

## Notice of Decision and Reasons for Decision

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Applicant:	'BK1'
Agency:	Department of Premier and Cabinet
Decision date:	31 March 2020
Exemption considered:	Section 31(1)(a)
Citation:	'BK1' and Department of Premier and Cabinet ( <i>Freedom of Information</i> ) [2020] VICmr 98 (31 March 2020)

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FREEDOM OF INFORMATION – Aboriginal Victoria – *Aboriginal Heritage Act 2006* (Vic) – disclosure reasonably likely to prejudice proper administration in particular instance

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 is the same as the Agency's decision in that I have decided to refuse access to the documents in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

31 March 2020

## 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 their initial request and sought access to the following documents:

Copies of all direct correspondence between [specified person] and [specified person] from Aboriginal Victoria that refers to [Applicant's name/Applicant's business name] in the subject line or the body of the text, and any attachments to these emails that were not written by or sent to [Applicant's name/Applicant's business name] from [date] to the date of the request. All correspondence to which [Applicant's name/Applicant's business name] was a party to is excluded from the scope of the request.

2. In its decision, the Agency identified five documents falling within the terms of the Applicant's request. It decided to grant access to one document in part and refuse access to the other four documents in full.
3. The Agency relied on the exemptions in sections 30(1) and 31(1)(a) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant advised they do not seek access to the personal affairs information of any individuals named in the documents. Accordingly, this review relates to Documents 1, 2, 4 and 5 only (the **documents**), to which the Agency refused access in full under sections 30(1) and 31(1)(a).
6. I have been briefed by OVIC staff, who inspected the documents claimed to be exempt under section 31(1).<sup>1</sup>
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 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 submission dated [date]; and
  - (c) the Agency's submission dated [date] and additional information provided in the course of the review.
9. 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.

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<sup>1</sup> Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

## Review of exemptions

### Section 31(1)(a)

10. Section 31(1)(a) provides:

#### 31 Law enforcement documents

Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

(a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;

11. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>2</sup> 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>3</sup>
12. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.<sup>4</sup>
13. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
14. 'Proper administration of the law' includes the manner in which the law is administered, including regulatory, monitoring and compliance activities.<sup>5</sup>
15. The Agency relies on the second limb in section 31(1)(a) concerning the 'proper administration of the law in a particular instance'. It submits 'administration of the law' under this section includes enforcement and compliance powers under the *Aboriginal Heritage Act 2006* (Vic) (the **Aboriginal Heritage Act**), adding:

The functions of an Authorised Officer under section 159 of the *Aboriginal Heritage Act 2006*, include monitoring compliance, investigating suspected offences and conducting cultural heritage audits. Authorised Officers are authorised to gather relevant information in order to ensure compliance under the *Aboriginal Heritage Act 2006*.

Disclosure of these documents could undermine the effectiveness of such monitoring, investigating and auditing and would be likely to prejudice the proper administration of the law in a particular instance. ... If such information were to be released, it would be reasonably likely to prejudice the proper administration of the *Aboriginal Heritage Act 2006*.

16. The Applicant, in their submission states:

... Given the very considerable powers and severe penalties available under the Act, it is problematic that the authorised officers do not operate in a transparent manner and come under very little public scrutiny. ...

I would argue that the public interest (cited in the DPC Aboriginal Victoria response in relation to Section 30(1) would be better served by openness and transparency. ...

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<sup>2</sup> *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

<sup>3</sup> *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

<sup>4</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

<sup>5</sup> *Cichello v Department of Justice* [2014] VCAT 340 at [23]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] VicRp 72; [1991] 2 VR 322.

If, as I contend, officers are operating outside their roles and functions as set out in the Aboriginal Heritage Act 2006, and/or pursuing matters which are not within the scope of the Act, then the exemptions available under Section 30(1) could not be legitimately applied. ...'

17. For completeness, and as a result of the Applicant's submission, I must consider section 31(2) of the FOI Act. However, having been briefed on the documents subject to review, there is no information before me to suggest this section applies.
18. While I acknowledge the Applicant's concerns in relation to the powers of Authorised Officers under the Aboriginal Heritage Act, I accept regular monitoring of compliance, investigating suspected offences and directing the conduct of cultural heritage audits are the functions of Authorised Officers under the Aboriginal Heritage Act, a measure employed to maintain good and proper administration of that Act in accordance with the Agency's statutory obligations. Further, I am satisfied the information subject to this review is a 'particular instance' for the purposes of section 31(1)(a).
19. It is necessary to consider the impact of disclosure, specifically how the use of information in the documents would affect the monitoring, compliance and auditing activities of the Agency, given the unrestricted and unconditional nature of release under the FOI Act, such that an applicant is free to use or further disseminate the documents. In this regard, the Agency advised information in the documents may provide insight into the methodologies used if provided or otherwise obtained which would undermine the Agency's effective monitoring, compliance and auditing activities.
20. Based on the above factors, I accept the Agency's submission regarding the likely impact of disclosure of the documents under the FOI Act. I consider such an outcome could reasonably lead to the misuse of information in the documents which would be reasonably likely to have a detrimental effect on the proper administration of the Aboriginal Heritage Act by the Agency.
21. Specifically, I consider disclosure of the documents could undermine the effectiveness of the Agency's monitoring, compliance and auditing activities, which are integral to the Agency's functions under the Aboriginal Heritage Act. I am satisfied this is a 'particular instance' in which the administration of the law may be prejudiced.
22. Accordingly, I am satisfied disclosure of the documents and their titles would be reasonably likely to prejudice the proper administration of the Aboriginal Heritage Act 2006 and the Agency's monitoring, compliance and audit activities.
23. Accordingly, I have determined the documents are exempt under section 31(1)(a).
24. In light of my decision, it is not necessary for me to consider the additional exemption relied on by the Agency under section 30(1).

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

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</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>7</sup>

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<sup>6</sup> *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].

<sup>7</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].

27. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is not practicable to delete the exempt information as to do so would render the documents meaningless.

### **Conclusion**

28. On the information before me, I am satisfied the documents are exempt under sections 31(1)(a).
29. As I am satisfied it is not practicable to delete the exempt information in accordance with section 25, I have determined to refuse access to the documents in full.

### **Review rights**

30. 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>8</sup>
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
33. 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.
34. 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>11</sup>

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

35. 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>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).