

## Notice of Decision and Reasons for Decision

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Applicant:	'DM3'
Agency:	Department of Environment, Land, Water and Planning
Decision date:	11 August 2021
Exemption considered:	Section 32(1)
Citation:	'DM3' and Department of Environment, Land, Water and Planning (Freedom of Information) [2021] VICmr 238 (11 August 2021)

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FREEDOM OF INFORMATION – ministerial briefs – government inquiry – request for documents under *Emergency Management Act 2013* (Vic) – legal advice

All reference 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 determined the relevant information in the document subject to review is exempt from release under section 32(1).

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
11 August 2021

## Reasons for Decision

### Background to review

1. The Applicant, who is a Member of Parliament, made a request to the Agency seeking access to the following documents:

A copy of the following ministerial briefs from the period October 2020 to December 2020 to the Minister for Energy, Environment, Climate Change and Solar Homes:

- MBR043628 Achieving the Government's 2020 Operational Emissions Reduction Target
- MBR043560 Whole of Government Emissions Reduction
- MBR043494 Victorian Greenhouse Gas Emissions Report 2018
- MBR043963 Approval of Draft Adaptation Objectives and Priorities of the Climate Change Strategy 2021-2025
- MBR043716 Victoria's Great Outdoors Camping and Caravan Round Two Recommended Grant Recipients
- MBR043858 Approval to Withhold Documents and Information to IGEM that are Subject to Public Interest Immunity
- MBR043579 Latrobe Valley Asbestos Taskforce
- MBR043665 Managing Grazing Licences Impacted By 2019-20 East Gippsland Bushfires
- MBR043863 Alpine Resorts (Management) Regulations 2020
- MBR043604 Victorian Environmental Assessment Council - Request for Advice on Aspects of Public Land Use Information
- MBR043255 Alpine Resorts Co-ordinating Council Annual Report 2019-20
- MBR044092 FOI Request to the Minister (5216) - Green Bear Recycling and Back Again Recycling
- MBR043504 Regional Climate Change Adaptation: Greater Melbourne
- MBR042352 Approval of Metropolitan Open Space Strategy
- MBR043861 Local Parks Program Round 2 - Recommended Package of Dog and Pocket Park Projects
- MBR043522 Cleanaway

2. The Agency identified documents falling within the terms of the Applicant's request and granted access to the documents in part. The Agency relied on sections 28(1)(ba), 28(1)(d), 29(1)(a), 32(1) to refuse access to certain information in the documents. The Agency's decision letter sets out the reasons for its decision.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Applicant advised they seek review of pages 2 and 3 of document reference MBR043858 only (the **Document**), which the Agency exempted from release under sections 28(1)(ba) or 32(1). The remainder of the exempted information in the Document and other documents identified by the Agency are not subject to review.
5. I have examined a copy of the Document.
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.
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.

9. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

## Review of exemptions

### ***Section 32(1) – Documents affecting legal proceedings***

10. Section 32(1) provides a document is an exempt document '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' (**legal privilege**).
11. A document will be subject to legal 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; or
  - (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 Document is a briefing to the Minister for Energy, Environment and Climate Change seeking approval to withhold certain documents from the Inspector-General for Emergency Management (**IGEM**) Inquiry into the 2019-2020 Victorian Fire Season. The documents were required to be produced to the IGEM Inquiry by the Agency under section 69(2) of the *Emergency Management Act 2013* (Vic).
13. As described in point 2 of the Document under the heading 'Key information', the Agency and its external legal advisor reviewed the documents required to be produced to the IGEM inquiry 'for relevance and any privileges and other sensitivities'.
14. I am satisfied the information exempted from release by the Agency amounts to a confidential communication between the Agency and its legal advisor made for the dominant purpose of providing legal advice in relation to the documents.
15. Accordingly, I am satisfied the relevant information in the Document is subject to legal privilege for the purposes of section 32(1).

### *Has legal professional privilege been waived?*

16. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. However, privilege will be lost where the client has acted in a way that is inconsistent with the

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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 section 119 of the *Evidence Act 2008* (Vic).

maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client’s express or implied consent.<sup>2</sup>

17. There is no information before me to demonstrate the privileged information in the Document has been waived.
18. Accordingly, I am satisfied the relevant information is exempt from release under section 32(1).
19. Given my decision in relation to section 32(1), I have not further considered the application of section 28(1)(ba) to the Document.

### **Section 25 – Deletion of exempt or irrelevant information**

20. Section 25 requires an agency to grant access to an edited copy of a document where 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>3</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>4</sup>
22. I have considered the effect of providing the Applicant with an edited copy of the Document with exempt and irrelevant information deleted in accordance with section 25. I am satisfied it is practicable to do so as it will not require substantial time and effort, and the edited document will retain meaning.

### **Conclusion**

23. On the information before me, I am satisfied the relevant information in the Document, which the Agency exempted from release, is exempt under section 32(1).
24. As I am satisfied it is practicable to provide the Applicant with an edited copy of the Document with exempt and irrelevant information deleted, I have granted access to the Document in part.
25. Accordingly, the Document is to be released to the Applicant with the following information deleted:
  - (a) the information exempted by the Agency on page 1 is to remain deleted as irrelevant information in accordance with section 25, as page 1 is not subject to review;
  - (b) the information exempted by the Agency on pages 2 and 3, which I have determined is exempt under section 32(1); and
  - (c) the name on page 3, which is outside the scope of the request and should remain deleted as irrelevant information in accordance with section 25.

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<sup>2</sup> Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for client legal privilege) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

<sup>3</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>4</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**

26. 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>5</sup>
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>6</sup>
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>7</sup>
29. 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.
30. 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>8</sup>

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

31. 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>5</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>6</sup> Section 52(5).

<sup>7</sup> Section 52(9).

<sup>8</sup> Sections 50(3F) and (3FA).