**Freedom of Information Guidelines**

**Part IV – Exempt documents
Section 30 – Internal working documents**

***Freedom of Information Act 1982* (Vic)**

**Section 30 – Internal working documents**

All legislative references are to the *Freedom of Information Act 1982* (Vic) unless otherwise stated.

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**Section 30 – Internal working documents**

Extract of legislation

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| **30** | **Internal working documents** |
|  | (1) | Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act— |
|  |  | (a) | would 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, 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 |
|  |  | (b) | would be contrary to the public interest. |
|  | (1A) | Subsection (1) applies in relation to a council as if for "Minister" there were substituted "member of the council". |
|  | (2) | In the case of a document of the kind referred to in section 8(1), the matter referred to in subsection (1)(a) of this section does not include matter that is provided for the use or guidance of, or is used or may be used for, the purpose of making decisions or recommendations, or enforcing enactments or schemes, referred to in section 8(1). |
|  | (3) | This section does not apply to a document by reason only of purely factual material contained in the document. |
|  | (4) | This section does not apply to the record of a final decision, order or ruling given in the exercise of an adjudicative function, and any reason which explains that decision, order or ruling. |
|  | (5) | Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 27 shall state the public interest considerations on which the decision is based. |
|  | (6) | Subsection (1) shall cease to apply to a document brought into existence after the day of commencement of this section when a period of ten years has elapsed since the last day of the year in which the document came into existence. |

Guidelines

Overview

* 1. Section 30(1) exempts documents that contain opinion, advice or recommendation, or consultation or deliberation, where disclosure would be contrary to the public interest. A document is not exempt simply because it is an internal working document.[[1]](#footnote-1)
	2. Section 30 must be read consistently with the objects of the Act in [section 3](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-3/), which is to extend as far as possible the right of the community to access government held information. This right is only limited by exemptions necessary for the protection of essential public interests and private and business affairs.[[2]](#footnote-2) If it is unclear whether section 30 applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[[3]](#footnote-3)

Discretion to disclose exempt documents

* 1. The decision to exempt a document under section 30 is a discretionary power.[[4]](#footnote-4)
	2. An agency can choose to provide access to information that would otherwise be exempt under section 30, where it is proper to do so and where the agency is not legally prevented from providing access.

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| For more information on providing access to information outside of the Act, see [section 16 – Access to documents apart from Act](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-16/). |

The exemption

* 1. To be exempt under section 30(1), three conditions must be satisfied:
		+ Firstly, the document or information is matter in the nature of:
			- opinion, advice or recommendation prepared by an agency officer or a Minister; or
			- consultation or deliberation that has taken place between agency officers or Ministers; and
		+ Secondly, the matter was created during the deliberative processofan agency, Minister, or the government’s functions; and
		+ Thirdly, disclosure of the matter would be contrary to the public interest.

Steps to applying the exemption

* 1. An agency or Minister seeking to apply the section 30 exemption should:
		+ Identify the information and confirm from its content and context that the information is:
			- opinion, advice, or recommendation that has been prepared by an agency officer or Minister; or
			- consultation or deliberation that has taken place between agency officers, between Ministers, or between an officer and a Minister;

(collectively referred to as ‘deliberative information’ for the purpose of these Guidelines)

* + - Confirm the application of section 30(1) to the deliberative information is not expressly excluded by sections 30(2), (3), (4) or (6):
			* guidance or policy used for making decisions that must be available for inspection or purchase under section 8(1) – section 30(2);
			* purely factual information – section 30(3);
			* a final decision, order or ruling from an adjudicative function and reasons for that decision, order or ruling – section 30(4); or
			* a document more than 10 years old – section 30(6).
		- Identify the legislative or operational functions of the agency or Minister that the deliberative information relates to and confirm that it was created in relation to those functions.
		- Determine if it would be contrary to the public interest to disclose the information taking into account relevant factors. Where disclosure is contrary to the public interest, the decision letter must clearly explain why disclosure is contrary to the public interest (section 30(5)).
		- If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

When section 30(1) does not apply

* 1. Section 30 lists four circumstances where this exemption does not apply:
		+ documents required to be made available for inspection and purchase under section 8 (section 30(2));
		+ purely factual information (section 30(3));
		+ certain documents relating to adjudicative functions (section 30(4)); and
		+ documents more than 10 years old (section 30(6)).
	2. Other legislation may limit the application of the exemption to certain documents.

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| **Example** Section 84(3) of the [*Adoption Act 1984* (Vic)](https://www.legislation.vic.gov.au/in-force/acts/adoption-act-1984/073) prevents the Department of Health and approved adoption agencies from applying section 30 to documents concerning the assessment of an application for adoption that contain opinion, advice or recommendation or consultation or deliberation between the Secretary or principal officer of the agency.  |

Section 30(2) – Documents required to be made available for inspection and purchase

* 1. [Section 8](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-8/) requires an agency to make available for inspection and purchase documents such as manuals, policy and guidance material used by the agency in its operations. The effect of section 30(2) is that the section 30(1) exemption cannot be claimed over these documents.

