

Notice of Decision and Reasons for Decision

Applicant:	'BC7'
Agency:	Department of Environment, Land, Water and Planning
Decision Date:	18 February 2020
Exemption considered:	Section 30(1)
Citation:	'BC7' and Department of Environment, Land, Water and Planning (Freedom of Information) [2020] VICmr 31 (18 February 2020)

FREEDOM OF INFORMATION – decision making documents – Ministerial brief – briefing – Minister – approval for mineral exploration in public park – ministerial decision making – deliberative process – disclosure in the public interest

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I am not satisfied the document is exempt under section 30(1).

As I am satisfied it is practicable to edit the document to delete irrelevant information, I have determined to grant access to the document in full, with irrelevant information removed in accordance with section 25.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
18 February 2020

Reasons for Decision

Background to review

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

As the [position title] for [named business] of [town in Victoria] and the author of the application to the Minister for Environment and Climate Change [name of application] lodged [date]; I hereby request under the freedom of information act [sic], the decision concluded by [the Agency] to support or not support this application.

2. In their application, the Applicant states their company made an application to the Minister for Energy, Environment and Climate Change (**Minister**) seeking approval to drill for stone in a public park. They seek information regarding the Agency's consideration and advice; either supporting or not supporting the application. At the time of making their FOI request, the Applicant's approval application was still to be determined. However, I understand during this review, the Minister's decision was communicated to the Applicant.
3. The Applicant agreed to the Agency removing personal information from the documents.
4. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to the document in full.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Agency's submissions dated 23 December 2019;
 - (c) information provided with the Applicant's review application; and
 - (d) all other communications between OVIC staff, the Agency and the Applicant.

Documents subject to review

9. The Agency advised it did not assess seven attachments referred to on page 4 of the document, as it determined the information was irrelevant to the Applicant's request.
10. Having reviewed the document, OVIC staff requested and the Agency provide copies of these attachments (Documents 2-8) for review.
11. Section 49F provides my role is to 'review the decision that is the subject of the application for review', while section 49P provides I must make a 'fresh decision on the original application'.
12. Given their inclusion in the Brief, I consider the attachments were to be read in combination with the covering brief. For example, to provide relevant background or further context for the Minister in

deciding whether to approve the application. In my view, this is the case for Documents 2 and 3. Therefore, in accordance with section 49P, I have included these documents as part of my review. However, with respect to Documents 4-8, which are unendorsed approval letters, I am satisfied these documents do not fall within the scope of the Applicant's request.

13. By email dated 20 January 2020, the Agency advised it does not rely on any exemption to refuse access to Documents 2 and 3. Therefore, I have determined to release these documents to the Applicant and my review will only concern the four page brief to the Minister (Document 1).

Review of exemptions

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

Section 30(1)

15. 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.
16. The exemption does not apply to purely factual material in a document.¹
17. 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.
18. In *Sportsbet v Department of Justice*, the Victorian Civil and Administrative Tribunal (VCAT) held, '[m]inisterial briefs are not exempt as a class and must be considered case by case'.²

Does the document 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?

19. As mentioned, the document is a briefing to the Minister, prepared by Parks Victoria, and submitted to the Minister in July 2019. I am satisfied the document contains advice and recommendations prepared by officers of Parks Victoria.

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?

20. I am satisfied the briefing was prepared in the course of the Agency's deliberative processes, namely the assessment of applications for proposed projects by mineral resource exploration and extraction operators and subject to determination by the Minister under the *Mineral Resources (Sustainable Development) Act 1990* (Vic).

¹ Section 30(3).

² (*General*) [2010] VCAT 8 at [46] (per Justice Bell, VCAT President).

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

21. Section 30(1) requires I must also be satisfied releasing the document would not be contrary to the public interest, which involves weighing against each other conflicting 'merits and demerits'.³
22. In determining if release would be contrary to the public interest, I must consider all relevant factors remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of government information. In this case, 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 document and the broader context giving rise to the creation of a document;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time a communication was made;
 - (d) whether disclosure of a document would be likely to inhibit communications between agency officers or Ministers, essential for an agency or Minister to make an informed and well-considered decision or participate fully and properly in a process in accordance with their statutory functions;
 - (e) whether disclosure of a document 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 or Minister would not otherwise be able to explain upon disclosure of the document;
 - (f) the public interest in the community being better informed about the way in which an agency or Minister carries out statutory functions, including deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny; and
 - (g) the impact disclosure would have on the efficient and economical conduct of government, in particular, the deliberative processes of high levels of government in relation to sensitive issues, and the preservation of confidentiality to promote the giving of full and frank advice.⁵
23. As to the consideration of public interest factors against release, the Agency's decision letter states:

The relevant document is a briefing prepared for the Minister containing advice. Disclosure of this briefing would be contrary to the public interest as it contains matters that were not settled and recommendations that were not adopted.
24. As noted above, the document is a Ministerial brief prepared by Parks Victoria in consultation with the Agency regarding an application made under section 40 of the *National Parks Act 1975* (Vic) (**Parks Act**) seeking the Minister's approval to search for stone within a public park.
25. Having considered the content and context of the Ministerial brief, and having regard to information in the possession of the Applicant at the time of my decision, I am not satisfied disclosure of the document would be contrary to the public interest having regard to the following matters:

³ *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].

