

Notice of Decision and Reasons for Decision

Applicant:	'EP9'
Agency:	Department of Transport
Decision date:	24 June 2022
Exemptions and provisions considered:	Sections 35(1)(b) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 90Q of the <i>Road Safety Act 1986</i> (Vic)
Citation:	'EP9' and Department of Transport (Freedom of Information) [2022] VICmr 172 (24 June 2022)

FREEDOM OF INFORMATION – VicRoads – car registration – notification from third-party – information from which an individual's identity can be reasonably ascertained – medical report – secrecy provision – *Road Safety Act 1986* (Vic)

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.

While I am not satisfied the document is exempt from release under section 38 of the FOI Act in conjunction with section 90Q of the *Road Safety Act 1986* (Vic), I am satisfied it is exempt under section 35(1)(b).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted, access is refused in full.

Accordingly, my decision on the Applicant's request is the same as the Agency's decision.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
24 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 - ... the report with all details of the complaint and evidence of to justify the request for a medical report [reference number] [Case number]
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under section 38 in conjunction with Part 7B of the *Road Safety Act 1986* (Vic) (**Road Safety Act**).
3. 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. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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 – Secrecy Provision

10. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

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.

11. A document is exempt from release under section 38 if the following three requirements are met:
 - (a) there is an enactment in force;
 - (b) the enactment applies specifically to the kind of information in a document; and
 - (c) the enactment prohibits persons, referred to in the enactment, disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

12. For section 38 to apply to a document, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Is there an enactment in force?

13. Section 90P of the Road Safety Act provides:

- (1) A document which contains relevant information is an exempt document within the meaning of section 38 of the Freedom of Information Act 1982.
- (2) Subsection (1) does not limit the operation of section 38 of the Freedom of Information Act 1982.

14. Accordingly, I am satisfied the Road Safety Act is an enactment in force for the purpose of section 38.

15. Therefore, the first requirement of section 38 is satisfied.

Does the enactment apply specifically to the kind of information in the document?

16. Section 90Q of the Road Safety Act applies to 'relevant information'. Section 90I of that Act defines 'relevant information' as information to which section 90J of the Road Safety Act applies.

17. Section 90J of the Road Safety Act provides:

90J Information to which this Part applies

- (1) This Part applies to information—
 - (a) that is collected or received by the Secretary in relation to the Secretary's registration or licensing functions and activities or in relation to the accessible parking permit scheme; and
 - (b) that identifies an individual or from which an individual's identity can be reasonably ascertained....
- (3) For the purposes of subsection (1), information collected or received by the Secretary in relation to the Secretary's registration or licensing functions and activities includes, but is not limited to, information relating to—
 - (a) granting, renewing, suspending or cancelling registration of vehicles;
 - (b) entering or removing vehicles from the written-off vehicles register;
 - (c) exempting vehicles from registration;
 - (d) granting, renewing, suspending or cancelling driver licenses or learner permits and recording demerit points—whether that information relates to a registered or unregistered vehicle or a licensed or unlicensed driver.

18. The document subject to review is an anonymous letter from a member of the public submitted to the Agency's Medical Review department in relation to the Applicant's driving ability.

19. While the letter was submitted anonymously, I am satisfied the identity of the informant may be reasonably ascertained from the context and content of the letter.

20. I am satisfied it is 'relevant information' within the meaning of section 90J of the Road Safety Act, being information relating to the Agency's registration or licensing functions and activities that identifies an individual or is information from which an individual's identity can be reasonably ascertained.

21. Therefore, the second requirement of section 38 is satisfied.

Does the enactment prohibit persons referred to in the enactment from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications)?

22. Section 90Q of the Road Safety Act provides:

90Q Offences

- (1) The Secretary or a relevant person or a person who has been a relevant person must not use or disclose relevant information other than as authorised by this Part—
- (a) knowing that the use or disclosure is not so authorised; or
 - (b) being reckless as to whether the use or disclosure is so authorised.
- Penalty: 120 penalty units or imprisonment for 12 months.

23. 'Secretary' means the Secretary of the Agency.¹

24. Section 90I of the Road Safety Act defines 'relevant person'. The definition includes 'employees in the Department', which means the Agency's officers.

25. Section 90K of the Road Safety Act authorises disclosure of relevant information in certain limited circumstances and for particular purposes.

26. Having reviewed section 90K and based on the information before me, I am satisfied an exception to the prohibition under section 90Q of the Road Safety Act applies in the circumstances of this matter, as disclosure is authorised where there is consent of the individual to whom the information relates.²

27. Therefore, the third requirement of section 38 is not met.

28. Accordingly, I am not satisfied the document is exempt from release under section 38 in conjunction with section 90Q of Road Safety Act.

Section 35(1)(b) – Information obtained in confidence

29. As I am not satisfied the document is exempt from release under section 38, I have considered the application of section 35(1)(b) given the letter was submitted to the Agency anonymously.

30. A document is exempt from release 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.

Was the information obtained in confidence?

31. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.³

32. In doing so, 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.⁴

¹ Section 3(1) of the *Road Safety Act 1986* (Vic).

² Section 90K(d) of the *Road Safety Act 1986* (Vic).

³ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

⁴ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

33. Given the nature of the information provided and the context in which it was provided to the Agency, I am satisfied the identity of the person who provided the information and the contents of the document was intended to remain confidential.

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

34. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
35. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out of an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.⁵
36. I accept, in order to enforce the Road Safety Act, the Agency relies on voluntary reports provided to it by individuals who are concerned about a licensed driver's fitness to drive. In my view, the Agency would reasonably expect that some individuals would be deterred from making reports of this nature if those persons could not be assured that their identity would remain confidential in light of information provided to the Agency.
37. In the matter of *McInnes v VicRoads (McInnes)*,⁶ the Victorian Civil and Administrative Tribunal (VCAT) determined that disclosure of an anonymous notification about a licensed driver would impair the Agency's ability to obtain such notifications in the future and accepted the public interest factors in favour of maintaining confidentiality of such information.⁷
38. In the present matter, I am of the view that, as stated in *McInnes*:
- ... there is a public interest in protecting the privacy of members of the public who provide notifications to VicRoads in confidence for the purposes of VicRoads carrying out its statutory obligations with regard to the safety of road users. This significant and important public interest consideration outweighs [the Applicant's] understandable personal interest in knowing the identity of the author (or authors) of the Notification.⁸
39. Accordingly, I am satisfied disclosure of the document would be contrary to the public interest as it would be reasonably likely to impair the Agency's ability to obtain similar information in the future, and the document is exempt from release under section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

40. 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.
41. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ and the effectiveness of the deletions. Where deletions

⁵ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

⁶ [2009] VCAT 2342.

⁷ *Ibid* at [38].

⁸ *Ibid* at [47].

⁹ *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].

would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.¹⁰

42. I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted, as do so would render the document meaningless.

Conclusion

43. On the information before me, while I am not satisfied the document is exempt from release under section 38 of the FOI Act in conjunction with section 90Q of the Road Safety Act, I satisfied it is exempt under section 35(1)(b).
44. 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.

Review rights

45. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
47. The Agency may apply to VCAT for a review up to 14 from the date it is given this Notice of Decision.¹³
48. 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.
49. 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.¹⁴

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and 50(3FA).