**Freedom of Information Guidelines**

**Part IV – Exempt documents  
Section 35 – Documents containing material obtained in confidence**

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

**Section 35 – Documents containing material obtained in confidence**

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

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Section 35 – Documents containing material obtained in confidence

Extract of legislation

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| **35** | **Documents containing material obtained in confidence** | | | |
|  | (1) | A document is an exempt document if its disclosure under this Act would divulge any information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister, and— | | |
|  |  | (a) | the information would be exempt matter if it were generated by an agency or a Minister; or | |
|  |  | (b) | the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future. | |
|  | (1A) | An agency or Minister, in deciding whether a document is an exempt document under subsection (1), must— | | |
|  |  | (a) | notify the following that the agency or Minister has received a request for access to the document— | |
|  |  |  | (i) | the person or government that communicated the information or matter; |
|  |  |  | (ii) | the person or government on whose behalf the information or matter was communicated; and |
|  |  | (b) | seek the view of that person or government as to whether— | |
|  |  |  | (i) | the information or matter was communicated in confidence; and |
|  |  |  | (ii) | the disclosure of the information or matter would be contrary to the public interest for the reason set out in subsection (1)(b); and |
|  |  | © | if notifying a person, state that if the person consents to disclosure of the document, or disclosure subject to deletion of the information or matter communicated in confidence, the person is not entitled to apply to the Tribunal for review of a decision to grant access to that document. | |
|  | (1B) | Despite subsection (1A), an agency or Minister is not required to notify a person if— | | |
|  |  | (a) | the notification would be reasonably likely to endanger the life or physical safety of that person, or cause that person undue distress, or is otherwise unreasonable in the circumstances; or | |
|  |  | (b) | it is not practicable to do so. | |
|  | (1C) | If the agency or Minister, after consultation, decides to disclose the document, the agency or Minister must notify the person who communicated the information or matter, or on whose behalf the information or matter was communicated, of the— | | |
|  |  | (a) | decision to grant access to the document; and | |
|  |  | (b) | right to make an application for review of the decision provided by section 50(3AB). | |
|  | (1D) | An agency or Minister is not required to notify a person who has consented to disclosure of a document, or a document with deletions, of the decision to disclose that document or document with deletions (as the case requires). | | |
|  | (2) | This section does not apply to information— | | |
|  |  | (a) | acquired by an agency or a Minister from a business, commercial or financial undertaking; and | |
|  |  | (b) | that relates to trade secrets or other matters of a business, commercial or financial nature. | |

Guidelines

Overview

* 1. Section 35 contains two streams of exemptions that relate to information communicated in confidence by or on behalf of a person or a government to an agency or Minister:
* **section 35(1)(a)**: release would disclose information communicated in confidence to an agency or Minister and the information would be exempt matter if it were generated by an agency or a Minister.
* **section 35(1)(b)**: release would disclose information communicated in confidence to an agency or Minister and the disclosure would be contrary to the public interest because the disclosure would be reasonably likely to impair the ability of an agency or Minister to obtain similar information in the future.
  1. Unless an exception applies, an agency or Minister must consult with the relevant third party or parties who communicated the information, before making a decision on the request.
  2. Section 35 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.[[1]](#footnote-1) If it is unclear whether section 35 applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[[2]](#footnote-2)

Discretion to disclose exempt documents

* 1. The decision to exempt a document under section 35 is a discretionary power.
  2. An agency or Minister can choose to provide access to information that would otherwise be exempt under section 35, where it is proper to do so and where the agency or Minister 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/). |

When section 35 does not apply – section 35(2)

* 1. The exemptions in section 35 do not apply to information acquired by an agency or Minister from a business, commercial or financial undertaking, where the information relates to trade secrets or other matters of a business, commercial or financial nature. This type of information is considered under the [section 34](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-34/) exemption.

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| **Example**   * A company’s commercial information provided in tender documents * A company’s financial reports or records |

Meaning of certain common terms and phrases

Information communicated to the agency

* 1. For both the section 35(1)(a) and (b) exemptions, the information must have been communicated ‘by or on behalf of a person or a government to an agency or a Minister’.
  2. Section 35 can apply to information communicated confidentially by an officer in a department to a different department, agency or Minister. For example, information provided confidentially by public servants to the Victorian Ombudsman.[[3]](#footnote-3)
  3. Generally, section 35(1) only applies to information communicated from an external source. It usually does not apply to information generated by the agency or its own officers.
  4. Documents created by an agency or its own officers should be considered under [section 30(1)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/) – the internal working documents exemption. Applying section 35(1) to internal documents appears strained and inconsistent with Parliament’s intention.[[4]](#footnote-4) For example, a brief prepared by departmental officers to their Minister should be considered under section 30, not section 35.[[5]](#footnote-5)
  5. In very limited circumstances, section 35 may apply to particularly sensitive and confidential information communicated to an agency by its own officers.[[6]](#footnote-6) For example, in the context of internal complaints and investigations, or where misconduct or corruption is reported. In these situations, the officer’s position is analogous to that of an outside source.[[7]](#footnote-7)

