

## Notice of Decision and Reasons for Decision

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Applicant:	'FQ3'
Agency:	Ambulance Victoria
Decision date:	29 May 2024
Exemptions considered:	Sections 30(1), 33(1) and 35(1)(b)
Citation	'FQ3' and Ambulance Victoria (Freedom of Information) [2024] VICmr 34 (29 May 2024)

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FREEDOM OF INFORMATION – workplace review – workplace investigation – cultural review – external consultant report – information provided in confidence

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 is the same as the Agency's decision as I am satisfied the documents are exempt from release in full under sections 30(1), 33(1) and 35(1)(b).

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

Please refer to page 11 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
**Acting Public Access Deputy Commissioner**

29 May 2024

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - Drafts under the Cultural Review into [part of the Agency] written by [name] from the period [month] [year] to [month] [year].
  - Finalised Report of Cultural Review into [part of the Agency] written by [name] from the period [month] [year].
  - All email correspondence between [name] and [part of the Agency], including [name], [name] and [name] from the period [day] [month] [year] to [day] [month] [year].
2. The Agency identified eight documents falling within the terms of the Applicant's request and granted access to six documents in full and refused access to two documents in full under sections 30(1), 33(1) 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. I have examined a copy of the documents subject to review.
5. During the review, the Applicant advised that they do not seek access to personal affairs information in the documents.
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 relevant 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 to be the 'correct or preferable decision'.<sup>1</sup> This

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

## 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>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?*

13. 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.
14. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>3</sup>
15. Document 5 is a finalised *Cultural Review Report* [date] prepared by an external consultant.
16. Document 8 is an email from an Agency officer to the external consultant, providing feedback on the draft version of the report, along with a copy of the draft report. The draft report is annotated with comments from the Agency officer.
17. 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, regardless of whether they are subject to the *Public Administration Act 2004* (Vic) apply or not.
18. Accordingly, as the external consultant was contracted to prepare the report on behalf of the Agency, I am satisfied the external consultant is an 'officer' of the Agency for the purposes of the FOI Act.
19. The Agency's decision letter states:

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<sup>2</sup> Section 30(3).

<sup>3</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

This exemption has been applied in full to two documents (the finalised report and the draft report) as it contains matters in the nature of opinion advice or recommendations into [part of the Agency] and disclosure may inhibit the ability of staff to provide frank and candid advice in the future. This would not be in the public interest.

20. I am satisfied the reports, being the final version at Document 5 and the draft version in Document 8, contain matter in the nature of opinion, advice and recommendations prepared by the external consultant on behalf of the Agency.
21. I am also satisfied that the email in Document 8 from the Agency officer is matter in the nature of opinion.

*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?*

22. The term 'deliberative process' is interpreted to include most processes undertaken by an agency or Minister in relation to their functions.<sup>4</sup>
23. I am satisfied the documents were created in the course of deliberative processes involved in the functions of the Agency, namely, as an employer with obligations under workplace legislation to provide a safe workplace for its employees.

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

24. 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.
25. There are many factors that may be relevant to determining whether it would be contrary to the public interest to disclose a document or information.<sup>5</sup> Public interest factors are not a fixed, determinative set of criteria.<sup>6</sup>
26. I have considered the Applicant's interest in seeking access to the documents, and whilst this is a relevant factor, it must be balanced with other factors in determining whether disclosure of a document would be contrary to the public interest.
27. On balance, I have determined disclosure of certain information in the documents would be contrary to the public interest for the following reasons:
  - (a) The documents were prepared during a review into workplace culture and the assessment examined the individual experiences of Agency officers regarding their workplace environment. I am satisfied the broader context to which the documents relate is sensitive.
  - (b) The purpose of reports of this nature is to allow the Agency to consider and deliberate any findings and recommendations of the consultant. The assessment and

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<sup>4</sup> *Re Waterford and Department of Treasury (No.2)* (1981) 1 AAR 1 referred to in *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

<sup>5</sup> For example, see *Coulson v Department of Premier and Cabinet* [2018] VCAT 229 at [25]; *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483, 488; *Secretary to Department of Justice v Osland* (2007) 26 VAR 425 at [77].

