

Notice of Decision and Reasons for Decision

Applicant:	'BI2'
Agency:	Department of Transport (formerly VicRoads)
Decision Date:	24 March 2020
Exemptions considered:	Sections 32(1), 35(1)(b), 30(1)
Citation:	'BI2' and Department of Transport (<i>Freedom of Information</i>) [2020] VICmr 80 (24 March 2020)

FREEDOM OF INFORMATION – investigation documents – Behaviour Change Program – legal professional privilege – dominant purpose – provision of legal advice and services – real prospect of litigation – confidential communications – 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 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.

While I am satisfied certain documents are exempt under sections 30(1) and 35(1)(b), I am not satisfied the documents are exempt under section 32(1).

In relation Documents 2 and 3, I am satisfied these documents are exempt in full.

In relation to Documents 10 and 81, I am satisfied it is practicable to delete exempt information from these documents in accordance with section 25 and have determined to grant access 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

24 March 2020

Reasons for Decision

Background to review

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

Documents pertaining to [program provider] and their employees, [named individual] and [named individual]

 - a. Documents that relate to any claims or allegations against the companies and/or staff
 - b. Documents used to substantiate claims made against the companies and/or staff in the [named individual] investigation, or any other documents used as evidence for the same purpose
 - c. Documents made accessible to VicRoads which may have been used to investigate show cause letters sent to the staff as part of the approval process for the BCP [Behaviour Change Program]
 - d. Any other documents used to make negative claims against the companies and/or its staff
2. In April 2018, the Victorian Government made legislative reforms to change the penalties and licence sanctions, requiring all drink and drug drivers to participate in a Behaviour Change Program (**BCP**). Under the scheme, the Agency is responsible for determining who is qualified to provide this program.
3. Prior to the legislative amendments, the Department of Health and Human Services (**DHHS**) were responsible for managing and approving program providers under the former arrangement, known as the Victorian Accredited Driver Education Program (**VADEP**). The VADEP supported the requirements of the *Road Safety Act 1986* (Vic) in relation to individuals undergoing mandatory licence restoration relating to drug and alcohol driving offences. Only providers approved by DHHS could provide education and assessment services. The Applicant operated an accredited drink driver program under the VADEP and does so currently, under the BCP.
4. In its decision, the Agency identified 116 documents, comprising 843 pages, falling within the terms of the Applicant's request. The Agency relied on the exemption in sections 32(1) and 35(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision. It decided to grant access to 90 documents in full, four documents in part and refuse access to 22 documents in full.
5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

Preliminary view

6. On 15 November 2019, OVIC provided the Agency with the following preliminary view based on available information:
 - (a) In relation to section 32(1), in each instance, the Agency had not provided sufficient information to satisfy me the dominant purpose of the third party documents were to provide legal advice, or the documents subject to review related to pending or contemplated litigation.
 - (b) In relation to section 35(1)(b), in each instance, I was not satisfied the public interest test would be met having regard to: the supplier of the information, the age of the documents and the particular circumstances of the matter. For example, certain information was already in the possession of the Applicant.
7. Having considered the preliminary view, the Agency was invited to provide a further submission, consider making a fresh decision under section 49M(1) or agree to release further information in the

documents without making a fresh decision. It was also open to the Agency to rely on its decision letter and submission already made.

8. By email dated 10 December 2019, the Agency agreed to the release of further information. Subsequently, the Agency withdrew its claim that Documents 45-46 and Documents 56-62 inclusive were exempt under section 32(1). Accordingly, these documents are no longer subject to my review and should be released by the Agency to the Applicant as a priority upon receipt of this decision.
9. I have examined copies of the documents subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submissions dated 14 March 2019 and information provided with the Applicant's review application;
 - (c) the Agency's submissions dated 2 July 2019, 10 December 2019 and 27 December 2019; and
 - (d) all communications between this Office and the Agency and the Applicant.
12. Further, 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.
13. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.

Review of exempt documents and information

Section 32(1)

14. Section 32(1) provides a document is an exempt document 'if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege'.
15. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:²
 - (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
 - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

² *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

(c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

16. Where a question of legal professional privilege arises, the Agency must satisfy me, with evidence or arguments, that the dominant purpose for preparing the document was either for legal advice, or alternatively for anticipated litigation.³ These are referred to as advice privilege and litigation privilege respectively.

