

Notice of Decision and Reasons for Decision

Applicant:	'GD9'
Agency:	Department of Education
Decision date:	18 July 2024
Exemptions considered:	Sections 28(1)(c) and 30(1)
Citation:	'GD9' and Department of Education (Freedom of Information) [2024] VICmr 60 (18 July 2024)

FREEDOM OF INFORMATION – list of school condition scores – Condition Assessment Report – Rolling Facilities Evaluation – document created from a database – not extracted from a Cabinet document

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 fresh 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.

I am satisfied the document is not exempt from release under sections 28(1)(c) or 30(1) and is to be released in full.

Please refer to page 9 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Sean Morrison
Information Commissioner

18 July 2024

Reasons for Decision

Background to review

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

A document which outlines the individual condition score of every government school in Victoria, sourced from the most recent Condition Assessment Report for each individual school under the Rolling Facilities Evaluation program. The document should contain the school name, the suburb the school is located in and the individual condition score of the school.

2. The Applicant excluded personal affairs information of non-executive level staff from the scope of their request.
3. The Agency created one document under section 19 meeting the terms of the Applicant's request and refused access to the document in full under section 28(1)(ba).
4. The Agency's decision letter sets out the reasons for its decision.
5. The Agency's website provides the following information about the Rolling Facilities Evaluation:

The Rolling Facilities Evaluation is conducted by the VSBA¹ and involves 5-yearly assessments of the condition of school buildings and other infrastructure such as car parks, footpaths and fencing at all Victorian government schools (condition assessment). These findings will be detailed by the VSBA in a Condition Assessment Report.

The Rolling Facilities Evaluation is delivered on a rolling 5-year cycle and approximately 300 schools will be assessed each year. The current Rolling Facilities Evaluation program is in year 1 of the 5-year cycle and will complete this cycle at the end of 2027.

The Rolling Facilities Evaluation ensures that the VSBA maintains up-to-date data about the condition of schools. This data is used to inform where investment in maintenance needs to be prioritised.²

6. It states the following in relation to Condition Assessment Reports:

Schools will receive a detailed Condition Assessment Report (CAR) approximately 4 to 6 weeks after the condition assessment...

The report will identify:

- the school's condition score
- the school's condition issues, known as defects
- the priority and recommended timing to address the defects (Priority 1 within 6 months, Priority 2 within 12 months)

¹ Victorian School Building Authority.

² <https://www2.education.vic.gov.au/pal/school-maintenance-plans-rfe/policy>

- actions needed to address the defect, for example clean blockages, replace light fitting, patch or re-paint
- the recommended tradespeople needed to address the issues, for example, electrician, plumber
- issues that will require further investigation by a specialist tradesperson.

Schools have 10 business days to review the report. They can accept the report or provide feedback to the VSBA Rolling Facilities Evaluation team.³

Review application

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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 relevant communications and submissions received from the parties.
11. On [date], the Agency made a written submission concerning its decision to apply section 28(1)(ba) to the document and that it sought to also rely on the exemption under section 28(1)(d).
12. On [date], OVIC staff provided the Agency with their initial assessment that sections 28(1)(ba) and 28(1)(d) do not apply to the document and provided the reasons why.
13. On [date], the Agency notified OVIC and the Applicant of its intention to make a fresh decision under section 49M(1).
14. On [date], the Agency made a fresh decision on the request and decided to refuse access to the document in full under sections 30(1) and 28(1)(c). The Agency's fresh decision letter sets out the reasons for its decision.
15. Following the Agency's fresh decision, the Agency was provided with further assessments from OVIC staff that sections 30(1) and 28(1)(c) do not apply to the document and the reasons why.
16. The Agency provided a further submission in support of its fresh decision.
17. 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.
18. 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

³ Ibid.

facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

19. 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'.⁴ This 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 28(1)(c) – Copy, draft, or extracts or a Cabinet document

20. Section 28(1)(c) exempts a document that is a copy or draft of, or contains extracts from, a document referred to in sections 28(1)(a), 28(1)(b) or 28(1)(ba).
21. The Agency's fresh decision states:

