

## Notice of Decision and Reasons for Decision

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Applicant:	'FR1'
Agency:	Department of Premier and Cabinet
Decision date:	1 July 2024
Exemption considered:	Section 38
Citation:	'FR1' and Department of Premier and Cabinet (Freedom of Information) [2024] VICmr 41 (1 July 2024)

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FREEDOM OF INFORMATION – Cultural Heritage Management Plans – *Aboriginal Heritage Act 2006* (Vic) – 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 documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision and no further information is to be released.

I am satisfied the documents are exempt in full under section 38 of the FOI Act in conjunction with section 146(2) of the *Aboriginal Heritage Act 2006* (Vic) (**Aboriginal Heritage Act**).

Please refer to page 6 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Sean Morrison  
Information Commissioner

1 July 2024

## Reasons for Decision

### Background to review

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

A copy of the Cultural Heritage Management Plans that were not approved on the following dates...
2. The requested dates were sourced from a previous decision of the Agency that was provided to the Applicant on [date].
3. The Agency identified six documents falling within the terms of the Applicant's request and refused access in full under section 38 of the FOI Act in conjunction with section 146(2) of the Aboriginal Heritage 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.
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 relevant 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.
9. 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'.<sup>1</sup> 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.

### *Clarification provided by the Agency about the status of the documents*

10. During the review, the Agency clarified that Document 1 does not exist, as Plan [reference] was created for the purpose of testing whether its internal records management system was operating as intended. I accept the Agency's submission and consider there are only five documents subject to review (Documents 2 to 5).

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

11. The Agency also submitted that its decision letter included an error in that it had mistakenly conveyed to the Applicant that only one Cultural Management Heritage Plan (CMHP) had not been approved at the time of the Applicant’s FOI request. The Agency confirmed during the review that at the time of the Agency’s decision:

- (a) Document 4 had been refused;
- (b) Documents 3 and 6 are two versions of the same CMHP;
- (c) Document 6 had been refused; and
- (d) Document 3 is an amended version of Document 6 that was refused.

12. The following table sets out the timeframe in when the CHMPS were refused, or later approved:

Document number	Plan number	Date received by the Agency	Refusal decision	Approval decision
2	[Number]	[Date]	Refused on [date]	Approved on [date]
3	[Number]	[Date]	Refused on [date]	-
4	[Number]	[Date]	Refused on [date]	-
5	[Number]	[Date]	Refused on [date]	Approved on [date]
6	[Number]	[Date]	Refused on [date]	-

## Review of exemption

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

13. Section 38 provides:

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

14. Therefore, a document is exempt under section 38 when three conditions are satisfied:

- (a) there is a section of a Victorian Act (an enactment) that is in force; and
- (b) the enactment applies specifically to information contained in the document; and
- (c) the enactment prohibits specific persons from disclosing the specified information.

*Is there an enactment in force?*

15. The Aboriginal Heritage Act is an enactment in force.

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

16. For section 38 to apply, the secrecy provision must refer specifically to the kind of information in the document.
17. Section 146(2) of the Aboriginal Heritage Act provides:

The Secretary must not allow any other person to have access to the Register except—

  - (a) if there is a registered Aboriginal party for the area relating to the request, with the written approval of each registered Aboriginal party for that area; or
  - (b) if there is no registered Aboriginal party for the area relating to the request, with the written approval of the Council.
18. Section 145 of the Aboriginal Heritage Act sets out what information must be recorded in the Register, which relevantly includes:
  - (e) all cultural heritage permits, approved cultural heritage management plans and cultural heritage agreements, including any amendments to those permits, plans or agreements;
19. Under section 145(2) of the Aboriginal Heritage Act:

The Secretary may record in the Register any other information regarding Aboriginal cultural heritage or Aboriginal intangible heritage that the Secretary considers necessary in order to protect or manage that heritage.
20. I am satisfied that Section 146 of the Aboriginal Heritage Act identifies with specificity the kind of information contained in the Register, as section 145 of the Aboriginal Heritage Act sets out all the information that must be recorded on the Register, and as such, is a secrecy provision for the purposes of section 38.
21. The documents subject to review are two approved Cultural Heritage Management Plans (**CHMP**), and three refused CHMPs.
22. Of the five CHMPs subject to review, the Agency submits that Documents 2 and 5 were approved and placed on the Register under section 145(1)(e) of the Aboriginal Heritage Act prior to the receipt of the Applicant's request.
23. The Agency submits that Documents 2 and 5 were listed as Plans not approved in the Agency's previous decision on [date], as previous versions of these Plans had been refused. However, Documents 2 and 5 were approved prior to the receipt of the Applicant's request on [date]. Therefore, the approved versions of these Plans were recorded on the Register under section 145(1)(e) of the Aboriginal Heritage Act. The Agency submits that in any event, the previous versions were also placed on the register under section 145(2) of the Aboriginal Heritage Act, when received by the Agency.
24. The Agency submits that Documents 3, 4 and 6 were placed on the Register by the delegate using their discretion under section 145(2) of the Aboriginal Heritage Act as information contained in these documents relates to 'Aboriginal cultural heritage'.

25. In conducting my review, I have not obtained a copy of the relevant documents. However, the Agency provided an attestation from a Senior Agency officer who has delegated authority from the Secretary to place documents on the Register, attesting that the documents are on the Register.
26. Accordingly, I am satisfied the enactment applies specifically to the documents subject to review.

*Does the enactment prohibit persons from disclosing the information in the documents?*

27. Section 146(1) of the Aboriginal Heritage Act sets out who can access the Register and for what purpose.
28. I am satisfied that section 146(2) of the Aboriginal Heritage Act prohibits the Secretary from allowing any other person to access the Register, other than those listed in section 146(1) of the Aboriginal Heritage Act.
29. On the information before me, the Applicant is unable to access the Register under section 146(1) of the Aboriginal Heritage Act and I am therefore satisfied the enactment prohibits the disclosure of the document.

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

30. 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.
31. Deciding whether it is ‘practicable’ to delete exempt or irrelevant information requires consideration of:
  - (a) the effort involved in making the deletions from a resources point of view;<sup>2</sup> and
  - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.<sup>3</sup>
32. I am satisfied the documents are exempt in full and it is not practicable to provide the Applicant with edited copies with exempt information deleted.

#### **Conclusion**

33. On the information before me, I am satisfied the documents are exempt in full under section 38 in conjunction with section 146(2) of the Aboriginal Heritage Act.

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

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<sup>2</sup> *Mickelborough v Victoria Police* [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>3</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]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.

34. 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>4</sup>
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>5</sup>
36. 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.
37. 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>6</sup>

**When this decision takes effect**

38. 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>4</sup> Section 50(1)(b).

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

<sup>6</sup> Section 50(3FA).