

## Notice of Decision and Reasons for Decision

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Applicant:	'BA9'
Agency:	Victoria Police
Decision Date:	28 January 2020
Exemption considered:	Section 30(1)
Citation:	'BA9' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 13 (28 January 2020)

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FREEDOM OF INFORMATION – firearms reclassification – *Firearms Act 1996* (Vic) – Licensing and Regulation Division Classification Review Committee (LRDCRC) – recommendation not finalised

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.

While I am satisfied certain documents are exempt in full under section 30(1), I am not satisfied all information exempted by the Agency under section 30(1) is exempt.

Where I am satisfied it is practicable to delete exempt information in the documents, in accordance with section 25, I have granted access to those documents 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  
28 January 2020

## Reasons for Decision

### Background to review

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

Documents pertaining to the reclassification and review of the C-More Competition M26 straight pull 12 gauge shotgun. In particular any documents for the classification and reclassification review being conducted by the licensing services department.
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to some of those documents in part and refuse access to other documents 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. The Applicant indicated they do not seek review of information the Agency exempted under sections 35(1)(b), 33(1) or section 38 in conjunction with section 114 of the *Firearms Act 1996* (Vic) (**Firearms Act**). Accordingly, this review relates to documents to which the Agency refused access under section 30(1) only.
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;
  - (b) the information provided with the Applicant's review application; and
  - (c) information provided by the Agency on 21 November 2019.
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 section 30(1) to refuse access to certain documents in part and in full. Its decision letter sets out the reasons for its decision.

### Section 30(1)

10. 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.

11. The exemption does not apply to purely factual material in a document.<sup>1</sup>
12. The Agency refused access to seven documents in part and three documents in full under section 30(1).
13. By way of background, the documents relate to firearms reclassification undertaken by the Agency. Amendments made in 2008 to the Firearms Act gave the Chief Commissioner limited powers to reclassify firearms. As the Chief Commissioner's delegate, the Superintendent of the Licensing and Regulation Division may reclassify firearms ordinarily classed as category 'A, B or C longarm' to category 'D or E longarms' when a firearm is designed or adapted for military purposes or substantially duplicates a 'militaristic-type' firearm in design, function or appearance. Firearm reclassifications are assisted by the Classification Review Committee.
14. The documents relate to the process undertaken by the Agency when considering the reclassification of the C-More M26 firearm, among other firearms.

*Do the documents contain information in the nature of opinion, advice, recommendation, consultation or deliberation prepared by an officer?*

15. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
16. I am satisfied that both the Agency officers and members of the Classification Review Committee are officers for the purposes of section 30(1). I note also that some of the information in the documents was provided by third parties, being public sector agencies of other Australian states.
17. In *Halliday v Office of Fair Trading*,<sup>2</sup> the former Administrative Appeals Tribunal of Victoria held the words 'opinion, advice or recommendation' convey a meaning of matters in the nature of a 'personal view', 'an opinion recommended or offered' or 'a presentation worthy of acceptance'.
18. Having reviewed the documents, I am satisfied certain documents contain opinion, recommendations and consultation between Agency staff. However, I certain information in the documents is purely factual and is not exempt under section 30(1) by virtue of section 30(3).

*Were the opinions, advice or recommendations provided in the course of the Agency's deliberative processes?*

19. The term 'deliberative process' has been interpreted widely. In *Re Waterford and Department of Treasury (No. 2)*,<sup>3</sup> the Commonwealth Administrative Appeals Tribunal held:

..."deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency...In short, ...its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

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

<sup>2</sup> (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

<sup>3</sup> [1981] 1 AAR 1 at [58].

20. I am satisfied the opinion and consultation in the documents was provided in the course of and for the purpose of the Agency's deliberative processes with respect to reclassification of a firearm under the Firearms Act.

*Would it be contrary to the public interest for this information to be released?*

21. I must also be satisfied disclosure of this information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>4</sup>
22. In doing so, 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.
23. In determining whether disclosure would be contrary to the public interest, I have taken the following factors 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 discussed in the documents and the broader context giving rise to the creation of the documents;
  - (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 making 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.
24. Where I have decided the information meets the first two limbs of section 30(1), I have considered the following factors in determining whether release of the documents would be contrary to the public interest:
- (a) The nature of the documents

The documents were created by Agency officers in the Agency's Licensing and Regulation Division as part of the decision making process regarding reclassification of a firearm under the Firearms Act.

