

## Notice of Decision and Reasons for Decision

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Applicant:	'BU8'
Agency:	Game Management Authority
Decision date:	22 June 2020
Exemption considered:	Section 32(1)
Citation:	'BU8' and Game Management Authority ( <i>Freedom of Information</i> ) [2020] VICmr 168 (22 June 2020)

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FREEDOM OF INFORMATION – briefs of evidence – prosecution services – subject to legal professional privilege

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.

I am satisfied the documents are exempt under section 32(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
22 June 2020

## Reasons for Decision

### Background to review

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

Copies of documents and communications regarding the briefs of evidence submitted by [named person] who was then the [role description] with the Game Management Authority [GMA] in regards to the footage that was recorded by various people during the [specified year] duck season and forwarded to the [GMA] for investigation. The briefs of evidence were submitted to the then DEDJTR [Department of Economic Development, Jobs, Transport and Resources] Prosecutions Unit and contained recommendations on future legal proceedings. The documents/communications sought to include but not be limited to full copies of the briefs of evidence and the recommendations submitted with them as well as any responses to recommendations from the Prosecutions Unit to the GMA which may be documented in emails, notes, meeting notes minutes/agendas.

2. In its decision, the Agency identified 18 documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full.
3. The Agency relied on the exemptions in sections 32(1) and 33(1) 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. During the review, the Applicant advised they do not seek access to the personal affairs information of third parties in the documents.
6. I have examined copies of the documents 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 Applicant's review application; and
  - (c) the Agency's submission dated [date].
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.

### Review of exemptions

#### **Section 32(1)**

10. Section 32(1) provides a document is exempt 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.

11. A document is subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>1</sup>
- (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
  - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
  - (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

12. The Agency submitted the following information in support of its application of section 32(1) to the documents:

GMA was established on 1 July 2014 to facilitate the effective regulation of Victoria's game resources and game hunting across the state. GMA is an independent statutory authority responsible for the regulation of game hunting in Victoria and its functions are outlined in the *Game Management Authority Act 2014*. In order to meet its objectives GMA relies on corporate services provided by [the Department of Jobs, Precincts and Regions] DJPR...

DJPR plays a coordination and policy role for game hunting, working closely with GMA the Department of Environment, Land, Water and Planning (DELWP) and Parks Victoria. Prosecution Services (PS) is a business unit within Agriculture Victoria within DJPR. PS provides a range of prosecution and enforcement services to a number of internal and external regulators, including the GMA.

It is well established that client legal privilege can attach to confidential professional communications between government agencies and their salaried legal officers provided that the requisite level of independence between the legal officer and the agency exists.

PS's staff hold relevant authorisations and /or delegations under appropriate legislation for all work undertaken for GMA. PS provides services to GMA with respect to infringement notices, prosecutions, and training. PS also provides legal advice to GMA on compliance and enforcement matters on request, for example with respect to complaints received from the public about alleged breaches to hunting laws.

In accordance with relevant legislative authorisations, PS also conducts internal reviews of infringement notices issued by GMA officers. PS reviews and conducts court appearances for any GMA infringement notices referred to court, for example by an infringement offender electing to take a GMA infringement notice to court.

PS also reviews briefs of evidence compiled by GMA officers to determine if a prosecution should be commenced. Consistent with the Policy of the Director of Public Prosecutions...for Victoria, PS will only commence a prosecution if:

- there is a reasonable prospect of a conviction; and
- a prosecution is in the public interest.

13. In relation to the application of section 32(1) the Applicant submits:

A communication containing GMA's own recommendation on future legal proceedings cannot be for the dominant purpose of obtaining legal advice (and litigation privilege only attaches to actual or anticipated litigation);

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<sup>1</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

Certain documents, such as the original evidence, included in the brief or briefs would not have been created for the dominant purpose of obtaining legal advice (or connected to actual or anticipated proceedings); and

To attract privilege the communication must be made in a lawyer's capacity as a lawyer, rather than any other capacity (i.e. they must be independent) and cannot be for mixed legal and non-legal purposes. In this case the communications are between the GMA and the prosecutions services unit of the DJPR. The prosecutions services unit does not sit within the legal arm of the DJPR, it sits under the Agriculture division (see: [https://djpr.vic.gov.au/\\_\\_data/assets/pdf\\_file/0009/1370394/DJPR-Organisational-Structure-20-Jan.pdf](https://djpr.vic.gov.au/__data/assets/pdf_file/0009/1370394/DJPR-Organisational-Structure-20-Jan.pdf)) and forms part of that division's Animal Welfare and Regulatory Policy...The fact the prosecutions services unit sits within a branch/unit that has mixed responsibility for legal and policy work, and not in a dedicated legal branch, is a strong factor against finding the necessary independent character of the persons involved in the communications with GMA (see e.g. *Philip Morris Ltd and Prime Minister* (2011) 122 ALD 619).