<sup>6</sup> *Landes v Vic Roads* [2009] VCAT 2403 at [46].

recommendations set out in the documents do not necessarily reflect the views of the Agency, and the recommendations may not have ultimately been accepted or adopted by the Agency. As such, disclosing the documents could mislead the Applicant given they do not have further contextual information about the Agency's actual deliberation of the consultant's findings and recommendations.

- (c) Furthermore, while the workplace culture review took place in [year], I am satisfied the sensitivity of the issues discussed has not dissipated. In this regard, I note the independent review undertaken by the Victorian Equal Opportunity and Human Rights Commission (the **Commission**) at the request of the Agency into workplace equality in Ambulance Victoria, "following reports of alleged discrimination, sexual harassment, victimisation and bullying in the organisation" is evidence of the continuing occurrence of workplace reviews.<sup>7</sup> Following the Commissioner's review, it published two final reports in November 2021 and March 2022. While the scope of the Commission's review covered the whole Agency and my review is only to documents that examined [part of Agency], I consider this nevertheless highlights the sensitivity of the documents subject to this review and the issues discussed.
- (d) The assessments and recommendations are closely linked to information that was provided by persons who participated in the review. I consider an external review process conducted by a consultant engaged by the Agency relies on free and fulsome information being provided by review participants. In this case, I am of the view the participants would have provided information to the external consultant on the basis it would be held in confidence or be utilised for internal processes of the Agency to address any workplace issues. Given the nature of disclosure under the FOI Act, which is unrestricted and unconditional, I do not consider the participants would have contemplated or been as engaged in the process had they known documents prepared in relation to the review would be disclosed under the FOI Act, or otherwise be available publicly.
- (e) It is important that public sector agencies can undertake a thorough and considered review processes in relation to workplace incidents, culture and conflict. Without an open flow of relevant and sufficient information, such workplace reviews are unlikely to be able to obtain and clearly identify and advise on all relevant matters. Such an outcome, in my view, may result in flawed or incomplete review findings which would be contrary to the public interest.
- (f) While in certain circumstances it could be said the disclosure of such information is critical to ensuring public scrutiny of the way in which an agency carries out its statutory responsibilities and meets legislative requirements, having reviewed the documents and considered their contents, I consider disclosure of certain information would impair the Agency's ability to properly identify and address similar matters in the future by disclosing information obtained from Agency officers in relation to sensitive workplace issues. As such, I consider there is an essential public interest in maintaining a robust review process by ensuring the confidentiality of the Agency's consultations.

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<sup>7</sup> See *Final Report into Independent Review into Workplace Equality in Ambulance Victoria* (Volumes 1 and 2) (published by the Victorian Equal Opportunity and Human Rights Commission at <https://www.humanrights.vic.gov.au/legal-and-policy/research-reviews-and-investigations/ambulance-victoria-review/about/>).

28. Accordingly, on balance, I am satisfied certain information in the documents is exempt under section 30(1).
29. My decision in relation to information in the documents that is exempt under section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

***Section 33(1) – Documents affecting personal privacy of third parties***

30. A document or information is exempt under section 33(1) if two conditions are satisfied:
  - (a) the document or information relates to the ‘personal affairs’ of a natural person (living or deceased); and
  - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.

*Do the documents contain personal affairs information of individuals other than the Applicant?*

31. A document will indirectly disclose personal affairs information if it contains information from which any person’s identity, address or location can reasonably be determined. This means that a document can be exempt under section 33(1) where the document itself does not contain personal affairs information, but its disclosure would reveal personal affairs information.
32. The concept of personal affairs information is broad. Information will relate to the personal affairs of a person if it ‘concerns or affects that person as an individual’.<sup>8</sup> This includes information relating to health, private behaviour, home life, or personal or family relationships of individuals.<sup>9</sup>
33. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.<sup>10</sup>
34. The documents contain direct identifying information about third parties, such as names, position titles and contact details. I am satisfied such information is irrelevant information for the purposes of this review, as the Applicant has advised that they do not seek access to personal affairs information.
35. However, there is also broader personal affairs information in the documents, including detailed information provided by participants in relation to their workplace and colleagues.
36. I am also satisfied there is potential for the identity of individuals to be deduced from information in the documents. This includes where:
  - (a) opinions can be attributed to a small pool of participants;
  - (b) the opinions disclosed are specific to persons, work areas or issues;

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<sup>8</sup> *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

<sup>9</sup> *Re F and Health Department* (1988) 2 VAR 458, quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 [103], [109].