17. The Agency stated it consulted with the DHHS, which advised:

- The reports were commissioned for the dominant purpose of informing legal advice which was provided to the client.
- The reports were sought on the basis that, based on previous experience with the subject of the investigations, litigation would be likely.

18. Based on the information before me, it appears the Agency seeks to rely on the proposition the documents are exempt in accordance with litigation privilege.

Investigation reports – Documents 2 and 3

19. The two reports concern complaints received by DHHS regarding the Applicant's driver education program. The first report concerns a complaint received and investigated in [year] (**Document 2**) and the second report concerns various complaints received and investigated in [another year] (**Document 3**).

Common interest privilege

20. The documents came about during the period in which DHHS was responsible for the appointment of service providers under the VADEP. As the current proponent, the Agency requested the documents to assist a decision on the Applicant's renewal application under the BCP.

21. I accept the Agency's submission that the particular circumstances means it has a common interest with the DHHS, the result of which is the Agency can claim privilege over the documents.

Are the documents confidential?

22. Having viewed the documents, I note both reports have been provided by a third party to DHHS' in-house lawyer and are marked confidential and sensitive. There is no other information to indicate the document was provided to any other third party at the time of its preparation.

23. Accordingly, I am satisfied the reports were communicated with an intention they remain confidential and the reports are subject to legal professional privilege.

'Dominant purpose' of the documents

24. As noted above, the Agency advised the documents were commissioned by DHHS to assist the provision of legal advice in relation to anticipated litigation.

25. The Agency also stated in its submission:

³ *Grant v Downs* 135 CLR 674 at 689.

The documents were heavily relied on for making decisions on particular steps which this agency's [VicRoads] solicitors took to provide advice, and were correspondence between solicitors and employees for the purpose of providing instructions to prepare for litigation against the applicant.

26. 'Purpose' in the phrase 'dominant purpose' means the purpose that led to the creation of the document or the making of the communication.⁴ The relevant time at which a claim for privilege is to be determined is the time when the document came into existence.⁵
27. Therefore, the Agency's use of the documents to provide advice in relation to litigation involving the Applicant is not relevant to my consideration in determining the dominant purpose of the Investigation reports, as this occurred after the creation of the documents.
28. Further, the 'dominant purpose' requires the primary or substantial reason for the communication for privilege to attach.⁶ Where there are mixed purposes, the paramount purpose must be identified. Where two purposes are of equal weight, neither will be dominant. If the decision to bring the document into existence would have been made, irrespective of obtaining legal advice, the latter purpose cannot be dominant.⁷
29. Generally, the purpose will be that in the mind of the document's creator, but this will not always be the case. For example, where a solicitor commissions a report from a consultant in relation to the provision of legal advice by the solicitor to their client, the relevant intention will be that of the solicitor, not the author of the report.⁸
30. In this case, neither investigation report was prepared by a lawyer. Relevantly, in the case of communications passing between a third party and the lawyer, the communications (in all but limited circumstances)⁹ are subject to privilege only when litigation is either pending or in contemplation and the communication came into existence for the dominant purpose of its use in or in relation to litigation, as opposed to purely legal advice.¹⁰
31. In considering litigation privilege, there must be a real prospect of litigation, as distinct from a mere possibility, determined at the time the communication was made.¹¹ A vague apprehension of litigation will not suffice.

Was litigation reasonably contemplated?

32. The question of whether litigation was reasonably contemplated or reasonably anticipated at the relevant time is a question of fact, determined by reference to objective criteria.¹²
33. The occurrence of an event, that in common experience, very often leads to litigation may be enough to establish the anticipation of litigation.¹³
34. The starting point in applying the dominant purpose test is to ask what was the intended use of the document which accounted for it being brought into existence.¹⁴ Having objectively considered all

⁴ *Carnell v Mann* (1998) 89 FCR 247 at 253.

⁵ *Telstra Corporation Limited v Minister for Communications, Information technology and the Arts (No.2)* [2007] FCA 1445 at [28].

⁶ *Ibid.*

⁷ *SM Preuss, in Ormonde v Darebin CC* [2008] VCAT 588 at [24] citing *Cross on Evidence*, Australian loose leaf edition, 25115 at [25240].

