

Notice of Decision and Reasons for Decision

Applicant:	'FE8'
Agency:	Department of Justice and Community Safety
Decision date:	26 May 2023
Exemptions and provisions considered:	Sections 30(1), 25
Citation:	'FE8' and Department of Justice and Community Safety (Freedom of Information) [2023] VICmr 52 (26 May 2023)

FREEDOM OF INFORMATION – video recordings of meetings – Zoom – internal working documents – inhibit frank and confidential discussions – compromise public safety – release contrary to 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 documents 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 documents are 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 documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

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
26 May 2023

Reasons for Decision

Background to review

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

I am seeking either a copy of or a viewing of in their office a 'zoom' or 'teams' meeting held on the following dates [dates], ie earlier this year. The one on the [date] is of particular significance to a meeting to be held sometime next week. I have asked on three occasions for a copy OR to come into and view them in their office. The last answer yesterday from [named Agency officer] is '...information is classified as sensitive.' And, [another government entity] is not in a position to release this type of information to external parties.' I believe this is an ad hoc decision with no legal basis. I was a participant in the three meetings along with approx [number] other people from [participants]. I am seeking an immediate release of a copy of the meeting.

2. On [date], the Applicant clarified that they are seeking access to all [meeting type] meetings held on [dates], including the [meeting type] meetings they did not attend.
3. The Agency identified five documents responsive to the request, being five video recordings. The Agency's decision letter advised the Applicant they could view two of the video recordings, and that the remaining three video recordings are exempt under sections 30(1), 33(1) and 35(1)(b). 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 to all five documents.
5. I have examined a copy 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. The Applicant was provided with my preliminary view that section 30(1) applied to the documents and was invited to make a further submission.
11. I have considered the Applicant's further submission and it is summarised below.

Review of exemptions

Section 30(1) – Internal working documents

12. 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.

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

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?

- 14. 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.
- 15. 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.²
- 16. 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.
- 17. The documents are recordings of 5 meetings chaired by Agency officers. The recordings are in 'zoom' format where parties dial into the meeting and are shown on the screen to one another. The participants in the meetings are representatives from a range of Victorian government agencies, as well as an external third party.
- 18. The meetings take place to coordinate the various parties' responsibilities in relation to the arrival, storage and transport of what is referred to during the meetings as a 'high consequence product'.
- 19. While the documents contain some factual information, I am satisfied, that for the most part the documents record the meetings participants' opinion, advice and recommendations based on their roles and subject matter expertise.

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?

- 20. 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.³
- 21. In *Re Waterford and Department of Treasury (No.2)*,⁴ 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.

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

³ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208]; ; *Re Waterford v Department of Treasury (No 2)* [1984] 1 AAR 1 at [58] .

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

22. I am also satisfied the documents were prepared for the deliberative processes involved in the functions of the Agency, being in coordination various government agencies responsibilities in relation to the safe transport of certain goods.

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

23. 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.
24. 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:⁵
- (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 of 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.
25. In its decision letter, the Agency provided the following reasons for deciding disclosure would be contrary to the public interest:
- [redacted]
26. During their review request, including in response to my preliminary view, the Applicant advised that they considered it was in the public interest to disclose the documents in order to have confidence in the decision making of the Agency. They considered the idea that disclosure may mean Agency staff do not talk freely at future meetings was not a real and sufficient reason for refusal but an excuse. The Applicant also advised that the legal responsibility for the transport of goods is their own, and not the Agency's.
27. Following review of the documents and consideration of the positions of the Applicant and the Agency in line with the factors detailed at paragraph 24, I have decided it would be contrary to the public interest to release the documents for the following reasons:

- (a) I accept the Agency's view that the documents contain sensitive and confidential information.

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483 at 488.

- (b) Meetings between Agency officers and stakeholders function as a way to raise and discuss issues before reaching a final conclusion. This means that recordings of such meetings are inherently more sensitive than minutes or documents reflecting the outcome of such meetings.
 - (c) Should meeting recordings of this particular nature be released under FOI, this could reasonably be expected negatively to affect confidential discussions between Agency officers and stakeholders who need to be able to discuss matters freely and without expectation that the discussions will later be released under FOI.
 - (d) I note the Applicant's reasons for the request and the valid public interest considerations they raise, particularly in relation to the Agency being accountable for its public safety obligations. However, I consider there is greater public interest in ensuring Agency officers and third parties can have frank and confidential discussions in relation to the information in the documents subject to review.
 - (e) I acknowledge the Applicant attended [number] of the meetings subject to my review and therefore would be aware of what occurred. However, I consider there is a significant difference between a recollection of events and obtaining a copy of a recording.
 - (f) In this regard, while I do not have any information that suggests the Applicant will further distribute the documents, as the FOI Act does not place restrictions on an applicant's use or dissemination of documents obtained under FOI, I must consider the affect broader disclosure could have. In my view distribution outside of the Agency could pose a safety risk as outlined by the Agency in its decision.
 - (g) While the prospect of further distribution may be remote, given the sensitivity of the information in the documents, this is a factor in my decision.
28. As I am satisfied it would be contrary to the public interest to disclose the documents, they are exempt under section 30(1).

Section 25 – Deletion of exempt or irrelevant information

- 29. 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.
- 30. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
- 31. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because the resources required to do so would be onerous, and the fact that deleting the exempt information would mean the documents no longer contained the information specifically sought by the Applicant.

Conclusion

- 32. On the information before me, I am satisfied the documents are exempt from release under section 30(1).

⁶ *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].

⁷ *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].

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

Review rights

34. 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.⁸
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
37. 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.
38. 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.¹¹

When this decision takes effect

39. 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.

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

No.	Date of document	Title or description of document as per Agency decision letter	Number of pages	Agency's decision	OVIC decision	OVIC comments
1	[date]	[type of meeting] Planning Meeting [date]	MP4	Refused in full Sections 30(1), 33(1), 35(1)(b) View only access offered to applicant	Refuse in full Section 30(1)	Section 30(1): The document is exempt from release for the reasons described above in the Notice of Decision.
2-3	[date]	[type of meeting] Discussions [date]	MP4	Refused in full Sections 30(1), 33(1), 35(1)(b)	Refuse in full Section 30(1)	Section 30(1): See comments for Document 1.
4	[date]	[type of meeting] Meeting [date]	MP4	Refused in full Sections 30(1), 33(1), 35(1)(b) View only access offered to Applicant	Refuse in full Section 30(1)	Section 30(1): See comments for Document 1.
5	[date]	[type of meeting] Meeting [date]	MP4	Refused in full Sections 30(1), 33(1), 35(1)(b)	Refuse in full Section 30(1)	Section 30(1): See comments for Document 1.