

## Notice of Decision and Reasons for Decision

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Applicant:	'FP6'
Agency:	Department of Energy, Environment and Climate Action
Decision date:	22 March 2024
Exemptions and provisions 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:	'FP6' and Department of Energy, Environment, and Climate Action (Freedom of Information) [2024] VICmr 28 (22 March 2024)

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

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 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 from release under section 38 of the FOI Act in conjunction with section 119 of the *Minerals Resources (Sustainable Development) Act 1990* (Vic) (**MRSD Act**).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, I have determined to refuse grant access to the document in full.

Please refer to page 6 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**). If review is not sought at VCAT, this decision takes effect when the review period expires.

My reasons for decision follow.

Sean Morrison  
Information Commissioner

22 March 2024

## Reasons for Decision

### Background to review

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

The most recent endorsed work plan for sand quarry at [address] with the Work Authority number [work authority number].
2. The Applicant subsequently confirmed they were seeking access to:

The approved work authority variation for [work authority number] dated [date]. This is not an “endorsed” work authority, rather an “approved” work authority.
3. The Agency identified one document falling within the terms of the Applicant’s request and refused access to it in full under section 38 of the FOI Act in conjunction with section 119 of the MRSD Act. 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.

### *Initial view*

5. Where possible, I seek to informally resolve matters consistent with the requirements of performing my functions with as little formality as possible.
6. In this matter, OVIC staff provided the Applicant with an initial view that the document is likely exempt from release under section 38 of the FOI Act in conjunction with section 119 of the MRSD Act. In response, the Applicant advised they did not agree with this initial assessment and sought a formal decision.

### *Review*

7. I have examined a copy of the document 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 the submissions received from the parties.
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.
11. 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 exemption

*Section 38 - Documents to which secrecy provisions of enactments apply*

12. A document is exempt under section 38 if:
  - (a) there must be an enactment in force;
  - (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
  - (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications)
  
13. The Agency applied section 38 in conjunction with section 119 of the MRSD Act to refuse access to the document in full.
  
14. Section 119 of the MRSD Act provides:
  - (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;
    - (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 purpose of any legal proceedings under this Act.

Penalty: 100 penalty units.
  
  - (3) The Minister may only consent under subsection (2)(a) if he or she is of the opinion that the authority holder is unreasonably withholding consent.
  
  - (4) In this section—

**authority holder** has the same meaning as in section 77U.
  
15. Section 77U defines the term 'authority' to mean:
  - (a) an exploration licence, a mining licence, a prospecting licence or a retention licence under Part 2; or
  - \*\*
  - (c) an extractive industry work authority;

*authority holder* means the holder of an authority.

*Is there an enactment in force?*

16. 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.
17. I am satisfied the MRSD Act is an enactment in force for the purposes of section 38.

*Does the enactment apply specifically to the kind of information in the documents?*

18. In the quarry industry, a license is known as a work authority and is required before starting works at a quarry.<sup>1</sup> A work authority gives the holder the right to extract specified earth resources and a work authority must be obtained before any site activities commence, except in specified situations.<sup>2</sup> A work authority is only granted after a work plan is approved, amongst some other requirements.<sup>3</sup>
19. A work plan variation is a document that seeks approval for changes in work that are not consistent with an existing approved work plan.<sup>4</sup>
20. The document subject to review is a work authority work plan variation for a quarry and was submitted by a Work Authority holder.
21. Accordingly, I am satisfied the document contains information obtained by the Agency from an authority holder during the course of the Agency's official duties, and as such, falls within the scope of section 119(2) of the MRSD Act.
22. Accordingly, I am satisfied the enactment applies specifically to the kind of information in the documents subject to review.

*Does the enactment prohibit persons from disclosing the information in the document(s)?*

23. Section 119(2) of the MRSD Act prohibits the communication or publication of the type of information to which it applies, and it is an offence to disclose information in contravention of the prohibition.
24. However, section 119(2) of the MRSD Act 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.

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<sup>1</sup> See <https://resources.vic.gov.au/licensing-approvals/extractives-industry-work-authority>

<sup>2</sup> See <https://resources.vic.gov.au/licensing-approvals/extractives-industry-work-authority/work-approval-process-for-extractive-industries>.

<sup>3</sup> See <https://resources.vic.gov.au/licensing-approvals/extractives-industry-work-authority>.

<sup>4</sup> See [https://resources.vic.gov.au/\\_data/assets/pdf\\_file/0010/458605/Preparation-of-Work-Plans-and-Work-Plan-Variations-Guideline-for-Extractive-Industry-Projects.pdf](https://resources.vic.gov.au/_data/assets/pdf_file/0010/458605/Preparation-of-Work-Plans-and-Work-Plan-Variations-Guideline-for-Extractive-Industry-Projects.pdf).

25. The Applicant submits:

We believe the exception in 2(a) of section 119 should apply. The Minister needs to release a copy of the work authority and workplan to the residents if the authority is unreasonably withholding consent. It is unreasonable for a [descriptor] operating a sand quarry in such close proximity to residential premises to rely on this secrecy provision to withhold consent to release a copy of the decades old work plan...

26. In this case, the Agency consulted with the current authority holder, who objected to the disclosure of the document.
27. While disclosure may be authorised by with written consent of a Minister under section 199(2)(a) of the MRSD Act, there is no information before me that the Minister has consented to disclosure and any such disclosure would be outside of the FOI Act, as opposed to under the FOI Act.
28. As such, I am satisfied there is no evidence before me to support the exceptions in section 119(2)(a)-(c) apply and I am satisfied that the enactment prohibits the Agency from disclosing the document.

*Conclusion on section 38*

29. In summary, I am satisfied:

- (a) the MRSD Act is an enactment in force for the purposes of section 38;
- (b) the document contains specific information described in section 119(2) of the MRSD Act; and
- (c) there is a prohibition against disclosure and there are no relevant exceptions that apply in this instance.

30. Accordingly, I am satisfied the document is exempt under section 38 of the FOI Act in conjunction with section 119(2) of the MRSD Act.

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

31. 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.
32. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>5</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>6</sup>

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<sup>5</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>6</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], [155].

33. 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**

34. On the information before me, I am satisfied the document is exempt from release under section 38 in conjunction with section 119 of the MRSD Act.
35. 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 is refused in full.

**Timeframe to seek a review of my decision**

36. If either party to this review is not satisfied with my decision, they are entitled to apply to **VCAT** for it to be reviewed.<sup>7</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
39. 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.
40. 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>10</sup>

**When this decision takes effect**

41. 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.

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<sup>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

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

<sup>10</sup> Sections 50(3F) and 50(3FA).