

## Notice of Decision and Reasons for Decision

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Applicant:	'EU6'
Agency:	Department of Environment, Land, Water and Planning
Decision date:	30 August 2022
Exemptions and provision considered:	Sections 30(1), 33(1), 25
Citation:	'EU6' and Department of Environment, Land, Water and Planning (Freedom of Information) [2022] VICmr 215 (30 August 2022)

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FREEDOM OF INFORMATION – wind farms – Brolga 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 is the same as the Agency's decision.

I am satisfied certain information in the documents is exempt from release under sections 30(1) and 33(1).

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 to the documents is granted 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

30 August 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 Applicant's request were refined to:
  1. Copies of all agendas and minutes (and their attachments) of meetings held by the Broilga Technical Reference Group (BTRG)
  2. Copies of any presentations made to the BTRG by any person or group
  3. A list of any wind farm post-completion reports used to help advise the BTRG on buffer requirements
  4. Copies of all declarations of conflicts of interest by BTRG members.
  5. Any documents (other than emails) held in the DELWP project team working on the draft mitigation standards to protect broilgas from the impacts of wind farms that examine or attempt to examine the potential or actual impacts of the operation of wind farms on the behaviour of broilgas at flocking or breeding sites;
  6. Any documents produced since [date] held in the DELWP project team working on the draft mitigation standards to protect broilgas from the impacts of wind farms that discuss or comment on or refer to those documents and the ability or inability of DELWP to produce effective wind farm mitigation standards without considering the impacts of the operation of wind farms located around breeding grounds or flocking grounds on the behaviour of adult broilgas, such as being disturbed to the extent that they abandon nests or chicks.
3. The Agency identified ten 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). 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 a copy 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 exemptions

### *Section 30(1) – Internal working documents*

10. 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.
11. The exemption does not apply to purely factual material in a document.<sup>1</sup>
12. 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.
13. In doing so, I have given weight to the following relevant factors:<sup>2</sup>
  - (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.
14. The Agency refused access to a small amount of information in Documents 2 and 7, noting in its decision letter:

Material in the nature of opinion or advice exempted under this section from the Technical Reference Group Meeting Notes. The views expressed by the authors are either speculative or

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

preliminary in nature and do not reflect the views of the department and disclosure would be contrary to the public interest as the document would misrepresent the department's final position on the matters being discussed.

15. 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. Having reviewed both documents, I have determined disclosure of the information to which the Agency refused access 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.
17. I also consider there is a public interest in the Agency being able to create documents of this nature to capture initial thoughts and responses to policy issues under consideration without concern such documents will be made public prior to their further development and consideration within the Agency.
18. Accordingly, I am satisfied the information to which the Agency refused access is exempt from release under section 30(1).
19. 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***

20. 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**);<sup>3</sup> and
  - (b) such disclosure would be 'unreasonable'.
21. 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 such information may be reasonably determined.<sup>4</sup>
22. 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.<sup>5</sup>
23. 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.
24. In *Victoria Police v Marke*,<sup>6</sup> 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'.<sup>7</sup> The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an

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<sup>3</sup> Sections 33(1) and 33(2).

<sup>4</sup> Section 33(9).

<sup>5</sup> *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].

<sup>6</sup> [2008] VSCA 218 at [76].

<sup>7</sup> *Ibid.*

important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.<sup>8</sup>

25. I am satisfied the information sought is personal affairs information for the purpose of section 33. Therefore, it is necessary I 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.<sup>9</sup>
27. In its decision letter, the Agency advised it considered the following factors in determining disclosure of the personal affairs information of the third parties 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. The Applicant relies on their submissions made in a separate OVIC FOI review application and further submits disclosure would not be unreasonable as:

...Release assists in advancing accountability and transparency of public sector decision making in the 'broilga-wind farm buffer' standards preparation process that continues to fail the public and the broilga.

...In the interests of public service transparency, the membership of the BTRG should be public, so that the minutes can be understood in the broader social and political context, including the potential for public service advisory groups to be used to promote private interests. This would help show who advanced particular positions, and perhaps stimulate further examination of the processes used to make decisions by the Group.

