

## Notice of Decision and Reasons for Decision

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Applicant:	'EV9'
Agency:	Horsham Rural City Council
Decision date:	13 October 2022
Exemptions and provision considered:	Sections 30(1), 32(1), 33(1), 35(1)(b), 25
Citation:	'EV9' and Horsham Rural City Council (Freedom of Information) [2022] VICmr 229 (13 October 2022)

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FREEDOM OF INFORMATION – Council documents – [internal investigation] – personal affairs information of third parties, including agency officers – legal privilege

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 in that I have decided to release further information in the documents.

While I am satisfied certain information is exempt from release under sections 30(1), 32(1) and 33(1), I am not satisfied all information to which the Agency refused access is exempt under sections 30(1) or 35(1)(b).

A marked-up copy of the documents indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

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  
13 October 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - All documents between [date] and [date] that relate to:
    - [named third party] and any or all of:
      - o [business name]
      - o [entity]
      - o [program]
    - The approval of [business name] to be part of any [program] between the above dates.
2. The Applicant provided additional information regarding his request. [Content redacted]
3. To assist in streamlining the process [the Applicant advised the Agency they were] happy for the names of staff or members of the public to be redacted apart from:
  - [named third party]
  - The CEO of HRCC
  - Any Director of HRCC
  - Any Councillor of HRCC
  - Any employee/representative of [entity].
4. In its decision, the Agency identified 222 documents falling within the terms of the Applicant's request and released 208 documents in full and refused access to 14 documents under sections 30(1) and 35(1)(b).
5. The Agency's decision letter sets out the reasons for its decision.

### Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. I have examined copies of the documents subject to review.
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.
12. 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'.<sup>1</sup> 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.

### **Complaint regarding adequacy of document searches**

13. With their review application, the Applicant made a complaint under section 61A(1) regarding the adequacy of the Agency's document searches.
14. Given the nature of the complaint, it was determined it would be dealt with by this review in accordance with section 61B(3), which relevantly provides the Information Commissioner must dismiss a complaint if its subject matter could be dealt with by an application for review.
15. Enquiries were made by OVIC staff with the Agency regarding the Applicant's concerns and details of the Agency's responses were provided to the Applicant.
16. Having considered the details of the complaint, inquiries made by OVIC staff and the Agency's responses, I am satisfied the Applicant's complaint has been fully pursued and there is no basis for the making of further inquiries or taking further action on that matter.

### **Review of exemptions**

#### ***Section 30(1) – Internal working documents***

17. 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.
18. Section 30(3) provides purely factual information is not exempt under section 30(1).

#### *Were the documents prepared by an officer of the Agency?*

19. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, an agency staff member, and any person engaged by or on behalf of an agency, whether or not they are subject to the *Public Administration Act 2004* (Vic).
20. I am satisfied the documents were prepared by Agency officers for the purposes of the FOI Act.

#### *Do the documents disclose matter in the nature of opinion, advice or recommendation, or consultation or deliberation?*

21. For section 30(1) to be satisfied, a document must also contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between officers.
22. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.<sup>2</sup>

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

<sup>2</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

23. Having reviewed the documents, I am satisfied they contain information in the nature of opinion, advice or recommendation.

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

24. The term 'deliberative process' has been interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>3</sup>
25. I am satisfied the information was prepared in the course of the Agency's deliberative processes in connection with its investigation of complaints regarding the conduct of its officers.

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

26. Determining whether disclosure of a document would be contrary to the public interest involves a 'process of the weighing against each other conflicting merits and demerits'.<sup>4</sup>
27. In *Howard v Treasurer*,<sup>5</sup> the Commonwealth Administrative Appeals Tribunal held the more sensitive the issues discussed in a communication, the more likely the communication should not be disclosed.
28. Where information is already known to an applicant, it is more likely its disclosure would not be contrary to the public interest. If the information is sensitive, tentatively expressed or unclear, it is more likely its disclosure would be contrary to the public interest.<sup>6</sup>
29. In determining whether disclosure of information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>7</sup>
- (a) the right of every person to gain access to documents under the FOI Act;
  - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
  - (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

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<sup>3</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

<sup>4</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

<sup>5</sup> (Cth) (1985) 7 ALD 626; 3 AAR 169.