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| **Example**[***Williams v University of Melbourne* [2019] VCAT 1215**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/1215.html?context=1;query=%22foia1982222%20s8%22;mask_path=)**Background**The applicant sought access to Guidelines for Graduate Access Melbourne program selection officers.The University refused access to the Guidelines under section 30(1).**Issue**Did section 30(2) apply? Were the Guidelines a document of a kind referred to in section 8(1)? Namely, a guideline that is used or may be used by the agency or its officers for the purpose of making decisions or recommendations with respect to rights, privileges, or benefits to which a person may be entitled or eligible. **Decision**Yes, the Guidelines did meet this description. This meant section 30(2) applied to the Guidelines, they could not be exempt under section 30(1), and should be released to the applicant.The Victorian Civil and Administrative Tribunal (**VCAT**) held that although the Guidelines were not a formal policy and there was no requirement to use them, it was sufficient for the purposes of section 30(2) that the document provided guidance and maybe used for the purpose of making decisions in relation to a person’s eligibility to enter a graduate course by way of the Graduate Access Melbourne program. The guidance did not have to be comprehensive or prescriptive.VCAT held that any decision about eligibility into the Graduate Access Melbourne program was not a ‘right’, because it did not provide a guarantee of anything substantive. However, it was a ‘benefit’ in the sense of a ‘favourable or helpful factor or circumstance’ and may also be a ‘privilege’ in the sense of an ‘advantage belonging to a person, class or office’. The persons who are or may be entitled or eligible to the benefit or privilege are those that fall within the identified equity categories in the Guidelines. |

Section 30(3) – Purely factual information

* 1. Section 30(3) provides this exemption does not apply to purely factual information.
	2. Factual information is information without any opinion or inference – it is information that is objectively the same for any individual. Common examples of factual information include:
* statistics, data, times, or dates;
* backgrounds[[5]](#footnote-5), summaries or chronologies of events. For example, recounting of facts as see by individuals during an investigation,[[6]](#footnote-6) development of a policy, or file notes informing or recounting past events such as a conversation with a manager.[[7]](#footnote-7) Information of this nature does not cease to be factual simply because there might be some future debate about its accuracy[[8]](#footnote-8); and
* actual financial expenditure, as opposed to financial advice based on estimates and assumptions.[[9]](#footnote-9)
	1. When deliberative information is intertwined with factual information and cannot be separated, that intertwined information is exempt.[[10]](#footnote-10)
	2. However, an agency or Minister must critically examine the information to ensure that the intertwined information is truly inseparable. In many instances it will be practicable to sever the deliberative information from the factual information by redacting a document.

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| **Example** |
| [***EW2 and The Royal Victorian Eye and Ear Hospital* [2022] VICmr 230 (21 October 2022)**](https://ovic.vic.gov.au/decision/ew2-and-the-royal-victorian-eye-and-ear-hospital-freedoma-of-information-2022-vicmr-230-21-october-2022/)The applicant requested access to an *Executive Committee Paper for Information* concerning an audit into surgery cancellations on the day of the Applicant’s appointment.The Public Access Deputy Commissioner was satisfied that it would be contrary to the public interest to disclose certain information in the document that was opinion, advice or recommendation in that it contained the outcome of the audit and recommendations, and was clearly a draft document with tracked comments by agency officers, made in the course of the agency’s deliberative processes in reviewing its operating environment, specifically the review of day-of-surgery cancellations and surgical waitlists.However, the document contained some factual information in the ‘background’ section of the document and factual information about patients in the Appendix. The Commissioner decided this factual information was not exempt from release under section 30(1) because of section 30(3). |

Section 30(4) – adjudicative functions

* 1. Section 30(4) provides this exemption does not apply to a record of a final decision, order, or ruling when exercising an adjudicative function. It also does not apply to any reasons which explain the decision, order, or ruling.
	2. An ‘adjudicative function’ generally refers to a judge acting within a court or tribunal, or where a person decides disputes between parties. For example, court or tribunal decisions, as well as arbitration decisions.

Section 30(6) – documents that are more than 10 years old

* 1. Section 30(6) provides this exemption does not apply to a document when 10 years has passed since the last day of the year when the document was created. For example:
* if a document was created during 2013, this exemption cannot be claimed from 1 January 2024;
* if a document was created during 2014, this exemption cannot be claimed from 1 January 2025;
* if a document was created during 2015, this exemption cannot be claimed from 1 January 2026.
	1. Section 30(6) does not apply to documents created before 5 July 1983 (being the day after commencement of section 30).

Officer of an agency

* 1. Section 30(1) applies to opinion, advice, or recommendation prepared by an officer and consultation or deliberation between officers. As such, an agency must establish that the individuals involved are ‘officers’ for the purposes of the Act.
	2. The term ‘[officer’](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-5/#definitions-officer) is defined in section 5(1). It includes independent contractors, consultants and legal advisers engaged by an agency to carry out work or provide services.[[11]](#footnote-11)

Opinion, advice, or recommendation

* 1. The words ‘opinion’, ‘advice’ and ‘recommendation’ should be given their plain English meaning. Their dictionary definitions are:[[12]](#footnote-12)
* **Opinion:** a personal view, an estimation, judgement, or belief.
* **Advice**: an opinion recommended, or offered, as worthy to be followed, or a formal or professional opinion given.
* **Recommendation**: a representation in favour of a person or thing, or anything that serves to recommend or induce acceptance or favour.

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| **Common examples:** * emails or other correspondence between agency officers or a Minister deliberating issues or providing advice on a matter;
* parts of reports that analyse evidence and provide subjective views and recommendations; or
* recommendations in briefings to a Minister.
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* 1. “Advice” must be something better than mere “informing” or “recounting” events that have occurred.[[13]](#footnote-13)
	2. To be exempt, the opinion, advice or recommendation must come from an agency officer or Minister, not another source such as a complainant, witness or third party.[[14]](#footnote-14)
	3. The agency officer or Minister expressing the opinion, advice or recommendation does not need to be from the same agency or Minister that is processing the request.[[15]](#footnote-15)
	4. It is not necessary for the document to be opinion, advice or recommendation. The issue is whether release of the document would disclose matter of that nature.[[16]](#footnote-16)
	5. Often, documents with deliberative information are rarely exempt in full because they usually include factual information like a background, description of events leading up to a decision or statistical information to support a course of action.
	6. Factual records such as meeting minutes and agenda, terms of reference or instructions from one agency officer to another officer generally are not opinion, advice or recommendation.