I consider the documents are sensitive in nature as:

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<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.

- i. They relate to consultation and advice provided prior to a potential reclassification of a firearm by the Chief Commissioner under section 3B of the Firearms Act.
- ii. They relate to the Agency undertaking its statutory obligations under the Firearms Act, the purpose of which is to ensure the possession, carriage, use, acquisition and disposal of firearms are regulated in order to ensure public safety and peace.<sup>6</sup>
- iii. The documents do not constitute the Agency's final decision with respect to how the firearm will be classified, as the Agency has yet to make a decision.

(b) The nature of the information

If the information is innocuous, dated or already known to an applicant, its disclosure will more likely than not be contrary to the public interest. If the information is sensitive, tentatively expressed or unclear, it is more likely its disclosure will be contrary to the public interest.<sup>7</sup>

In *Howard v Treasurer*,<sup>8</sup> the Commonwealth Administrative Appeals Tribunal held the more sensitive the issues involved in a communication, the more likely it will be the communication should not be disclosed.

I note the information is not dated and is not known to the Applicant. Further, for the reasons set out above, I consider it constitutes sensitive information. While I do not consider the information is unclear, I note it remains preliminary and the Agency has yet to make a final decision. I also note, once a final decision is made, it will be published in the Victorian *Government Gazette*.

(c) The effect of disclosure

Disclosure of information in the documents may have an adverse effect on the integrity or effectiveness of future assessments conducted by the Agency in that officers seeking to report contributing factors, opinions or observations relating to firearms may alter their responses to influence an Agency decision.

While Agency officers are professionally obliged to provide their opinions and comments with respect to classifying firearms, I accept there is a public interest in them being able to record details of observations and opinions without concern such information will be disclosed to the public. Therefore, I am satisfied the impact of routinely disclosing documents of this nature would undermine the robustness of the Agency's process in making recommendations for the purpose of making a declaration for classification of a firearm.

I also note the documents are sensitive in nature, being the regulation of firearms in the interests of public safety. The disclosure of such information, where it does not relate to the Agency's final decision, may have serious unintended consequences.

(d) The nature of disclosure under FOI

Disclosure of a document under the FOI Act is unconditional and unrestricted, which means an Applicant is free to disseminate widely or use a document as they choose.<sup>9</sup>

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<sup>6</sup> *Firearms Act 1996* (Vic) section 1, and Victoria, Parliamentary Debates, Legislative Assembly, 21 September 2017, 2962-2963.

<sup>8</sup> (Cth) (1985) 7 ALD 626; 3 AAR 169.

<sup>8</sup> (Cth) (1985) 7 ALD 626; 3 AAR 169.

<sup>9</sup> [2008] VSCA 218 at [68].

I accept there is a risk, if preliminary investigative documents are routinely disclosed under FOI, where no restrictions or conditions can be placed upon further use or dissemination, relevant agency personnel and those they consult may be inhibited to provide their opinions where an element of discretion exists.

There is no information before me to suggest the Applicant intends to disseminate the document if disclosed in full. However, having considered the sensitive nature of the documents, I consider the potential for dissemination, even if remote, weighs against disclosure.

25. While noting the right of every person to seek access to documents under the FOI Act, I consider it would be contrary to public interest to disclose certain information in the documents due to the likelihood it would undermine the ability of Agency officers to freely record their opinions and details of consultation in such a document.
26. Accordingly, I am satisfied it would be contrary to the public interest to release certain information in the documents and such information is exempt under section 30(1).
27. However, where information in the documents does not divulge sensitive aspects of the reclassification process or deliberation between Agency officers (for example, where the documents generally describe the next steps for actions to be taken or intended to be taken and are administrative in nature) I am not satisfied this information is exempt under section 30(1).
28. The Schedule of Documents in **Annexure 1** set out my decision in relation to each document.