<sup>10</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

- (c) the language used in the report, for example, paraphrases responses provided by the participants.

37. I consider it likely that the Applicant seeks access to such information, and accordingly, I will consider whether disclosure of such information would be unreasonable in the circumstances.

*Would disclosure of the personal affairs information be unreasonable?*

38. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

39. This involves weighing the facts and matters that 'relevantly, logically, and probatively' bear upon whether disclosure of the personal affairs information is unreasonable in the circumstances.<sup>11</sup>

40. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:<sup>12</sup>

- (a) the nature of the personal affairs information;
- (b) the circumstances in which the information was obtained;
- (c) the extent to which the information is available to the public;
- (d) the applicant's interest in the information;
- (e) whether any public or important interest would be promoted by release of the information;
- (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
- (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>13</sup>

41. There is no information before me to suggest that disclosure would or would be reasonably likely to endanger the life or safety of any person.

42. Having considered the above factors, I am satisfied the disclosure of any personal affairs information in the documents would be unreasonable in the circumstances for the following reasons:

- (a) The review conducted by the external consultant relied on the voluntary provision of free and fulsome information from participants. In this case, I accept the participants provided their personal affairs information to the consultant on the basis they would not be named or identified in the documents, and the specific nature of the information they

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<sup>11</sup> *Victoria Police v Marke [2008] VSCA 218 at [98]*.

<sup>12</sup> See OVIC FOI Guidelines – Section 33(1).

<sup>13</sup> Section 33(2A).

provided would be held in confidence due to its sensitive nature concerning a review of workplace health and wellbeing.

- (b) Parts of the documents contain observations or opinions, often reinforced or demonstrated by paraphrased quotes from participants, which means the information is sensitive in nature given its content and the context in which it was provided.
  - (c) As stated above, the documents contain highly sensitive information provided by participants about their colleagues.
  - (d) I consider most participants would be reasonably likely to object to the disclosure of their personal affairs information given the sensitive nature of the information within the documents.
  - (e) There is a strong public interest in Agency officers being sufficiently comfortable and confident to voluntarily participate in a sensitive workplace review. I am satisfied disclosure of the documents in full would undermine the confidentiality of participants and their confidence in the conduct and integrity of similar future reviews.
43. Accordingly, I am satisfied information contained in the documents is exempt under section 33(1).
44. My decision regarding section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

***Section 35(1)(b) – Information obtained in confidence***

45. 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.

*Was the information obtained in confidence?*

46. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.<sup>14</sup>
47. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>15</sup>
48. Generally, section 35(1) only applies to information communicated from an external source. It usually does not apply to information generated by the agency or its own officers. However, in very limited circumstances, section 35 may apply to particularly sensitive and confidential information communicated to an agency by its own officers.<sup>16</sup> For example, in the context of

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<sup>14</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>15</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265], referring to *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

<sup>16</sup> *Sportsbet v Department of Justice* [2010] VCAT 8 at [77]-[78], referring to *Birnbauer v Inner & Eastern Health Care Network* (1999) 16 VAR 9, 17.



internal complaints and investigations, or where misconduct or corruption is reported. In these situations, the officer's position is analogous to that of an outside source.<sup>17</sup>

49. The Agency's decision letter states:

This exemption has been applied in full to two documents (the finalised report and the draft report) as it contains material communicated in confidence by participants into the Cultural Review at [part of Agency that] participated on the basis that their contributions would remain confidential.

50. The documents reflect the views of numerous employees who participated in the review conducted by an external consultant in relation to workplace culture and their personal opinions and experiences.

51. I am satisfied Agency officers who made statements to the external consultant did so in circumstances in which a certain degree of confidentiality can reasonably be implied based on the nature and context of the review. Therefore, I am satisfied parts of the documents contain information or matter that was communicated to the Agency in confidence.

