

## Notice of Decision and Reasons for Decision

---

Applicant:	'DM8'
Agency:	Department of Jobs, Precincts and Regions
Decision date:	13 August 2021
Exemption considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 119(2) of the <i>Mineral Resources (Sustainable Development) Act 1990</i> (Vic)
Citation:	'DM8' and Department of Jobs, Precincts and Regions (Freedom of Information) [2021] VICmr 243 (2 July 2021)

---

FREEDOM OF INFORMATION – ecology assessment – *Minerals Resources (Sustainable Development) Act 1990* – authority holder – secrecy provision

All reference 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 decision to refuse access to a document 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 the document is exempt under section 38 of the *Freedom of Information Act 1982* (Vic) in conjunction with section 119(2) of the *Minerals Resources (Sustainable Development) Act 1990* (Vic) (**MRSD Act**).

My reasons for decision follow.

Sven Bluemmel  
Information Commissioner

13 August 2021

## Reasons for Decision

### Background to review

The Applicant made a request to the Agency seeking access to [an ecologist's report on the flora and fauna of a named Quarry].

1. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to the document in full relying on the exemption in section 38 of the FOI Act in conjunction with section 119 of the MRSD Act.
2. 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.
4. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. 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 38 – Documents to which a secrecy provision of an enactment applies***

9. A document is exempt under section 38 if:
  - (a) there is an enactment in force;
  - (b) that applies specifically to the kind of information contained in the document; and
  - (c) the enactment prohibits persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exception or qualifications).
10. For section 38 to apply, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

#### ***Application of the secrecy provision***

11. The Agency relied on section 38, in conjunction with section 119(2) of the MRSD Act, to refuse access to the document in full.

12. Section 119 of the MRSD Act provides:

**Secrecy**

- (1) This section applies to a person who has at any time–
  - (a) exercised a power or discharged a function under this Act or the regulations; or
  - (b) been employed for the purposes of, or in connection with, the administration of this Act.
- (2) A person to whom this section applies must not divulge or communicate to any person or publish any information obtained by him or her from an authority holder in the course of his or her official duties unless the divulgence, communication or publication is made–
  - (a) with the written consent of the authority holder or the Minister; or
  - (b) in connection with the administration of this Act; or
  - (c) for the purposes of any legal proceedings under this Act.

Penalty: 100 penalty units.

...

- (4) In this section–  
“authority holder” has the same meaning as in section 77U.

13. Section 77U provides:

“authority” means–

- (a) An exploration license, a mining license, a prospective license or a retention license under Part 2; or

\* \* \* \*

- (c) An extractive industry work authority;

“authority holder” means the holder of an authority.

***Is there an enactment in force?***

14. The term ‘enactment’ is defined in section 5 of the FOI Act as meaning an Act or instrument (including rules, regulations, local laws or by-laws) made under an Act.

15. I am satisfied section 119 of the MRSD Act is an enactment in force for the purposes of section 38.

***Does the prohibition against disclosure in the enactment apply specifically to the kind of information in the document?***

16. The document is ecology report, compiled by a third party, on behalf of [the authority holder].The report has been provided to the Agency as part of an application to vary a work plan.

17. The Agency submits:

The document lodged by [the authority holder] as part of their application to vary their work plan include the report requested by the applicant. The work plan variation is still at the application stage and has yet been approved or endorsed by [the Agency] and the relevant authorities.

Therefore, the requested document was obtained by [the Agency] in the course of official duties, those duties being the management of the work authority issued to [the authority holder], including their application for a variation to that authority.

18. I am satisfied the document amounts to information obtained by the Agency from an authority holder during the course of its official duties, being the assessment of the authority holder's application to vary a work plan. I note the Agency's advice that the application is in its early stages, yet to be approved.
19. Further, section 119(2) of the MRSD imposes strict confidentiality requirements on Agency officers, among others, which apply in all but certain limited circumstances.

#### ***Exceptions to the disclosure of information obtained by an authority holder***

20. Section 119(2) of the MRSD Act prohibits the communication or publication of the type of information to which it applies. It is an offence to disclose information in contravention of that prohibition.
21. However, section 119(2) is subject to exceptions in sections 119(2)(a-c) of the MRSD Act, which permits the release of information obtained from an authority holder in certain circumstances. In particular, disclosure is permitted with the consent of the relevant authority holder.
22. In this case, the Agency consulted with the relevant authority holder, who did not consent to the disclosure of the information in the document.
23. I am satisfied there is no evidence before me to support the exceptions in section 119(2)(a-c) apply.

#### ***Conclusion on section 38***

24. In summary, I am satisfied:
  - (a) the MRSD Act is an enactment in force for the purposes of section 38;
  - (b) information in the document contains specific information described in section 119(2) of the MRSD Act to which there is a prohibition against disclosure; and
  - (c) there are no relevant exceptions that apply in this instance.
25. Accordingly, I have determined the document is exempt under section 38 of the FOI Act in conjunction with section 119(2) of the MRSD Act.

#### ***Deletion of exempt or irrelevant information***

26. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>1</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>2</sup>

---

<sup>1</sup> *Mickelburgh 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>2</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].

28. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the document meaningless.

### **Conclusion**

29. On the information available, I am satisfied the document is exempt under section 38 in conjunction with section 119 of the MRSD Act.
30. As it is not practicable to edit the document to delete exempt information, I have determined to refuse access to the documents in full.

### **Review rights**

31. If the Applicant 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>3</sup>
32. The Applicant has up to 60 days from the date they are given this Notice of Decision to make any such application to VCAT.<sup>4</sup>
33. 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.
34. The Agency is required to notify the Information Commissioner in writing as soon as practicable an application is made to VCAT for a review of my decision.<sup>5</sup>

---

<sup>3</sup> Section 50(1)(b).

<sup>4</sup> Section 52(5).

<sup>5</sup> Sections 50(3F) and (3FA).