Consultation or deliberation

* 1. ‘Consultation’ and ‘deliberation’ should be given their plain English meaning. Their dictionary definitions are:[[17]](#footnote-17)
* **Consultation**: the action or process of formally consulting or discussing.
* **Deliberation**: careful consideration before decision.
	1. To be exempt, the consultation or deliberation must be between agency officers or Ministers. Consultation or deliberation between an officer or Minister and an external third party (that is not engaged by the agency) is not exempt under section 30(1).
	2. ‘Deliberations between officers’ includes deliberations between officers of different agencies and does not have to involve officers from the agency processing the request.[[18]](#footnote-18)

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| **Example**Department A contracts with a University to perform an evaluation of certain research studies. The University creates an evaluation group consisting of academics from the University and an officer employed by Department B.The evaluation group prepares a first draft report. The first draft report contains consultation or deliberation between members of the evaluation group, being officers of the University and Department B. This is enough to satisfy the ‘consultation or deliberation’ element of section 30(1). It does not matter that the consultation or deliberation does not involve officers from Department A. |

Deliberative process

* 1. Where a document contains deliberative information, an agency or Minister must also determine whether the deliberative information was created in a ‘deliberative process’ related to the functions of an agency, Minister, or the government.
	2. ‘Deliberative process’ is widely interpreted to include most processes undertaken by an agency or Minister in relation to their functions.[[19]](#footnote-19) When considering if deliberative information was generated as part of an agency or Minister’s deliberative process, an agency or Minister should be able to identify:
* what the agency or Minister’s functions are (for example, as set out in legislation); and
* that the information generated relates to those functions and contributes to how those functions are exercised.

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| **Examples of deliberative processes:*** the process of decision-making
* the formulation of policy
* the process of investigation[[20]](#footnote-20)
* comments on the effect of future contemplated legislation
* medical and psychiatric reports commissioned by agencies for regulatory purposes[[21]](#footnote-21)
* internal audit investigations.[[22]](#footnote-22)
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* 1. Example of opinions not forming part of an agency’s deliberative process:

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| ***[Porter v Victoria Police](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/962.html)* [[2005] VCAT 962](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/962.html)****Background**A Senior Sergeant in a particular unit provided two documents to the Superintendent in charge of that unit. The two documents were critical of the applicant, a Senior Constable who was stationed in the unit at that time. At the time the documents were prepared, the applicant was not in the process of being assessed for promotion or demotion, was not the subject of any contemporaneous performance assessment, was not the subject of any contemplated or ongoing investigation, and her suitability for a nominated position was not in contemplation. **Decision**In the circumstances, the Victorian Civil and Administrative Tribunal concluded that the presentation of the two documents to the Superintendent was not part of Victoria Police’s deliberative processes. They were not part of the thought processes of the agency or any reflective consultation.  |

* 1. A document created after the completion of a deliberative process, but which records that process, can fall within the section 30(1) exemption.[[23]](#footnote-23)
	2. The deliberative process does not have to relate to the functions of the agency processing the request.[[24]](#footnote-24) The deliberative process may relate to functions of another agency, or Minister or of the government.

Disclosure would be contrary to the public interest

* 1. For section 30(1) to apply, the agency must establish that disclosure of deliberative information would be contrary to the public interest.
	2. “Would” requires certainty that an event will occur, rather than a mere possibility or likelihood.[[25]](#footnote-25) The need for a high degree of confidence reflects the object of the Act in [section 3](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-3/) to provide public access “as far as possible”.[[26]](#footnote-26)
	3. There are many factors identified in case law that may be relevant to determining whether it would be contrary to the public interest to disclose a document or information.[[27]](#footnote-27) The trend towards modern, transparent and accountable government, has resulted in courts and tribunals limiting these factors.
	4. An agency or Minister’s decision must be made consistently with the object of the Act, which is to release information as far as possible, and to only use exemptions to protect essential public interests. Consequently, the balancing of public interest factors for and against disclosure does not begin from empty scales or a blank page. Instead, the Act requires the balancing to occur from and within a default position that the document or information should be released.[[28]](#footnote-28)

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| For more information about the object of the Act, see [section 3](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-3/) of the FOI Guidelines. |

* 1. As required by section 30(5), an agency or Minister must, in its decision notice under section 27, explicitly state the relevant public interest considerations on which the decision is based. This requires the agency or Minister to carefully consider the relevant public interest factors on a case-by-case basis.[[29]](#footnote-29) The decision notice should explain how they apply to the specific documents or information in the context of the requested document and the potential consequences of its disclosure, referring to the facts, evidence and reasons for the agency or Minister’s decision.

