

Notice of Decision and Reasons for Decision

Applicant:	'EV6'
Agency:	Eastern Health
Decision date:	7 October 2022
Exemption considered:	Section 30(1)
Citation:	'EV6' and Eastern Health (Freedom of Information) [2022] VICmr 224 (7 October 2022)

FREEDOM OF INFORMATION – cyber incident – cyber attack – post incident review – data security – internal working document – 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 is the same as the Agency's decision.

I am satisfied the document is exempt from release under section 30(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to refuse access to the document in full.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

7 October 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents. Following clarification, the request was for:
 - The initial stage of the cyber incident, and up to the date the cyber incident was resolved; and
 - A copy of any Post Incident Review created by Eastern Health.
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to it in full under sections 30(1), 31(1)(d), 33(1), 34(1)(b), and 35(1)(b).

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 document 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.

Review of exemptions

Section 30(1) – Internal working documents

9. 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.
10. The exemption does not apply to purely factual material in a document.¹

¹ Section 30(3).

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?

11. For the requirements of section 30(1) to be met, 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.
12. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant information deleted, where it is practicable to do so.
13. While the document does contain some brief factual information, I am satisfied the majority of the document contains matter in the nature of opinion, advice and recommendations prepared by an Agency officer. This includes:
 - (a) the selection of what information was relevant and therefore to be included in the report;
 - (b) the Agency officers' views of what occurred;
 - (c) the causes of those events; and
 - (d) the way in which the Agency should respond.

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?

14. 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.²
15. In *Re Waterford and Department of Treasury (No.2)*,³ 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.
16. I am satisfied the document was prepared for the deliberative purposes of the Agency, that of its response to a cyber attack.

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

17. 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.
18. In deciding whether disclosure of the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁴
 - (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;

² *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

³ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

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

- (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.
19. I have decided it would be contrary to the public interest to release the document for the following reasons:
- (a) the document does not appear to be finalised as it contains an ongoing series of comments and responses from various Agency officers;
 - (b) without disclosing specific information in the document, generally speaking, the document contains detailed sensitive [and technical] information about [the Agency's] information technology infrastructure [and the specific cyber incident]. [Content redacted]
 - (c) While I do not have any information about whether the Applicant has or intends to share the document with any other parties, I must consider that release under the FOI Act does not place any restrictions on the use or dissemination of the document. Given the detailed technical information it contains, I cannot discount the fact that disclosure of the document to the wrong parties could have a significant impact on the Agency's data security. As the Agency stores sensitive personal medical information of members of the community, this is a significant factor in my decision.
 - (d) I note there are public interest factors in favour of disclosure of the document, including holding the Agency accountable for its data security and its response to a cyber attack. However, I consider there is a stronger public interest factor that weighs against disclosure in this case. Given the level of detail in the document, as described above, I have serious concerns that disclosure of this detailed technical information could make the Agency's systems vulnerable to further attacks.
20. I am therefore satisfied that a majority of the document is exempt under section 30(1).

Section 25 – Deletion of exempt

- 21. 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.
- 22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where deletions

⁵ *Mickelburgh v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.⁶

23. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete the exempt information, because to do so would essentially render the document meaningless and not provide the Applicant with any substantive information.

Conclusion

24. On the information before me, I am satisfied section 30(1) applies to the document.
25. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is refused in full.

Review rights

26. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁷
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
28. 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.
29. If the Applicant applies to VCAT for review, the Agency is required to notify the Information Commissioner in writing as soon as practicable.⁹

When this decision takes effect

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

⁶ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division* (Review and Regulation) [2013] VCAT 1267 at [140], [155].

⁷ Section 50(1)(b).

⁸ Section 52(5).

⁹ Sections 50(3F) and (3FA).