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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'F19'
Agency:	Transport Accident Commission
Decision date:	19 December 2022
Exemptions considered:	Sections 30(1) and 38, in conjunction with section 251(1) of the <i>Victorian Police Act 2013</i> (Vic) and section 90Q(1) of the <i>Road Safety Act</i> (Vic)
Citation:	'F19' and the Transport Accident Commission (<i>Freedom of Information</i>) [2023] VICmr 256 (19 December 2022)

FREEDOM OF INFORMATION – traffic accident compensation scheme – internal working documents – documents prepared by an external party - disclosure contrary to public interest – secrecy provision – *Road Safety Act 1986* (Vic) – *Victorian Police Act 2013* (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 documents requested by the Applicant under the FOI Act.

I am satisfied information in the documents is exempt from release under sections 30(1), and 38 in conjunction with section 251(1) of the *Victoria Police Act 2013* (Vic) and section 90Q(1) of the *Road Safety Act* (Vic).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, access is granted in part. Where it is not practicable to do so, access is refused in full.

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

19 December 2022

Reasons for Decision

Background to review

1. The Applicant's representative made a request to the Agency seeking access to all documents in the Applicant's accident compensation file held by the Agency.
2. The Agency identified four documents falling within the terms of the Applicant's request and granted access to one document in part under section 30(1) and refused access to three documents in full under section 38 in conjunction with section 251(1) of the *Victoria Police Act 2013* (Vic) (**Police Act**) and Part 7B of the *Road Safety Act 1986* (Vic) (**Road Safety Act**). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 38 – Documents to which secrecy provisions of enactments apply

9. A document is exempt 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, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
10. 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.
11. The Agency has applied section 38 in conjunction with 251(1) of the Police Act to refuse access to two documents.
12. The Agency also relies on Part 7B of the Road Safety Act to refuse access to Document 4. As discussed above, I consider the correct provision in the Road Safety Act is section 90Q(1) rather than Part 7B (as relied on by the Agency) as discussed below.

13. Accordingly, I will first consider section 38 of the FOI Act and section 251(1) of the Police Act.

Section 38 in conjunction with section 251(1) of the Police Act

14. I am satisfied the Police Act is an enactment in force for the purpose of section 38.

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

15. For section 38 to apply to the enactment, the enactment must be formulated with such precision that it specifies the information sought to be withheld.

16. Section 251(1) of the Police Act provides:

251 Disclosure or use of vehicle accident information for a purpose other than an authorised purpose prohibited

(1) A person referred to in section 248(1)(a) to (d) must not disclose or use vehicle accident information disclosed to that person by a police officer, or a Victoria police employee, except for an authorised purpose.

Penalty: 60 penalty units.

17. Under sections 248(1)(a) to (d), 'person' is defined as:

Certain persons may request disclosure of vehicle accident information

(1) A person may request a police officer or a Victoria Police employee to disclose to the person vehicle accident information relating to an accident if—

- (a) the person was injured as a result of the vehicle accident; or
- (b) the person's property was damaged or destroyed as a result of the vehicle accident; or
- (c) the person is a personal representative of a person who died or was injured, or whose property was damaged or destroyed, as a result of the vehicle accident; or
- (d) the person is an authorised representative of a person referred to in paragraph (a) or (b), or a personal representative referred to in paragraph (c).

(2) A request may only be for an authorised purpose.

(3) A request must be made in accordance with section 249.

18. 'Vehicle accident information' in section 251(1) of the Police Act is defined in section 246 of that Act to include:

... any of the following information relating to a vehicle accident held by the Chief Commissioner of Police that has been recorded, collected or obtained by a police officer in the course of his or her duty—

- (a) information that identifies—
 - (i) the driver or registered operator or passenger of any vehicle involved in the vehicle accident;
 - (ii) a person who witnessed the vehicle accident;
 - (iii) a person who dies or is injured as a result of the vehicle accident;
- (b) a statement of—
 - (i) the driver or a passenger of any vehicle involved in the vehicle accident;
 - (ii) a person who witnessed the vehicle accident;
 - (iii) a person injured as a result of the vehicle accident;
- (c) information that identifies any vehicle involved in the vehicle accident;
- (d) the full particulars of the vehicle accident.