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

29. 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.
30. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>10</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>11</sup>
31. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable to delete such information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

#### ***Conclusion***

32. On the information before me, I am satisfied certain documents are exempt in full under section 30(1). However, I am not satisfied all information exempted by the Agency under section 30(1) is exempt.
33. Where I am satisfied it is practicable to delete exempt information in the documents, in accordance with section 25, I have granted access to those documents in part.

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<sup>10</sup> *Mickelburgh 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].

<sup>11</sup> *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].

## **Review rights**

34. 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>12</sup>
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
37. 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.
38. 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>15</sup>

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

39. 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>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</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.	Undated	Issue Cover Sheet	6	<p>Released in part</p> <p>Sections 30(1), 35(1)(b), 33(1), 38 in conjunction with section 114 of the Firearms Act, 25.</p>	<p><b>Release in part</b></p> <p>Sections 30(1), 25</p> <p>The document is to be released to with the following information deleted in accordance with section 25:</p> <p>Information not sought by the Applicant:</p> <ul style="list-style-type: none"> <li>information exempted under sections 33(1), 35(1)(b) and 38;</li> <li>irrelevant information, being the last two lines of page 1 and attachments 1 and 3;</li> </ul> <p>Information exempt under section 30(1):</p> <p>Page 2:</p> <ul style="list-style-type: none"> <li>sentence immediately after numbered bullet point 4;</li> <li>points 2 and 3 underneath heading 'Recommendation';</li> </ul> <p>Page 6:</p>	<p><b>Section 30(1):</b> I am satisfied certain information meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.</p> <p><b>Section 25:</b> I am satisfied information deleted by the Agency as irrelevant falls outside the scope of the Applicant's request.</p>



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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>• first sentence of first paragraph under heading 'C-More M26'.</li> <li>• first and second sentence in fourth paragraph under heading 'Other Information';</li> <li>• second sentence of second bullet-point starting with 'NSW'; and</li> <li>• last paragraph, text from the work after 'category A firearm' to end of paragraph.</li> </ul>	
2.	[date]	Email to CRC Member 1	1	Released in part Section 33(1)	Not subject to review	
3.	[date]	Email to CRC Member 2	1	Released in part Section 33(1)	Not subject to review	
4.	[date]	Email to CRC Member 3	1	Released in part Section 33(1)	Not subject to review	
5.	[date]	Email to CRC	1	Released in part	Not subject to review	

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		Member 4		Section 33(1)		
6.	[date]	Email to CRC Member 5	1	Released in part Section 33(1)	Not subject to review	
7.	[date]	Email response from CRC Member 1	1	Released in part Section 33(1)	Not subject to review	
8.	[date]	Submission from CRC Member 1	3	Refused in full Sections 30(1), 35(1)(b)	Refuse in full Section 30(1)	Section 30(1): I am satisfied the document meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.
9.	[date]	Submission from CRC Member 2	2	Released in part Sections 30(1), 35(1)(b), 33(1)	Refuse in full Section 30(1)	Section 30(1): I am satisfied information in the email dated 24 July 2018 meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.  The remaining is a duplicate of Document 3 and is not subject to review.
10.	[date]	Email response from CRC Member 3	1	Released in part	Release in part	Section 30(1): I am satisfied the body of the email meets the first two limbs

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				Sections 30(1), 35(1)(b) and 33(1), 25.	<p>Sections 30(1), 25</p> <p>The document is to be released to with the following information deleted in accordance with section 25:</p> <p>Information not sought by the Applicant:</p> <ul style="list-style-type: none"> <li>information the Agency exempted under section 33(1) (being names at the top of the email);</li> <li>irrelevant information, being the name of attachments 1 and 3 that appear at the top of email;</li> </ul> <p>Information exempt under section 30(1):</p> <ul style="list-style-type: none"> <li>the body of the email.</li> </ul>	<p>of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.</p> <p><b>Section 25:</b> I am satisfied information deleted by the Agency as irrelevant falls outside the scope of the Applicant's request.</p>
11.	[date]	Submission from CRC 3	5	<p>Refused in full</p> <p>Sections 30(1), 35(1)(b)</p>	<p>Refuse in full</p> <p>Section 30(1)</p>	<p><b>Section 30(1):</b> I am satisfied the document meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.</p>

