

## Notice of Decision and Reasons for Decision

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Applicant:	'AH4'
Agency:	Department of Jobs, Precincts and Regions
Decision Date:	23 July 2019
Exemptions considered:	Sections 25, 30(1), 33(1), 34(1)(b)
Citation:	'AH4' and Department of Jobs, Precincts and Regions (Freedom of Information) [2019] VICmr 67 (23 July 2019)

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FREEDOM OF INFORMATION – wildlife management – environmental controls

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 the documents in part to the Applicant.

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

23 July 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 amended the initial request.
2. The amended request was for access to the following documents:

Copies of all documents relating to kangaroo management at Epping Wholesale Market on Cooper St Epping, and on any land surrounding or adjoining ... from June 2017 to present.
3. In its decision, the Agency identified 15 documents falling within the terms of the Applicant's request. It decided to grant access to 12 documents in full and refuse access to 3 documents in full.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies 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, including:
  - (a) the Agency's decision on the FOI request dated 21 March 2019;
  - (b) the Applicant's submission dated 2 May 2019 and information provided with the Applicant's review application;
  - (c) the Agency's confidential submission dated 30 May 2019; and
  - (d) The correspondence between OVIC staff, the Applicant and the Agency.
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.

### Review of exemptions

9. The Agency relied on the exemption in sections 30(1) and 34(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

### **Section 34(1)(b)**

10. Section 34(1)(b) provides:

A document is an exempt document if its disclosure under the FOI Act would disclose information acquired by an agency (or a Minister) from a business, commercial or financial undertaking and:

- a) the information relates to other matters of a business, commercial or financial nature; and
- b) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.

11. In *Thwaites v Department of Human Services*,<sup>1</sup> the Victorian Civil and Administrative Tribunal (VCAT) observed the phrase 'information acquired' in section 34(1) signifies the need for some positive handing over of information in some precise form.
12. VCAT has also recognised the words 'business, commercial or financial nature' have their ordinary meaning.<sup>2</sup>
13. Section 34(2) provides:

In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—

  - a) whether the information is generally available to competitors of the undertaking;
  - b) whether the information would be exempt matter if it were generated by an agency or a Minister;
  - c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
  - d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls -

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.
14. The Agency has applied section 34(1)(b) to one document, namely the operations plan and firearms risk assessment form prepared by the business undertaking. In its decision, the Agency advised it consulted with the third party undertaking and agreed with their submission that disclosure would be detrimental to their business and that the information in the document was provided to the Agency in confidence.
15. While I accept that the information in the document was acquired by the Agency from a business undertaking relating to matters of a business and commercial nature, I am not satisfied that release of this document would expose the business undertaking that provided it unreasonably to disadvantage for the following reasons:
  - (a) the document does not contain commercially sensitive information that is not generally available to competitors of the undertaking;
  - (b) the information in the document could be disclosed without causing substantial harm to the competitive position of the undertaking;
  - (c) as the successful tenderer, the details of the business undertaking, including their business name and ABN, are publicly available on the Department of Treasury and Finance tender register at [www.tenders.vic.gov.au](http://www.tenders.vic.gov.au); and
  - (d) there is a public interest consideration in favour of disclosure of documents on evaluating aspects of government regulation of environmental controls that outweighs considerations of competitive disadvantage to the undertaking.
16. Accordingly, I am satisfied section 34(1)(b) does not apply to the document.

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<sup>1</sup> (1999) 15 VAR 1.

<sup>2</sup> *Gibson v Latrobe CC* [2008] VCAT 1340 at [25].

## Section 30(1)

17. 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.
18. The exemption does not apply to purely factual material in a document.<sup>3</sup>
19. 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>4</sup>
20. 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.
21. In deciding whether disclosure of the matter would be contrary to the public interest, I have taken the following into consideration:<sup>5</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 or unnecessary debate 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.
22. Based on its application of section 30(1), the Agency refused access to Documents 2 and 3 in full. The documents contain a wildlife management plan of the Kangaroo population at Melbourne Market Precinct, and include previous management plans and actions, current status, issues, options and recommendations.