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

52. For information communicated in confidence to be exempt under section 35(1)(b), its disclosure must be reasonably likely to impair the Agency's ability to obtain similar information in the future.

53. It is not sufficient to merely establish that people would be less candid in future or would feel betrayed or feel resentment if the information were disclosed.<sup>18</sup> There must be an actual impairment to the ability of the agency to obtain like information in the future.<sup>19</sup>

54. I consider workplace reviews are not uncommon and rely on the voluntary participation of agency officers who are almost always provided with assurances of confidentiality in exchange for relevant information to inform a workplace review. I also acknowledge the fine balance between encouraging the voluntary participation of agency officers in exchange for assuring a certain degree of participants' confidentiality with the need to collate and report on evidence obtained and make appropriate findings and recommendations.

55. I accept the documents are written in such a way to protect the identity and confidentiality of most of the participants; however, the pool of participants who were interviewed was small, and in such circumstances, their identity could be inferred by persons who are aware of the issues discussed.

56. The need to ensure candour and honesty in the provision of feedback by Agency officers in such workplace reviews is of crucial importance where the results collected will be used to identify issues and inform relevant recommendations.

57. In my view, it would be contrary to the public interest to disclose information provided by Agency officers in the context of workplace reviews. If this information is disclosed, it may

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<sup>17</sup> *Sportsbet v Department of Justice* [2010] VCAT 8 at [77].

<sup>18</sup> *Ryder v Booth* [1985] VR 869, referred to in *Mees v University of Melbourne* [2009] VCAT 782 at [54].

<sup>19</sup> *Birnbaauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363 at [68].

significantly impact their willingness to participate in any future review, staff survey or interview on the grounds that the information they provide to the Agency, or an external consultant may be disclosed under the FOI Act and their identity may be discernible based on particular information or comments made and recorded.

58. Accordingly, I am satisfied information in the documents is exempt under section 35(1)(b).
59. I also note that the Agency has applied section 35(1)(b) broadly, including, to information that clearly does not fall within the scope of the exemption. For example, this includes sections of the report, both in the final version in Document 5 and the draft in Document 8, that sets out the background, methodology, recommendations, and internal correspondence concerning the draft version of the report. In any case, I am satisfied that this information is exempt from release under section 30(1).
60. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

#### ***Section 25 – Deletion of exempt or irrelevant information***

61. 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.
62. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>20</sup> 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.<sup>21</sup>
63. As stated above, the Applicant did not seek access to personal affairs information, which I have interpreted to be for access to direct personal affairs information. Such information is irrelevant for the purposes of my review.
64. In any case, I am not satisfied it is practicable for the Agency to delete the irrelevant and exempt information in the documents, because it would render the documents meaningless to the Applicant.

#### **Conclusion**

65. On the information before me, I am satisfied information in the documents is exempt from release under sections 30(1), 33(1), and 35(1)(b).
66. As I am not satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is refused in full.

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<sup>20</sup> *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].

<sup>21</sup> *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].

**Timeframe for the Applicant to seek a review of my decision**

67. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>22</sup>
68. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>23</sup>
69. 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.
70. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it become aware that the Applicant has applied to VCAT for a review of my decision.<sup>24</sup>
71. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>22</sup> section 50(1)(b).

<sup>23</sup> Section 52(5).

<sup>24</sup> Section 50(3FA).

## Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision
1.	[date]	Email – Cultural Review Invoice	1	Released in full	Not subject to review
2.	[date]	Email – Accepted Discuss Report	1	Released in full	Not subject to review
3.	[date]	Remail Re Cultural Review Invoice	1	Released in full	Not subject to review
4.	[date]	Email and one attachment	1	Released in full	Not subject to review
5.	[date]	Cultural Review Report Final Report [year]	40	Refused in full Sections 30(1), 33(1) and 35	Refuse in full Sections 30(1), 33(1), 35(1)(b)
6.	[date]	Email – Todays appointment	1	Released in full	Not subject to review
7.	[date]	Cultural Review Report – Follow Up	1	Released in full	Not subject to review

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision
8.	[date]	Email and draft Cultural Review Report	42	Refused in full Sections 30(1), 33(1) and 35	Refuse in full Sections 25, 30(1), 33(1), and 35(1)(b)