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Information Commissioner

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## Notice of Decision and Reasons for Decision

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Applicant: 'BM2'  
Agency: Department of Environment, Land, Water and Planning  
Decision date: 17 April 2020  
Exemptions considered: Sections 30(1), 35(1)(a)  
Citation: 'BM2' and Department of Environment, Land, Water and Planning  
(Freedom of Information) [2020] VICmr 117 (17 April 2020)

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FREEDOM OF INFORMATION – agency correspondence – wind farms – wind farm proposals

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.

I am not satisfied the documents are exempt under sections 30(1) or 35(1)(a).

As I am satisfied it is practicable to delete irrelevant information in the documents in accordance with section 25, I have determined to grant access to the documents 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

17 April 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to documents detailing communications relating to Victorian Wind Farms.
2. In consultation with the Agency, the Applicant agreed to amend the request to the following documents:

All email correspondence sent or received by [named individual] for the following wind farm proposals, relating to any matter from [date range], Dundonnell wind farm, Mt Fyans wind farm, Golden Plains wind farm, Mortlake South windfarm, Hawkesdale wind farm, Woolsthorpe wind farm, Willatook windfarm, Macarther windfarm.

3. In its decision, the Agency identified 45 documents falling within the terms of the Applicant's request. It decided to grant access to 44 documents in part and refused access to one document in full.
4. The Agency relied on the exemptions in section 30(1), 33(1) and 35(1)(a) to refused access to documents. The Agency's decision letter sets out the reasons for its decision.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. During the review, the Applicant advised they do not seek review of information the Agency exempted under section 33(1). Therefore, my review concerns the Agency's application of sections 30(1) and 35(1)(a) only.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application;
  - (c) the Agency's submissions dated 30 January 2020; and
  - (d) all communications between this Office and the Agency and the Applicant.
10. 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.

## Review of exemptions

### Section 30(1)

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.<sup>1</sup>
13. The Agency relied on the exemption in section 30(1) to refuse access to Document 23 in full and Documents 24 and 25 in part.

*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?*

14. Having read the documents, I am satisfied they contain information in the nature of advice, opinion and recommendation.

*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?*

15. I am satisfied the opinions, advice and recommendations in the documents were prepared in the course of, or for the purpose of, the deliberative processes involved in the functions of the Agency. Namely, its functions relating to the administration and management of renewable energy projects in Victoria. Specifically, its responses to matters raised by individuals, lobbyists and/or groups with the Agency.
16. Therefore, I must consider whether disclosure of the advice, opinions and recommendations would be contrary to the public interest in the circumstances. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>2</sup>

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

17. In deciding if release is 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. In doing so, I have given weight to the following factors:<sup>3</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;

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

<sup>2</sup> *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].

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

- (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; 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.
18. The Agency submits the emails were exempted in part or in full as they contain material in the nature of opinion or advice. This information represents the sharing of recommendations, opinion and advice between staff. The views expressed are either speculative or preliminary in nature and do not reflect the final view of the Agency. Release of these documents would be contrary to the public interest as they could be misinterpreted as presenting a final position of the Agency.
19. Further, it is vital for effective decision making that Agency officers have the freedom to exchange information and ideas as part of an overall deliberative process.
20. On balance, I have determined it would not be contrary to the public interest to release the opinions, advice and recommendations, for the following reasons:
- (a) Although I acknowledge the Agency has carefully considered the documents in order to release information that reflects a final position or view of the Agency, I do not consider the information exempted by the Agency is particularly sensitive such that its release would undermine the development of future projects or otherwise diminish the Agency's deliberative processes.
  - (b) I note the Agency's view disclosure of the documents 'could be misinterpreted as representing a final position'. In my view, the public is capable of understanding such advice, opinions or recommendations are provided at a particular point in time and may be one of a number of sources of advice contributing to the Agency's overall assessment of an issue. I consider it would be open to the Agency to provide an explanation as to the current position of the Agency regarding the matter.
  - (c) I also note the Agency's submission regarding the importance of its officers to have the freedom to exchange advice, opinions and recommendations. However, I consider greater transparency can improve the provision of such advice.<sup>4</sup>
  - (d) In any case, it is arguable Agency officers are responsible for ensuring advice provided is accurate, complete and properly considered on matters central to its governmental functions. It is the role of government, supported and informed by analysis and advice undertaken by departments and agency officers, to make decisions and act in the best interests of the public – a role that is necessarily the subject of public scrutiny.

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<sup>4</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869.

21. Accordingly, I am not satisfied Documents 23, 24 and 25 are exempt under section 30(1).

**Section 35(1)(a)**

22. A document is exempt under section 35(1)(a) if two conditions are satisfied:

- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
- (b) the information would be exempt matter if it were generated by an agency or Minister.