⁸ *Hartogen Energy Ltd v Australian Gas Light Co* [1992] FCA 322; 36 FCR 557 at pp 568-9.

⁹ The Full Federal Court of Australia in *Pratt v Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAF 122 extended the privilege doctrine.

¹⁰ *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* 920020 4 VR 332; [2002] VSCA 59 at [8].

¹¹ *Ibid.*

¹² *Ibid* at [22].

¹³ In *Ormonde v Darebin CC* [2008] VCAT 588, VCAT cited with approval *Cross on Evidence*, Australian loose leaf edition, 25108 at [25235].

¹⁴ *AWB Limited v Honourable Terence Rhoderic Hudson Cole* (No 5) 2006 FCA 1236 at [44(6)].

information before me, I am not satisfied that that at the time the reports were commissioned, litigation was reasonably anticipated because:

- (a) The facts relating to the investigation reports and claim of legal professional privilege is limited. I have not been provided with any information to support the Agency's written submission it is common experience that such matters subject to investigation would lead to litigation.
- (b) I consider the purpose of each investigation report is more closely related to the complaints received by the Agency and its investigation of complaints, rather than any subsequent litigation or likely litigation. In my view, any subsequent litigation would only occur after the Agency's investigation is concluded and a decision is made by the Agency whether to take further action regarding the complaint. Therefore, I am not satisfied possible litigation was the dominant purpose for the investigation reports at the time they were commissioned.

- 35. On the information before me, I am of the view at the time each report was commissioned, the contemplation of litigation was too remote to be subject to legal professional privilege. In such circumstances, the dominant purpose of the test was not contemplated litigation, but concerned the Agency's investigation of complaints received regarding the Applicant's program and whether such complaints could be substantiated.
- 36. Accordingly, I am not satisfied the documents are exempt under section 32(1).
- 37. However, having carefully considered the content and context of the documents, I am of the view section 30(1) is the more appropriate exemption in the circumstances, which I discuss below.

Documents 10 and 81

- 38. Documents 10 is a collation of the Applicant's show cause responses. The document does not contain any details regarding who authored the information, who called it into creation, or contain any information regarding its intended recipient. Nor has the Agency provided further information in its submissions to clarify this matter. Document 81 appears to be a duplicate of Document 10.
- 39. Having reviewed the document, while it may have been communicated or received for the purposes of legal advice, no evidence to support a claim of legal professional privilege over the documents have been provided. Therefore, on the documents face, I am not satisfied they contain or reveal legal advice or constitute a confidential communication provided or received for the purposes of obtaining legal advice.
- 40. Accordingly, I am not satisfied Documents 10 and 81 are exempt under section 32(1).
- 41. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 32(1).

Section 30(1)

- 42. A document is exempt under section 30(1) if the following three conditions are met:
 - (a) the document discloses 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, Minister 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.

43. The exemption does not apply to purely factual matter in a document.¹⁵
44. The term 'officer of an agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
45. The Victorian Civil and Administrative Tribunal (**VCAT**) has held that consultants, when engaged by an agency, are officers for the purposes of the FOI Act, on the basis the external company is under the paid employment of the agency to carry out a designated function or perform a task.¹⁶
46. Therefore, in this case, I am satisfied the term 'officer of an agency' extends to the external investigators, who authored each report.

Does the document disclose matter in the nature of opinion, advice or recommendation, or consultation or deliberation?

47. As stated, both reports were written by an investigator and prepared for the purpose of advising whether aspects of complaints received against the Applicant's program were substantiated or not. Having regard to content and purpose of the reports, I am satisfied the documents disclose matter in the nature of opinion, advice and recommendation.
48. I also note the documents contain information that could be considered factual in nature. However, having carefully reviewed the information I am satisfied the factual information is heavily intertwined with the opinion, advice and recommendations such that it could not be reasonably separated. Accordingly, it is not purely factual for the purposes of section 30(3).

Was the opinion, advice, recommendation, consultation or deliberation disclosed in the document provided in the course of, or for the purpose of, the deliberative processes of the Agency?

49. The term 'deliberative process' has been interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.¹⁷
50. I am satisfied the documents were acquired for the deliberative processes involved in the supervision and complaint management of approved program providers, and such function is now under the control of the Agency. I also note, the reports were acquired by the Agency to assist their determination on whether to renew the Applicant's business as an approved driver education provider under the BCP.
51. Therefore, I am satisfied the documents were provided in the course of, and for the purpose of, a deliberative process of an agency.

