – de-identified data

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.

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

My reasons for decision follow.

Sven Bluemmel  
**Information Commissioner**

21 September 2021

## Reasons for Decision

### Background to review

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

Data, Analysis and Report from both the [month year] (wave 1) as well as [month year] (wave 2) MSIR Community Survey, as performed by [named contactor] and referenced in the Review of the MSIR Review Panel, [month year] Report
2. The Agency identified nine documents falling within the terms of the Applicant's request. It decided to refuse access to all documents in full. The Agency relied on section 30(1) to deny access to the documents. 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 advised OVIC they are seeking review of the decision to deny access to Documents 1 to 7. Documents 8 and 9 are therefore not subject to review.
5. I have examined copies of the documents 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.

### Preliminary view

10. OVIC staff provided the Agency with my preliminary view that section 30(1) did not apply to the documents. The Agency's response is set out below.

### Review of exemptions

#### ***Section 30(1) – Internal working documents***

11. 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; and

- (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.

12. The exemption does not apply to purely factual material in a document.<sup>1</sup>

13. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.

14. I accept an employee of the business undertaking that undertook the surveys subject to review on behalf of the Agency, is an 'officer of an Agency' for the purposes of the FOI Act.<sup>2</sup>

*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?*

15. The information in the documents is:

- (a) aggregated statistical information about the method of contact and information about the individuals who provided responses to the surveys;
- (b) aggregated statistical information recording survey participants' responses;
- (c) maps containing aggregated information recording survey participants' responses;
- (d) a document with graphical representations of the above statistical information.

16. The Agency submits:

While the documents themselves do not contain the analysis or assessment of the survey responses, they have been obtained to inform this as part of the review process and final report. It is this aspect that they have been considered to form one aspect of the opinion, advice, recommendation, consultation or deliberation that went into the final report.

17. I accept this information is in the nature of opinion, advice or recommendation prepared by an Agency officer in the course of consultation or deliberation between Agency officers. While I note it could be argued the data is purely factual, I accept the position taken in *Johnson v Cancer Council of Victoria*<sup>3</sup> that such information requires the expertise of specialists to formulate questions, determine how they are delivered and their presentation. I also can see that considerable expertise is required to understand the results of the surveys to ensure that are interpreted correctly.

*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?*

18. I accept the documents were created for the deliberative processes of the agency – that of conducting an assessment of the MSIR.

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Mees v University of Melbourne* (General) [2009] VCAT 782 (6 May 2009) at [31]

<sup>3</sup> (Review and Regulation) [2016] VCAT 1596.

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

19. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
20. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>4</sup>
  - (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 or 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.
21. The Agency submits:
  1. **Disclosing government deliberations:** This document is an internal working draft document prepared to inform the development of a Cabinet submission attachment (the Review of the Medically Supervised Injecting Room). These documents disclose confidential information prepared by department staff and contractors that was developed for the primary purpose of drafting the cabinet submission attachment, to inform Ministerial consideration of a Cabinet submission about the MSIR trial.
  2. **Working draft materials:** These drafts were superseded by the Final MSIR review report that went to Cabinet. The documents are working documents with unweighted information prepared as part of the development of the final review report. The study area is a diverse community and the final published results are representative of the population's views.
    - a. The department engaged external technical specialists to survey the population and to get a representative sample. While the sample was very close to ABS statistics in terms of age and gender, the standard approach in surveys is to undertake a weighting process to better reflect the population level data.

