

Notice of Decision and Reasons for Decision

Applicant:	'AQ1'
Agency:	Department of Environment, Land, Water and Planning
Decision Date:	18 October 2019
Exemption considered:	Section 30(1)
Citation:	'AQ1' and Department of Environment, Land, Water and Planning (Freedom of Information) [2019] VICmr 145 (18 October 2019)

FREEDOM OF INFORMATION – wind farm – inquiry under the *Environment Effects Act 1978* (Vic) – panel under the *Planning and Environment Act 1987* (Vic) – internal agency communications regarding responses to inquiry and panel

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.

I am satisfied the documents are exempt under section 30(1). Where I have determined it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, I have granted access to the document in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
18 October 2019

Reasons for Decision

Background to review

1. The Applicant made an FOI request to the Agency for access to a range of documents about concerns raised regarding the Dundonnell Wind Farm and Golden Plains Wind Farm Collision Risk Modelling of brolgas.
2. In consultation with the Agency, the Applicant agreed to reduce the scope of their request to the following documents:

All communications between [relevant dates] within DELWP and between DELP [sic] staff including the Secretary and the Minister, relating to the concerns... [redacted] relating to this Collision Risk Modelling issue at the Golden Plain panel hearing.

...[Including] [redacted] possible flaws in the CRM pre-or post the discussion of CRM modelling at the Golden Plains panel hearing.
3. By email dated 18 January 2019, the Applicant advised the Agency they did not seek access to personal affairs information of third party individuals in the documents.
4. The Golden Plain Wind Farm project (the **Project**) involves the proposed construction of 228 wind turbines. In summary, it requires a number of approvals, including by the Minister for Planning.
5. On 17 June 2018, three persons were appointed by the Minister for Planning to:
 - (a) conduct an inquiry under the *Environment Effects Act 1978* (Vic) (**EE Act**) to inquire into the potential environment effects of the Project; and
 - (b) form a panel under the *Planning and Environment Act 1987* (Vic) (**PE Act**) to consider submissions to the permit application for the Project (together, the **Panel**).
6. The Panel held a Directions Hearing on 6 July 2018 and a joint Inquiry and Panel hearing was held from 30 July to 13 August 2018.
7. On 26 September 2018, the Panel issued its report to the Minister for Planning.¹ In its report, the Panel states:

The Panel's assessment of the environmental effects of the Project will inform the Planning Minister's assessment of the Project under the EE Act. The Minister's assessment will be provided to the relevant decision makers who hold the powers under legislation to issue the statutory approvals for the Project. The Minister is himself a decision maker in respect of the planning permit for the Project.²
8. From a review of the report, I note public submissions were received and the Applicant participated in the Panel hearing process. The Agency attended and also participated in the Panel hearing.
9. The documents subject to review concern questions raised before the Panel and internal communications between Agency officers in preparing proposed responses to those questions.

¹ Planning Panels Victoria, EES Inquiry and Planning Permit Application Panel Report Golden Plains Wind Farm dated 26 September 2018, website: <https://www.planning.vic.gov.au/environment-assessment/browse-projects/projects/golden-plains-wind-farm/overview> (accessed on 18 October 2019).

² Ibid, p 9.

10. On Tuesday 23 October 2018, the Minister for Planning released his assessment under the EE Act. The assessment has been provided to statutory decision makers to inform approval decisions on the Project, including for the planning permit application. Therefore, it appears the approval process for the Environment Effects Statement is completed, however, other approval processes required for the Project continue.
11. In its decision, the Agency identified 11 documents falling within the terms of the Applicant's amended FOI request. It decided to grant access to five documents in full, five documents in part and refuse access to one document in full.
12. As the Applicant did not seek access to the personal affairs information of third party individuals, the Agency granted partial access to documents with their names, telephone numbers and email addresses deleted in accordance with section 25.

Review

13. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
14. I have examined copies of the documents subject to review.
15. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
16. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated 1 August 2019;
 - (d) publicly available information regarding the Project; and
 - (e) OVIC's communications with the Agency and Applicant.
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.

