

## Notice of Decision and Reasons for Decision

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Applicant:	'AS7'
Agency:	Department of Environment, Land, Water and Planning
Decision date:	22 November 2019
Provision and exemption considered:	Sections 24(1)(b) and 30(1)
Citation:	'AS7' and Department of Environment, Land, Water and Planning ( <i>Freedom of Information</i> ) [2019] VICmr 170 (22 November 2019)

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FREEDOM OF INFORMATION – audit – forestry – timber harvesting – deferral of access – prepared for release to the press

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 defer 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.

On the information before me, I am not satisfied the document was prepared for release to the Press within the meaning of section 24(1)(b).

Further, I am satisfied the document is not exempt under section 30(1), as I am not satisfied its disclosure would be contrary to the public interest and certain information in the document is factual in nature and contains information that is publicly available.

Accordingly, the document is to be released to the Applicant in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

22 November 2019

## Reasons for Decision

### Background to review

1. On 21 August 2019, the Applicant made a request to the Agency for access to the following documents:

I am seeking the final, or most recent, version of the [audit] assessing [c]ompliance of VicForests' timber harvesting activities (both planned and harvested) within the [location] area. This audit was referred to by [name of Agency officer], a letter to [a person] dated [date] (see attached). In the case that this audit is part of a larger audit, I then request that larger audit.

2. In its decision, dated 20 September 2019, the Agency identified one document falling within the terms of the Applicant's request. It decided to defer access to the document under section 24.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to defer access to the document.
4. I have examined a copy of the document 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 review application, including a copy of the [date] letter referred to in the FOI request;
  - (c) the Agency's submissions dated 9 and 23 October 2019; and
  - (d) information publicly available.
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 section 24(1)(b) to defer access to the document. In its decision letter, the Agency provided the following reasons for its reliance on this provision:

The decision to defer access to the document in accordance with section 24 of the FOI Act. Access to the document is deferred until such time that the document has been approved for release to the Press and other stakeholders.

9. During the review, the Agency advised it also seeks to rely on section 30(1) to exempt the document in its current draft form.

## Section 24

10. Section 24(1) provides an agency that receives a request may defer the provision of access to a document under the FOI Act, including, if the document has been prepared 'for release to the Press' (section 24(1)(b)).
  11. Section 24(2) provides that, where an agency defers access to a document under section 24(1), the agency must inform the applicant of the reasons for the decision and indicate, 'as far as practicable, the period for which the deferment will operate'.
  12. In their review application, the Applicant, advised:
    - (a) the decision letter does not meet the requirements of section 24(2) in that it does not attempt to advise the length of the deferral;
    - (b) in an email from the Agency on [date], the Agency advised it had completed the audit and that it would be published by the end of March 2019;
    - (c) at that time, there was no indication it was being held until it was presented to any other body; and
    - (d) given the passage of time, it is implausible it has not been presented to whomever it was intended.
  13. The Applicant also provided OVIC with a copy of the [date] letter referred to in the FOI request with their review application. The letter is written by an officer within the Agency's Office of the Conservation Regulator (**OCR**).
  14. In summary, the letter provides the Applicant with an update about an [audit] the Agency is undertaking 'to assess the compliance of VicForests' timber harvesting activities (both planned and harvested) within the [location]'. The letter advises the Agency has 'completed the [audit] and is in the process of finalising the report' and that 'the report ... is now expected to be published at the end of March 2019'. Finally, the letter advises the Agency 'is committed to finalising the [audit] report to ensure that commercial timber harvesting activities are compliant with Victoria's environmental regulatory framework'.
  15. I note the Agency's website provides the following information about the OCR:

The Office of the Conservation Regulator (OCR) has recently been established in the Department of Environment, Land Water and Planning (DELWP) to bring together all of DELWP's regulatory functions in one place. Led by Victoria's first Chief Conservation Regulator, it will coordinate and oversee all DELWP's direct regulatory responsibilities across more than 20 Acts of Parliament.

The OCR will work to ensure DELWP regulates the natural environment and conservation effectively to prevent the law being broken and to respond appropriately when it is.
  16. In a submission dated 9 October 2019, the Agency advised, 'access to the document was deferred in accordance with section 24(1)(b)' and the 'document is still at draft stage and we are currently unable to identify the exact date that the document will be released. Access to the document is therefore deferred until such time that the document has been approved for release to the Press and other stakeholders'.
  17. For section 24(1)(b) to apply, I must be satisfied the document was 'prepared for release to the Press'.
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18. Having considered the content of the document and submissions from the Applicant and the Agency, I am not satisfied the document was 'prepared for release to the Press' for the following reasons:
- (a) In relation to the phrase, 'prepared for release to the Press', I consider its ordinary meaning requires a document be prepared for release to the 'Press' or the media. For example, a press release or similar document that's release is embargoed. This is not the same thing as a document prepared by an agency for release to the public generally, regardless of whether it is to be released to the media at the same time or in advance of its public release.
  - (b) From the Agency's submission it is clear the report is in draft form and intended to be publicly released. Further, from a review of the document, it states its purpose is to conduct [an audit] regarding VicForests' harvesting activities and to provide recommendations to ensure future compliance by the Agency. Therefore, on the information before me, I consider the purpose for preparing the document is for the Agency to meet its obligations in relation to forestry regulations. While the Agency intends for the document to be released to 'the Press and other stakeholders', I do not consider these circumstances satisfy the requirements of section 24(1).
  - (c) To interpret section 24(1) as applying to a draft report that will be eventually released, would mean this provision could be used widely to defer the release of draft documents. I do not accept Parliament intended section 24(1) to apply so broadly to documents other than a narrow category prepared for the actual purpose of release to the media.
  - (d) Finally, I note the Agency's decision letter does not provide a time for release of the document or advise why it was not practicable to do so, as required under section 24(2). While the Agency provided a timeframe in its submission dated 23 October 2019, as stated above, I am not satisfied the document was 'prepared for release to the Press'.
19. Accordingly, I am not satisfied the document was prepared for release to the Press with the meaning of section 24(1)(b).