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

52. The third requirement to be met under section 30(1) is that disclosure of the documents would be contrary to the public interest.
53. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:¹⁸
 - (a) the right of every person to gain access to documents under the FOI Act;

¹⁵ Section 30(1).

¹⁶ See *Koch v Swinburne University* [2004] VCAT 1513 at [15]; *Thwaites v Department of Human Services* (No 2) (1998) 14 VAR 347.

¹⁷ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

¹⁸ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (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;
- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the agency at the conclusion of a decision or process; and
- (g) 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.

54. I consider the process of investigating a complaint is an inherently sensitive and confidential process. I also consider that whenever an allegation is raised, it is imperative an agency is able to thoroughly investigate the matter. A complete investigation relies on free and fulsome information being provided to an investigator. Without an open information flow, an investigation may not be successful in obtaining accurate and detailed information, resulting in flawed or biased findings.

55. Further, I am of the view release of information, which may undermine the investigative process and the free flow of information is likely to be contrary to the public interest. If investigations cannot be conducted in a comprehensive manner, relevant learnings may not be identified, and improvements not implemented. This may have serious negative implications for public sector bodies given that investigations are dependent on candid input from those involved.

56. Therefore, the 'essential public interests' that limit release of information under the FOI Act, to my mind, includes the integrity of investigative processes for these reasons.¹⁹

57. I appreciate the Applicant has a private interest in obtaining access to the documents. The denied information concerns complaints lodged against the delivery of the Applicant's program.

58. Further to this private interest, I acknowledge there is a broader public interest in disclosure where it is clear from the face of the documents there may be the lack of a fair and independent process or legitimate questions arise about the handling of a matter, or fairness in an outcome reached by an agency. However, having carefully examined the documents, there is no information before me to suggest there is anything unusual about the manner in which the investigations were conducted. Therefore, I am not satisfied there is a broader public interest that would be promoted by release of the documents.

59. On balance, I am satisfied it would be contrary to the public interest to disclose documents that would have an adverse effect on the integrity or effectiveness of a decision-making and investigative process of an agency.

¹⁹ Section 3.

60. Accordingly, I am satisfied the documents are exempt under section 30(1).

Documents 10 and 81

61. I have also considered the application of section 30(1) to Documents 10 and 81.

62. It is clear the documents are internal working documents of the Agency. Having examined the contents, I am satisfied the documents contain information in the nature of advice, opinion recommendation produced in the course of, and for the purpose of the Agency's deliberative function. Namely, its decision regarding the appointment of key personnel of a driver education program provider under the BCP.

63. After careful consideration, I am not satisfied the documents are exempt in full, for the following reasons:

- (a) The document provides general background. I consider this type of information to be factual in nature rather than deliberative, noting section 30(1) is not intended to prevent disclosure of documents or information that demonstrate fact or serve an innocuous or general administrative purpose.²⁰
- (b) I am not satisfied release would be contrary to the public interest given, for the most part, the document contains a summary of information provided by the Applicant to the Agency and in some instances, similar information has been released and therefore, would be known to the Applicant.
- (c) I do not consider release would curtail Agency officers from providing or recording open and candid views at an early stage in the process where Agency officers will generally have a responsibility to do so as part of a proper workplace process.
- (d) Further, release of the additional details in the document may advance or promote a better understanding of the Agency's functions in relation to its management of the BCP for providers. In this case, its role was to appropriately assess key personnel responsible for providing drink driver education to the public in accordance with the relevant policies and law. The public interest in release is favoured in instances where disclosure would lead to a benefit by 'clearing the air'.²¹

64. However, where the documents refer to information in Document 2 and 3, which I have determined to be exempt under section 30(1), for the reasons outlined above, I am satisfied this information is also exempt under section 30(1).

65. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 30(1).

Section 35(1)(b)

66. The Agency denied access to Documents 2 and 3, based on its application of section 35(1)(b).

67. A document is exempt under section 35(1)(b) 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) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

²⁰ Section 30(3).

²¹ *Graze v Commissioner State Revenue* [2013] VCAT 869 at [76].

Was the information communicated in confidence?