19. I am satisfied the enactment is specific enough to apply to the kind of information in the documents to which the Agency refused access.

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

20. Section 251(1) of the Police Act states a person referred to in sections 248(1)(a) to (d) is prohibited from disclosing the information.
21. Sections 248(1)(a) to (d) of the Police Act lists the following persons who may request disclosure of vehicle accident information:
- (a) the person was injured as a result of the vehicle accident; or
 - (b) the person's property was damaged or destroyed as a result of the vehicle accident; or
 - (c) the person is a personal representative of a person who died or was injured, or whose property was damaged or destroyed, as a result of the vehicle accident; or
 - (d) the person is an authorised representative of a person referred to in paragraph (a) or (b), or a personal representative referred to in paragraph (c).
22. I am satisfied section 251(1) of the Police Act prohibits specific persons from disclosing vehicle accident information in the documents.

Is release under FOI an 'authorised purpose'?

23. Section 251(2) of the Police Act allows a person who obtains vehicle accident information to disclose that information for an 'authorised purpose'.
24. 'Authorised purpose' is defined in section 246 of the Police Act to include:
- authorised purpose" means, in relation to the disclosure or use of vehicle accident information relating to a vehicle accident, any one or more of the following purposes—
- (a) to obtain legal advice in relation to the vehicle accident; or
 - (b) to recover any loss or damage incurred or suffered, or costs incurred, as a result of the vehicle accident, whether by way of legal proceedings or otherwise; or
 - (c) to assess and determine a claim under a contract of insurance made in relation to—
 - (i) the death or injury of a person as a result of the vehicle accident; or
 - (ii) the damage to, or destruction of, property as a result of the vehicle accident; or
 - (d) to assess and determine a claim for compensation under a statutory insurance scheme law in respect of the death of or injury to a person as a result of the vehicle accident; or
 - (e) to investigate the vehicle accident for a purpose set out in paragraph (a), (b), (c) or (d)
25. In summary, section 251(1) of the Police Act operates to protect the personal privacy of individuals who are identified in documents generated in connection with the management and investigation of transport accidents. The section imposes strict confidentiality requirements on Agency officers, among others, which apply in all but certain limited circumstances.
26. I am satisfied none of the scenarios set out under section 246 of the Police Act apply in this case. Therefore, the information is not required to be released for an authorised purpose under section 251(2) of that Act.
27. Further, as the Police Act does not include release of information under the FOI Act as an 'authorised purpose', I am satisfied the information cannot be disclosed in accordance with section 251(1) of the Police Act.

Conclusion in relation to 38 in conjunction with section 251(1) of the Police Act

28. As such, I am satisfied section 38 of the FOI Act applies to the information in the documents as:
- (a) section 251(1) of the Police Act is an enactment in force;
 - (b) the definition of 'vehicle accident information' in the Police Act refers specifically to information in the documents; and
 - (c) section 251(1) of the Police Act prohibits the Agency and its officers from disclosing 'vehicle accident information' in these circumstances.
29. Accordingly, I am satisfied information in the documents is exempt from release under section 38 in conjunction with section 251(1) of the Police Act.

Section 38 and section 90Q(1) of the Road Safety Act

30. The Agency relies on section 38 in conjunction with Part 7B of the Road Safety Act to refuse access to Document 4.
31. Part 7B creates a statutory regime for the use and disclosure of 'relevant information'.
32. I am satisfied the Road Safety Act is an enactment in force for the purpose of section 38.

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

33. For section 38 to apply to a documents, the relevant enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
34. 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.
35. Section 90Q of the Road Safety Act provides:
- (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 authorisedPenalty: 120 penalty units or imprisonment for 12 months
 - (2) A person who obtains relevant information under an information protection agreement must not use or disclose that information other than in accordance with the information protection agreement
 - (a) Knowing that the use or disclosure is not in accordance with the agreement; or
 - (b) Being reckless as to whether the use or disclosure is in accordance with the agreement.Penalty: 120 penalty units or imprisonment for 12 months
- ...
36. Section 90I of the Act sets out the applicable definitions in Part 7B. 'Relevant information' is defined as information to which s 90J of the Road Safety Act applies.