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| **Example**  [XYZ v Victoria Police [2010] VCAT 255](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html)[[8]](#footnote-8)  In this case the Victorian Civil and Administrative Tribunal (**VCAT**) found that section 35(1)(b) could apply to confidential information provided to the Ethical Standards Department (**ESD**) of Victoria Police, by officers in other parts of Victoria Police.  VCAT found:   * ESD was a semi-autonomous, separate department of Victoria Police, with the specific and independent function of investigating alleged police corruption and misconduct; and * ESD had its own senior command structure, highly confidential management system and its own dedicated operating procedures. |

Information communicated in confidence

* 1. Whether information was communicated in confidence is a question of fact,[[9]](#footnote-9) determined from the perspective of the communicator.[[10]](#footnote-10) Consequently, an agency should consider direct or circumstantial evidence about the confidentiality the person expected when they communicated to the agency, taking into account:
* confidentiality can be express or implied from the circumstances;[[11]](#footnote-11)
* it is not necessary to consider whether legal obligations of confidence are set up by the communication in question;[[12]](#footnote-12)
* a formal agreement between the parties is not necessary to support the claim of confidentiality, nor will a formal agreement automatically mean information is confidential;[[13]](#footnote-13)
* merely marking a document ‘confidential’ is not sufficient evidence of an intention that the information remains confidential.[[14]](#footnote-14) Conversely a document does not have to be marked ‘confidential’ in order to establish that it contains information communicated in confidence;[[15]](#footnote-15)
* a legislated process to provide confidential information may support applying the exemption;[[16]](#footnote-16)
* information disclosed to the public generally (for example, by the media) can remove confidentiality;[[17]](#footnote-17)
* information may still be regarded as being communicated in confidence if the person giving the information is told that the information they provide is not, or may not be, absolutely confidential;[[18]](#footnote-18)
* the reliability of information does not affect whether it was communicated in confidence;[[19]](#footnote-19) and
* appropriate disclosure within the agency (for example, to parties involved in an investigation, or to those in management, or in a chain of command) does not undermine the confidentiality of the information.[[20]](#footnote-20)

Case examples

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| [**Wellington v Surf Coast Shire Council (Review and Regulation) [2022] VCAT 942**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/942.html)  **Background**  A local Councillor requested access to complete copies of the results of the three most recent staff satisfaction surveys of the Council.  The survey results included anonymised verbatim survey responses from staff members in response to direct questions. Only members of the Executive team of the Council were given access to this granular level information.  The Council refused access to the verbatim survey responses under section 35(1)(b) and other exemptions.  **Issue**  Were the staff responses to the survey communicated to the Council in confidence?  **Decision**  Yes, the Victorian Civil and Administrative Tribunal (**VCAT**) found that the verbatim responses were communicated in confidence. This was evidenced by emails sent to staff during the survey process informing them about the survey and seeking their cooperation. The emails assured staff that their responses would be treated confidentially, and their identity would not be disclosed in any way.  The agency also engaged an external consultant to conduct the surveys, to further protect the confidentiality of survey participants.  [**Victorian National Parks Association Inc v Department of Sustainability & Environment (General) [2012] VCAT 710**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2012/710.html)  **Background**  The applicant requested several documents relating to an alpine cattle grazing trail.  The agency claimed that section 35 applied to emails received from the University of Sydney outlining a research proposal, because:   * the agency and the academics discussed confidentiality at a meeting and during prior discussions; * confidentiality was important to both parties; * the parties agreed that all discussions would be confidential; * the measure of confidentiality agreed between the parties was critical to the freeness and frankness with which the academic provided opinions, advice and recommendations.   **Decision**  VCAT found that the email had not been communicated in confidence because:   * it was sent prior to the meeting where confidentiality was agreed; * a later agreement that communications would be confidential was not sufficient to make the document confidential; and * the nature of the information in the email did not appear to be inherently confidential, in contrast to other kinds of confidential material.   [**AB v Department of Education and Early Childhood Development (General) [2011] VCAT 1263**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2011/1263.html)  **Background**  The applicant made a request for documents relating to allegations against him in respect of various alleged incidents that occurred at a school where his daughter was a student and where he was volunteering.  The agency refused access to a communication by a parent to the principal of the school under section 35(1)(b).  **Decision**  VCAT found the information was evidently communicated in confidence because by their very nature, communications between parents and the principal of a school are confidential.  VCAT recognised that it “is very important for parents to be able to express a view about their children and other matters at the school in the full knowledge that that information will be kept confidential”. |

Section 35(1)(a) – information would be exempt if generated by an agency

* 1. A document may be considered exempt under section 35(1)(a) if two conditions are satisfied:

1. disclosure would divulge information or matter:
2. communicated in confidence;
3. by or on behalf of a person or a government to an agency or a Minister; **and**
4. the information would be exempt matter if it were generated by an agency or a Minister.
   1. The first condition is discussed above under ‘meaning of certain common terms and phrases.’