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

<sup>4</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>5</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

23. In my view, the document is substantially in the nature of 'opinion, advice or recommendation' prepared by a consultant engaged by the Agency. It contains opinion about what constitutes a risk to humans and the animal population in the area, and the recommendations for mitigating that risk. As the document is part of the Agency's decision-making process about controlling the kangaroo population, I also consider it was prepared for the deliberative functions of the Agency. Therefore, I must consider whether its disclosure is contrary to the public interest.
24. In its decision, the Agency decided it would be contrary to the public interest to disclose the two documents because of the degree of sensitivity of the issues involved and the likelihood that premature disclosure of the documents would cause unnecessary confusion or debate.
25. I note the Agency has not provided the document that summarises the Agency's final views following assessment of the information in the document, as well as other information it takes into consideration in making such assessments.
26. Having reviewed the documents and based on the information before me, I have decided it would not be contrary to the public interest to release, for the following reasons:
  - (a) There is significant public interest in the disclosure of information relating to the environment, in particular controls of native wildlife. Disclosure of the documents will provide a mechanism for the Agency to be accountable for its assessment of plans, risks and options available in management of wildlife.
  - (b) The documents do not contain sensitive information. They are expert reports of a private consultant that provide informed and considered points regarding the various aspects of implementing the proposed wildlife management plan. It draws on various studies and academic research evaluating both positive and adverse outcomes and for the most part, is factual in nature. Therefore, I am not satisfied the document could be characterised as highly sensitive given much of the information draws from published work and statistical data, the most of which would be already within the public domain.
  - (c) I acknowledge the documents represent only part of the Agency's policy or decision making process. It may be that the documents, the subject of this review, have been superseded by a more recent version. Nonetheless, having read the documents, they both appear to be well developed and complete versions that have been provided for the consideration of the Agency to inform future decisions of the matter. I believe that by providing access to information that demonstrates well considered administrative decisions, disclosure will serve the public interest in open and accountable actions of the public sector.
  - (d) I consider the Applicant, along with members of the public, are capable of understanding the document which sets out the wildlife management plan was produced at a particular time, and that the document is but one source of information used in the Agency's decision making process. Consequently, I consider there is little likelihood that disclosure of the documents would be contrary to the public interest in that they would cause confusion or mislead the public.
  - (e) It would be open to the Agency to release the document with any supplementary explanation or clarification to eliminate or minimise any possibility of the document causing confusion or being incapable of being understood as a standalone document.
  - (f) The document does not appear to contain contentious or controversial information the disclosure of which would inhibit provision of similar advice in the future.
27. Having considered the relevant exemption and all information before me, I have determined that both documents are not exempt under section 30(1).

### **Section 33(1)**

28. As I have determined the exemption in sections 30(1) and 34(1)(b) do not apply to the documents, I have also considered the application of section 33(1) and whether it would be unreasonable to disclose personal affairs information in the documents.
29. Section 33(1) provides:
  - (a) a document is an exempt document if its disclosure under this Act would involve disclosure of information relating to the personal affairs of any person; and
  - (b) disclosure of the personal affairs information would be unreasonable.
30. 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.
31. 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>6</sup>
32. The documents in this matter contain information that disclose names, mobile numbers, a business address, a business email and website address, a business telephone and fax information and the academic qualifications and professional experience of a third party.
33. The Applicant, in discussion with OVIC staff, indicated they do not seek access to names and business contact information in the documents.
34. Having reviewed the documents and considered the context in which the documents were provided to the Agency, I consider the personal affairs information of individual third parties to be sensitive and unreasonable to release in the circumstances. Further, I consider the Applicant is able to read and interpret the documents without the inclusion of this information, and that the personal affairs information does not add any material value to the documents.
35. I therefore consider the documents are exempt in part, with names, mobile numbers and information regarding academic and professional qualifications of a third party to be exempt under section 33(1).
36. Further, as the Applicant does not press access to the names and business contact information, I am satisfied this information is no longer in scope and should be deleted by the Agency as irrelevant in accordance with section 25.
37. The Schedule of Documents in **Annexure 1** contains a brief summary of my decision with respect to each document.