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<sup>4</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- b. The weighting process involves applying a mathematical formula to account for demographic differences between the sampled population and the true population to support stronger alignment between the results and the experiences of the broader population.
  - c. The weighting process involved using ABS [title] data (the smallest Census collection district) to calculate weighting scores for each gender and age group. This resulted in small calculated changes to results, for example a 10 per cent result could change to an 11 per cent result after population weighting.
  - d. Weightings are calculated to confirm the rigour of the initial sampling and provide additional confidence in the accuracy of the final results. Documents with results that have not had weights applied are effectively preliminary working documents and are not an accurate reflection of the final results. This means that although the department has used a rigorous, scientific and ABS accepted method, disclosure of this preliminary data will easily be misconstrued should it be released as there will two sets of numbers out in the public.
  - e. While this process may be understandable to experienced technical experts, engaged community members are likely to think the department has improperly changed the draft data. This is likely to mislead the public, reduce trust in the department and add to ill-informed and unnecessary debate.
- 3. Not in the public interest:** It is not in the public interest to release confidential working drafts prepared to inform Cabinet decisions for the following reasons:
- a. Ethical concerns: [Content redacted]
  - b. Privacy concerns: There is significant concern that the Department may face challenges obtaining privacy approval in the future. The *Privacy and Data Protection Act 2014* and privacy principles protects information held by Victorian government organisations. People have a right to know why their information is being collected and, what it is being used for. The Act is clear that information can only be used for the purpose for which it was provided. The survey participant information sheet did not include that individual or aggregate participants responses could become publicly available through FOI. As individuals have not consented for responses to become public through FOI, the department's provision of this data may contravene the Privacy Act. People were surveyed by a contractor on behalf of government and had an expectation of anonymity. Participants are likely to feel 'identified' and experience negative impacts from the release of granular results and maps, and are likely to feel the department's commitments would be breached by the release of these documents.
  - c. Quality concerns: [Content redacted]. Release of this information is likely to impact future operations of the department, by reducing the ability for the department to collect or record similar detailed information in the future, prevent thorough investigation of issues, and brief Cabinet on that data to inform decisions in the future. Release of this information is likely to reduce the scope and quality future investigations and advice. If the documents are released it is likely that the department would experience difficulties conducting similar future work in this context. If approvals could be granted in the future, release would likely bias future review activity by either impacting the response rate or changing people's responses to future evaluation surveys conducted by the department, or department contractors. It is critical that the department is able to provide relevant, accurate and timely advice to Cabinet and accurately measure people's views over time to inform government decisions.
  - d. Open to misinterpretation: The draft unweighted data results are different to the results on the public record. Releasing these would mislead the public about the results of the survey and clearly lead to ill-informed and unnecessary debate which is contrary to the public interest. There is public interest in the MSIR trial and a range of views about the trial. Some individuals have had significant concerns about the MSIR trial. It is in the public interest to ensure there is one correct public record of the results to reduce misinformation and potential community concern about the results. Together these issues are likely to lead to

misinformation, significant concern, negative local impacts, and reputational damage to the department at a time when trust in the department is critical, both for the future review of the MSIR, and in the context of the COVID19 pandemic response to support an effective public health response. There is significant risk of misinterpretation. This preliminary advice includes unweighted information without adjustments to reflect population weighted results – out of context without analysis of factors that contribute to changes in results. It is reasonably likely that out of context, people would not be able to understand differences between draft information and final reports, especially as this required the engagement of technical specialists to ensure the most accurate and robust method was used. This has the potential to mislead the public and promote misinformation and community concern, impacting the reputation of the MSIR service, the review panel and the department.

Alternatively, the department contends that any data with less than five respondents must remain exempt.

22. The Agency also submitted the following in relation to specific documents:

Document 3

...

- c. contains a layout and format that is extremely confusing for a lay person to interpret. For example it contains notes that data is ‘uncoded’ or ‘in error’. This may lead to further misinformation, confusion and a lack of confidence in the review, impacting the reputation of department or review panel.

Document 4

...

- a. The format of this draft is extremely confusing for a lay person to interpret and may lead to misinformation and lack of confidence in the review, impacting the reputation of department or review panel. For example it contains notes about “information weighted at zero” this is likely to lead to public speculation and misinformation about the way data was treated by the review, and may impact response rates for future evaluations.

...

Document 6

[Content redacted].

23. I have determined it would not be contrary to the public interest to release most of the information in the documents for the following reasons:

- (a) for the most part, I do not consider the data could be used to re-identify the individuals who participated in the surveys; disclosure therefore would not affect participation in future similar surveys;
- (b) similarly, disclosure would not affect the privacy of those individuals;
- (c) while I note decision making about this sensitive topic takes place at a high level, the deliberative nature of a document is not in itself a sufficient reason for disclosure to be contrary to the public interest; rather, the FOI Act provides for members of the public to access such documents to understand and participate in such deliberations;
- (d) I note the concerns of the Agency that the documents contain raw unweighted data, however, I consider the documents themselves provide such notations as to make that clear; I also consider the information provided by the Agency above will assist the applicant understand the documents;

- (e) I agree the information informs sensitive public policy; however in my view this factor weighs in favour of disclosure where it can demonstrate the integrity of the data and the Agency's analysis of that data; that is, disclosure can build public trust by demonstrating the robustness and transparency of the Agency's processes; and
- (f) while similar surveys may be undertaken in the future, the surveys subject of this review are complete.