<sup>6</sup> *Thomas v Department of Natural Resources and Environment* [2002] VCAT 533 at [27].

<sup>7</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.

30. In its submission, the Agency states:

...

The documents in question include e-mails and file notes containing opinions or personal views, and information pertaining to the consultation or deliberation process between Council officers in relation to an internal investigation. The documents in question also include a report prepared by an internal decision-maker. In the report, the decision-maker analyses evidence and provides subjective views and recommendations.

...

The opinions, advices and recommendations that were provided by Council officers, as well as the consultations and deliberations that took place between Council officers, all occurred in the course of, or for purposes of, the deliberative processes involved in the functions of the Council in undertaking internal investigations.

31. On balance, I have determined disclosure of certain information in the documents would be contrary to the public interest for the following reasons:

- (a) The documents were prepared in the course of a review into [an internal investigation]. The emails and reports examined [issues examined]. Given this, I consider the documents contain sensitive information about the Agency officer.
- (b) It is important that public sector agencies have the ability to undertake a thorough and considered review process in relation to [Agency officer conduct]. Without an open flow of relevant and sufficient information from review participants, such reviews are unlikely to be able to obtain and clearly identify and advise on all relevant matters. Such an outcome, in my view, may result in flawed or incomplete review findings which would be contrary to the public interest.
- (c) An internal complaints process regarding [the conduct of an Agency officer] by an agency relies on free and fulsome information being provided by agency officers and other persons with relevant information. In this case, I am of the view the Agency officer subject to the internal investigation participated with the reasonable expectation the information they provided to the Agency's investigation would be held in confidence or be utilised for the internal processes of the Agency to address any issues arising out of the investigation.
- (d) While in certain circumstances it could be said the disclosure of such information is critical to ensuring public scrutiny of the way in which an agency carries out its statutory responsibilities and meets its legislative obligations, having reviewed the documents and considered their contents, I consider disclosure of the documents would impair the Agency's ability to properly identify and address similar matters in the future by disclosing information obtained from Agency officers in relation to workplace issues. As such, I consider there is an essential public interest in maintaining a robust review process by ensuring the confidentiality of disclosures made to the Agency. Further, having reviewed the documents and the information before me, there is no indication disclosure is necessary as the underlying issues require greater public scrutiny.

32. Therefore, I am satisfied certain information in the documents is exempt from release under section 30(1).

33. However, I am not satisfied all information to which the Agency refused access under section 30(1) is exempt from release on grounds, I consider it is factual information and therefore is not exempt from release under section 30(3). Further, disclosure of certain information in the documents would support a broader public interest in transparency and accountability in relation to the Agency's

obligations under local government legislation and would build trust in the Agency's ability to meet its obligations as a public sector employer and effectively and efficiently carry out its statutory responsibilities.

34. My decision in relation to section 30(1) is outlined in the Schedule of Documents at **Annexure 1**.

***Section 33(1) – Documents affecting personal privacy of third parties***

35. Section 33(1) of the FOI Act, which provides a document is exempt if:

- (a) disclosure of a document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (personal affairs information) (a **third party**);<sup>8</sup> and
- (b) disclosure of the personal affairs information would be 'unreasonable' in the circumstances.

*Do the documents contain 'personal information'?*

36. I accept the term 'personal affairs information' may encompass a broad range of information about an individual. For example, their name, address, their correspondence with a Council or details about their property, family, employment or other personal details.

37. The documents contain names, contact details and personal opinions and experiences that constitute the 'personal affairs information' of third parties.

*Would disclosure of the personal affairs information in the documents be unreasonable?*

38. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party individual in the particular circumstances of a matter.

39. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,<sup>9</sup> that there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.<sup>10</sup> The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.<sup>11</sup>

40. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

- (a) The nature of the personal affair information.
- (b) The circumstances in which the information was obtained.
- (c) The Applicant's interest in the information. The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a

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<sup>8</sup> Sections 33(1) and 33(2).

<sup>9</sup> [2008] VSCA 218 at [76].