37. 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 Corporation in relation to its registration or licensing functions and activities; 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 Corporation in relation to its 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 licences or learner permits and recording demerit points—
- whether that information relates to a registered or unregistered vehicle or a licensed or unlicensed driver.

38. Section 90N Road Safety Act provides:

- ...
- (2) An information protection agreement must—
- (a) specify—
 - (i) the purpose for which the information is proposed to be disclosed to the person or body; and
 - (ii) the provision of this Act under which the Secretary is authorised to disclose the information; and
 - (iii) the means by which the information will be provided by the Secretary; and
 - (iv) the means by which the information will be protected by the person or body; and
 - (v) how compliance with the terms of the agreement will be monitored and enforced by each party to the agreement; and
 - (vi) the auditing arrangements; and
 - (vii) the procedures for managing any breach of privacy; and
 - (b) include an undertaking by the person or body that the information will be used or disclosed only for the purpose specified in the agreement.
- (3) An information protection agreement may include any other requirements, qualifications or conditions specified by the Secretary.
- ...

39. The Agency advises and I accept that it receives information from VicRoads under an information protection agreement and that release of information to the Applicant is not a circumstance which is covered by that agreement.

40. Having viewed Document 4, and without describing its contents, I am satisfied it contains information from which individuals could be identified, including the owners of vehicles matching particular licence plates as well as Agency officers. I am also satisfied it contains information collected by VicRoads in connection with its vehicle registration and licensing functions. The

information in the document is 'relevant information' for the purposes of Part 7B of the Road Safety Act.

41. Having carefully reviewed the document, I accept the Agency's submission that Document 4 contains relevant information and was obtained under a confidential service agreement between the Agency and VicRoads.

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

42. As indicated above, section 90Q(1) of the Road Safety Act makes it an offence for the Secretary or a relevant person to disclose relevant information.

43. Section 90I of the Road Safety Act defines 'relevant person' as:

- (a) The Head, Transport for Victoria; and
- (b) Employees in the Department; and
- (c) A person who is a delegate or subdelegate of the Secretary; and
- (d) A person engaged to provide services for the Secretary.

Conclusion in relation to 38 in conjunction with section 90Q(1) of the Road Safety Act

44. I am satisfied section 38 applies to the information in the document as:

- (a) the Road Safety Act is an enactment in force;
- (b) the definition of 'relevant information' in section 90J of the Road Safety Act refers specifically to information contained in the documents; and
- (c) section 90Q(1) prohibits the Agency and Agency officers from disclosing the 'relevant information'.

45. Accordingly, I am satisfied Document 4 is exempt from release under section 38 of the FOI Act in conjunction with section 90Q(1) of the Road Safety Act.

46. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 38.

Section 30(1) – Internal working documents

47. Section 30(1) has three requirements:

- (a) the document must disclose 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, Ministers 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.

48. The exemption does not apply to purely factual material in a document.¹

¹ Section 30(3).

49. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of an agency, a member of an agency’s staff, and any person employed by or engaged on behalf of an agency, regardless of whether or not they are subject to the *Public Administration Act 2004* (Vic).
50. The Agency refused access in part to Document 1 under section 30(1).

Does the document disclose 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, Ministers or an officer and a Minister?

51. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
52. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.²
53. Having considered the content and context of the document, I am satisfied it contains information in the nature of opinion, advice and recommendations prepared by Agency officers for the purpose of section 30(1).

Was the document 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?

54. The term ‘deliberative process’ is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³
55. In *Re Waterford and Department of Treasury (No.2)*,⁴ the former Victorian Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

56. I am satisfied the information in the document was provided in the course of the Agency’s deliberative processes in relation to its assessment of the Applicant’s needs following the motor vehicle accident subject to this FOI request.

