

Notice of Decision and Reasons for Decision

Applicant:	'EE1'
Agency:	Department of Environment, Land, Water and Planning
Decision date:	9 May 2022
Exemption and provision considered:	Sections 30(1), 33(1), 25
Citation:	'EE1' and Department of Environment, Land, Water and Planning (Freedom of Information) [2022] VICmr 63 (9 May 2022)

FREEDOM OF INFORMATION – wind farms – Broлга Assessment and Mitigation Standards – initial considerations of agency officers not sufficiently formalised – disclosure of agency officer names

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 in that I have determined to release a small amount of additional information in Document 1 to the Applicant.

I am satisfied sections 30(1) and 33(1) apply to parts of the documents.

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, the documents are to be released in part.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

9 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation between the Agency and the Applicant, the terms of the request were refined:
 1. Documents held by DELWP that discuss, calculate or refer to the economic benefits and/or costs to the government, wind farm companies, energy consumers or other interests from the application of standards
 - proposed by the department as published in the document Brolga Assessment and Mitigation Standards for wind energy facility permit applications through the above website
 - proposed by any other individual or organization, such as those suggested by people or organizations to the DELWP engage website (above).
 2. Any risk analysis (draft or final) conducted on the draft or other standards as proposed by anyone or as possibly accepted or developed through the above 'engage' process for the potential impact of the standards on the southern brolga.
 3. Documents that show the locations of known active and successful (and any unsuccessful) nesting sites for the Southern Brolga during 2020 and 2021 that are within 1 km, 2 km and 5 km of operating wind farms in Victoria - and the locations of any active nesting sites for which the success of chick raising is unknown
 4. Documents showing the sources of the information provided in point 3; and
 5. Documents showing the names of the members of the "Technical Reference Group, membership of which included DELWP species experts and external experts" as mentioned in the email to me from [name] of DELWP on [date].
3. The Agency identified six documents falling within the terms of the Applicant's request and refused access to the documents in part under sections 30(1) and 33(1).¹ 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. The Applicant seeks review of the Agency's application of section 30(1) and certain information it exempted from release under section 33(1) as detailed below.
6. I have examined a copy 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 and submissions received from the parties.
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.

¹ While the Agency's decision letter refers to three documents identified as relevant to the Applicant's request, the correct number of documents subject to review is six documents.

10. 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 30(1) – Internal working documents

11. 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;
 - (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.
12. The exemption does not apply to purely factual material in a document.²
13. In determining if disclosure of the documents would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
14. In doing so, I have given weight to the following relevant factors:³
- (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 documents and the broader context giving rise to the creation of the documents;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
 - (e) whether disclosure of the documents 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 would not otherwise be able to explain upon disclosure of the documents;
 - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
 - (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

² Section 30(3).

³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

15. The Agency exempted a small amount of information from Documents 2 and 5. I am satisfied this information is in the nature of opinion and advice, and was prepared for the deliberative processes of the Agency – being the development of policy relating to brolgas in proximity to wind farms.
16. I have determined it would not be contrary to the public interest to disclose the information in Document 2 for the following reasons:
 - (a) It appears the information has been released elsewhere in the document.
 - (b) In any case, the document discloses considered positions reached by the Agency following a deliberative process which are relatively formed and finalised, and are not speculative or incomplete in nature.
 - (c) Members of the public are capable of understanding that views or information in a document prepared by an agency may change or be superseded as new information comes to light, circumstances change or as the development of a policy progresses through a consultative and/or deliberative process.
 - (d) Wind farms are often subject to a broad spectrum of public opinions and debate including, for example, issues of local amenity, the environment, politics and economics. As with any such sensitive topic of interest to the public, I consider there is a public interest in the government being transparent in the way in which it carries out its functions through the disclosure of such documents.
17. In relation to Document 5, I have determined disclosure of the information exempted from release by the Agency would be contrary to the public interest as I am satisfied it amounts to the initial thoughts and ideas of Agency officers and is not sufficiently formalised. I also consider there is a public interest in the Agency being able to create a document of this nature to capture initial thoughts and responses to policy issues under consideration without concern such documents will be made public. Those redactions made by the Agency are therefore exempt under section 30(1).
18. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 33(1) – Documents affecting personal privacy of third parties

19. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI Act would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person other than the Applicant (a **third party**);⁴ and
 - (b) such disclosure would be ‘unreasonable’.
20. Information relating to a person’s ‘personal affairs’ includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.⁵
21. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁶

⁴ Sections 33(1) and (2).

