

## Notice of Decision and Reasons for Decision

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Applicant:	'DW4'
Agency:	Department of Environment, Land, Water and Planning
Decision date:	2 December 2021
Exemption considered:	Section 35(1)(b)
Citation:	'DW4' and Department of Environment, Land, Water and Planning (Freedom of Information) [2021] VICmr 328 (2 December 2021)

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FREEDOM OF INFORMATION – VicForests – harvesting and regeneration – response to investigation outcome – instructions – statistical information – statutory obligations

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.

I have decided section 35(1)(b) does not apply to the documents.

The documents are therefore to be released with irrelevant information deleted in accordance with section 25.

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

My reasons for decision follow.

Sven Bluemmel  
**Information Commissioner**

2 December 2021

## Reasons for Decision

### Background to review

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

On [date] the Office of the Conservation Regulator [OCR] responded to a complaint about unsuccessful regeneration in the [location] stating that its finding was 'no breach detected'. I am seeking documents relating to (a) the investigation of the complaint and (b) the making of the decision that no breach was detected.
2. The Applicant indicated they are not seeking personal affairs information in the documents.
3. The Agency identified 12 documents and their attachments falling within the terms of the Applicant's request and decided to grant access to the documents in part. The Agency relied on section 35(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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.
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 exemption

#### ***Section 35(1)(b) – Documents containing material obtained in confidence***

10. A document is exempt under section 35(1)(b) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
11. The documents relate to the response from the Office of the Conservation Regulator (**OCR**) to a complaint that VicForests had failed to successfully regenerate certain coupes of land following harvesting. In responding to the complaint, OCR obtained information from VicForests.

## Submissions

12. The Agency consulted with VicForests in accordance with section 35(1A). VicForests advised it provided the information in the documents to the Agency in confidence. VicForests advised disclosure would affect how VicForests provides information to the Agency in the future.
13. In its submission to OVIC, the Agency provided the following background information in support of its decision to exempt information under section 35(1)(b) that it obtained from VicForests:

### Monitoring Compliance with Timber Harvesting Laws

- a) OCR's Authorised Officers are appointed under section 83 of the *Conservation Forests and Lands Act 1987*. They may be appointed 'for the purpose of all or any relevant laws' (s 83(2)). The definition of 'relevant law' includes those listed in Schedule 1, one of which is the *Sustainable Forests (Timber) Act 2004* (SFT Act).
- b) The SFT Act is the primary source of OCR's timber harvesting regulation powers. OCR monitors VicForests' compliance with the Act and the Code of Practice for Timber Production 2014 (and its incorporated documents), which includes the ability to conduct audits (see Part 6 of the SFT Act). However, this audit function is separate to the investigation of alleged breaches.
- c) Whereas OCR has more extensive powers to investigate alleged offences under other legislation (the Wildlife Act 1975, for example), it's powers to investigate timber harvesting related offences are limited...
- d) Under Part 9 of the SFT Act, Authorised Officers may take certain enforcement actions if an offence detected. However, these do not include the power to conduct searches, enter premises, or direct for the production of any item or document during the investigation or enforcement phases.
- e) This issue has been the subject of recent policy and law reform efforts. The *Forests Legislation Amendment (Compliance and Enforcement) Bill 2019* was recently passed in Parliament. It introduces new powers enabling Authorised Officers to require VicForests to produce documents under the SFT Act (see section 9 of the Bill). The amendment will come into effect on 1 March 2022 but until then, OCR's powers remain limited.\*

... Currently, VicForests is not legally required to provide documents to OCR during a timber harvesting-related investigation and OCR has no legal powers to compel VicForests to do so.

\*Footnote: The Bill has since become an Act. *The Forests Legislation Amendment (Compliance and Enforcement) Act 2021* No. 38 of 2021 was recently passed in Parliament and has received Royal Assent. The Act will come into effect on 1 March 2022 unless commenced earlier by proclamation.

### Was the information communicated in confidence?

14. Whether information communicated by an individual was communicated in confidence is a question of fact.<sup>1</sup>
15. A document does not need to be marked 'confidential' for its contents to be considered to have been communicated in confidence.<sup>2</sup> Confidentiality can be express or implied from the circumstances of a matter.<sup>3</sup>
16. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>4</sup>

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<sup>1</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>2</sup> *Williams v Victoria Police* [2007] VCAT 1194 at [75].

<sup>3</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>4</sup> *Ibid.*

17. Based on information provided by the communicator, VicForests, I am satisfied the information in the documents was provided to the Agency in confidence.

*Would disclosure impair the Agency's ability to obtain similar information in the future?*

18. I note the requirements for section 35(1)(b) will not be satisfied if the impairment in obtaining similar information would go no further than potential providers of the information being less candid than they otherwise would have been.<sup>5</sup>
19. I have decided disclosure of the documents would not impair the Agency's ability to obtain similar information in the future for the following reasons:

- (a) For the most part, section 35(1)(b) applies to information provided by members of the public, or business undertakings to an Agency where that information is provided voluntarily and where those external parties do not have a legal obligation to provide that information.
- (b) In this matter, however, the Agency and the entity that provided the information to the Agency, have statutory obligations to provide specific services to the community. This places on them an obligation to cooperate where their functions overlap, regardless of whether any statutory power is being exercised.
- (c) In my view all Agency officers, as public servants, are required to discharge their duties to provide impartial and fulsome advice to decision makers and this requirement is a core aspect of their professional responsibilities and accords with their obligations under the *Public Administration Act 2004* (Vic).<sup>6</sup> In such circumstances I do not consider the public servants in both agencies would be able to discharge their duties without cooperating on such matters as is the subject of this request.
- (d) I also note that the documents subject to this request are not sensitive. Rather, they are:
  - (i) a small amount of statistical information about the coupes subject to the complaint;
  - (ii) general instructions regarding regeneration of forests; and
  - (iii) VicForests' response to the outcome of the Agency's investigation of a complaint, the general nature of which the Applicant is aware of.
- (e) While I note VicForests' objection, I am not persuaded by its response that disclosure would affect its provision of information to the Agency in the future.
- (f) In any case, as advised by the Agency, in the near future, legally enforceable obligations for VicForests to provide information requested by the Agency will be in place.