14. I have considered the information submitted by the Agency and the Applicant.
15. The documents are emails, memorandums, briefs of evidence and file notes between the Agency and Prosecution Services, which is a part of the Department of Jobs, Precincts and Resources that provides the Agency with legal services.
16. Having examined each of the documents, I accept they are confidential communications between the Agency and its legal advisers, provided for the dominant purpose of obtaining or providing legal advice.
17. In forming this view, I am satisfied:
  - (a) each of the documents was provided by the Agency to Prosecution Services for the purpose of seeking legal advice;
  - (b) Prosecution Services is staffed with inhouse lawyers for the purposes of providing legal advice, including to the GMA; and
  - (c) lawyers within Prosecution Services are qualified to provide legal advice.
18. For the above reasons I am satisfied the documents are exempt under section 32(1).
19. The Schedule of Documents at **Annexure 1** sets out my decision in relation to each document.

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

20. 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.
21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>2</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>3</sup>

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<sup>2</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>3</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].

22. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to do so, as it would render the documents meaningless.

### **Conclusion**

23. On the information before me, I am satisfied the documents are exempt under section 32(1).
24. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

### **Review rights**

25. 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>4</sup>
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>5</sup>
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>6</sup>
28. 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.
29. 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>7</sup>

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

30. My decision does not take effect until the relevant review periods (as stated above) expire.
31. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>4</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

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

<sup>6</sup> Section 52(9).

<sup>7</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.	[date]	Email between Agency and Prosecution services	1	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> The document is an email from the Agency to its legal advisers. I consider it is a confidential communication that was made for the dominant purpose of obtaining legal advice. It is therefore exempt under section 32(1).
2.	[date]	Memorandum of advice	3	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> The document is a memorandum from Prosecution Services to the Agency. I consider it is a confidential communication that was made for the dominant purpose of providing legal advice. It is therefore exempt under section 32(1).
3.	[date]	Brief of evidence and covering memorandum in relation to a named individual	22	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> The document is covering memorandum and a brief of evidence from the Agency to its legal advisers. I consider it is a confidential communication that was made for the dominant purpose of obtaining legal advice. It is therefore exempt under section 32(1).
4.	[date]	Brief of evidence and covering memorandum in relation to a named	22	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		individual				
5.	[date]	Brief of evidence and covering memorandum in relation to a named individual	17	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.
6.	[date]	Brief of evidence and covering memorandum in relation to a named individual	17	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.
7.	[date]	Brief of evidence and covering memorandum in relation to a named individual	13	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.
8.	[date]	Brief of evidence and covering memorandum in relation to a named individual	17	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.
9.	[date]	Brief of evidence and covering memorandum in	21	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		relation to a named individual				
10.	[date]	Brief of evidence and covering memorandum in relation to a named individual	22	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.
11.	[date]	Brief of evidence and covering memorandum in relation to a named individual	17	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.
12.	[date]	Brief of evidence and covering memorandum in relation to a named individual	11	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.
13.	[date]	Brief of evidence and covering memorandum in relation to a named individual	11	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 3.
14.	[date]	Email between the Agency and	1	<b>Refused in full</b>	<b>Refuse in full</b>	<b>Section 32(1):</b> See comments for Document 1.



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		Prosecution Services		Sections 32(1), 33(1)	Section 32(1)	
15.	[date]	Memorandum from Prosecution Services to the Agency	3	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 2.
16.	[date]	Memorandum from Prosecution Services to the Agency	3	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> See comments for Document 2.
17.	[date]	Emails to and from Prosecution Services to the Agency	3	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> The document comprises emails between the Agency and Prosecution Services. I consider the document to be confidential communications prepared for the dominant purpose of obtaining and providing legal advice and is therefore exempt under section 32(1).
18.	[date]	File note created by Prosecution Services	1	<b>Refused in full</b> Sections 32(1), 33(1)	<b>Refuse in full</b> Section 32(1)	<b>Section 32(1):</b> The document is a file note prepared by the Agency's legal adviser. It contains legal advice. I therefore consider it is a confidential communication prepared for the dominant purpose of providing legal advice and is therefore exempt under section 32(1).