- 24. The majority of the documents is therefore not exempt under section 30(1).
- 25. I have determined some of the information in the documents could, combined with other information, identify individuals. This is where there is more information available about those individuals in the documents other than just an answer to a survey question. This information is:
  - (a) the location codes in documents 1 and 2;
  - (b) the ethnicity listed in documents 1 and 2;
  - (c) the maps in document 6.
- 26. Where individuals can be identified, I consider disclosure could affect the ability of the Agency to conduct such surveys in the future. Given the sensitivity and importance of the survey, as outlined by the Agency in its submission, I consider disclosure of this information would be contrary to the public interest as it could impair the ability of the Agency to conduct such surveys in the future.
- 27. This information is therefore exempt under section 30(1).
- 28. The information exempt under section 30(1) is set out in detail in the Schedule of Documents at **Annexure 1**.

### **Conclusion**

- 29. On the information available, I am satisfied section 30(1) applies to Documents 1 and 2 in part and Document 6 in full. I am not satisfied the remainder of the documents are exempt under section 30(1).
- 30. I have determined it is practicable to delete exempt information from Documents 1 and 2, they are therefore to be released in part. However, as it is not practicable to delete exempt information from Document 6 it is exempt in full.

### **Review rights**

- 31. 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.<sup>5</sup>
- 32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>6</sup>
- 33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>7</sup>

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<sup>5</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>6</sup> Section 52(5).

<sup>7</sup> Section 52(9).

34. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
35. 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.<sup>8</sup>

**When this decision takes effect**

36. 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.

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<sup>8</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description provided by Agency	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[year]	Aggregated Results - Wave 1 - Survey output	33	Refused in full Section 30(1)	<b>Release in part</b> Sections 30(1), 25  The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 30(1):</b> For reasons set out above, I have determined most of the information in the document is not exempt under section 30(1).  However, I am satisfied that the following information, which contains more detail and combined with other information could potentially risk identifying individuals, is exempt under section 30(1): <ul style="list-style-type: none"> <li>the table '[title]' starting on page 2 and the first half of page 3;</li> <li>the information in the table '[title]' on page 3 in the columns 'resident sample', 'business sample' and 'net' for the second language listed in the table to the last language listed in the table.</li> </ul> <b>Section 25:</b> It is practicable to delete exempt information from the document.

Document No.	Date of Document	Document Description provided by Agency	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
2.	[year]	Aggregated Results - Wave 2 - Survey output	36	Refused in full Section 30(1)	<b>Release in part</b>  Sections 30(1), 25  The document is to be released with exempt information deleted in accordance with section 25.	<b>Section 30(1):</b> See comments for Document 1.  I am satisfied the following information only, that contains more detail, is exempt under section 30(1): <ul style="list-style-type: none"> <li>the table '[title]' starting on page 1 and page 2;</li> <li>the information in the table '[title]' on page 3 in the columns 'resident sample', 'business sample' and 'net' for the second language listed in the table to the last language listed in the table.</li> </ul>
3.	[date]	Descriptives for validation - post-analysis	63	Refused in full Section 30(1)	<b>Release in full</b>	<b>Section 30(1):</b> For reasons set out above, I have determined the information in the document is not exempt under section 30(1).
4.	[date], [date]	Descriptives for validation - pre-analysis	196	Refused in full Section 30(1)	<b>Release in full</b>	<b>Section 30(1):</b> See comments for Document 4.  I note certain data in this document appears to be printed across several pages. This information should be provided to the Applicant in a readable form.

Document No.	Date of Document	Document Description provided by Agency	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
5.	Undated	Descriptives for validation - results to check	3	Refused in full Section 30(1)	Release in full	Section 30(1): See comments for Document 4.
6.	[month year]	MSIR community survey by [reference]	1	Refused in full Section 30(1)	Refuse in full Section 30(1)	Section 30(1): The document is exempt under section 30(1) for the reasons described above in my Notice of Decision.  Section 25: It is not practicable to delete exempt information from the document as to do so would render the document meaningless.
7.	Undated	MSIR Survey Dashboard	2	Refused in full Section 30(1)	Release in full	Section 30(1): See comments for Document 4.
8.	[dates]	Raw Data - Wave 1	1800	Refused in full Sections 30(1), 33(1), 35(1)(b)	Not subject to review	
9.	[dates]	Raw Data - Wave 2	1800	Refused in full Sections 30(1), 33(1), 35(1)(b)	Not subject to review	