

## Notice of Decision and Reasons for Decision

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| Applicant:             | 'AG1'   |
| Agency:                | Game Management Authority   |
| Decision Date:         | 25 June 2019  |
| Exemptions considered: | Sections 30(1), 33(1)   |
| Citation:              | 'AG1' and Game Management Authority ( <i>Freedom of Information</i> )<br>[2019] VICmr 55 (25 June 2019) |

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FREEDOM OF INFORMATION – documents relating to recommendations made about the 2019 duck shooting season – whether release of advice in the document would be contrary to the public interest – whether release of report writers names is unreasonable – whether release of information about agency staff member preparing brief is unreasonable

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 differs from the Agency's decision in that I have decided to release Documents 1 and 2 in full, and release further information from Document 3.

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

25 June 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the initial request and sought access to the following documents:

GMA [Game Management Authority] advice to the relevant minister(s) (and other unpublished documents/evidence considered in that advice) recommending the 2019 Duck Season Arrangements.

2. In its decision, the Agency identified four documents falling within the terms of the Applicant's request. It decided to grant access to one document in full, deny access to two documents in part and refuse access to one document in full.

### Review

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 copies of the documents 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, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the Applicant's submissions dated 19 May 2019 and information provided with the Applicant's review application; and
  - (c) information provided by the Agency during the course of the review.
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.

### Review of exemptions

8. The Agency relied on the following exemptions to refuse access to the documents or parts of them: sections 30(1) and 33(1). The Agency's decision letter sets out the reasons for its decision.

### Section 33(1)

9. A document is exempt under section 33(1) if two conditions are satisfied:
  - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

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<sup>1</sup> Sections 33(1) and (2).

10. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.<sup>2</sup>
11. 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.
12. Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.
13. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.<sup>3</sup> However, this obligation does not arise if:
  - (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
  - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
  - (c) it is not practicable to do so.<sup>4</sup>
14. The Agency's decision letter referred to the requirement to consult, but did not specify whether that consultation had taken place or the views of any individuals consulted if this did occur.

#### *Document 1*

15. Document 1 contains the names of individuals who have prepared the document on behalf of the Agency and are members of a third-party research institute funded by the Department of Environment, Land, Water and Planning. The names of individuals who have assisted with the report have also been deleted. This information clearly identifies individuals.
16. These details were collected as part of the preparation of the report. While this is not necessarily in confidence, I accept that the report was created for the use of the Agency and not for the specific purpose of wider publication.
17. The institute that prepared the document has a list of staff published on its website. As a result, I do not consider that the details of those named in the document are particularly sensitive.
18. Given names of staff at the institute are published, I also do not consider that those individuals would likely object to their names being released as part of an FOI Application.
19. I consider that the above factors also extend to the names of those who assisted in the preparation of the report.
20. When considering the above, on balance, I am not of the view that release of the names from the document would be unreasonable. The names are therefore not exempt under section 33(1).

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<sup>2</sup> Section 33(9).

<sup>3</sup> Section 33(2B).

<sup>4</sup> Section 33(2C).

### *Document 3*

21. Document 3 contains the name of an Agency officer who prepared the brief, the direct contact numbers of Agency officers, and the signature of the Chair of the Agency.
22. In the case of the Chair's signature, I note this is publicly available, for instance in the Agency's published annual reports during his tenure. As a result, I consider that similar factors are relevant when considering release as for Document 1. I do not consider the signature, therefore, to be unreasonable to release and accordingly it is not exempt.
23. In relation to the contact phone numbers, this information is not as likely to be known and is therefore more sensitive. The release of this information would not assist the Applicant in understanding recommendations made about the duck shooting season. Further, I am of the view that individuals would be more likely to object to the release of this information as it leads to the ability to more freely directly contact them.
24. As a result, I am of the view that release of the direct contact information is unreasonable and this information is exempt under section 33(1).
25. In relation to the name of the staff member who prepared the brief, I consider this to be more sensitive. Agency officers who prepare briefs are ultimately not responsible for the contents, in the sense that they are endorsed and approved by other, more senior staff. In this case it is clear from the information that has been released that the Chair of the Agency has approved the brief.
26. Further, details of Agency staff are not published in the same manner as with the research institute who created Document 1.
27. Otherwise, I consider the factors relating to release to be similar as for the names in Document 1. However, considering the increased sensitivity and the lack of accountability for Agency decisions afforded to junior staff, I am of the view that release of the name would be unreasonable. It is therefore exempt under section 33(1).