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid* at [79].

document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable under section 33(1).<sup>12</sup>

- (d) Whether any public interest would be promoted by release of the personal affairs information.
- (e) The likelihood of disclosure of the personal affairs information, if released. As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>13</sup> Accordingly, I have considered the likelihood of the personal affairs information in the documents being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third party.
- (f) Whether the third party to whom the information relates object, or would be likely to object, to the release of the information.
- (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>14</sup> However, there is no information before me to suggest this is a relevant factor in this matter.

41. I have determined disclosure of the 'personal affairs information' of certain third parties, being certain Agency officers, as well as those outside the Agency, would be unreasonable for the following reasons:

- (a) Disclosure of the names of Agency officers who did not make decisions in relation to the [internal investigation] matter would be unreasonable in the circumstances. I consider its disclosure would amount to an unnecessary intrusion into the personal privacy of those individuals where I can see no public interest would be served by its disclosure.
- (b) I also consider it would be unreasonable to release the names of certain Agency officers as such information, while related to their professional roles, is sensitive and personal in nature. There is no information before me to demonstrate its disclosure would serve a public interest.
- (c) With regard to the Applicant's concerns regarding the Agency's practices, it is open to them to contact an independent oversight body which has statutory powers to investigate alleged complaints concerning the conduct of public sector employees which may include the use of coercive powers to require the production of documents and examination of witnesses under oath or affirmation.
- (d) I consider the provision of private telephone numbers and email addresses would be unreasonable and note the Applicant does not specifically seek access to this information.
- (e) In relation to certain personal affairs information of third parties and Agency officers, I am satisfied its disclosure under the FOI Act would be unreasonable for the following reasons:
  - (i) Disclosure of detailed information in relation to an individual's [personal information] under the FOI Act in the circumstances of this matter would be unreasonable.
  - (ii) While the FOI Act provides any person with a general right of access to information in the possession of government or a public body, this right is limited

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<sup>12</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>13</sup> *Ibid* at [68].

<sup>14</sup> Section 33(2A).

by certain exceptions and exemptions including the protection of essential personal privacy rights.

- (iii) Given the nature of the information requested, it is most likely the relevant third parties would object to the release of their personal information under the FOI Act.
- (iv) While I note there is no indication the Applicant intends to distribute the requested information more broadly, the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.
- (v) I consider the interest in protecting the personal privacy of certain third parties outweighs the Applicant's personal interest in obtaining access to the documents.

42. Accordingly, I am satisfied certain personal affairs information in the documents is exempt from release under section 33(1).
43. However, I am not satisfied certain personal affairs would be unreasonable to disclose where that information relates only to an Agency officers professional role, and where they are directly involved in the matter. In my view, disclosure promotes the Agency's accountability for addressing [the issue] brought to its attention.
44. My decision in relation to section 33(1) is outlined in the Schedule of Documents at Annexure 1 and in a marked-up version of the documents provided to the Agency for its reference.

***Section 35(1)(b) – Information obtained in confidence by an agency***

45. Where I have determined sections 30(1) or 33(1) does not apply, I have considered whether section 35(1)(b) applies.
46. 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.
47. Confidentiality can be expressed or implied from the circumstances of the matter.<sup>15</sup>
48. In summary, section 35(1)(b) is concerned with protecting the public interest in the free flow of information provided in confidence to an agency by a person. In most cases, the person (including an organisation) will be external to the agency.

*Would disclosure divulge information or matter communicated in confidence by or on behalf of a person to the Agency?*

49. Whether information was communicated in confidence by a person to an agency is a question of fact.<sup>16</sup> In doing so, it is necessary to consider the position from the perspective of the communicator.<sup>17</sup>
50. The documents contain information relating to a perceived conflict of interest within the agency concerning a business owned by an agency officer. I am satisfied from the context of the information and the advice of the Agency that certain information was communicated with some expectation of

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<sup>15</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>16</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

<sup>17</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [265].

confidentiality.