68. The Agency submit the documents were provided to it under the condition that they are confidential. The Agency further submit release would be contrary to the public interest as it would impair the Agency from receiving information of a similar nature in the future. I do not accept the Agency's submissions as I am not satisfied government agencies would be inhibited from exercising their professional and ethical obligations to provide relevant information between one another, particularly where one agency undertakes the function or portfolio of the other.
69. However, having examined the documents, I note they contain information provided to the investigators by third party individuals. I have therefore, considered the application of section 35(1)(b) to information communicated by third parties to the investigator.
70. Whether information communicated by an individual was communicated in confidence is a question of fact.²² When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.²³
71. I have carefully considered the information from the perspective of the third parties who provided information to the investigator. Having considered the nature of the information and the circumstances in which it was communicated, I am satisfied the information was provided in circumstances in which confidentiality could reasonably be implied. Therefore, disclosure of the documents would divulge information communicated in confidence, meeting the first limb of the exemption.

Would it be contrary to the public interest to release?

72. The exemption in section 35(1)(b) also requires consideration of whether an agency would be impaired from obtaining similar information in the future if the documents were to be disclosed under the FOI Act. For example, whether others in the position of the communicator or communicators would be reasonably likely to not provide similar information to the Agency in the future should the information be disclosed.
73. Further, the public interest test in regard to section 35(1)(b) is narrow. It is directed toward the impact release would have on an agency's ability to obtain the same or similar information in the future. The provision does not permit me to have regard to other matters, such as any public interest in favour of released, or the extent to which an applicant's personal interest in the document would be served by gaining access to the information.
74. The words 'similar information' refer to information of the class or character obtained in the case under consideration and the precise contents of the material are not relevant.²⁴ Similarity in this context also refers to the similarity of the source of information.²⁵
75. As discussed above, I accept there exists a public interest in the appropriate management of complaints by an agency and that investigations into matters of this nature are dependent on fulsome admissions or information being provided by witnesses and third parties on a voluntary basis in order to inform an investigation or inquiry. Without an open flow of communication, an investigation may not appropriately identify all key issues, which could result in flawed or incomplete outcomes.
76. I consider individuals need to feel confident that the information they provide, including their identity, will be held in confidence by the Agency. I consider release of the information has the

²² *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

²³ *Ibid*, *XYZ* at [265].

²⁴ *Richards v Law Institute of Victoria* (unreported, County Court, Dixon, J, 13 August 1984).

²⁵ *Ryder v Booth* [1985] VR 869.

potential to dissuade individuals from raising concerns of a similar nature given release of information under FOI is unrestricted and unconditional. I consider this to be a significant and detrimental outcome that would impede the free flow of information provided to the Agency who is responsible to ensure those who provide driver education programs to the community are suitable to do so.

77. Further, the fact the confidential material was provided by one agency to another ought not to destroy the confidential character of the material. In this case, the Agency received the investigation reports to assist the undertakings of its functions involving the Applicant's company. I do not consider the information has been circulated widely that it would be considered release to 'the world at large'.²⁶
78. Accordingly, I am satisfied Documents 2 and 3 are exempt under section 35(1)(b).
79. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

Section 25 – Deletion of irrelevant and exempt information

80. 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.
81. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²⁷ 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 25.²⁸
82. Having examined each document, and in consideration of the terms of the Applicant's request, I am not satisfied the Agency's decision to delete information as 'not relevant' in accordance with section 25 is correct in each instance.
83. With the exception of Documents 2 and 3, which I have determined are exempt in full, I have considered the effect of deleting irrelevant and exempt information from the documents in accordance with section 25. In relation to Documents 10 and 81, I am satisfied it is practicable to delete irrelevant and exempt information from these documents, as to do so will not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

84. On the information before me, while I am satisfied certain documents are exempt under sections 30(1) and 35(1)(b), I am not satisfied the documents are exempt under section 32(1).
85. In relation Documents 2 and 3, I am satisfied these documents are exempt in full.
86. In relation to Documents 10 and 81, I am satisfied it is practicable to delete exempt information from these documents in accordance with section 25, and determined to grant access in part.
87. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

²⁶ *Marke v Victoria Police* [2006] VCAT 1364 at [98].

²⁷ *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].

²⁸ *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].

Review rights

88. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁹
89. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.³⁰
90. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.³¹
91. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
92. 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.³²

When this decision takes effect

93. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

³⁰ Section 52(5).

