

Notice of Decision and Reasons for Decision

Applicant: 'EY9'
Agency: Department of Environment, Land, Water and Planning
Decision date: 30 December 2022
Exemption considered: Section 30(1)
Citation: 'EY9' and Department of Environment, Land, Water and Planning
(Freedom of Information) [2022] VICmr 255 (30 December 2022)

FREEDOM OF INFORMATION – government policy development – Victorian Kangaroo Harvest Management Plan – wildlife management – environmental controls – public and stakeholder consultation – information provided in confidence – deliberation or decision of the Cabinet – draft briefing to a Minister – external consultant report – connection to Cabinet decision making process – decision making process not complete

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

I am satisfied the documents are exempt from release under section 30(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, access to the documents is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 December 2022

Reasons for Decision

Background to review

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

In relation to the Victorian Kangaroo Harvest Management Plan 2020 (the 2020 Plan) all documents relating to:

- The nature and extent of all public and stakeholder consultation undertaken in the development of the 2020 Plan, including details of the times and dates of those consultations and the stakeholders consulted.
 - The date upon which the 2020 Plan was first made available to the Victorian public.
 - The date the 2020 Plan was submitted for approval under the *Environmental Biodiversity Conservation Act 1999* (EPBC Act) as a Wildlife Trade Operation.
 - The date upon which the Minister declared the approval of the 2020 Plan as a Wildlife Trade Operation under the EPBC Act.
 - Copies of the following documents referred in the Review and Evaluation section of the 2020 Plan including:
 - Any and all reports or records (including any minutes of meetings) that document the nature and extent of all public and stakeholder consultation that took place both prior to and following the commencement of the Plan) and the outcome of those consultations
 - Any and all reports evaluating and/or assessing the Plans effectiveness (the impact of the program and success against its goals and objectives) and its efficiency (how processes, including governance and decision-making, are operating, and other measures such as costs and benefits) in relation to the 2020 Plan
 - Any and all reports evaluating those aspects of the program that sit outside the EPBC Act approval (e.g. cost benefit analysis, effectiveness of governance arrangements, and administrative efficiency) in relation to the 2020 Plan
 - Any and all reports assessing the sustainability and/or economic viability of the program and/or the commercial kangaroo industry in Victoria.
 - A copy of what is referred to in the 2020 Plan as an Annual Compliance Plan.
 - All documentation regarding the Departments rationale for not specifying a minimum weight for kangaroos killed under the 2020 Plan.
2. The Agency identified documents falling within the scope of the request as part of its original decision dated 25 October 2021 and released them to the Applicant in full.
 3. On 11 January 2022, the Agency purported to make a new decision in which it identified additional documents relevant to the Applicant's request, and granted access to 66 pages in full and refused access to 32 pages in full under section 35(1)(a) (**second decision**). Personal affairs information was excluded from the terms of the Applicant's request with their agreement. I have treated the Agency's second decision as a submission for the purpose of this review.

Complaint concerning adequacy of document searches

4. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches. In accordance with section 61B(3), these concerns were addressed as part of this review.
5. Based on the Agency's second decision and the Applicant's response, I am satisfied the Agency undertook a thorough and diligent search for documents. Accordingly, I consider the Applicant's

complaint has been fully pursued and there is no basis for the making of further enquiries or the taking of further action under the FOI Act.

Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's fresh decision to refuse access to two documents in full.
7. During the review, the Agency advised it also seeks to rely on section 28(1)(ba) to refuse access to the documents in full.
8. The Applicant does not seek access to personal affairs information of third parties, therefore this information is considered irrelevant for the purpose of section 25, which is discussed below.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. While the FOI request was made to the Agency, the Agency advises the documents were prepared by or for the Department of Jobs, Precincts and Regions (**DJPR**).
11. For this reason, during the review, OVIC staff consulted with DJPR regarding the documents and the exemptions claimed by the Agency. In relation to Document 1, DJPR submits sections 28(1)(c) and 30(1) apply. In relation to Document 2, DJPR submits sections 28(1)(b) and 30(1) apply.
12. Given the additional exemptions relied on by the Agency and DJPR's submission during the review, the Applicant was also invited to provide OVIC with additional submissions in support of their review application noting the change in exemptions relied upon.
13. I have considered all communications and submissions received from the parties and DJPR throughout the review.
14. 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.
15. 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.
16. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'. This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