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

20. As stated above, the Agency advised during the review it also seeks to rely on section 30(1) to exempt the document in its current draft form.
21. 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.
22. The exemption does not apply to purely factual material in a document.<sup>1</sup>
23. I must be satisfied disclosure of a document would be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>2</sup>
24. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.

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<sup>1</sup> Section 30(3).

<sup>2</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].

25. In deciding whether disclosure of the document would be contrary to the public interest, I have given weight to the following relevant factors:<sup>3</sup>
- (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 document and the broader context giving rise to the creation of the document.
  - (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 to be reached by the Agency at the conclusion of a decision making or consultation process.
  - (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, including the Agency's compliance with any laws and regulations.
26. The Agency advised in its submission of 23 October 2019, the report would attract section 30(1) as 'the department is in the process of receiving final feedback from affected parties on their response to the recommendations made and commitments around these'. While the Agency requested the above information be kept confidential, I do not consider this information is particularly sensitive given consultation with third parties is common practice and it appears to be a factor the Agency relies upon to submit the document is exempt under section 30(1).
27. The document subject to review was prepared by the OCR. Having reviewed the document, its inside pages are marked with a 'draft' watermark. Based on information on the inside front cover of the report, it is clear it is intended to be publicly released.
28. Of relevance to the Applicant in this matter is [redacted - certain circumstances].<sup>4</sup>

*Does the document disclose matter in the nature of opinion, advice or recommendations prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?*

29. I am satisfied the document was prepared by an Agency officer and discloses certain matter in the nature of opinion, advice and recommendations.
30. However, having reviewed the contents of the document, I am satisfied certain information is factual in nature and contains information that is publicly available. As such, I am not satisfied this information is exempt under section 30(1) by virtue of section 30(3).

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<sup>3</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

<sup>4</sup> [redacted].

*Was the document 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?*

31. I am satisfied the document was prepared for the deliberative processes of the Agency associated with its functions in the context of [certain circumstances] regarding Victorian timber harvesting activities.

*Would disclosure of the document be contrary to the public interest?*

32. Having reviewed the document subject to review and based on the information before me, on balance, I have decided it would not be contrary to the public interest to release the document, for the following reasons:

- (a) I accept there is sensitivity around forestry issues. However, based on a review of the document, it appears to have been prepared for public release in response to [certain circumstances] regarding Victorian timber harvesting activities in [month and year]. Therefore, while the [circumstances] may be sensitive, the report has clearly been drafted for public release. This factor weighs in favour of release.
- (b) In making my decision, I note *Penhalluriack v Glen Eira CC*,<sup>5</sup> in which the Victorian Civil and Administrative Tribunal (**VCAT**) stated in relation to draft documents:

In relation to the second limb of s 30, there are numerous decisions of this Tribunal, its predecessor and the courts which indicate that draft documents will, on consideration, generally turn out to be inappropriate for release where the final version was published ... this is not an absolute proposition, however. Every disputed document must be examined on its own merits.

While I note VCAT's views in the above decision (and other decisions of the Tribunal) I do not accept the case law endorses an approach that draft documents will, in all cases, be exempt on grounds it would be contrary to the public interest to disclose such documents. Such an interpretation is not consistent with the object of the FOI Act. The circumstances and content of each document must be considered on a case by case basis. In summary, I do not accept section 30(1)(b) provides a 'blanket' exemption for draft documents prepared by an agency.

In this case, while inside pages of the report are marked, 'Confidential draft not for release', the report appears to be at a well-developed stage, in that the findings and recommendations appear clearly formulated, such that it is or has been subject to consultation, and has been prepared for public release. As such, I consider release of the document in its current form would not involve the disclosure of a part explanation for the Agency's processes or the outcome of the audit. This factor weighs in favour of release.

- (c) There is a significant public interest in the public being informed about compliance with laws regulating and protecting Victorian public forests. This factor weighs in favour of release.
- (d) I note the recommendations in the report include reference to actions required to be taken by two other entities, I understand these to be the stakeholders referred to by the Agency in its submission above. While I agree such recommendations require consultation with those entities, given the well-developed nature of the document, it is unlikely its release in its current form would inaccurately reflect the Agency's findings and recommendations. In the event some changes or explanation is required, I consider the Agency could inform the Applicant or any relevant stakeholder prior to or at the time of release. This factor weighs in favour of release.
- (e) There is a significant public interest in the disclosure of information about the Agency's findings in relation to [certain circumstances] regarding the management of Victoria's public

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<sup>5</sup> [2012] VCAT 370 at [25].

forests. In my view, disclosure of such information will aid informed public debate about a public asset. This factor weighs in favour of release.

33. As I am not satisfied disclosure of the document would be contrary to the public interest, the document is not exempt under section 30(1).

### **Conclusion**

34. On the information available, I am not satisfied the document was prepared for release to the Press with the meaning of section 24(1)(b).
35. Further, I am satisfied the document is not exempt under section 30(1) as I am not satisfied its disclosure would be contrary to the public interest.
36. Finally, I consider certain information in the document is factual in nature and contains information that is publicly available. As such, I am not satisfied this information is exempt under section 30(1) by virtue of section 30(3). Accordingly, the document is to be released to the Applicant in full.

### **Review rights**

37. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>6</sup>
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>8</sup>
40. 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.
41. 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>9</sup>

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

42. 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.

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<sup>6</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> Sections 50(3F) and (3FA).