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| For more information on writing a decision, read [section 27](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-27/) of the FOI Guidelines. |

Factors relevant to the public interest

* 1. Public interest factors are not a fixed, determinative set of criteria.[[30]](#footnote-30) Rather, they are a list matters that may be relevant. Each request balances these factors based on the unique circumstances of the matter.
	2. Public interest factors that are given weight in the context of a modern, transparent and accountable government include:
* the right of every person to gain access to documents under the Act;
* the sensitivity of the issues involved and the broader context of how the documents were created;
* the stage of a decision or policy development at the time the communications were made;
* whether disclosure of the documents would be likely to inhibit communications between agency officers that are essential for the agency to make an informed and well-considered decision or for those officers to properly participate in a process of the agency’s functions (such as an audit or investigation, regulatory or law enforcement function);[[31]](#footnote-31)
* 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, but only where the agency would not otherwise be able to explain upon disclosure of the documents;[[32]](#footnote-32)
* the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final decision by an agency or Minister;
* the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions;
* the public interest in the community being better informed about an agency’s deliberative, consultative and decision-making processes;[[33]](#footnote-33)
* the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process[[34]](#footnote-34) and building the community’s trust in government and its decision making processes;[[35]](#footnote-35)
* whether there is controversy or impropriety around the decision or the decision-making process.
	1. In the context of clinical assessment reports for an offender in relation to a prevention of violence program, there is a public interest in whether disclosure may interfere with the integrity of the assessment process, in that release of the reports may give prisoners additional insights into clinicians’ methods which they could employ to subvert the effectiveness of assessments.[[36]](#footnote-36)
	2. In the context of public schools, there is a strong public interest in protecting the integrity of staff management processes, including enquiries into staff medical fitness and conduct that depend on information provided confidentially not being subsequently disclosed.[[37]](#footnote-37)

Case studies – document contains an incomplete explanation for an agency decision or action.

* 1. Modern government assumes that members of the public are able to understand that documents are produced at particular points in time and that a document, in isolation, may not represent the complete or final position or decision of an agency.[[38]](#footnote-38)
	2. If there are concerns about potential confusion in releasing a document, an agency should consider providing additional information to the applicant when releasing the document, that provides the necessary context or clarity to understand the information contained in the document and if relevant, how the information in the document was later used during a decision-making process.[[39]](#footnote-39)

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| **Example** |
| [***ES4 and Department of Jobs, Precincts and Regions* (Freedom of Information) [2022] VICmr 195**](https://ovic.vic.gov.au/decision/es4-and-department-of-jobs-precincts-and-regions-freedom-of-information-2022-vicmr-195-10-august-2022/)[[40]](#footnote-40)**Background**The applicant requested access to ministerial briefing documents prepared by the agency for a former Minister of Local Government. On review before the Information Commissioner, the agency sought to rely on section 30(1) to exempt certain information relating to public funding. The agency argued it would be contrary to the public interest to release the information because the information was inaccurate and could therefore confuse the public if released.**Decision**The Public Access Deputy Commissioner was not satisfied disclosure of the information would be contrary to the public interest.The Commissioner considered the agency could address the issue of inaccurate amounts of public funding referenced in the document, and any potential confusion caused, by explaining the errors and providing the correct information to the applicant at the same time the document is disclosed to the applicant. Also relevant to the Commissioner’s decision was: * the public interest in the community being better informed about the expenditure of public funds and government decision making processes. By providing access to information that demonstrates the basis upon which decisions are made, disclosure of documents like this builds the community’s trust in government and its decision making processes.
* the fact the information regarding the expenditure of public funds was not sensitive given there is already publicly available information regarding government assistance provided to businesses and organisations in response to the COVID-19 pandemic.
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| [***Major Transport Infrastructure Authority v Davis* [2022] VCAT 123**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/123.html)**Background**The applicant requested access to an individual site report relating to two level crossings in Melbourne.The agency refused access to the document under section 30(1) on the basis that the document was a ‘desktop’ assessment, prepared at an early part of the preliminary decision-making process, and a final version of the document was not produced and considered when decisions were made about crossing removals. The information in the individual site report did not undergo the normal verification and review process to ensure the data and assumptions were accurate, which is usually conducted when a site report is to be used in some way to further a course of investigation or decision. This did not occur because there was no future need for the document. The document contained errors. Therefore, the agency argued disclosure has the potential to cause confusion and inappropriate debate around the decisions eventually made by the agency in relation to crossing removals.**Issue**Was disclosure of the document contrary to the public interest?**Decision**The Victorian Civil and Administrative Tribunal (**VCAT**) decided that disclosure of the site report would be contrary to the public interest on the basis that its disclosure would be likely to lead to confusion and ill-informed debate. Relevant to the decision was the fact the document, on its face, gave a superficial impression that it was complete and final, when in reality it was a draft internal working document containing preliminary advice or opinion that was incomplete, unchecked, unverified and contained significant factual errors. Senior Member Billings considered these qualities meant that the document could be easily misinterpreted as having some use or value which it does not have.In the circumstances, Senior Member Billings considered release of the document would not advance debate or facilitate the government being held accountable. Senior Member Billings considered whether members of the public would be able to understand that the document was created at a particular point in time and may not represent the final decision of the agency, and therefore members of the public would not be confused or misunderstand the document or participate in unnecessary debate if the document were released.In finding this was not the case, Senior Member Billings accepted the agency’s evidence that the intelligence or expertise of potential readers would not overcome the potential for confusion. The reason for this was due to the nature of how the information is presented in the document. It was presented as a concluded view when it was not in fact a concluded view. The factual errors made by the authors would have been picked up and corrected during the agency’s verification and harmonisation process, but this process never occurred because the document was not used in further decision-making around level crossing removals. Senior Member Billings stated there is undoubtedly a public interest in transparency in decision-making, but that public interest is outweighed in the particular circumstances of this document. |

Factors that should not be given too much weight in the context of modern government.