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

⁵ *Secretary, Department of Justice v Osland* [2007] VSCA 96.

- (a) Ministerial briefs, as a class of documents, are not automatically exempt under the FOI Act. Rather, each the purpose and content of each brief must be considered on case by case basis, having regard to factors relevant to the public interest both in favour and against release.⁶
- (b) The document contains factual information, including details of the Applicant's earlier proposal to the Minister. In my view, this information is not exempt by virtue of section 30(3).
- (c) Having reviewed the brief, I consider there is nothing inherently confidential or sensitive about the actual purpose and content of the document. The Parks Act provides the Minister is the decision maker for the approval application. Often decisions concerning statutory approvals and licensing of this nature are made by an agency officer. As such, the brief was prepared and provided to the Minister to assist in the fulfilment of their statutory obligation under the Parks Act. This circumstance is in contrast to a matter that involves high level government deliberation and decision making, the disclosure of which would reasonably disrupt the efficient and economical conduct of government or inhibit the provision of advice and briefings to a Minister by agency officers.
- (d) Having regard to the content and context of the brief, and noting the responsibility of public sector employees to provide responsive and impartial advice to government,⁷ I am of the view disclosure of the document to the Applicant would not reasonably inhibit the ability of agency officers to provide briefings, advice and recommendations, nor affect the integrity of the decision making process in determining similar applications in the future.
- (e) 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. I acknowledge disclosure of the document could be viewed as serving a private, pecuniary interest of the Applicant. However, I consider disclosure would promote understanding of the Minister's statutory decision making function under section 40 of the Parks Act and would serve the public interest in promoting open and accountable decision making by government. Such a public interest supports and is consistent with the purpose and object of the FOI Act.

26. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to the document.

Deletion of exempt or irrelevant information

- 27. The Agency's decision did not consider whether it would be practicable to provide the Applicant with an edited copy of the document in accordance with section 25.
- 28. 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.
- 29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ and the effectiveness of the deletions. Where

⁶ *Perton v Department of Education* [2004] VCAT 1143.

⁷ See the public sector values in section 7(1) of the *Public Administration Act 2004* (Vic) (including, Responsiveness, Integrity and Impartiality) and the Victorian Public Service Commission, *Code of Conduct for Victorian Public Sector Employees*.

⁸ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁹

30. I have considered the effect of deleting exempt and irrelevant information from the document. I am satisfied it is practicable to delete this information in accordance with section 25, as to do so would not require substantial time and effort and the edited document would retain meaning.

Conclusion

31. On the information before me, I am satisfied the document is not exempt under section 30(1).
32. As I am satisfied it is practicable to delete irrelevant information, I have determined to grant access to the document in full, with irrelevant information removed in accordance with section 25.
33. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to the document.

Review rights

34. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
37. 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.
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.¹³

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.

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ 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]	Briefing to the Minister for Energy, Environment and Climate Change	4	Refused in full Section 30(1)	Release in full Section 25	Section 30(1): For the reasons set out above, I am satisfied the document is not exempt under section 30(1). Section 25: As the Applicant has excluded personal affairs information from the request, this information is to be removed as irrelevant information under section 25.
2.	[date]	[business name] application to drill	4	Refused in full Section 25	Release in full	Having reviewed the document and the terms of the Applicant's request, I am satisfied the it is information relevant to the request. The Agency has advised the information is not exempt, therefore the document is to be released to the Applicant.
3.	[date]	Letter from National Parks Advisory Council	2	Refused in full Section 25	Release in full	See notes in Document 2 above.
4.	Undated	Template letter (unsigned)	1	Refused in full Section 25	Refuse in full Section 25	For the reasons set out above, I am satisfied the document is irrelevant to the request, and is to remain deleted under section 25.
5.	Undated	Template letter (unsigned)	1	Refused in full Section 25	Refuse in full Section 25	See comments in Document 4 above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
6.	Undated	Template letter (unsigned)	1	Refused in full Section 25	Refuse in full Section 25	See comments in Document 4 above.
7.	Undated	Template letter (unsigned)	1	Refused in full Section 25	Refuse in full Section 25	See comments in Document 4 above.
8.	Undated	Template letter (unsigned)	1	Refused in full Section 25	Refuse in full Section 25	See comments in Document 4 above.