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

38. 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.

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<sup>6</sup> Section 33(9).

39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>7</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>8</sup>
40. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, namely the personal affairs and business information that is outside scope of the review, because it would not require substantial time and effort and the edited documents would retain meaning.

### **Conclusion**

41. On the information available, I am satisfied the exemptions in sections 30(1) and 34(1)(b) do not apply to the documents. I have decided to grant access to the documents in part, with only the personal affairs information to be removed under section 25 as it is outside the scope of review. Further details are set out at Annexure 1.

### **Review rights**

42. 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>9</sup>
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
45. 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.
46. 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>12</sup>

### **When this decision takes effect**

47. I have decided to release a document that contains information of a commercial nature relating to a third party business undertaking.
48. 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.
49. My decision does not take effect until that 60-day period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>7</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>8</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].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).

Annexure 1 - Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Operations Plan – Management of Eastern Grey Kangaroos – Melbourne Market (Epping) and Firearms Risk Assessment Form	6	<p><b>Refused in full</b></p> <p>Section 34(1)(b)</p>	<p><b>Release in part</b></p> <p>Section 33(1)</p> <p>I direct that the following information be exempt under section 33(1):</p> <ul style="list-style-type: none"> <li>• all names and the contact phone number at the bottom of page four.</li> <li>• name, initial and the contact phone number at the bottom of page six.</li> </ul> <p>The following information is outside the scope of the review and is to be deleted from the document in accordance with section 25:</p> <ul style="list-style-type: none"> <li>• the entire letterhead section at top of page one, above the date, which includes business name and business contact information;</li> <li>• the entire letterhead section at top of page five, including business name and business contact information;</li> </ul>	<p>This document was prepared by the business engaged by the Agency.</p> <p>I am satisfied that release of this document would not expose the business undertaking that created it unreasonably to disadvantage.</p> <p>I consider the document is exempt in part with personal affairs information exempt under section 33(1).</p> <p>Business name and business contact information is out of scope of the review and is to be deleted under section 25.</p>



Annexure 1 - Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>all references to the business name on pages one, two, three four and six).</li> </ul> <p>The remaining information is to be released.</p>	
2.	[Date]	Wildlife Management Plan: the kangaroo population at Melbourne Market Precinct	26	<p><b>Refused in full</b></p> <p>Section 30(1)</p>	<p><b>Release in part</b></p> <p>Section 33(1)</p> <p>I direct that the following information be exempt under section 33(1):</p> <ul style="list-style-type: none"> <li>name at the bottom of page one and at the top of page four;</li> <li>qualifications of the author on page 22.</li> </ul> <p>The following information is outside the scope of the review and is to be deleted from the document in accordance with section 25:</p> <ul style="list-style-type: none"> <li>business name on bottom of first page, at the top of second page and in the first sentence on page four.</li> </ul>	<p>This document was prepared by a consultant engaged by the Agency.</p> <p>I consider the document is exempt in part, with personal affairs information and qualifications of the author to be exempt under section 33(1).</p> <p>References to the consultancy business name are out of scope of the review and are to be deleted under section 25.</p>

Annexure 1 - Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					The remaining information is to be released.	
3.	[Date]	Wildlife Management Plan: the kangaroo population at Melbourne Market Precinct	28	<b>Refused in full</b>  Section 30(1)	<p><b>Release in part</b>  Section 33(1)</p> <p>I direct that the following information be exempt under section 33(1):</p> <ul style="list-style-type: none"> <li>• name at the bottom of page one;</li> <li>• qualifications of the author on page 24.</li> </ul> <p>The following information is outside the scope of the review and is to be deleted from the document in accordance with section 25:</p> <ul style="list-style-type: none"> <li>• business name on bottom of first page, at the top of second page and in the first sentence on page four.</li> </ul> <p>The remaining information is to be released.</p>	<p>This document was prepared by a consultant engaged by the Agency.</p> <p>I consider the document is exempt in part, with personal affairs information and qualifications of the author to be exempt under section 33(1).</p> <p>References to the consultancy business name are out of scope of the review and are to be deleted under section 25.</p>