* 1. A modern, transparent and accountable government will not give significant weight to the following factors.

Draft documents

* 1. While the draft nature of adocument and whether a final version is available are both relevant considerations, a document will not be exempt under section 30(1) based only on the fact that it is in draft form, regardless of whether a final document exists.
	2. A draft document that simply shows an agency has changed its position does not mean it is exempt. The disclosure of drafts can show an agency diligently carried out its functions. Draft documents are only exempt where an agency can demonstrate that disclosure would be contrary to the public interest.
	3. Each document must be considered in light of the object of the Act and the public interest factors to determine whether disclosure would be contrary to the public interest in all of the circumstances.
	4. An agency or Minister should engage with an applicant at an early stage to confirm whether they seek access to draft documents. Asking the applicant this question can assist agencies to narrow the scope of a request. This potentially limits the number of documents needed to be processed, saving the agency or Minister’s time and resources, and promoting timely access to information.

Inhibiting frankness and candour

* 1. The public interest factor that disclosure would ‘inhibit frankness and candour’ can only be relied upon in very limited situations and must be supported by detailed evidence and reasoning as to why disclosure would be contrary to the public interest.[[41]](#footnote-41) It takes more than a mere assertion that an agency officer would be inhibited from providing frank and candid advice to exempt a document under section 30.
	2. The VCAT has interpreted ‘frankness and candour’ cautiously, stating:

It is the duty of officers in the public sector to give frank and fearless advice and generally one would ask why would they shrink from being seen by the release of documents under the Freedom of Information system as doing that very thing.[[42]](#footnote-42)

* 1. Further, in [*Graze v Commissioner of State Revenue* [2013] VCAT 869](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/869.html), Judge Macnamara VP commented at [26]:

As I have frequently observed in Freedom of Information determinations over the years, the possibility of public scrutiny may improve the quality of advice that is given to administrative decision-makers. The provision of advice that is superficial or the result of insufficient analysis might be thought to be slanted to a particular political view would be deterred by the prospect that such advice might come to light under the Freedom of Information system. The fact that Parliament has left the public interest issues relative to internal working documents at large indicates, to my mind, that it contemplates that the public interest may cut both ways.

* 1. Similarly, the former Victorian Administrative Appeals Tribunal noted:

[S]enior public servants … are a sufficiently robust group to understand the need for, and the method of relating clear and frank views to their peers and to Ministers. I am not persuaded by mere assertions to the contrary. Further no evidence was adduced before me that senior officers had actually been inhibited as a result of the Freedom of [Information] legislation and that frankness has been a casualty of the legislation.[[43]](#footnote-43)

* 1. More recently, a [2023 communique](https://www.oaic.gov.au/newsroom/association-of-information-access-commissioners-of-australia-and-new-zealand-aiac-meeting-communique-2023) of the Association of Information Access Commissioners of Australia and New Zealand (**AIAC**) notes:

Governing in a democracy demands public trust. Trust is built on transparency and government leaders are compelled in our democratic system to champion a culture of accountability and transparency.

Members of the AIAC also observe that record keeping is a fundamental part of good governance and accountability. Leaders of government are responsible for promoting public sector values and behaviours including fearlessly upholding the public’s right to access information. Agencies should start with the assumption that public servants are obliged by their position to provide robust and frank advice at all times and that obligation will not be diminished by transparency of government activities. In this setting, transparency of the work of public servants should be the accepted operating environment and fears about a lessening of frank and candid advice correspondingly diminished.

* 1. Consistent with these statements, the object of the Act (to make the maximum amount of information available), and the breadth of the public interest test in section 30(1), an agency should adopt a cautious approach to the frankness and candour argument.
	2. An agency should remain mindful of their officers’ professional obligations to provide robust and frank advice in accordance with the [*Code of Conduct for Public Sector Employees*](https://vpsc.vic.gov.au/ethics-behaviours-culture/codes-of-conduct/code-of-conduct-for-victorian-public-sector-employees/)(Responsiveness, Integrity, Impartiality, Accountability and Leadership). The Code expressly requires agency officers to maintain accurate and reliable records, and to make such records available to appropriate scrutiny when required. These obligations ensure that public sector employees ‘implement government policy in an open and transparent manner’.[[44]](#footnote-44)
	3. Agency officers are responsible for ensuring advice provided to agencies, ministers and the government is accurate, properly considered and impartial regardless of whether such information is intended to be publicly released.[[45]](#footnote-45)