Documents subject to review

17. I have examined a copy of the two documents subject to review.
18. Document 1 is titled, '[Title]' and is three pages long. It appears to be in draft form and is not dated.
19. Document 2 is a report dated January 2021 and titled, '[Title]'. It is 29 pages long and is referenced in Document 1 as an attachment to that draft document. I accept from the face of the document and the content of Document 1 that Document 2 was commissioned by DJPR and was prepared by an

external consultant. I also accept information provided to OVIC by the Agency and DJPR that Document 1 was drafted by DJPR and along with Document 2 was provided in confidence by DJPR to the Agency.

Consultation with DJPR

20. Given the role of DJPR in relation to the creation of the documents, it was invited to provide information about how the documents came into being and its views as to the application of any applicable exemptions under the FOI Act.
21. On 21 October 2022, DJPR provided information in relation to each of the documents and submitted Document 1 is exempt under section 28(1)(c) and/or 30(1) and Document 2 is exempt under section 28(1)(b) and/or 30(1).

Review of exemptions

22. I understand the exemptions now relied on by the Agency are sections 28(1)(b), 28(1)(ba), 28(1)(c), 28(1)(d) and 35(1)(a) to one or both of the documents.
23. As referenced above, noting the submission made by DJPR following OVIC's consultation with that agency, and given DJPR's role in preparing and commissioning the documents, I consider it is appropriate to first consider the application of section 30(1) to the documents.

Section 30(1) – Internal working documents

24. 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.
25. The exemption does not apply to purely factual material in a document.¹
26. I must also be satisfied releasing this information is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.²
27. The Agency submits it would be contrary to the public interest to disclose information in the documents as the information was communicated in confidence and relates to issues that may be reported to the Cabinet. The Agency further states that as the documents are in draft, disclosure would lead to unnecessary debate.
28. Further, I note DJPR also considers disclosure of the documents would be contrary to the public interest as they contain information to be considered by the Cabinet and that the matters at hand have yet to be decided. DJPR also considers disclosure would likely have a prejudicial impact on upcoming consultation regarding the issue under consideration in the documents.

¹ Section 30(3).

² *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

Do the documents 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?

29. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person engaged by or on behalf of an agency, whether or not they are subject to the provisions of the *Public Administration Act 2004* (Vic).
30. In this case, I accept the author of Document 1 would have been an employee of DJPR. Further, the author of Document 2 is an external consultant engaged by DJPR to prepare the report. In both cases, I am satisfied each is an officer of an agency for the purpose of section 30(1).
31. Having reviewed the content of Document 1 and Document 2 (the latter being an attachment to Document 1), I am satisfied both documents disclose matter in the nature of opinion, advice and recommendations prepared by an officer and constitute consultation that has taken place between Agency and DJPR officers with the expectation that the documents would be provided to the relevant Minister at a future point in time.
32. While the documents contain some factual information, I consider it is arguably intertwined with material in the nature of opinion, advice and recommendation given it provides necessary context to the substantive issue discussed in the documents and in this sense is not 'purely factual' in nature.

Were the documents 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?

33. Having reviewed the documents and considered the submissions of the Agency and DJPR, I am satisfied the documents were made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency, namely in relation to the development of government policy.

Would disclosure of the documents be contrary to the public interest?

34. In deciding if release 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.
35. In doing so, I have given consideration to the following 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 their creation;
 - (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 a document 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 an agency would not otherwise be able to explain upon disclosure of the documents;

³ *Hulls v Victorian Casino and Gambling Authority* [1998] 12 VAR 483.