⁵ Section 33(9).

⁶ *O’Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

22. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the particular circumstances.
23. In *Victoria Police v Marke*,⁷ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.⁸ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁹
24. The Applicant seeks access to the following names the Agency exempted from release under section 33(1):
- 'Decision Maker – Executive Director Biodiversity Division' (page 1 of PDF file)
 - 'Reviewer' – Reviewed by (page 1)
 - 'Endorser' – Endorsed by (page 1)
 - 'Preparer' of "Approval of a Brolga Habitat buffer option for wind energy facilities" – Prepared by (bottom of pages 2 – 7)
 - Names of people contained in the table "Consolidated DEWLP comments on the draft brolga standards" (pages 32 - 53) other than those providing comments whose names are listed in 'Name' column of that table
 - Members of the Brolga Technical Reference Group and the supporting DELWP staff (pages 54 and 55)
25. I am satisfied the information sought is personal affairs information for the purposes of section 33. Therefore, it is necessary must decide whether disclosure would be unreasonable.
26. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
- (a) the nature of the personal affairs information;
 - (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of further dissemination of the information, if released;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.¹⁰

⁷ [2008] VSCA 218 at [76].

⁸ Ibid.

⁹ Ibid at [79].

¹⁰ Section 33(2A).

27. In its decision letter, the Agency advised it considered the following factors in determining disclosure of the personal affairs information would be unreasonable:

- the statutory consequences of release, that is, there being no restrictions or limits on the dissemination of the information
- the likelihood that disclosure would cause distress or anxiety to individuals it relates to
- whether the public interest would be promoted by releasing the personal information.

Disclosure would be unreasonable in the circumstances given the nature of the information and the context in which the documents were created and the information was collected.

28. In summary, the Applicant submits disclosure would not be unreasonable as:

It would help complete the reader's understanding of Document 1, showing who was actually responsible for the document, by showing who responds to the comments from staff, and then who accepts the arguments and work of that staffer and his/her associates. It is reasonable to expect that the public should be aware of the individuals who write and are responsible for such standards, and not be forced to accept such an important set of standards that come out of a 'black box'. Transparency around the current preparation process is currently poor.

...

The secrecy surrounding the names of staff working on the broilga-wind farm buffer standards is not in the public interest. It represents a failure within DELWP to properly involve the general public in the process of preparing the standards.

...

The members of the Broilga Technical Reference Group (Document 2), at least some of which are from outside the public service, serve on the group because of their perceived standing in the scientific world. Members were reported as having expertise on broilga ecology and biology, wind farm impacts, collision risk modelling and Population Viability Analysis. They agreed to provide advice to DELWP in relation to scientific issues affecting the understanding of broilga ecology etc. The public should know their names so they can understand those people's qualifications, experience and potential conflicts of interest. Those members that are public servants are simply fulfilling their work responsibilities.

...

The public release of the names of members of such DELWP committees has precedent. The names of the members of at least one major advisory group are publicly known – and advertised by the government. That group is the panel advising the Minister for Energy, Environment and Climate Change on the greenhouse gas emissions target for 2035.

29. Having considered the personal affairs information in the documents, I have determined disclosure of the name of the decision maker in Document 1 would not be unreasonable for the following reasons:

- (a) the name can be reasonably inferred from the position title and information that is publicly available;
- (b) the individual is a senior public servant and decision maker; and
- (c) the public interest weighs in favour of such information being publicly available to assist in accountability and transparency for public sector decision making.