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| **Example** |
| [***‘EW6’***](https://ovic.vic.gov.au/decision/eo7-and-department-of-justice-and-community-safety-freedom-of-information-2022-vicmr-161-14-june-2022/) ***and Development Victoria* (Freedom of Information) [2022] VICmr 234****Background**The applicant requested access to text messages sent between the personal mobile phone number of an agency officer and other specified agency officers, relating to Development Victoria matters. The agency refused access to certain documents in full or in part under section 30(1) and other exemptions. The documents recorded communications between Agency executive officers regarding staffing availability and a project involving the agency.The Public Access Deputy Commissioner was satisfied the text messages contained information in the nature of opinion, advice and recommendations prepared by agency officers and consultation between agency officers; and were created in the course of the agency’s deliberative processes in relation to agency matters.**Issue**Would disclosure of the documents be contrary to the public interest?**Decision**The Commissioner was not satisfied that disclosure would be contrary to the public interest for the following reasons:[[46]](#footnote-46)* A text message sent between agency officers in their capacity as a public sector executive or officer in relation to matters involving the agency is a ‘document’ for the purposes of the FOI Act.
* Agency documents can be drafted in a formal or less formal nature. This does not change their status as a ‘document’ for the purposes of the FOI Act.
* When communicating with each other, agency officers are aware, or should be aware that their communications in whatever form or format, may be the subject of an FOI request.
* Disclosure of the text messages would not alter the way officers communicate and prevent them from taking early, efficient and effective action on matters, as claimed by the agency.
* There is a reasonable expectation that agency officers will create a written record of agency related activities and communications, through which their public sector duties are documented and open to appropriate public scrutiny.
* Public sector agency executives and officers are required to reflect and embody the Victorian public sector values in the *Code of Conduct for Victorian Public Sector Employees* when carrying out their public sector duties. This includes:
	+ **Responsiveness:** by providing frank, impartial and timely advice to the Government;
	+ **Integrity**: by being honest, open and transparent in their dealings;
	+ **Accountability**: submitting themselves to appropriate scrutiny; and
	+ **Leadership**: public officials should demonstrate leadership by actively implementing, promoting and supporting these values.
* Despite the informal and frank nature of the opinions exchanged in the text messages, disclosure would not have a detrimental or lasting impact on the Agency’s relationships with other agency contacts or external stakeholders.
* If the Agency considered disclosure of the text messages would lead to any misunderstanding by the applicant or the general public, it is open to the Agency to release the documents with any necessary additional information to minimise any concern about the documents being misunderstood or taken out of context.
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Sensitivity of information

* 1. The sensitivity of information is generally diminished where that information is:
* relatively dated, innocuous, or not of particular significance;[[47]](#footnote-47)
* already publicly known;
* only likely to result in mere embarrassment to an officer, agency or Minister; or
* reflects a decision that has already been made or publicly announced.
	1. In contrast:
		+ The disclosure of information about a current significant issue or project still to be decided may undermine the decision-making process.
		+ Where the content of a document would disclose information more closely connected to the circumstances of a third party than the applicant, the degree of sensitivity associated with the information is higher.[[48]](#footnote-48)
	2. When determining the sensitivity of information, an agency should carefully consider whether the information is, in fact sensitive, with reference to its current status and surrounding circumstances.

Factors that should not be taken into account

* 1. The fact there may be “no point” in releasing a document or that nothing would be achieved by release of the document, does not mean that it is not in the public interest to release the document.[[49]](#footnote-49)
	2. An agency or Minister must not prescribe a class of documents as being contrary to the public interest to disclose.[[50]](#footnote-50) For each request, the whole of the circumstances must be examined and weighed up on a case by case basis, with reference to the specific documents or information claimed to be exempt under section 30.

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| **Example**Blue, Red and Green books and possible parliamentary questions (**PPQ**) are not exempt under section 30 as classes of documents.[[51]](#footnote-51) It is always necessary to consider the context in which each policy book or PPQ is requested and the public interest considerations relevant to the disclosure of the specific content of the document or information. |