The document created in response to this request is an extract from a master spreadsheet, the substantive purpose of which is input to recommendations to Cabinet for school upgrade projects submitted as part of the State Budget process.
22. An extract usually contains a reproduction of part of the text or material such as a quote, paraphrase, or summary.⁵
23. The document containing extracts must have been created after the official record, Cabinet submission or Ministerial brief was prepared.⁶
24. The Agency described the master spreadsheet referred to in its fresh decision as a 'master dataset' (the **dataset**) from which spreadsheets can be produced.
25. The Agency provided a submission setting out the circumstances in which it extracts information from the dataset for purposes relating to the preparation of submissions to Cabinet as well as evidence that information had in fact been extracted from the dataset and included in a Cabinet submission.
26. I am satisfied that information from the dataset is used in Cabinet submissions. However, for the exemption under section 28(1)(c) to apply, the document subject of my review must have been extracted from a document that is itself exempt under sections 28(1)(a), 28(1)(b) or 28(1)(ba).
27. I am not satisfied the dataset itself is an exempt document under sections 28(1)(a), 28(1)(b) or 28(1)(ba). This is because:
 - it is not an official record of any deliberation or decision of the cabinet;

⁴ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

⁵ *Mildenhall v Department of Education* (unreported, VCAT, Glover M, 16 April 1999); *Honeywood v Department of Human Services* [2006] VCAT 2048 [19].

⁶ *Honeywood v Department of Human Services* [2006] VCAT 2048 [19]; *Smith v Department of Sustainability and Environment* (General) [2006] VCAT 1228 [28].

- the database is not a document that was prepared for the purpose of submitting it to Cabinet for consideration; and
 - the database is not a briefing document.
28. There is also no information before me to indicate that the sole, substantial or dominant purpose of the database is for data to be extracted for the purpose of inclusion in documents falling within the ambit of sections 28(1)(a), (b) or (ba).
29. I am also satisfied that the document itself was not extracted from the Cabinet submission referred to in the Agency's submission. Rather, it is a new document that was created, or in other words, extracted from the same database. While it may contain the same information, it is not in itself an extract of the Cabinet submission and is instead an extract from the database.
30. Accordingly, I am satisfied the document is not exempt from release under section 28(1)(c).

Section 30(1) – Internal working documents

31. To be exempt under section 30(1), three conditions must be satisfied:
- (a) the document or information is matter in the nature of:
 - (i) opinion, advice or recommendation prepared by an agency officer or a Minister; or
 - (ii) consultation or deliberation that has taken place between agency officers or Ministers; and
 - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions; and
 - (c) disclosure of the matter would be contrary to the public interest.
32. The exemption does not apply to purely factual material in a document.⁷

First requirement – opinion, advice, recommendation, or consultation or deliberation

33. The Agency submits information in the document is an expert assessor's opinion on the condition of each school's assets and infrastructure.
34. I am satisfied the scores are the opinion of the assessor.

Second requirement – deliberative process

35. Where a document contains deliberative information, an agency or Minister must also determine whether the deliberative information was created in a 'deliberative process' related to the functions of an agency, Minister, or the government.

⁷ Section 30(3).

36. 'Deliberative process' is widely interpreted to include most processes undertaken by an agency or Minister in relation to their functions.⁸
37. I accept the Agency's submission that information in the document is used as part of the deliberative processes of the Agency to inform infrastructure planning and investment.

Third requirement – would disclosure of the document be contrary to the public interest?

38. I must consider all relevant facts and circumstances, remaining mindful that the intention of the FOI Act is to promote the disclosure of information.
39. 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.⁹ These are not a fixed or determinative set of criteria.¹⁰
40. The Agency made the following submission concerning the reasons why it considers disclosure of the document would be contrary to the public interest:
 - (a) Disclosing condition scores will have a negative impact on some schools' reputation. A single condition score does not fully represent the performance of the school or its facilities, it may unfairly damage its reputation within the community. A negative reputation from a condition score can lead to parents deciding to send students to another school. This can have a range of negative effects: declining enrolment reduces the range of subjects which a school can provide, further damaging their reputation. This can have further flow-on effects to a school's condition as maintenance funding can decline as enrolments decline, reducing the ability of a school to maintain its infrastructure.
 - (b) The score is based on a visual inspection conducted by expert assessors. Disclosing these scores is likely to compromise the integrity of future RFE inspections: if assessors and schools are aware that the score can be made public, with potential impacts for the school, it could lead them to distort the scoring to avoid damage to the school's reputation.
 - (c) The condition score is only a limited snapshot of a school's condition. It is one factor within a comprehensive asset management system which works to identify defects, prioritise them and then provide funding, guidance and support to resolve them to ensure that schools remain safe and in good condition.
 - (d) The condition score represents an aggregated view of a wide range of condition defects on a school site. It does not distinguish between a site with a high number of small defects compared to a site with the smaller number of high priority defects. The Victorian School Building Authority's asset management systems recognise and account for the varying severity of defects in prioritising support for schools, but this is not captured in the aggregate score.