30. Therefore, I am not satisfied the name of the decision maker is exempt from release under section 33(1).

31. However, I have determined the remainder of the personal affairs information sought by the Applicant would be unreasonable to disclose for the following reasons:

- (a) while the relevant information is the names of persons associated with a public purpose, I am satisfied the information is sensitive as it relates to an issue that is often subject to intense and impassioned debate;
 - (b) in these circumstances, I must balance the right of access to government information, including accountability for those who provide expert advice to government, with the personal privacy of the individuals concerned;
 - (c) while there is no information before me to suggest the Applicant will use the disclosure of the names to harass or intimidate those individuals, once those names are released under FOI, I have no power to impose conditions on their further dissemination;
 - (d) while the names of the members of other groups tasked with advising government are sometimes released, I must consider the particular circumstances of this matter as outlined above; and
 - (e) I do not consider the release of the remainder of the personal affairs information would assist in understanding the documents given a significant majority of the documents were released to the Applicant by the Agency, including explaining the options before the Agency, the information it relied on and relevant considerations, background and context.
32. Accordingly, I am satisfied the remainder of the personal affairs information in the documents sought by the applicant is exempt from release under section 33(1).

33. My decision in relation to section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

34. 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.
35. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹¹ 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 25.¹²
36. The Applicant does not seek access to all information exempted from release by the Agency under section 33(1). Therefore, the remainder of the personal affairs information is irrelevant to the request.
37. I have considered the effect of deleting irrelevant and exempt information from the documents. I am satisfied it is practicable to delete this information from the documents as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

38. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 30(1) and 33(1). However, I have decided to release additional information to the Applicant where I am satisfied it is not exempt.

¹¹ *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].

¹² *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].

39. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.
40. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

41. 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.¹³
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
44. 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.
45. 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.¹⁶

Third party review rights

46. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁷
47. In this case, I am satisfied it is practicable to notify the relevant third party of their review rights and confirm they will be notified of my decision on the date of decision.

When this decision takes effect

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

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and 50(3FA).

¹⁷ Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Memo – Approval of a Brolga Breeding Habitat Buffer Option for Wind Energy Facilities	7	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25 The document is to be released with irrelevant and exempt information deleted in accordance with section 25.	Section 33(1): The Applicant seeks the names of persons listed in paragraph 23 of the Notice of Decision only. I have determined it would not be unreasonable to disclose the name and signature of the decision maker, however, it would be unreasonable to disclose the remainder of the information sought by the Applicant. The reasons for my decision are set out in my Notice of Decision above. Section 25: I have determined it is practicable to delete exempt and irrelevant information from the document in accordance with section 25.
2.	Undated	Attachment 1 – Context Diagrams	3	Released in part Sections 30(1), 25	Release in full	Section 30(1): I have determined the small amount of information exempted from release by the Agency is not exempt under section 30(1) for the reasons set out in the Notice of Decision above.
3.	Undated	Attachment 2 – Breeding buffer options analysis	19	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25	Section 33(1): The Applicant does not seek access to the personal affairs information in this document. Therefore,

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					The document is to be released with irrelevant information deleted in accordance with section 25.	this information is irrelevant information for the purpose of section 25. Section 25: See comments for Document 1.
4.	Undated	Attachment 3 – Buffer options tabled at the TRG workshops in [year]	2	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25 The document is to be released with exempt information deleted in accordance with section 25.	Section 33(1): The Applicant does not seek access to the personal affairs information in this document. Therefore, this information is irrelevant information for the purpose of section 25. Section 25: See comments for Document 3.
5.	Undated	Consolidated DELWP comments on the Draft Brolga Standards	22	Released in part Sections 30(1), 33(1), 25	Release in part Sections 30(1), 33(1), 25 The document is to be released with the information identified by the Agency as exempt under sections 30(1) and 33(1) deleted in accordance with section 25.	Section 30(1): My decision in relation to this document is the same as the Agency's decision. I am satisfied certain information is exempt from release under section 30(1) for the reasons set out in the Notice of Decision above. Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in the document. See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 25: See comments for Document 1.
6.	Undated	Brolga Technical Reference Group - Terms of Reference	2	Released in part Sections 33(1), 25	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with information exempt under section 33(1) deleted in accordance with section 25.</p>	<p>Section 33(1): I have determined it would be unreasonable to disclose the personal affairs information in the table sought by the Applicant.</p> <p>The reasons for my decision are set out in the Notice of Decision above.</p> <p>Additionally, as the last dot point does not refer to names, I am satisfied disclosure of this information would not be unreasonable.</p> <p>Section 25: See comments for Document 1.</p>