* 1. Concerns about the reputation of an agency are not relevant.[[52]](#footnote-52)
1. [*Graze v Commissioner of State Revenue* [2013] VCAT 869](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/869.html), 25. [↑](#footnote-ref-1)
2. [*Ryan v Department of Infrastructure*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2004/2346.html) [2004] VCAT 2346, [32]. [↑](#footnote-ref-2)
3. [*Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission*](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/822.html) [2013] VCAT 822, [21] and [*Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/39.html#fnB4), [29], both referring to *Ryder v Booth* (1989) VR 869, 877. While these decisions do not deal with section 30, they refer to the principle set out in *Ryder v Booth* that because the FOI Act is remedial legislation, where ambiguity is encountered the rights given by the Act should be construed liberally and exceptions narrowly.  [↑](#footnote-ref-3)
4. [*Smith v Victoria Police* [2005] VCAT 654](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/654.html), [60]. [↑](#footnote-ref-4)
5. See example, [*NKY v Department of Education and Training* [2022] VCAT 302](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/302.html), [83]-[87]. [↑](#footnote-ref-5)
6. See example, [*Baker v Department of Education and Training* [2005] VCAT 2263](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2263.html), 11. [↑](#footnote-ref-6)
7. See example, [*Conyers v Monash University* [2005] VCAT 2509](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2509.html), [32], [35]. [↑](#footnote-ref-7)
8. [*Porter v Victoria Police* [2005] VCAT 962](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/962.html), [23]. [↑](#footnote-ref-8)
9. [*Doyle v Department of Human Services* [2002] VCAT 1768](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2002/176.html), [20]. [↑](#footnote-ref-9)
10. [*Mees v University of Melbourne* [2009] VCAT 782](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/782.html), [29]-[30]. [↑](#footnote-ref-10)
11. See example, [*Mees v University of Melbourne* (General) [2009] VCAT 782](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/782.html), [31]. [↑](#footnote-ref-11)
12. See the Macquarie Dictionary. [↑](#footnote-ref-12)
13. [*Porter v Victoria Police* [2005] VCAT 962](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/962.html), [23]; [*Baker v Department of Education and Training* [2005] VCAT 2263](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2263.html), [11]. [↑](#footnote-ref-13)
14. [*Shaw v Department of Justice and Regulation* [2018] VCAT 2038](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2018/2038.html), [33] citing *Deasey v Geshke* (unreported, County Court, 1 November 1984) per Judge Hasset at 38. [↑](#footnote-ref-14)
15. *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 207. [↑](#footnote-ref-15)
16. *Mildenhall v Department of Education* (1998) 14 VAR 87. [↑](#footnote-ref-16)
17. See the Macquarie Dictionary. [↑](#footnote-ref-17)
18. *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 207. [↑](#footnote-ref-18)
19. *Re Waterford and Department of Treasury (No.2)* (1981) 1 AAR 1 referred to in *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 208. [↑](#footnote-ref-19)
20. See examples [*Marke v Victoria Police* [2006] VCAT 1364](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2006/1364.html), [63]; [*Rosen v Department of Human Services* [2006] VCAT 691](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2006/691.html), [62]-[63]. [↑](#footnote-ref-20)
21. See [*Nichols v Department of Education and Training* [2021] VCAT 1244](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/1244.html) and [*Stark v Department of Education and Training* [2015] VCAT 625](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2015/625.html). [↑](#footnote-ref-21)
22. [*Kotsiras v Department of Premier & Cabinet* [2003] VCAT 472](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/472.html), [20]. [↑](#footnote-ref-22)
23. [S*cott v Office of the Assistant Treasurer* [2013] VCAT 2015](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/2015.html), [24], [26]. [↑](#footnote-ref-23)
24. [*United Firefighters Union of Australia – Victoria Branch v Country Fire Authority* [2018] VCAT 630](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2018/630.html), [98]-[99]; *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 207. [↑](#footnote-ref-24)
25. See *‘*[*DY2’ and Department of Health* [2022] VICmr 11](https://ovic.vic.gov.au/decision/dy2-and-department-of-health-freedom-of-information-2022-vicmr-11-18-march-2022/), [18] in the context of the word “would” in the same phrase used in the section 29 exemption. See also [*Victoria Police v Marke* [2008] VSCA 218](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2008/218.html), [97] in the context of the word “would” in the section 33 exemption. [↑](#footnote-ref-25)
26. [*Victoria Police v Marke* [2008] VSCA 218](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2008/218.html), [96]-[98]. [↑](#footnote-ref-26)
27. For example, see [*Coulson v Department of Premier and Cabinet* [2018] VCAT 229](http://www.austlii.edu.au/au/cases/vic/VCAT/2018/229.pdf), [25]; *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483, 488; *Secretary to Department of Justice v Osland* (2007) 26 VAR 425, [77]. [↑](#footnote-ref-27)
28. [*McKinnon v Department of Treasury* [2006] HCA 45](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2006/45.html), [19]. [↑](#footnote-ref-28)
29. [*McIntosh v Department* *of Premier and Cabinet* [2009] VCAT 1528](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/1528.html), [22]. [↑](#footnote-ref-29)
30. [*Landes v Vic Roads* [2009] VCAT 2403](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/2403.html), [46]. [↑](#footnote-ref-30)
31. See examples, [*‘EL7’ and University of Melbourne* (Freedom of Information) [2022] VICmr 134](https://ovic.vic.gov.au/decision/el7-and-university-of-melbourne-freedom-of-information-2022-vicmr-134-19-may-2022/), Annexure 1; ‘[*EH8' and Mornington Peninsula Shire* (Freedom of Information) [2022] VICmr 99](https://ovic.vic.gov.au/decision/eh8-and-mornington-peninsula-shire-freedom-of-information-2022-vicmr-99-4-march-2022/), [51]; [*Debono v Department of Justice* [2008] VCAT 1791](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/1791.html); [*‘EM4' and Northern Health* (Freedom of Information) [2022] VICmr 140](https://ovic.vic.gov.au/decision/em4-and-northern-health-freedom-of-information-2022-vicmr-140-27-may-2022/), [59-[60]. [↑](#footnote-ref-31)