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12.	[date]	Email response from CRC Member 4	2	Released in part Sections 33(1), 35(1)(b)	Not subject to review	
13.	[date]	Submission from CRC Member 4	2	Refused in full Section 30(1), 35(1)(b)	Refuse in full Section 30(1)	Section 30(1): I am satisfied the document meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.
14.	[date]	Consultation with NTPF	2	Released in part Sections 33(1), 25	Not subject to review	
15.	[date]	Consultation with AFP	2	Released in part Sections 33(1), 35(1)(b), 25	Not subject to review	
16.	[date]	Consultation with QPS	2	Released in part Sections 33(1), 25	Not subject to review	
17.	[date]	Consultation with NSWPF	4	Released in part Sections 33(1), 35(1)(b), 25	Not subject to review	

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18.	[date]	Consultation with QPS	3	Released in part  Sections 33(1), 35(1)(b), 25	<b>Not subject to review</b>	
19.	[date]	Consultation with WAPF	1	Released in part  Sections 30(1), 33(1)	<p><b>Release in part</b>  Sections 30(1), 25</p> <p>The document is to be released with the following information deleted in accordance with section 25:</p> <p>Information not sought by the Applicant:</p> <ul style="list-style-type: none"> <li>information the Agency exempted under section 33(1), (being names and phone numbers).</li> </ul> <p>Information exempt under section 30(1):</p> <ul style="list-style-type: none"> <li>the last seven words of last sentence in the email.</li> </ul>	<p><b>Section 30(1):</b> I am satisfied information in the last sentence of the email meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.</p>
20.	Undated	WAPF Firearm Policy Document	3	Refused in full	<b>Not subject to review</b>	

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				Section 35(1)(b)		
21.	[date]	Email enquiry to LRD	5	Released in part Section 33(1)	Not subject to review	
22.		Consultation with ABF	2	Released in part Sections 30(1), 35(1)(b), 33(1)	<p>Release in part Section 30(1)</p> <p>The document is to be released with the following information deleted in accordance with section 25:</p> <p>Information not sought by the Applicant:</p> <ul style="list-style-type: none"> <li>information the Agency exempted under sections 33(1) (being names and phone numbers) and 35(1)(b).</li> </ul> <p>Information exempt under section 30(1):</p> <ul style="list-style-type: none"> <li>last fifteen words of last sentence in the email following comma in the email dated [date].</li> </ul>	Section 30(1): I am satisfied information in the last sentence of the email meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.

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23.		Enquiry from CRC Member 3	3	Released in part  Sections 30(1), 35(1)(b), 33(1)	<p><b>Release in part</b></p> <p>Section 30(1)</p> <p>The document is to be released with the following information deleted in accordance with section 25:</p> <p>Information not sought by the Applicant:</p> <ul style="list-style-type: none"> <li>information the Agency exempted under sections 33(1) (being names, email addresses, street addresses and phone numbers) and 35(1)(b).</li> </ul> <p>Information exempt under section 30(1):</p> <ul style="list-style-type: none"> <li>the body of emails dated [date] and [date].</li> </ul>	<b>Section 30(1):</b> I am satisfied information in the two emails meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons set out above.
24.		Email advice from the Department of Home Affairs	2	Released in part  Sections 30(1), 35(1)(b), 33(1)	<p><b>Release in part</b></p> <p>Section 30(1)</p> <p>The document is to be released with the following information</p>	<b>Section 30(1):</b> I am satisfied information in the two emails meets the first two limbs of section 30(1) and its disclosure would be contrary to the public interest for the reasons

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					<p>deleted in accordance with section 25:</p> <p>Information not sought by the Applicant:</p> <ul style="list-style-type: none"> <li>information the Agency exempted under sections 33(1) (being names, email addresses and phone numbers) and 35(1)(b).</li> </ul> <p>Information exempt under section 30(1):</p> <ul style="list-style-type: none"> <li>second paragraph of email dated [date];</li> <li>sentence following greeting in the email dated [date].</li> </ul>	set out above.
25.	Undated	Tasmania Police Policy Document	1	Refused in full Section 35(1)(b)	Not subject to review	