*Would disclosure be contrary to the public interest as it would be reasonably likely to impair the ability of an agency to obtain similar information in the future?*

51. In determining whether disclosure of a document would be contrary to the public interest, I must consider whether disclosure would be reasonably likely to impair the ability of an agency to obtain similar information in the future.
52. In *Gunawan v Department of Education*,<sup>18</sup> the Victorian Civil and Administrative Tribunal (VCAT) discussed the importance of confidentiality in the course of an investigation:

I consider that disclosure of the information contained in those documents would be contrary to the public interest, because I accept the evidence that the unit ... would be substantially impaired in their ability to undertake investigations in the future, and ... would be severely compromised by any interference in the confidentiality of the process.
53. I note the Agency advises that they consider the information provided by Agency officers to it was communicated in confidence.
54. The Agency did not consult with the Agency staff involved, so I cannot determine with confidence that those employees considered their communication to be in confidence. I also consider that, once certain sensitive information is exempt from release under sections 30(1) or 33(1), the remainder is less sensitive and therefore less likely to have been communicated in confidence.
55. In any case, I am not satisfied disclosure of the information in the documents would impair that ability of the Agency to obtain similar information in the future.
56. Rather, I consider the disclosure of such information would not be reasonably likely to affect the frankness and candour of Agency officers in their provision of opinion or advice. Nor do I accept disclosure would have any material or lasting effect on advice provided to the Agency in the future, as Agency officers are required to fulfil their employment duties in accordance with their employment responsibilities and relevant public sector values in the Code of Conduct for Victorian Public Sector Employees issued by the Victorian Public Sector Commissioner under section 61 of the *Public Administration Act 2004* (Vic).<sup>19</sup>
57. Further, I am of the view the release of this information would not impair the agency obtaining similar information from its officers in the future.
58. Accordingly, I do not consider section 35(1)(b) applies to information in the documents.
59. My decision in relation to section 35(1)(b) is outlined in the Schedule of Documents at Annexure 1 and in a marked-up version of the documents provided to the Agency for its reference.

### ***Section 32(1) – Documents affecting legal proceedings***

60. 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’. I have considered whether section 32(1) applies to a part of Document 2.

### ***Legal professional privilege***

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<sup>18</sup> [1999] VCAT 665.

<sup>19</sup> See, for example, the public sector value of ‘Responsiveness’ which requires Victorian public sector employees to demonstrate responsiveness by ‘providing frank, impartial and timely advice to the Government’.

61. A document will be subject to legal professional privilege where it contains a confidential communication between:
- (a) 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) the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
  - (c) 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.<sup>20</sup>

#### *Client legal privilege*

62. A document will be subject to client legal privilege where it contains a 'confidential communication'<sup>21</sup> between:
- (a) 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;<sup>22</sup> or
  - (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.<sup>23</sup>
63. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.
64. The privilege extends to communications between government agencies and its in-house lawyers provided those lawyers are sufficiently independent.<sup>24</sup>
65. The High Court of Australia held legal privilege ensures a client can openly and candidly discuss legal matters with their legal representative and seek and obtain legal advice:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.<sup>25</sup>

66. Where a question of legal privilege arises, an agency must show the dominant purpose for which the document was prepared was either for legal advice, or alternatively for anticipated litigation.<sup>26</sup> The dominant purpose test applies to both communications for the purpose of obtaining or providing legal advice.
67. Having reviewed the document, I am satisfied it constitutes a confidential communication that was

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<sup>20</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

<sup>21</sup> Defined in section 117 of the *Evidence Act 2008* (Vic) to mean communications made in circumstances where the Agency and its professional legal advisers were under an obligation not to disclose their contents.

<sup>22</sup> Section 118 of the *Evidence Act 2008* (Vic).

<sup>23</sup> Section 119 of the *Evidence Act 2008* (Vic).

<sup>24</sup> *Waterford v The Commonwealth* [1987] HCA 25 at 4 (per Mason and Wilson JJ) and at 5 to 6 (per Brennan J).

<sup>25</sup> *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 at [19].

<sup>26</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

made for the dominant purpose of the Agency's professional legal advisers providing legal advice to its client – the Agency.