- (e) 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
 - (f) 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.
36. As stated above, I am satisfied the documents were prepared and commissioned by DJPR and provided in confidence to the Agency, for example, for the purpose of inter-departmental consultation on the issue under consideration.
37. Having reviewed Document 1, I am satisfied it is a draft briefing to a Minister and references a decision of a Cabinet subcommittee and future consideration by that subcommittee of the issue under consideration.
38. I am also satisfied that Document 2, while a separate document, forms part of Document 1. As such, I have considered the two documents as a single document for the purpose of my review.
39. Having regard to the overall context and purpose of the document and the stage of the policy development process, I am satisfied disclosure of the document at this time would be contrary to the public interest for the following reasons:
- (a) The issue under consideration is indicated to be a sensitive one in Document 1 and I agree the broader context giving rise to the documents and the development of policy in relation to the culling of kangaroos is sensitive. Although I acknowledge there is a public interest in transparency regarding the development of government policy and decisions taken by government in relation to the management and welfare of wildlife, including the culling of kangaroos.
 - (b) I am satisfied the documents concern the development of government policy and reflect that process at a relatively early stage prior to any concluded position being reached by the responsible agency (DJPR), the relevant Minister, or future anticipated deliberation or decision by the Cabinet. I have given considerable weight to this factor in the particular circumstances of this matter and the context of the documents as discussed below.
 - (c) Document 1 references a decision of a Cabinet subcommittee and an anticipated future Cabinet submission in relation to the issue under consideration. If looked at in relation to the exemption under section 28(1)(d), this small amount of information would be exempt from release under section 28(1)(d). I consider this factor supports the view the content of the document is sensitive given its connection to a Cabinet decision making process that is not yet complete.
 - (d) Accordingly, I accept the policy development process is intended to culminate in a submission being placed before the Cabinet and a final decision being made on possible options canvassed in the documents. I also accept the document as a whole is a draft of a briefing for the relevant Minister on an issue that Document 1 states will be put to a subcommittee of the Cabinet for its consideration at a future point. If looked at in relation to the exemption under section 28(1)(ba), the document would likely be exempt from release under section 28(1)(ba). As discussed in paragraph (c) above, I consider this factor supports the view the content of the document is sensitive given its connection to a Cabinet decision making process that is not yet

complete. Although, it is not necessary for me to determine this point conclusively in relation to the application of section 30(1).

- (e) In my view, disclosure of the document as a whole in its current form, would give merely a part explanation as to the issue under consideration, particularly prior to future anticipated deliberation or a decision of the Cabinet. In this regard, I consider it is reasonably likely the views in the document would have been or will be informed by further consultation, review or policy development by DJPR.
- (f) Similarly, I have given consideration to the impact of disclosing the document as a whole in draft form, given it does not represent a final position or decision reached by the Agency or the Cabinet at the conclusion of a policy development or decision making process.
- (g) While I accept there is a strong 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, I do not consider disclosure of the draft document, which was provided to the Agency by DJPR (most likely for the purpose of inter-departmental consultation) would be in the public interest given the early stage of the policy development process, and the future anticipated deliberation or a decision by the Cabinet.

40. Accordingly, I am satisfied the document as a whole is exempt from release under section 30(1).

Section 25 – Deletion of exempt or irrelevant information

- 41. 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.
- 42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
- 43. I have considered the effect of deleting exempt information from the document. I am satisfied it is not practicable to delete the exempt information as to do so would render the document devoid of substantive meaning.

Conclusion

- 44. On the information before me, I am satisfied the document is exempt from release under section 30(1). As such, I do not consider it is necessary to determine whether the other exemptions relied on and submitted by the Agency and DJPR are established, subject to my comments regarding sections 28(1)(ba) and 28(1)(d) above.
- 45. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to the document is refused in full.

⁴ *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].

⁵ *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

46. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁶
47. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
49. 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.
50. 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.⁹

When this decision takes effect

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

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and 50(3FA).