23. The Agency applied section 35(1)(a) in conjunction with section 30(1) to refuse access to Document 1 in part.

24. Section 30(1) concerns 'internal working documents' of an agency. However, section 35(1)(a) has the effect that, if the information was communicated to an agency from an outside source, so long as the requirements of section 30(1) are met, those communicating the information in confidence are 'deemed' to be officers of the agency and the material will be assessed as if it were generated by the agency. If the material is capable of being exempt under section 30(1), the exemption under section 35(1)(a) will be made out.<sup>5</sup>

*Was the information communicated in confidence?*

25. When determining whether the information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>6</sup>

26. Having reviewed the document, there is nothing to indicate the information has been provided in confidence. For example, there are no protective markings or language to imply it is communicated in confidence. Rather, the information appears to be administrative in nature and does not disclose highly sensitive aspects of the project. Therefore, I am not satisfied this information is 'information or matter communicated in confidence' to the Agency for the purpose of section 35(1)(a).

*Would the information be exempt matter if it was generated by the Agency under section 30(1)?*

27. Even if I were satisfied the information was communicated in confidence, for the reasons provided above, I am not satisfied it would be exempt under section 30(1).

28. Accordingly, I am not satisfied Document 1 is exempt under section 35(1)(a).

**Deletion of exempt or irrelevant information**

29. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

30. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>7</sup> and the effectiveness of the deletions. Where

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<sup>5</sup> *Casey City Council v Environment Protection Authority* [2010] VCAT 453 at [28]-[30].

<sup>6</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>7</sup> *Mickelborough 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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>8</sup>

31. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is practicable to do so, providing an edited copy of the documents would not require substantial time and effort, and they would retain meaning.

### **Conclusion**

32. On the information before me, I am not satisfied the documents are exempt under sections 30(1) or 35(1)(a).
33. As I am satisfied it is practicable to delete irrelevant information in the documents (being names, position titles, emails and direct telephone numbers) in accordance with section 25, I have determined to grant access to the documents in part.
34. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

35. 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>9</sup>
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
38. 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.
39. 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>12</sup>

### **Third party review rights**

40. As I have decided to release information the Agency determined was provided in confidence under section 35(1)(a) and I am satisfied it is practicable to notify that person of their review rights, they must be notified of my decision<sup>13</sup> and their right to apply to VCAT for a review within 60 days from the date they are given notice.<sup>14</sup>

### **When this decision takes effect**

41. For that reason, my decision does not take effect until that 60 day period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

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<sup>8</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].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).

<sup>13</sup> Section 49P(5).

<sup>14</sup> Section 50(3AB).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	3	Released in part Sections 33(1), 35(1)(a)	<b>Release in full</b> With personal affairs information removed under section 25	<b>Section 35(1)(a):</b> For the reasons set out above, I am not satisfied the document is exempt under section 35(1)(a) as I am not satisfied the information is communicated on confidence nor do I consider the information is exempt matter under section 30(1).  <b>Section 25:</b> Personal affairs information is not sought by the Applicant and is irrelevant to my review. I am satisfied it is practicable to delete irrelevant information in the documents (being names, position titles, emails and direct telephone numbers) in accordance with section 25.
2.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
3.	[date]	1	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
4.	[date]	3	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
5.	[date]	1	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
6.	[date]	14	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
7.	[date]	4	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
8.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
9.	[date]	1	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
10.	[date]	4	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
11.	[date]	3	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
12.	[date]	7	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
13.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
14.	[date]	4	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
15.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
16.	[date]	4	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
17.	[date]	1	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
18.	[date]	5	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
19.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
20.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
21.	[date]	3	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
22.	[date]	29	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
23.	[date]	1	Refused in full Section 30(1)	<b>Release in full</b> With personal affairs information removed under section 25	<b>Section 30(1):</b> For the reasons set out above, I am not satisfied it would be contrary to the public interest to release the advice, opinions or recommendations in the circumstances. Accordingly, the

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					document is not exempt under section 30(1).
24.	[date]	8	Released in part Section 30(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 23 above.
25.	[date]	32	Released in part Section 30(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 23 above.
26.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
27.	[date]	5	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
28.	[date]	4	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed	See comments in Document 1 above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				under section 25	
29.	[date]	1	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
30.	[date]	1	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
31.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
32.	[date]	5	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
33.	[date]	16	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
34.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
35.	[date]	3	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
36.	[date]	3	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
37.	[date]	4	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
38.	[date]	1	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.

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Document No.	Date of Document	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
39.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
40.	[date]	3	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
41.	[date]	3	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
42.	[date]	6	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
43.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.

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<b>Document No.</b>	<b>Date of Document</b>	<b>Number of Pages</b>	<b>Agency's Decision</b>	<b>OVIC Decision</b>	<b>OVIC Comments</b>
44.	[date]	2	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.
45	[date]	1	Released in part Section 33(1)	<b>Release in full</b> With personal affairs information removed under section 25	See comments in Document 1 above.