32. See example where this ground was made out in [*Major Transport Infrastructure Authority v Davis* [2022] VCAT 123](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/123.html), [79]-[89], and not made out in [*'ES4' and Department of Jobs, Precincts and Regions* (Freedom of Information) [2022] VICmr 195](https://ovic.vic.gov.au/decision/es4-and-department-of-jobs-precincts-and-regions-freedom-of-information-2022-vicmr-195-10-august-2022/). [↑](#footnote-ref-32)
33. See example, [‘*EW7’ and Victorian Building Authority* [2022] VICmr 235](https://ovic.vic.gov.au/decision/ew7-and-victorian-building-authority-freedom-of-information-2022-vicmr-235-27-october-2022/); ‘[*EQ9’ and Department of Environment, Land, Water and Planning* [2022] VICmr 181](https://ovic.vic.gov.au/decision/eq9-and-department-of-environment-land-water-and-planning-freedom-of-information-2022-vicmr-181-29-june-2022/). [↑](#footnote-ref-33)
34. See examples *‘*[*EU9’ and Yarra City Council* (Freedom of Information) [2022] VICmr 218](https://ovic.vic.gov.au/decision/eu9-and-yarra-city-council-freedom-of-information-2022-vicmr-218-15-september-2022/) and [*‘EU4’ and Game Management Authority* [2022] VICmr 213](https://ovic.vic.gov.au/decision/eu4-and-game-management-authority-freedom-of-information-2022-vicmr-213-7-september-2022/). [↑](#footnote-ref-34)
35. [*'ES4' and Department of Jobs, Precincts and Regions (Freedom of Information)* [2022] VICmr 195](https://ovic.vic.gov.au/decision/es4-and-department-of-jobs-precincts-and-regions-freedom-of-information-2022-vicmr-195-10-august-2022/), [45]. [↑](#footnote-ref-35)
36. [*Debono v Department of Justice* [2008] VCAT 1791](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/1791.html), [20]; [*‘EJ2' and Department of Justice and Community Safety* (Freedom of Information) [2022] VICmr 111](https://ovic.vic.gov.au/decision/ej2-and-department-of-justice-and-community-safety-freedom-of-information-2022-vicmr-111-30-march-2022/). [↑](#footnote-ref-36)
37. [*Stark v Department of Education and Training* [2015] VCAT 625](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2015/625.html), [39] relied on in [*Nichols v Department of Education and Training* [2021] VCAT 1244](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/1244.html), [39]. [↑](#footnote-ref-37)
38. In New South Wales, the fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account when deciding whether there is an overriding public interest against disclosure of government information: [*Government Information (Public Access) Act 2009*](https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-052#sec.15)(NSW), section 15(d); in Queensland the fact that disclosure of the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document is an irrelevant consideration when deciding if it would be contrary to the public interest to disclose a document: [*Right to Information Act 2009*](https://www.legislation.qld.gov.au/view/pdf/inforce/current/act-2009-013) (Qld), Schedule , Part 1. [↑](#footnote-ref-38)
39. [*‘EV5’ and Department of Health* (Freedom of Information) [2022] VICmr 223](https://ovic.vic.gov.au/decision/ev5-and-department-of-health-freedom-of-information-2022-vicmr-223-19-september-2022/), [70]. [↑](#footnote-ref-39)
40. See also [*‘EY6’ and Department of Health* [2022] VICmr 252](https://ovic.vic.gov.au/decision/ey6-and-department-of-health-freedom-of-information-2022-vicmr-252-22-december-2022/), [42]-[53] (decisions made by government agencies that directly affect members of the public or their business); [*‘DN9’ and COVID-19 Quarantine Victoria* [2021] VICmr 253](https://ovic.vic.gov.au/decision/dn9-and-covid-19-quarantine-victoria-freedom-of-information-2021-vicmr-253-20-august-2021/), [23] (expert ventilation reports under the covid-19 hotel quarantine program); [‘*BQ2’ and National Gallery of Victoria* [2020] VICmr 154](https://ovic.vic.gov.au/decision/bq2-and-national-gallery-of-victoria-freedom-of-information-2020-vicmr-154-12-june-2020/), [45] (emails recording discussions between agency officers on the use of function areas). [↑](#footnote-ref-40)
41. See example where this ground was upheld in [*Nichols v Department of Education and Training* [2021] VCAT 1244](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/1244.html), [37]. [↑](#footnote-ref-41)
42. [*Yarra City Council v Roads Corporation* [2009] VCAT 2646](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/2646.html), [38]; [↑](#footnote-ref-42)
43. *Bracks v Department of State Development* (unreported, AAT, 10 September 1996), 9. [↑](#footnote-ref-43)
44. *Code of Conduct for Victorian Public Sector Employees*, section 8: “Demonstrating Accountability”. [↑](#footnote-ref-44)
45. *‘*[*ES4' and Department of Jobs, Precincts and Regions (Freedom of Information)* [2022] VICmr 195](https://ovic.vic.gov.au/decision/es4-and-department-of-jobs-precincts-and-regions-freedom-of-information-2022-vicmr-195-10-august-2022/). [↑](#footnote-ref-45)
46. See [*‘EW6’*](https://ovic.vic.gov.au/decision/eo7-and-department-of-justice-and-community-safety-freedom-of-information-2022-vicmr-161-14-june-2022/) *and Development Victoria* (Freedom of Information) [2022] VICmr 234, [28]. [↑](#footnote-ref-46)
47. [*Thomas v Department of Natural Resources and Environment* [2002] VCAT 533](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2002/533.html), [27]. [↑](#footnote-ref-47)
48. See ‘[*EH8' and Mornington Peninsula Shire* (Freedom of Information) [2022] VICmr 99](https://ovic.vic.gov.au/decision/eh8-and-mornington-peninsula-shire-freedom-of-information-2022-vicmr-99-4-march-2022/), [51](b). [↑](#footnote-ref-48)
49. [*Dean v Department of Justice* [2001] VCAT 2031](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/2031.html), [28]. [↑](#footnote-ref-49)
50. [*Wells v Department of Premier and Cabinet* [2001] VCAT 1800](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/1800.html), [37]. [↑](#footnote-ref-50)
51. [*McIntosh v Department* *of Premier and Cabinet* [2009] VCAT 1528](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/1528.html), [22], [62], [70]; [*Wells v Department of Premier and Cabinet* [2001] VCAT 1800](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/1800.html). [↑](#footnote-ref-51)
52. *‘*[*ES4' and Department of Jobs, Precincts and Regions (Freedom of Information)* [2022] VICmr 195](https://ovic.vic.gov.au/decision/es4-and-department-of-jobs-precincts-and-regions-freedom-of-information-2022-vicmr-195-10-august-2022/), [45]. See also, in New South Wales and Queensland, the fact that disclosure of information could reasonably be expected to cause embarrassment to, or loss of confidence in, the Government is irrelevant when deciding whether it would be contrary to the public interest to disclose a document: [*Government Information (Public Access) Act 2009* (NSW)](https://legislation.nsw.gov.au/view/html/inforce/current/act-2009-052#sec.15), section 15(c); [*Right to Information Act 2009* (Qld)](https://www.legislation.qld.gov.au/view/html/inforce/current/act-2009-013#sch.4), Schedule 4, Part 1. [↑](#footnote-ref-52)