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Notice of Decision and Reasons for Decision

Applicant: 'BX2'
Agency: Victorian Building Authority
Decision date: 14 August 2020
Exemptions considered: Sections 30(1), 36(1)(b)
Citation: 'BX2' and Victorian Building Authority (*Freedom of Information*) [2020] VICmr 222 (14 August 2020)

FREEDOM OF INFORMATION – personnel management – salary review – remuneration review

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 have decided to release additional information in the document.

I am not satisfied the Document is exempt under sections 30(1) and 36(1)(b).

As I am satisfied it is practicable to delete irrelevant information in the Document in accordance with section 25, I have determined to grant access to the Document in part.

A marked up copy of the Document has been provided to the Agency the necessary redactions to be made.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

14 August 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant amended their initial request and sought access to:
 1. Copies of all correspondence including emails, reports, memoranda, briefing notes referencing (**refer to**) [the Applicant] insofar as they relate to the provision, or decision not to provide, the Victorian Premier's remuneration adjustment for the [specified financial year] period; and
 2. Copies of all correspondence / recommendations / decisions, relating to [the Applicant], to or from the Victorian Building Authority Board [and named Agency staff] relating to the provision of the Premier's remuneration adjustment for the [specified financial year] period.
 3. The date range requested for these documents is [date] to [date].

Please note that the [financial year] period specified above is the period the remuneration adjustment applies to **not** the date range requested for the search to be conducted.

3. During consultation with the Agency, the Applicant stated they sought access to a copy of the documents in full.
4. In its decision, the Agency identified one document falling within the terms of the Applicant's request, being an email with an attached briefing paper (the **Document**). The Agency relied on the exemptions in sections 30(1), 33(1) and 36(1)(b) to refuse access to the Document in full. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant advised in their review application they do not seek access to the personal affairs information of third parties in the Document. Accordingly, this review does not consider information exempted by the Agency under section 33(1).
7. During the review, the Applicant also indicated they agree to receive an edited copy of the Document in accordance with section 25.
8. I have examined a copy of the Document subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated [date]; and
 - (d) all other communications between the Agency, the Applicant and OVIC staff.

11. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my decision.
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.

Submissions

14. In its decision, the Agency submits:

- (a) in relation to section 30(1):

The exempt document contains or would disclose matter in the nature of opinions, advice or recommendations in relation to the performance and proposed remuneration of VBA Executives. It was prepared by the People and Culture area of the VBA by officers of the VBA for consideration at an In Camera meeting of a Committee of the Board.

In the case of each document, the documents contain and would therefore disclose communications of an officer or officers in the course of and for the purposes of the deliberative functions of the VBA in considering or determining performance and remuneration of VBA Executives. That is a deliberative process involved in the functions of the VBA, namely the personnel management of the VBA in connection with its staffing of the VBA in accordance with sections 200 to 204 of the *Building Act 1993*.

Disclosure of the document would, on balance, be contrary to the public interest taking into account the following relevant factors:

- the object of the FOI Act to maximise disclosure of information;
- the fact that although the applicant may be interested in the information in the document, the public interest would not be advanced as an agency must be free to deliberate appropriately in relation to performance and remuneration of staff without such deliberative material being made available to a person referred to in the document (and potentially more widely);
- the sensitivity and confidential nature of the information in question;
 - information contained in reflected in the exempt document is sensitive to the whole Executive Team both current and previous. It is highly personal information discussed internally on a strictly confidential basis.
 - the sensitivity of employment or personnel management related information is recognised by s 36(1)(b) and disclosure would undermine that public interest against disclosure;
- decision-makers should be judged on the final decision, not on what might have been considered or recommended by others in preliminary internal working documents;
- it is contrary to the public interest to disclose documents where disclosure may undermine decisions already taken and not necessarily reflect accurately why a particular decision was taken;
 - disclosure of material of a preliminary nature at an earlier stage of the consideration and decision-making continuum would in such circumstances merely serve to undermine the

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

decision-making process – it would not be an accurate reflection of the reasons why a particular decision was taken by the VBA in relation to each Executive Team member.

- it is contrary to the public interest to disclose documents that would have adverse effects on the integrity or effectiveness of a decision-making process.

(b) in relation to section 36(1)(b):

Therefore, a document is exempt from disclosure if it would disclose instructions issued to or provided for the use or guidance of officers of an agency (like the VBA) on the criteria to be applied in labour negotiation and in the execution of contracts, and in similar activities relating to the personnel management and assessment interest of the agency.

A simple examination of the exempt document reveals that it sets out opinions, advice or recommendations for the consideration of the Board of the VBA at an In Camera meeting as to the performance and commensurate proposed remuneration changes for all VBA Executives, including you. To the extent that Board accepted or not the recommendations in that document, it would disclose the procedures followed and criteria to be applied by the VBA in activities relating to management of personnel of the VBA; in this instance VBA Executives.

15. The Agency states in its submission:

...