### ***Section 30(1)***

28. 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.
29. The exemption does not apply to purely factual material in a document.<sup>5</sup>

### *Do the documents contain opinion, advice, recommendation or evidence consultation or deliberation?*

30. Document 2 is a table which shows modelling of figures in relation to duck population numbers. The Agency stated in its decision letter that these numbers were used to inform the advice and recommendations in Document 3.

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<sup>5</sup> Section 30(3).

31. While these numbers alone do not amount to advice, I consider that, being predictions, they are evidence of Agency officer opinions as to duck populations in certain circumstances.
32. Document 3 is a brief to the Minister for Agriculture. From the contents of the document, it appears a similar brief is prepared yearly to advise the Minister in relation to conditions for upcoming duck shooting seasons in preparation for the commencement of each season.
33. The Agency has deleted two sections from Document 3 which refer to advice provided by the Agency to the Minister in a previous brief.

*Was the advice and opinion created as part of the deliberative processes of the Agency?*

34. I consider that this advice, and the modelling, were prepared as part of the deliberative processes of the Agency, namely briefing other parts of government in relation to game management issues.

*Is release contrary to the public interest?*

35. I must also be satisfied releasing this information is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>6</sup>
36. 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.
37. In deciding whether disclosure of the matter would be contrary to the public interest, I have taken the following into consideration<sup>7</sup>:
  - (a) the right of every person to gain access to documents under the FOI Act;
  - (b) the degree of sensitivity of the issues involved;
  - (c) the state of the policy development process at which the communication was made;
  - (d) whether the disclosure would be likely to inhibit frankness and candour in the making of communications;
  - (e) whether disclosure would lead to confusion having regard to the possibilities discussed;
  - (f) whether the disclosure will give merely a part explanation rather than a complete explanation for the taking of a particular decision;
  - (g) the likelihood disclosure of the documents would inhibit the independence of officers or the making of proper and detailed research and submissions by them;
  - (h) the likelihood disclosure would create mischief in one way or another such as a risk of mischievous interpretation; and
  - (i) the significance of the document, for example whether it is or is not merely a draft document.
38. In relation to Document 2, I do not consider the modelling is sensitive or significant. The modelling is not of a nature that the scenarios modelled would not be able to be anticipated by interested members of the public if released.

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<sup>6</sup> *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].

<sup>7</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

39. Further, the release of the modelling would show that the Agency conducted its role as intended by predicting duck population numbers in the way it has. Its disclosure would help to inform the public on an important area of policy and sustainability, which are strong factors in favour of disclosure.
40. I do not consider release of the documents would affect the ability of Agency officers to provide future advice of a similar nature or inhibit the frankness and candidness of such advice. Agency officers, as public servants, are required to discharge their duty to provide full and frank advice given this is often a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic).<sup>8</sup>
41. Given the modelling is not accompanied by a particular piece of advice, I do not consider that it would provide an incomplete picture of any decisions made by the Agency, compared to, for instance, where a particular modelled scenario was recommended by the Agency as being better than others for specific, named reasons.
42. On balance, therefore, I do not consider that release of Document 2 would be contrary to the public interest. It is therefore not exempt under section 30(1).
43. In relation to the advice in Document 3, I also consider that it is not of a high sensitivity or significance. I am unable to go into detail about the nature of the advice as that would reveal exempt information. However, I consider that the advice is of a similar significance and sensitivity to that which has otherwise been released by the Agency from the remainder of the document.
44. Further, the reference is to historical advice, where release would not affect decisions that have now been made about the management of this year's duck shooting season. This factor therefore does not weigh against disclosure.
45. I am of a similar view about this document as I am about Document 2 in relation to whether release would likely inhibit the frankness, candour or independence of Agency officers. I do consider that disclosure would help to inform the public on an important area of policy and sustainability.
46. As a result, on balance I do not consider release would be contrary to the public interest. Accordingly, the information is not exempt under section 30(1).