20. Therefore, I am not satisfied the documents are exempt under section 35(1)(b).

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

21. 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.

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<sup>5</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

<sup>6</sup> For example, see 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.

22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>7</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>8</sup>
23. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request because it is personal affairs information not sought by them.
24. I have considered the effect of deleting irrelevant information from the documents. In my view, it is practicable for the Agency to delete the irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

25. On the information available, I am not satisfied section 35(1)(b) applies to the documents.
26. As it is practicable to edit the documents to delete irrelevant information, I have determined to grant access to the documents in part.

### **Review rights**

27. 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>9</sup>
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
30. 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.
31. 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>12</sup>

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

32. I have decided to release documents that contain information provided in confidence by or on behalf of a third party.
33. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.

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<sup>7</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>8</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).

34. My decision does not take effect until the third party's 60 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Annexure 1 Schedule of Documents

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC decision	OVIC comments
1	[date]	Letter: VicForests to DEDJTR - Annual Reporting - Timber Harvest and Regeneration Results	1	Irrelevant material deleted	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 25:</b> I agree the information deleted by the Agency is irrelevant to the request as it is personal affairs information not sought by the Applicant.</p>
1A	[date]	Attachment: Spatial Data - Timber Harvest Area [reference]	NA	Released in full	Not subject to review	
1B	[date]	Attachment: Coupe Finalisation List [reference]	5	Released in full	Not subject to review	
1C	[date]	Attachment: Annual Harvesting and Regeneration Report [reference]	8	Irrelevant material deleted (also available online)	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 25:</b> See comments for Document 1.</p>

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC decision	OVIC comments
2	[date]	Complaint Email	1	Irrelevant material deleted	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	Section 25: See comments for Document 1.
2A	[date]	Attachment: Complaint Report	12	Irrelevant material deleted	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	Section 25: See comments for Document 1.
3	[date]	Preliminary Assessment Form	8	<p>Released in part</p> <p>Section 35(1)(b), irrelevant material deleted</p>	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p>Section 35(1)(b): I have decided the information is not exempt under section 35(1)(b) for the reasons set out above in the Notice of Decision.</p> <p>Section 25: See</p>



Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC decision	OVIC comments
						comments for Document 1.
4	[date]	Emails	5	<p><b>Refused in full</b></p> <p>Section 35(1)(b), irrelevant material deleted</p>	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 35(1)(b):</b> See comments for Document 3.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
4A	[date]	Attachment	19	<p><b>Refused in full</b></p> <p>Section 35(1)(b), irrelevant material deleted</p>	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 35(1)(b):</b> See comments for Document 3.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
4B	[date]	Attachment: Native Forest Silviculture Guideline No. 10 - Eucalypt Stocking Surveys and Regeneration Monitoring	109	<b>Available online</b>	<b>Not subject to review</b>	

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC decision	OVIC comments
4C	[date]	Attachment	16	Refused in full  Section 35(1)(b), irrelevant material deleted	Release in full	Section 35(1)(b): See comments for Document 3.
5	[date]	Emails: DELWP and DJPR	4	Irrelevant material deleted	Release in part  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	Section 25: See comments for Document 1.
5A	[date]	Attachment: VicForests Coupe Finalisation List [reference]	6	Released in full	Not subject to review	
6	[date]	Case Decision Record #1	8	Released in part  Section 35(1)(b), irrelevant material deleted	Release in part  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	Section 35(1)(b): See comments for Document 3.  Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC decision	OVIC comments
7	[date]	Letter to VicForests	6	Irrelevant material deleted	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 25:</b> See comments for Document 1.</p>
8	[date]	Letter	2	<p><b>Refused in full</b></p> <p>Section 35(1)(b), irrelevant material deleted</p>	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 35(1)(b):</b> See comments for Document 3.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
8A	[date]	Attachments	14	<p><b>Refused in full</b></p> <p>Section 35(1)(b), irrelevant material deleted</p>	<p><b>Release in part</b></p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 35(1)(b):</b> See comments for Document 3.</p> <p><b>Section 25:</b> See comments for Document 1.</p>

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC decision	OVIC comments
9	[date]	Case Decision Record #2	7	Released in part  Section 35(1)(b), irrelevant material deleted	Release in part  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	Section 35(1)(b): See comments for Document 3.  Section 25: See comments for Document 1.
10	[date]	File Note	1	Irrelevant material deleted	Release in part  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	Section 25: See comments for Document 1.
11	[date]	Letter to Complainant: Investigation Outcome	2	Irrelevant material deleted	Release in part  Section 25  The document is to be released with irrelevant information deleted in accordance with section 25.	Section 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. Of Pages	Agency's Decision	OVIC decision	OVIC comments
12	[date]	Letter to VicForests: Investigation Outcome	2	Irrelevant material deleted	<p>Release in part</p> <p>Section 25</p> <p>The document is to be released with irrelevant information deleted in accordance with section 25.</p>	Section 25: See comments for Document 1.