We consider that the applicant can be provided with a copy of the document with redactions that remove information which is not [their] personal affairs information, and that which is captured by the exemptions applied in the original notice of decision, namely those under sections 30(1), 33(1) and 36(1)(b) of the *Freedom of Information Act 1982* (Vic).

16. The Applicant states in their review application:

[redacted – description of the circumstances and details of the Applicant’s concerns].

Review of exemptions

Section 30(1)

17. 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.

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

19. 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 engaged by or on behalf of an agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.

² Section 30(3).

20. The words 'opinion, advice or recommendation' convey a meaning of matters in the nature of a 'personal view', 'an opinion recommended or offered' or a 'presentation worthy of acceptance'.³
21. It is not necessary for information in a document to be in the nature of opinion, advice or recommendation. Rather, its release must disclose information of that nature.
22. Determining whether disclosure of a document would be contrary to the public interest involves a 'process of the weighing against each other conflicting merits and demerits' of disclosure.⁴

Does the Document 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?

23. Having reviewed the Document, I am satisfied certain information conveys the opinions and recommendations of Agency officers.
24. However, certain information in the Document consists of factual and background information. I do not 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.
25. Accordingly, I am not satisfied the first requirement of section 30(1) is met with respect to certain information exempted by the Agency in the Document, and such information is not exempt under section 30(1).

Was the Document 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?

26. The term 'deliberative process' has been interpreted widely. In *Re Waterford and Department of Treasury (No. 2)*,⁵ the Commonwealth 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.
27. I am satisfied the Document was produced for the Agency's deliberative processes in determining the performance and remuneration of Agency executive officers. Therefore, I am satisfied the second requirement of section 30(1) is met.

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

28. In determining if disclosure of the 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 promote the disclosure of information.
29. I have given weight to the following factors in the context of this matter:⁶
 - (a) the right of every person to gain access to documents under the FOI Act;

³ *Halliday v Office of Fair Trading* (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

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].

⁵ [1981] 1 AAR 1.

⁶ *Hulls v Victorian Casino and Gambling Authority* [1998] 12 VAR 483.

- (a) the degree of sensitivity of the issues discussed in the document and the broader context giving rise to the creation of the document;
 - (b) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (c) whether disclosure of the document 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;
 - (d) whether disclosure of the document 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 document;
 - (e) the impact of disclosing document 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
 - (f) 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.
30. Having reviewed the Document, I am satisfied release of the opinions and recommendations of the Agency officers would not be contrary to the public interest for the following reasons:
- (a) I do not consider the information relating to the Applicant is particularly sensitive where similar information has been conveyed to the Applicant.
 - (b) While I accept there is a public interest in preserving the ability of Agency officers to express their opinions and recommendations when giving advice and providing information to the Agency, based on the content of the Document, I am of the view disclosure of such information where it relates to the Applicant would not be reasonably likely to discourage or inhibit Agency officers from recording similar opinions and recommendations in the future.
31. Accordingly, I am not satisfied the Document is exempt under section 30(1).

Section 36(1)(b)

32. Section 36(1)(b) provides a document is an exempt document if:
- in the case of documents of a department or prescribed authority its disclosure under the Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided for the use of guidance of, officers of an agency on the procedures to be followed or criteria to be applied in negotiation, including financial, commercial and labour negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to the financial property to personnel management and assessment interests of the Crown or of an agency.
33. The Agency states the Document discloses procedures followed and criteria to be applied by the Agency in activities relating to personnel management.
34. Having reviewed the Document, I am not satisfied its disclosure would be contrary to the public interest or its release would be likely to weaken the bargaining position of the Agency in future personnel management negotiations. Rather, I consider the information is more properly characterised as standard industry guidelines for personnel management.

35. Accordingly, I am not satisfied the Document is exempt under section 36(1)(b).

Deletion of exempt or irrelevant information

36. Section 25 requires an agency to grant access to an edited copy of a document when 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'⁷ 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 25.⁸

38. As stated above, the Applicant does not seek access to personal affairs information relating to third parties and agrees to receiving an edited copy of the Document. Therefore, third party personal affairs information is irrelevant information for the purposes of this review.

39. I have considered whether it is practicable to provide the Applicant with an edited copy of the Document with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is practicable to delete such information, as to do so would not require substantial time and effort, and the edited Document would retain meaning.

Conclusion

40. On the information before me, I am not satisfied the Document is exempt under sections 30(1) and 36(1)(b).

41. As I am satisfied it is practicable to delete irrelevant information in the Document in accordance with section 25, I have determined to grant access to the Document in part.

42. A marked up copy of the Document has been provided to the Agency showing the necessary redactions to be made.

Review rights

43. 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.⁹

44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰

45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹

46. 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.

47. 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.¹²

⁷ *Mickleburgh 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].

⁸ *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].

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

When this decision takes effect

48. My decision does not take effect until the Agency's 14 day review period expires.

¹² Sections 50(3F) and (3FA).