³¹ Section 52(9).

³² Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Various	Email chain	3	Refused in full Section 25	Not relevant to Applicant's request	Having examined the document and considered the terms of the Applicant's request, I am satisfied the document is not relevant to the terms of the request as it concerns administrative matters of the Agency and not information used to investigate show cause letters or used to make a negative claim against the Applicant's company.
2.	[date]	Investigation Report	14	Refused in full Sections 32(1) and 35(1)(b)	Refuse in full Sections 30(1), 35(1)(b)	<p>Section 32(1): For the reasons set out in the notice of decision above, I am not satisfied the dominant purpose of the document was to obtain legal advice and services in connection with pending or contemplated litigation as I do not consider the Agency has established, at the time of the document was created, litigation could have reasonably be anticipated. Accordingly, I am not satisfied the document is exempt under section 32(1).</p> <p>Section 30(1): For the reasons set out in the notice of decision above, I am satisfied disclosure of the document would be contrary to the public interest. Accordingly, I am satisfied the document is exempt under section 30(1).</p> <p>Section 35(1)(b): For the reasons set out in the notice of decision above, I am satisfied the document contains information communicated by third parties in confidence and its disclosure would be contrary to the public interest as it would impair the ability of the Agency to receive similar information in the future. Accordingly, I am satisfied the document is exempt under section 35(1)(b).</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
3.	[date]	Wise Workplace – Final report	41	Refused in full Sections 32(1) and 35(1)(b)	Refuse in full Sections 30(1), 35(1)(b)	See comments for Document 2 above.
4.	[date]	Show cause letter	3	Refused in full Section 25	Release in full	The document is a duplicate of Document 5 below. As the document was released by the Agency to the Applicant, I am satisfied it is not exempt under the FOI Act and is to be released in full.
5	[date]	Show cause letter	3	Released in full	Not subject to review	
6.	[date]	Email sent from Applicant to Agency	1	Refused in full Section 25	Release in full	The document is an email sent by the Applicant to the Agency providing particulars in response to a show cause letter. I am satisfied the document falls within the terms of the Applicant's request. As the information is in the possession of the Applicant, I am satisfied it is not exempt under the FOI Act and is to be released in full.
7	[date]	Request for documentation	1	Released in full	Not subject to review	
8	[date]	Letter to Applicant	3	Released in full	Not subject to review	
9	Various	Email thread, end date [date]; attached letter	7	Released in full	Not subject to review	
10	Undated	Summary of responses	6	Refused in full	Refuse in part	Section 32(1): For the reasons set out in the notice of decision above, I do not consider the Agency has