*Has legal privilege been waived?*

68. As stated above, legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be waived where the client acts in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the advice is disclosed with the client's express or implied consent.<sup>27</sup>
69. While widespread disclosure of legal advice within an agency may give rise to waiver of legal privilege,<sup>28</sup> I am satisfied the provision of some information about the legal advice by the Agency to the Applicant was limited and occurred between personnel of the Agency in their official capacity and was not inconsistent with the maintenance of legal privilege in the advice.
70. There is no evidence before me to establish privilege in the document has been waived by the Agency.
71. Accordingly, I am satisfied certain information in the document is exempt from release under section 32(1).
72. My decision in relation to section 32(1) is outlined in Schedule of Documents at **Annexure 1** and in a marked-up version of the documents provided to the Agency for its reference.

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

73. 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.
74. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>29</sup> and the effectiveness of the deletions. Further, where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>30</sup>
75. I have considered documents provided by the Agency and consider Document 13 to be irrelevant. I am of the view it falls outside the scope of the Applicant's request.
76. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to provide an edited copy of certain documents to the Applicant with the exempt information deleted, because the edited record would retain meaning.

**Conclusion**

77. While I am satisfied certain information in the documents is exempt from release under sections 30(1), 32(1) and 33(1), I am not satisfied all information to which the Agency refused access are exempt under sections 30(1) or 35(1)(b).
78. A marked-up copy of the documents indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

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<sup>27</sup> *Mann v Carnell* (1999) 201 CLR 1 at [28].

<sup>28</sup> *Setterfield v Minister for Education* [1986] VCAT.

<sup>29</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>30</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] and [155].

79. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

80. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.<sup>31</sup>

81. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>32</sup>

82. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>33</sup>

83. 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.

84. 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>34</sup>

### ***Third party review rights and when this decision takes effect***

85. As I have decided to release documents that contain the personal affairs information of a third party, if practicable, I am required to notify that person of my decision and their right to apply to VCAT for a review within 60 days from the date they are given notice.<sup>35</sup>

86. I confirm the third party will be notified of my decision and, therefore, my decision will not take effect until the 60 day review period expires.

87. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>31</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>32</sup> Section 52(5).

<sup>33</sup> Section 52(9).

<sup>34</sup> Sections 50(3F) and 50(3FA).

<sup>35</sup> Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Internal letter	1	Refused in full  Sections 30(1), 35(1)(b)	Refuse in full  Section 33(1)	<p><b>Section 33(1):</b> I am satisfied the document is exempt in full under section 33(1) for the reasons described in the Notice of Decision above.</p> <p><b>Section 25:</b> As I am satisfied the document is exempt in full, it would not be practicable to delete exempt information from the document. Accordingly, access to the document is refused in full.</p>
2.	[date]	Internal e-mail and attachments	25	Refused in full  Sections 30(1), 35(1)(b)	<p>Release in part  Sections 30(1), 32(1), 33(1), 25</p> <p>The document is to be released in accordance with the marked-up document provided with this decision.</p>	<p><b>Section 30(1):</b> I am satisfied certain information in the document is exempt from release under section 30(1) for the reasons described in the Notice of Decision above.</p> <p><b>Section 32(1):</b> I am satisfied the document contains a confidential communication prepared for the purposes of providing legal advice and is subject to legal privilege that has not been waived. Accordingly, I am satisfied this information is exempt from release under section 32(1).</p> <p><b>Section 33(1):</b> While I am satisfied certain information in the document is exempt from release under section 33(1), I am not satisfied all information to which the Agency refused</p>