#### ***Deletion of exempt or irrelevant information***

47. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
48. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>9</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>10</sup>
49. I have considered the effect of deleting exempt information from Document 3. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

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<sup>8</sup> For example, see the public sector values in section 7 of the PA Act.

<sup>9</sup> *Mickelborough 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 [82].

<sup>10</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

## **Conclusion**

50. On the information available, I am satisfied the exemption in section 33(1) applies to some of the information in the documents, but section 30(1) does not apply. I have decided to grant access to Documents 1 and 2 in full, and grant partial access to Document 3.
51. As it is practicable to edit Document 3 to delete the small amount of exempt information, I have determined to grant access to the document in part.

## **Review rights**

52. 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.<sup>11</sup>
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
55. 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.
56. 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.<sup>14</sup>

## **When this decision takes effect**

57. I have decided to release documents that contain information relating to the personal affairs of third parties.
58. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.
59. For that reason, my decision does not take effect until that 60-day period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

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<sup>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and (3FA).

Annexure 1

| Document No. | Date of Document | Document Description | Number of Pages | Agency's Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|----------------------|-----------------|-------------------|---------------|---------------|
|--------------|------------------|----------------------|-----------------|-------------------|---------------|---------------|



Annexure 1

| Document No. | Date of Document | Document Description                              | Number of Pages | Agency's Decision                     | OVIC Decision   | OVIC Comments  |
|--------------|------------------|---|-----------------|---------------------------------------|-----------------|--|
| 1.           | December 2017    | Report of the status of the Australasian Shoveler | 29              | Released in part<br><br>Section 33(1) | Release in full | Section 33(1): Given the publicly available nature of the names of most individuals in the document, I do not consider release to be unreasonable. |

Annexure 1

| Document No. | Date of Document | Document Description               | Number of Pages | Agency's Decision                    | OVIC Decision   | OVIC Comments  |
|--------------|------------------|------------------------------------|-----------------|--------------------------------------|-----------------|--|
| 2.           | December 2018    | Table of potential harvest options | 1               | Refused in full<br><br>Section 30(1) | Release in full | <p><b>Section 30(1):</b> The information is in the nature of opinion only insofar as it represents a prediction. No other advice accompanies it and as a result it is not sensitive. I also do not consider release would inhibit the frankness, candour or independence of Agency officers. As a result, release is not contrary to the public interest and the document is not exempt.</p> |

Annexure 1

| Document No. | Date of Document | Document Description                  | Number of Pages | Agency's Decision                         | OVIC Decision  | OVIC Comments   |
|--------------|------------------|---------------------------------------|-----------------|---|--|---|
| 3.           | 21/12/2018       | Brief to the Minister for Agriculture | 52              | Released in part<br>Sections 30(1), 33(1) | <p>Release in part<br/>Section 33(1)</p> <p>The telephone numbers and the name of the Agency officer who prepared the brief to remain deleted under section 33(1) and the remainder of the document to be released</p> | <p><b>Section 33(1):</b> See comments for Document 1 in relation to the Chair's signature.</p> <p>Otherwise, the direct contact details are sensitive, taking into account that they are not publicly known and individuals would likely object. They are therefore exempt.</p> <p>The name of the Agency officer who prepared the brief is sensitive in the sense they are not accountable for the brief's contents in the same way as the Chair, who approved the brief. That name is also not published. On balance, release would be unreasonable and the name is exempt.</p> |