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		to show cause letter		Section 32(1)	<p>Sections 30(1), 25</p> <p>The document is to be released with the following information, which is exempt under section 30(1), deleted in accordance with section 25:</p> <ul style="list-style-type: none"> page 3, paragraph 9; and page 4, paragraphs 1 and 2. 	<p>established the document is a confidential communication between the Agency and its legal adviser. Accordingly, I am not satisfied the document is exempt under section 32(1).</p> <p>Section 30(1): I am satisfied the document contains information in the nature of advice, opinion and recommendation provided for a deliberative purpose of the Agency. However, for the reasons set out in the notice of decision above, I am not satisfied release of certain information in the document would be contrary to the public interest. Accordingly, I am not satisfied the document is exempt under section 30(1).</p> <p>Section 25: I am satisfied it is practicable to delete exempt information from the document in accordance with section 25.</p>
11	Various	Email thread, end date [date]	5	Released in full	Not subject to review	
12	[date]	Email	3	Released in full	Not subject to review	
13	[date]	Email	2	Released in full	Not subject to review	
14	[date]	Email	2	Released in full	Not subject to review	
15	[date]	Email	1	Released in full	Not subject to review	
16	[date]	Email	1	Released in full	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
17	[date]	Email	1	Released in full	Not subject to review	
18	[date]	Email	2	Released in full	Not subject to review	
19	[date]	Email	2	Released in full	Not subject to review	
20	Various	Email thread, end date [date]	3	Released in full	Not subject to review	
21	Various	Email thread, end date [date]	3	Released in full	Not subject to review	
22	[date]	Email	1	Released in full	Not subject to review	
23	[date]	Email	2	Released in full	Not subject to review	
24	[date]	Email	1	Refused in full Section 25	Not relevant to Applicant’s request	The document is an email sent to the Agency by the Applicant regarding an address update. I am satisfied it is not relevant to the Applicant’s request.
25	Various	Email thread, end date [date]	2	Released in full Irrelevant information deleted under section 25	Not subject to review	
26	[date]	Email	1	Released in full	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
27	[date]	Email	1	Released in full	Not subject to review	
28	Various	Emails and attached photographs	78	Released in full	Not subject to review	
29	[date]	Email	2	Released in full With irrelevant information deleted under section 25	Release in full	<p>The Agency removed names and contact information of Agency officers as irrelevant information in accordance with section 25. I am satisfied the information forms part of the document and is relevant to the Applicant’s request.</p> <p>While I have considered the application of the exemption under section 33(1) to the relevant information, I am not satisfied it would be unreasonable to disclose the personal affairs information of the Agency officers in the document, based on similar information released by the Agency in other documents. Accordingly, I am not satisfied the document is exempt under the FOI Act.</p>
30	[date]	Email	1	Released in full	Not subject to review	
31	[date]	Email	1	Released in full With irrelevant information deleted under section 25	Release in full	See comments for Document 29 above.
32	Various	Email thread, end date [date]	3	Refused in full Duplicate of	Release in full	See comments for Document 4 above.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Document 33		
33	Various	Email thread, end date [date]	3	Released in full	Not subject to review	
34	[date]	Email	1	Released in full	Not subject to review	
35	[date]	Email	1	Released in full	Not subject to review	
36	Various	Email thread, end date [date]	9	Released in full	Not subject to review	
37	Various	Email thread, end date [date]	9	Released in full	Not subject to review	
38	[date]	Email and attached photographs	16	Released in full	Not subject to review	
39	Various	Email thread, end date [date]	2	Released in full	Not subject to review	
40	Various	Email thread, end date [date]	2	Released in full	Not subject to review	
41	[date]	Email	1	Released in full	Not subject to review	
42	[date]	Email	6	Released in full	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
43	Various	Email thread, end date [date]	4	Released in full	Not subject to review	
44	Various	Email thread, end date [date]	9	Duplicate of document 45	Not subject to review	
45	Various	Email thread, end date [date]	10	Refused in full Section 32(1)	Release in full	The Agency withdrew its reliance on section 32(1) to this document. I am satisfied the document is not exempt under the FOI Act.
46	Various	Email thread, end date [date]	3	Refused in full Section 32(1)	Release in full	See comments for Document 45 above.
47	Various	Email thread, end date [date]	5	Released in full	Not subject to review	
48	Various	Email thread, end date [date]	5	Released in full	Not subject to review	
49	Various	Email thread, end date [date]	6	Released in full	Not subject to review	
50	[date]	Email	2	Released in full	Not subject to review	
51	[date]	Email	1	Refused in full Section 25	Not relevant to Applicant's request	See comments for Document 1 above.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
52	Various	Email thread, end date [date]	2	Released in full Irrelevant information deleted under section 25	Not subject to review	
53	Various	Email thread, end date [date]	4	Refused in full Section 25	Not relevant to Applicant's request	See comments for Document 1 above.
54	Various	Email thread, end date [date]	8	Refused in full Section 25	Not relevant to Applicant's request	See comments for Document 1 above.