⁸ *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, 208.

⁹ 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].

¹⁰ *Landes v Vic Roads* [2009] VCAT 2403 at [46].

- (e) The condition score from the report is a point in time, and for many schools, several years will have elapsed since the initial assessment. As such, the score does not account for the wide range of activities which follow the initial assessment to address issues, such as addressing issues through the Planned Maintenance Program or the maintenance activities schools have completed through their School Maintenance Plan.

In considering the factors for and against disclosure, the department maintains that the provision of access to this information could be misleading and confusing and give rise to the risk of mischievous interpretation, could compromise the integrity of future evaluation and decision-making processes, and rather than assisting public confidence may produce a contrary result. Accordingly, it remains the opinion of the department that the disclosure of such information would be contrary to public interest.

41. The Applicant has made the following submissions in response to the Agency's fresh decision:

1. "Disclosing condition scores will have a negative impact on some schools' reputation."

This is entirely hypothetical, and the Department has not provided any evidence to substantiate the claim that the disclosure of this information would negatively impact the reputation of some schools.

We content that the disclosure of this information would advance the public interest, as Victorians have the right to know the condition of their local government school.

2. "Disclosing these scores is likely to compromise the integrity of future RFE inspections: if assessors and schools are aware that the score can be made public..."

As noted above, staff in all government schools currently receive their condition score within a Condition Assessment Report. Numerous entities beyond Cabinet or the Department have access to the scores. As such, the possibility of scores being disclosed to the public already exists and this has not compromised the integrity of RFE inspections.

3. "The condition score is only a limited snapshot of a school's condition."

As the Department itself states, the information being sought is an "expert assessors opinion on the condition of each school's assets and infrastructure." As such, the score is derived after careful analysis and expert advice and is by its nature, is designed to provide an expert snapshot of a schools condition.

4. "The document created in response to this request is an extract from a master spreadsheet, the substantive purpose of which is input to recommendations to Cabinet for school upgrade projects submitted as part of the State Budget process."

As the Department notes in the fresh decision, the document being sought by this FOI did not exist as a specific document and had to be created under s19 of the Act.

Beyond this, we again note that school condition scores are currently provided to entities beyond Cabinet or the Department. This includes, but is not limited to:

- Staff at all government schools
- Staff at the Victorian School Building Authority
- Staff at [named entity] – which is a third party, private sector firm...

Finally, [the Applicant] receives significant correspondence from members of the public about local government schools and their condition. As such, the disclosure of this information aligns with the objectives of the Act, in that it would provide members of the public with greater insight into government decision making, while simultaneously enabling [the Applicant] to enhance [their] scrutiny of government decision-making.

42. On careful consideration, I am satisfied disclosing the document would not be contrary to the public interest for the following reasons:
- (a) There is a strong public interest in whether the Agency is effectively planning for and managing school infrastructure.
 - (b) Community awareness will inform public debate on school infrastructure.
 - (c) The Government has announced significant funding towards a school maintenance program.¹¹ As such, it should be accountable to the community about where such funding is allocated.
 - (d) The report is of sufficient detail and expertise to be relied upon for use in the Agency's planning.
 - (e) I acknowledge that the document itself does not contain detailed information about the factors considered when school infrastructure is scored and does not fully represent the performance of the school or its facilities. However, I consider the aggregate score would be representative of the overall condition and is meaningful information.
 - (f) There is no evidence to support that disclosing a list of conditions scores would impact school enrolments. It may be one factor considered by parents and guardians, however, their decision to enroll their child would be dependent on a multitude of factors.
 - (g) I am not satisfied that assessors would risk their professional integrity by distorting scoring to avoid damage to a school's reputation due to release of the document.
43. Accordingly, I am satisfied the document is not exempt from release under section 30(1).

Conclusion

44. On the information before me, I am satisfied the document is not exempt from release under sections 28(1)(c) or 30(1) and is to be released in full.

Timeframe to seek a review of my decision

45. If the Agency is not satisfied with my decision, it is entitled to apply to VCAT for it to be reviewed.¹²

¹¹ For example, see: <https://www.premier.vic.gov.au/sites/default/files/2023-02/230227-Maintenance-Boost-For-More-Than-100-Victorian-Schools.pdf>; <https://www.premier.vic.gov.au/site-4/important-school-upgrades-and-minor-capital-works>

¹² Section 50(3D).

46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
47. 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.
48. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it applies to VCAT for a review of my decision.¹⁴

When this decision takes effect

49. 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.

¹³ Section 52(9).

¹⁴ Sections 50(3F).