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

57. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
58. 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:⁵
- (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;

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

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

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.

59. In their decision letter, the Agency advised:

... there is a strong public interest in allowing the TAC to hold full and frank internal discussions (including discussions with consultants and other independent contractors) concerning the performance of the TAC's obligations and accordingly, I have determined that disclosure of the documents would be contrary to the public interest.

- 60. In its decision, the Agency released the survey questions and answers selected by the Applicant in their response to the Agency's enquiries as 'factual information' which is not exempt from release under 30(1). The Agency refused access to the remaining answers.
- 61. 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.⁶
- 62. While I accept the remaining information was provided to the Applicant in the context of their engagement with the Agency, I also acknowledge disclosure of documents under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate or use the document as they choose.⁷
- 63. Having considered the nature of the document and the purpose for which it was prepared, I am of the view this factor weighs against disclosure.
- 64. The questions in the document are designed to elicit honest and timely responses in relation to their recovery from a motor vehicle accident. The answers are then used by the Agency to deliver appropriate support services in relation to the Agency's functions and other statutory obligations.
- 65. While I recognise the Applicant's personal interest in release of this information, I consider this is outweighed by the need to protect the accuracy and integrity of the information obtained by the Agency as part of its service to the public.
- 66. While there is nothing before me to suggest this is a factor in this matter, were this information to be released and further disseminated, the potential for future manipulation could compromise the

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

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [68].

ability of the Agency to obtain honest responses from clients and undermine the efficacy of the service provided.

67. In balancing the above factors, I am satisfied the release of the deliberative material in the document would be contrary to the public interest.
68. Accordingly, I am satisfied the information in the document is exempt from release under section 30(1).
69. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1).

Section 25 – Deletion of exempt or irrelevant information

70. 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.
71. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁸ 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 25.⁹
72. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, access is granted in part. Where it is not practicable to do so, access is refused in full.

Conclusion

73. I am satisfied information in the documents is exempt from release under sections 30(1), and 38 in conjunction with section 251(1) of the Victoria Police Act and section 90Q(1) of the Road Safety Act.
74. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, access is granted in part. Where it is not practicable to do so, access is refused in full.
75. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

76. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁰
77. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
78. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²

⁸ *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].

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

79. 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.
80. 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.¹³

When this decision takes effect

81. My decision does not take effect until the Agency's 14 day review period expires.
82. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹³ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Ongoing needs assessment	8	Released in part Section 30(1)	Release in part Sections 30(1), 25 The document is to be released except for the following information which is exempt under section 30(1) and is to be deleted in accordance with section 25: <ul style="list-style-type: none"> the multiple-choice answers not selected by the Applicant. 	Section 30(1): I am satisfied it would be unreasonable to disclose the opinion, advice and recommendations in this document for the reasons outlined in the Notice of Decision above. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and irrelevant information deleted in accordance with section 25.
2.	[Date]	[Document title]	17	Refused in full Section 38 in conjunction with section 251(1) of the Police Act.	Refuse in full Section 38 in conjunction with section 251(1) of the Police Act.	Section 38: I am satisfied this document is exempt from release under section 38 of the FOI Act in conjunction with section 251(1) of the Victoria Police Act for the reasons outlined in the Notice of Decision above. Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25 as to do so would render it meaningless.
3.	[Date range]	[Document title]	4	Refused in full	Refuse in full	Section 38: See comments for Document 2.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
				Section 38 in conjunction with section 251(1) of the Police Act.	Section 38 in conjunction with section 251(1) of the Police Act.	Section 25: See comments for Document 2.
4.	[Date]	[Document title]	1	Refused in full Section 38 in conjunction with section 7B of the Road Safety Act.	Refuse in full Section 38 in conjunction with section 90Q(1) of Road Safety Act.	Section 38: I am satisfied this document is exempt from release under section 38 of the FOI Act in conjunction with section 90Q(1) of the Road Safety Act for the reasons outlined in the Notice of Decision above. Section 25: See comments for Document 2.