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						<p>access is exempt information for the reasons described in the Notice of Decision above.</p> <p><b>Section 35(1)(b):</b> I am not satisfied certain information in the document is exempt under section 35(1)(b) for the reasons set out in the Notice of Decision above.</p> <p><b>Section 25:</b> I am satisfied it is practicable to delete exempt information from the document.</p> <p>I am also satisfied certain information is irrelevant to the terms of the Applicant's request and is to be deleted from the document in accordance with section 25. Accordingly, the document is to be released in part.</p>
3.	[date]	Internal review report	21	<p><b>Refused in full</b></p> <p>Sections 30(1), 35(1)(b)</p>	<p><b>Release in part</b></p> <p>Sections 30(1), 33(1), 25</p> <p>The document is to be released in accordance with the marked-up document provided with this decision.</p>	<p><b>Section 30(1):</b> See comments for Document 2.</p> <p><b>Section 33(1):</b> See comments for Document 2.</p> <p><b>Section 35(1)(b):</b> See comments for Document 2.</p> <p><b>Section 25:</b> See comments for Document 2.</p>
4.	[date]	Internal file note	1	<b>Refused in full</b>	<p><b>Refuse in full</b></p> <p>Section 30(1)</p>	<p><b>Section 30(1):</b> See comments for Document 2.</p> <p><b>Section 25:</b> See comments for Document 1.</p>

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				Sections 30(1), 35(1)(b)		
5.	[date]	Internal file note	1	<b>Refused in full</b>  Sections 30(1), 35(1)(b)	<b>Release in part</b>  Sections 33(1), 25  The document is to be released in accordance with the marked-up document provided with this decision.	<b>Section 30(1):</b> See comments for Document 2.  <b>Section 33(1):</b> See comments for Document 2.  <b>Section 35(1)(b):</b> See comments for Document 2.  <b>Section 25:</b> See comments for Document 2.
6.	[date]	Internal file note	2	<b>Refused in full</b>  Sections 30(1), 35(1)(b)	<b>Refuse in full</b>  Section 33(1)	<b>Section 33(1):</b> See comments for Document 2.  <b>Section 25:</b> See comments for Document 1.
7.	[date]	Internal e-mail	2	<b>Refused in full</b>  Sections 30(1), 35(1)(b)	<b>Release in part</b>  Sections 33(1), 25  The document is to be released in accordance with the marked-up document provided with this decision.	<b>Section 30(1):</b> See comments for Document 2.  <b>Section 33(1):</b> See comments for Document 2.  <b>Section 35(1)(b):</b> See comments for Document 2.  <b>Section 25:</b> See comments for Document 2.
8.	[date]	Internal e-mail	3	<b>Refused in full</b>	<b>Refuse in full</b>	<b>Section 33(1):</b> See comments for Document 2.

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				Sections 30(1), 35(1)(b)	Section 33(1)	Section 25: See comments for Document 1.
9.	[date]	Internal e-mail	3	Refused in full  Sections 30(1), 35(1)(b)	Refuse in full  Section 33(1)	Section 33(1): See comments for Document 2.  Section 25: See comments for Document 1.
10.	[date]	Internal e-mail	4	Refused in full  Sections 30(1), 35(1)(b)	Release in part  Sections 33(1), 25  The document is to be released in accordance with the marked-up document provided with this decision.	Section 30(1): See comments for Document 2.  Section 33(1): See comments for Document 2.  Section 35(1)(b): See comments for Document 2.  Section 25: See comments for Document 2.
11.	[date]	Internal e-mail	4	Refused in full  Sections 30(1), 35(1)(b)	Release in part  Sections 33(1), 25  The document is to be released in accordance with the marked-up document provided with this decision.	Section 30(1): See comments for Document 2.  Section 33(1): See comments for Document 2.  Section 35(1)(b): See comments for Document 2.  Section 25: See comments for Document 2.
12.	[date]	Internal e-mail	3	Refused in full	Release in part	Section 30(1): See comments for Document 2.

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				Sections 30(1), 35(1)(b)	Sections 33(1), 25  The document is to be released in accordance with the marked-up document provided with this decision.	Section 33(1): See comments for Document 2.  Section 35(1)(b): See comments for Document 2.  Section 25: See comments for Document 2.
13.	[date]	Internal e-mail	56	Refused in full  Sections 30(1), 35(1)(b)	Refuse in full  Section 25	Section 25: I am satisfied the document is not relevant to the Applicant's request. It does not relate to the specific incident, nor relevant policies or procedures. Rather it is a document that relates to tourism in the area generally.
14.	[date]	Internal e-mail	3	Refused in full  Sections 30(1), 35(1)(b)	Refuse in full  Section 33(1)	Section 33(1): See comments for Document 2.  Section 25: See comments for Document 1.