Preliminary view

18. On 10 September 2019, OVIC provided the Agency with a preliminary view that on the available information, it was not satisfied all information exempted under section 30(1) would meet the requirements of the public interest test.
19. The Agency was invited to either provide a further submission, consider making a fresh decision under section 49M or agree to release further information in the documents without making a fresh decision. It was also open to the Agency to rely on its decision letter and submission already made.
20. On 30 September 2019, the Agency agreed to the release of further information in the documents. Accordingly, Documents 8 and 8a are no longer subject to review, and should be released by the Agency to the Applicant as a priority upon receipt of this decision.

Review of exemptions

21. The Agency relied on the exemption in section 30(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

22. For a document to be exempt under section 30(1), three requirements must be met:
- (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.
23. The exemption does not apply to purely factual material in a document.³
24. The documents comprise internal emails and an attachment regarding concerns raised [redacted] before the Panel and preliminary views being prepared and considered by Agency officers in response to issues and questions raised by the Panel during the hearing.

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?

25. Having reviewed the documents, I am satisfied they contain information in the nature of opinion, advice and consultation of Agency officers.

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?

26. I am also satisfied the information was produced in the course of, and for the purpose of, the Agency's deliberative process in responding to public submissions regarding the Project, and its environmental impacts.

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

27. The third requirement to be met under section 30(1) is that disclosure of the documents would be contrary to the public interest.
28. In considering this public interest requirement, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act, including that a person's right to access documents under the FOI Act should be limited only by exceptions and exemptions necessary for the protection of essential public interests.

³ Section 30(3).

29. 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:⁴
- (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 or 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.
30. Documents 1, 3 and 7 are part of the same email chain. The Agency exempted these documents in part under section 30(1). Information exempted in the documents concerns a proposed response to be provided by the Agency at the Panel hearing, if required. The same paragraph was exempted in each document.
31. The Agency also refused access to Document 3a in full under section 30(1). Document 3a is the attachment to Document 3. Document 3a appears to have been created to assist Agency officers to gather and record information in preparation for the Panel hearing. It is clear the document is incomplete and in draft form.
32. The Agency provided its submission to OVIC in confidence. However, as outlined in its decision letter, the Agency submits release of opinion, advice or recommendation in the documents would be contrary to the public interest as the views expressed are speculative or preliminary and disclosure would misrepresent the Agency's final position on the matters being discussed.
33. I note there is community objections to, and concerns raised about the Project regarding the adverse effect of the Project to native flora and fauna, [redacted]. Accordingly, I accept the documents concern a sensitive matter in which there is a strong community interest.
34. Having reviewed the documents, I am satisfied their release would disclose the deliberative process of Agency officers in formulating a response to and before the Panel, if required. Therefore, I am satisfied the proposed responses were prepared at an early stage, were ultimately not required, and in the case of Document 3a, are incomplete and in draft form.
35. I have considered the broader context of the Panel hearing conducted in accordance with the EE Act and PE Act, the necessity of the Agency to prepare possible responses to the Panel, and the issuing and publication of the Panel's final report following public submissions and a hearing.

⁴ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

36. In these circumstances, I accept there is a public interest in Agency officers being able to exchange views and proposed responses in order that the Agency could participate fully and properly in the Panel hearing. I also accept, it is necessary for Agency officers to make a written record of such exchanges. In light of information the Agency has already disclosed to the Applicant, I consider there is a stronger public interest in ensuring the ability of the Agency to undertake and record appropriate deliberation and discussion than in disclosing the detail of possible responses prepared by the Agency.
37. Having received public submissions and conducted a hearing, the Panel's findings and recommendations are the subject of the report provided to the Minister for Planning. I consider disclosure of the documents would not contribute to the Applicant's understanding of the Agency's position on issues raised [redacted] at the Panel hearing.
38. Further, I consider the impact of disclosing Document 3a would not clearly or accurately represent the Agency's final position or inform the Applicant's understanding of any finding made by the Panel in its report.
39. In these circumstances, where public submissions were made and a Panel hearing conducted, I do not consider greater public scrutiny is required by disclosure of the documents in order that the community be better informed about the way in which the Agency carries out its functions or how the Panel process was conducted.
40. Having weighed the above factors, I am satisfied Documents 1, 3, 3a and 7 are exempt under section 30(1).
41. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Deletion of exempt or irrelevant information