55	Various	Email thread, end date [date]	3	Refused in full Section 25	Not relevant to Applicant's request	See comments for Document 1 above.
56	Various	Email thread, end date [date]	3	Refused in full Section 32(1)	Release in full	See comments for Document 45 above.
57	Various	Email thread, end date [date]	2	Refused in full Section 32(1)	Release in full	See comments for Document 45 above.
58	Various	Email thread, end date [date]	3	Refused in full	Not relevant to Applicant's request	See comments for Document 1 above.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Section 25		
59	Various	Email thread, end date [date]	3	Refused in full Section 25	Not relevant to Applicant's request	See comments for Document 1 above.
60	Various	Email thread, end date [date]	2	Refused in full	Not relevant to Applicant's request	See comments for Document 1 above.
61	Various	Email thread, end date [date]	2	Section 25	Not relevant to Applicant's request	See comments for Document 1 above.
62	Various	Email thread, end date [date]	16	Released in part Section 32(1) Irrelevant information deleted under section 25	Release in part Section 25 Irrelevant information to be deleted in accordance with section 25.	The Agency withdrew its reliance on section 32(1) to this document. I am satisfied the document is not exempt under the FOI Act. Section 25: I am satisfied irrelevant information in the document removed by the Agency in accordance with section 25 is irrelevant as it concerns matters involving program providers not operated by the Applicant.
63	Undated	'About [business name]'	2	Released in full	Not subject to review	
64	[date]	Letter to [business name]	1	Released in full	Not subject to review	
65	Undated	AON Health Practitioners Policy	28	Released in full	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
66	Undated	[business name] advertising material	2	Released in full	Not subject to review	
67	Undated	[business name] Statement of Purpose	2	Released in full	Not subject to review	
68	[date]	Letter	1	Released in full	Not subject to review	
69	[date]	Financial statement for [final year]	6	Released in full	Not subject to review	
70	[date]	Financial statement for [final year]	6	Released in full	Not subject to review	
71	[date]	[Year] Tax return	10	Released in full	Not subject to review	
72	[date]	[Year] Tax return	10	Released in full	Not subject to review	
73	Undated	Photographs	6	Released in full	Not subject to review	
74	Various	Email thread, end date [date]and attached letter	6	Released in full	Not subject to review	
75	Undated	Application form	17	Released in full	Not subject to review	
76	Undated	Assessment reports	10	Released in full	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
77	Undated	Photographs	13	Released in full	Not subject to review	
78	Undated	Advertising material	1	Released in full	Not subject to review	
79	[date]	Insurance certificate of currency	2	Released in full	Not subject to review	
80	Undated	Photographs	12	Released in full	Not subject to review	
81	Undated	Responses to show cause letter	6	Refused in full Section 32(1)	Refuse in full Section 32(1)	See comments in Document 10 above in relation to section 32(1).
82	[date]	University certificate	1	Released in full	Not subject to review	
83	[date]	Academic record	1	Released in full	Not subject to review	
84	[date]	Criminal history check	2	Released in full	Not subject to review	
85	[date]	Driver licence details	1	Released in full	Not subject to review	
86	[date]	Email	1	Released in full	Not subject to review	
87	Undated	Draft summary of responses to show cause letter	6	Refused in full Document outside scope of request	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
88	Undated	Photographs	7	Released in full	Not subject to review	
89	[date]	National police check	1	Released in full	Not subject to review	
90	Undated	Application form	16	Released in full	Not subject to review	
91	Various	Qualifications, academic and personal documents	25	Released in full	Not subject to review	
92	Undated	Photographs	11	Released in full	Not subject to review	
93	[date]	Application form	16	Released in full	Not subject to review	
94	Undated	CV and cover letter	2	Released in full	Not subject to review	
95	[date]	Application form	16	Released in full	Not subject to review	
96	Various	University certificate, CV	4	Released in full	Not subject to review	
97	Undated	Photographs	14	Released in full	Not subject to review	
98	[date]	Certificate of participation	1	Released in full	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
99	[date]	Academic record	2	Released in full	Not subject to review	
100	[date]	Letter	3	Released in full	Not subject to review	
101	Undated	VicRoads conditions of approval	49	Released in full	Not subject to review	
102	[date]	Letter	1	Released in full	Not subject to review	
103	Undated	Curriculum Vitae	10	Released in full	Not subject to review	
104	[date]	Application form	16	Released in full	Not subject to review	
105	Various	Identification	3	Released in full	Not subject to review	
106	Undated	Order confirmation	4	Released in full	Not subject to review	
107	Undated	Photographs	23	Released in full	Not subject to review	
108	Undated	Links to various websites	3	Released in full	Not subject to review	
109	[date]	Photograph of TAC online module	1	Released in full	Not subject to review	
110	[date]	[business name]client document	1	Released in full	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
111	Undated	VicRoads facilitator approval applications	6	Released in full	Not subject to review	
112	[date]	Invoice	1	Released in full	Not subject to review	
113	Undated	Letter	5	Released in full	Not subject to review	
114	[date]	Letter	3	Released in full	Not subject to review	
115	Undated	Photographs	14	Released in full	Not subject to review	
116	Various	Identification, qualifications, and CV of [Applicant]	9	Released in full	Not subject to review	