

## Notice of Decision and Reasons for Decision

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Applicant: 'DK4'  
Agency: Department of Jobs, Precincts and Regions  
Decision date: 26 July 2021  
Exemption considered: Section 30(1)  
  
Citation: 'DK4' and Department of Jobs, Precincts and Regions (Freedom of Information) [2021] VICmr 221 (26 July 2021)

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FREEDOM OF INFORMATION – Minister briefing – Ministerial Brief – advice prepared – disclosure not contrary to the public interest

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 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.

My decision on the Applicant's request differs from the Agency's decision in that I have decided the exemption in section 30(1) does not apply to Document 6.

As I am satisfied it is practicable to provide an edited copy of Document 6 with irrelevant information deleted in accordance with section 25, I have granted access to the document in part.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
26 July 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  1. Brief to the Minister for Resources, [brief number], Meeting with [third party company].
  2. Brief to the Minister for Resources, [brief number], Meeting with [third party organisation].
  3. Brief to the Minister for Resources [brief number], Meeting with [third party organisation].
  4. Brief to the Minister for Resources [brief number], Roundtable Meeting with [third party organisation].
  5. Brief to the Minister for Resources, [brief number], Consultation with Minister for Planning for [named mining company] work plan variation
  6. Brief to the Minister for Resources, [brief number], [named organisation] Boardroom Lunch.
  7. Brief to the Minister for Resources, [brief number], Victorian Gas Program Progress Report No. 5.
  8. Brief to the Minister for Resources, [brief number], Public Release of Historical Technical Data on Exploration Activity in Victoria.
2. In its decision, the Agency identified eight documents falling within the terms of the Applicant's request and granted access to the documents in part relying on the exemptions in sections 30(1), 33(1), 34(4)(a)(ii) and 35(1)(b). 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.

### Fresh decision

4. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
5. On [date], the Agency made a fresh decision in which it determined to release further information in the documents. Specifically, the Agency no longer relies on the exemptions in sections 34(4)(a)(ii) and 35(1)(b) to refuse access to the documents.
6. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
7. In their review application, the Applicant stated that they do not seek a review of the Agency's application of section 33(1) to the documents. Therefore, my review will only concern the Agency's application of section 30(1) to Document 6.
8. I have examined a copy of the document subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties.
11. 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.
12. 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 section 30(1)

13. 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.
14. The exemption does not apply to purely factual material in a document.<sup>1</sup>
15. The starting point under the FOI Act is that documents are to be released unless an agency or an affected third party can demonstrate there are proper reasons to refuse access to the requested documents in accordance with the FOI Act. As such, the FOI Act intends the default position is for transparency in government processes and decision making.
16. The Agency relied on section 30(1) to exempt from release a small amount of information on page 7 of Document 6.
17. Having reviewed the information, I am satisfied it is in the nature of opinion and advice, and was prepared by an Agency officer in the course of briefing the Minister for Resources in preparation for a stakeholder event.
18. Therefore, I must consider whether release of the information to which access was refused would be contrary to the public interest. In doing so, 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.
19. In this case, 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 document and the broader context giving rise to the creation of a document;
  - (c) the stage of a decision or status of policy development or a process being undertaken at the time a communication was made;
  - (d) whether disclosure of a document would be likely to inhibit communications between Agency officers or Ministers, essential for an Agency or Minister to make an informed and well-considered decision or participate fully and properly in a process in accordance with their statutory functions;
  - (e) 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 the agency or Minister would not otherwise be able to explain upon disclosure of the document;

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

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

- (f) the public interest in the community being better informed about the way in which an agency or Minister carries out statutory functions, including deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny; and
- (g) the impact disclosure would have on the efficient and economical conduct of government, in particular, the deliberative processes of high levels of government in relation to sensitive issues, and the preservation of confidentiality to promote the giving of full and frank advice.<sup>3</sup>

20. In its submissions, the Agency submits:

This opinion of a potential outcome was provided to the Minister by the brief author prior to a meeting in order for the minister have appropriate information to hand at that time.

This is speculation on potential outcomes of the fee review, which I still current and ongoing. The release of this information before any outcome have been determined is not in the public interest as it would:

- Cause confusion as to whether any changes have actually occurred; and
- Potentially lead to argumentative or antagonistic behaviour from interested parties regarding a decision which has not yet been made or finalised as in this instance the opinion to a potential outcome...

Additional advice from the program area is that the sentence could be read as pre-emptive, rather the speculation that it is, as only one potential outcome is listed...the ability for the individuals to add meaning or interpret that as the preferred outcome of the department is substantial.

21. Having considered the exempt information and the Agency's submissions, I am not satisfied it would be contrary to the public interest to disclose the advice, for the following reasons:

- (a) I accept the canvassing of advice by Agency officers that reflects possible outcomes is an important aspect of an agency's decision-making process. However, I do not consider it necessarily follows disclosure of a document before a final outcome or position is reached, as in this matter, would inevitably be contrary to the public interest.
- (b) I accept the advice was provided for the consideration of the Minister and is subject to ongoing discussion. Nevertheless, having read the sentence under review, I consider it is speculative in nature provided for the stakeholder meeting event. I fail to see how it could be misconstrued as being anything but a timely briefing note, rather than an informed recommendation to be adopted. Nor is there any information before me to suggest that the advice communicated was not an accurate reflection or statement made at the time of the stakeholder event.
- (c) In such circumstances, I consider the Applicant, along with members of the public, are capable of understanding the communication was produced at a particular point in time and may not necessarily represent a final decision reached by the Agency on the matter. Consequently, I do not accept disclosure of the documents would necessarily cause any confusion or lead to a mischievous interpretation.
- (d) Further, I consider the ability of an individual to add meaning, or incorrectly interpret the information, or speculate on the relevant issue is a matter that may occur regardless of whether or not the information is disclosed. Whether such speculation can be properly characterised as one that is 'misleading' will often be a matter of subjective opinion. In any case, I consider it is open to the Agency to provide a further explanation or clarification to mitigate any risk of confusion regarding the matter.

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<sup>3</sup> *Secretary, Department of Justice v Osland* [2007] VSCA 96.

22. Weighing the public interest factors, I am satisfied disclosure of the information to which the Agency refused access would not be contrary to the public interest.
23. Accordingly, I am satisfied Document 6 is not exempt from release under section 30(1).

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

24. 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.
25. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>4</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>5</sup>
26. The Applicant does not seek review of the Agency’s application of section 33(1). Therefore, personal affairs information in the document is to be treated as irrelevant information under section 25.

### **Conclusion**

27. On the information before me, I am satisfied Document 6 is not exempt from release under section 30(1).
28. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25, I have granted access to Document 6 in part.

### **Review rights**

29. 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>6</sup>
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>8</sup>
32. 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.
33. 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>9</sup>

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<sup>4</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>5</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].

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

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> Sections 50(3F) and (3FA).

***When this decision takes effect***

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