42. 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.
43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ 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 25.⁶
44. I have considered the effect of deleting exempt and irrelevant information from Documents 1, 3 and 7. I am satisfied it is practicable to delete irrelevant and exempt information in the documents as to do so would not require substantial time and effort, and the edited documents would retain meaning.
45. However, with respect to Document 3a, I consider deleting factual information from the deliberative content in the document would render it meaningless due to the intertwined nature of this information in the document. Accordingly, I am not satisfied it would be practicable to provide an edited copy of Document 3a in accordance with section 25. As such, I have determined it is exempt in full under section 30(1).

⁵ *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].

⁶ *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] and [155].

Conclusion

46. On the information before me, I am satisfied Documents 1, 3, 3a and 7 are exempt under section 30(1).
47. In relation Documents 1, 3 and 7, I am satisfied it would be practicable to provide an edited copy of these documents in accordance with section 25.
48. However, in relation to Document 3a, I am not satisfied it would be practicable to provide an edited copy in accordance with section 25. As such, I have determined Document 3a is exempt in full.
49. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

50. 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.⁷
51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
53. 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.
54. 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.¹⁰

When this decision takes effect

55. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ 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 range]	Emails	3	Released in part Section 30(1)	Release in part Sections 30(1), 25	<p>Section 30(1): For the reasons outlined in the Notice of Decision, I am satisfied the document is exempt in part under section 30(1).</p> <p>Section 25: I have considered information the Agency deleted from the documents as 'not relevant' in accordance with section 25. I note the names, email addresses and telephone numbers of Agency officers constitute personal affairs information of third party individuals which falls outside the scope of the review and should remain deleted.</p>
2.	[Date range]	Emails	8	Released in full <i>With irrelevant information deleted under section 25</i>	Not subject to review	
3.	[Date]	Emails	3	Released in part Section 30(1)	Release in part Sections 30(1), 25	<p>Section 30(1): For the reasons outlined in the Notice of Decision, I am satisfied the document is exempt in part under section 30(1).</p> <p>Section 25: See comments in Document 1 above.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
3a.	Undated	Draft table of responses	15	Refused in full Section 30(1)	Refuse in full Section 30(1)	Section 30(1): For the reasons outlined in the Notice of Decision, I am satisfied the document is exempt in full under section 30(1).
4.	[Date range]	Emails	2	Released in full <i>With irrelevant information deleted under section 25</i>	Not subject to review	
5.	[Date range]	Emails	4	Released in full <i>With irrelevant information deleted under section 25</i>	Not subject to review	
6.	[Date]	Emails	2	Released in full <i>With irrelevant information deleted under section 25</i>	Not subject to review	
7.	[Date range]	Emails	2	Released in part Section 30(1)	Release in part Sections 30(1), 25	Section 30(1): For the reasons outlined in the Notice of Decision, I am satisfied the document is exempt in part under section 30(1). Section 25: See comments in Document 1 above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
8.	[Date]	Email	1	Released in part Section 30(1)	Release in full	Section 30(1): The Agency no longer relies on section 30(1) to refuse access to the document. Accordingly, the document is to be released to the Applicant.
8a.	Undated	CRM summary	5	Released in part Section 30(1)	Release in full	Section 30(1): The Agency no longer relies on section 30(1) to refuse access to the document. Accordingly, the document is to be released to the Applicant.
8b.	Undated	Panel submission [redacted]	1	Released in full	Not subject to review	