...The redactions of the names of Group members in the minutes means that it is impossible for a reader to understand who made particular comments, how particular individuals participated in discussions and the departmental or private status of the participants. This stops a reader completely understanding the minutes, for example, by learning who had particular positions in discussions, and whether and how one or more people dominated the discussions.

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<sup>8</sup> Ibid at [79].

<sup>9</sup> Section 33(2A).

29. Having considered the personal affairs information in the documents, I have determined its disclosure would be unreasonable to disclose for the following reasons:
- (a) While the personal affairs information constitutes the names of persons recorded in connection with a public purpose, I am satisfied the named individuals are connected with a sensitive environmental and wildlife issue which is subject to differing and fervent views within the local and broader community.
  - (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 personal affairs information to harass or intimidate the relevant individuals, there is no power under the FOI Act to impose any restrictions or conditions on its use or further dissemination.
  - (d) While the names of the members of other groups tasked with advising government are commonly released, it is necessary to consider the particular circumstances of this matter as outlined above.
  - (e) I do not consider the disclosure of the personal affairs information would assist in the Applicant's understanding of the documents given the majority of the information was released by the Agency to the Applicant, including explaining the options before the Agency, the information it relied on and relevant considerations, background and context.
30. Accordingly, I am satisfied the personal affairs information in the documents sought by the Applicant is exempt from release under section 33(1).
31. 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***

32. 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.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>10</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>11</sup>
34. 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**

35. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 30(1) and 33(1).

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<sup>10</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>11</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].

36. 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.
37. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

#### **Review rights**

38. 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>12</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
41. 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.
42. 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>15</sup>

#### ***When my decision takes effect***

43. My decision does not take effect until the Agency's 14 day review period expires.
44. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Brolga Technical Reference Group Workshop 1 Agenda	1	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with the information identified by the Agency as exempt under section 33(1) deleted in accordance with section 25.	Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision, above.  Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and/or irrelevant information deleted in accordance with section 25.
2.	[date]	Brolga Technical Reference Group Workshop 1 discussion notes and actions	6	Released in part Sections 30(1), 33(1)	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.  Sections 33(1) and 25: See comments for Document 1.
3.	[date]	Brolga Technical Reference Group Workshop 2 Agenda	1	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with the information identified by the Agency as exempt under section 33(1)	Sections 33(1) and 25: See comments for Document 1.



Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					deleted in accordance with section 25.	
4.	[date]	Brolga Technical Reference Group Workshop 2 Paper – Design of buffers to avoid impacts	5	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with the information identified by the Agency as exempt under section 33(1) deleted in accordance with section 25.	Sections 33(1) and 25: See comments for Document 1.
5.	[date]	Brolga Technical Reference Group Workshop 2 discussion notes and key actions	9	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with the information identified by the Agency as exempt under section 33(1) deleted in accordance with section 25.	Sections 33(1) and 25: See comments for Document 1.
6.	[date]	Brolga Technical Reference Group Workshop 3 Agenda	7	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with the information identified by the Agency as exempt under section 33(1)	Sections 33(1) and 25: See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					deleted in accordance with section 25.	
7.	[date]	Brolga Technical Reference Group Workshop 3 discussion	8	Released in part Sections 30(1), 33(1)	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): See comments for Document 2.  Sections 33(1) and 25: See comments for Document 1.
8.	[date]	Buffer Options presented at Brolga Technical Reference Group Workshop 3	23	Released in full	Not subject to review	
9.	[date]	Brolga Standards consultation disturbance evidence analysis	2	Released in part Section 33(1)	Release in part Sections 33(1), 25  The document is to be released with the information identified by the Agency as exempt under section 33(1) deleted in accordance with section 25.	Sections 33(1) and 25: See comments for Document 1.

<b>Document No.</b>	<b>Date of Document</b>	<b>Document Description</b>	<b>No. of pages</b>	<b>Agency Decision</b>	<b>OVIC Decision</b>	<b>OVIC Comments</b>
10.	[date]	Brolga Standards Policy Paper	1	Released in full	Not subject to review	