Steps to applying the exemption

* 1. An agency or Minister seeking to apply the section 35(1)(a) exemption should:
* Specifically identify any information or matter that appears to have been communicated in confidence.
* Confirm that the information was communicated in confidence noting from whom, when and how the information was communicated and why the agency considers it was communicated in confidence.
* Confirm the information was not communicated from a business, commercial or financial undertaking, and is not a trade secret, or information about the business, commercial or financial matters of an undertaking. Under section 35(2), the section 35(1)(a) exemption does not apply to this type of information.
* Unless an exception in section 35(1B) applies, consult with the relevant third party or parties who communicated the information to determine:
  + if the information was communicated in confidence, and if so, any supporting evidence; and
  + whether the document should be disclosed to the applicant, including any reasons; and
  + whether the third party consents to disclosure of the document, or disclosure subject to deletions.
* Consider whether an extension of time under [section 21(2)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-21/) is permitted due to the need for consultation under section 35(1A).
* Consider whether the information or matter would be exempt under another provision in Part IV of the Act if that information had been generated by an agency or a Minister:
  + identify the relevant exemption in Part IV of the Act (typically section 30(1)); and
  + ensure each element of that exemption is met.
* If a decision is made to release the information, notify any third party who did not consent to the disclosure, or did not reply after being consulted. Inform them of the decision and their right to appeal to VCAT, including the 60-day appeal period.
* Wait until the conclusion of any appeal period or VCAT proceedings before providing the documents to the applicant.
  + If there are any documents falling within the request that do not contain the information the third party was consulted about, and a decision is made to release these documents, then these documents can be released to the applicant at the same time as the decision notice, without needing to wait for the appeal period to end.

Information would be exempt matter if generated by an agency or Minister

* 1. The second condition of the section 35(1)(a) exemption is that the information must be exempt under one of the other exemptions in Part IV of the Act, if the information had been generated by an agency, rather than communicated to the agency from an external person.
  2. For example, if an officer from Agency A communicates information in confidence to Agency B, and it contains information exempt under another section of the Act, Agency B might exempt that document under section 35(1)(a).

Section 30 example

* 1. Information might be exempt under 35(1)(a) where the information would be exempt under section 30(1) if it was created by an agency.
  2. Under section 30(1), a document is exempt from disclosure if:
* it discloses matter in the nature of opinion, advice, or recommendation prepared by an officer, or discloses consultation or deliberation between officers of the agency, Ministers, or an officer and a Minister; and
* its disclosure would be contrary to the public interest.
  1. When section 30(1) is being considered, for the purposes of applying section 35(1)(a), the persons who communicated the information in confidence are “deemed” to be officers of the agency to which the information was communicated.[[21]](#footnote-21)
  2. Consequently, for section 35(1)(a) to apply in conjunction with section 30(1), an agency would need to establish the following elements:
* the information was communicated in confidence; and
* the information is in the nature of opinion, advice, recommendation, deliberation, or consultation; and
* it would be contrary to the public interest to disclose the information.

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| For more information, see [section 30(1)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/) of the FOI Guidelines. |

Section 35(1)(b) – impair an agency’s ability to obtain information in future

* 1. A document may be considered exempt under section 35(1)(b) if two conditions are satisfied:

1. disclosure would divulge information or matter:
2. communicated in confidence;
3. by or on behalf of a person or a government to an agency or a Minister; **and**
4. disclosure would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
   1. The first condition is discussed above under ‘meaning of certain common terms and phrases’.

Steps to applying the exemption

* 1. An agency or Minister seeking to apply the section 35(1)(b) exemption should:
* Specifically identify any information or matter that appears to have been communicated in confidence.
* Confirm that the information was communicated in confidence noting from whom, when and how the information was communicated and why the agency considers it was communicated in confidence.
* Confirm the information was not communicated from a business, commercial or financial undertaking, and is not a trade secret, or information about the business, commercial or financial matters of an undertaking. Under section 35(2), the section 35(1)(b) exemption does not apply to this type of information.
* Consider the factors set out below in these Guidelines, to determine if disclosure would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
* Unless an exception in section 35(1B) applies, consult with the relevant third party or parties who communicated the information to determine:
* if the information was communicated in confidence, and if so, any supporting evidence; and
* whether the document should be disclosed to the applicant, including any reasons; and
* whether the third party consents to disclosure of the document, or disclosure subject to deletions.
* Consider whether an extension of time under [section 21(2)](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-21/) is permitted due to the need for consultation under section 35(1A).
* If a decision is made to release the information, notify any third party who did not consent to the disclosure, or did not reply after being consulted. Inform them of the decision and their right to appeal to VCAT, including the 60-day appeal period.
* Wait until the conclusion of any appeal period or VCAT proceedings before providing the documents to the applicant.
* If there are any documents falling within the request that do not contain the information the third party was consulted about, and a decision is made to release these documents, then these documents can be released to the applicant at the same time as the decision notice, without needing to wait for the appeal period to end.

The public interest

* 1. The public interest requirement in section 35 is directed specifically to the effect that disclosure would have on the ability of an agency or Minister to obtain similar information in future. This is a question of fact. An agency or Minister should have evidence to support a finding that disclosure of the information would have this effect.[[22]](#footnote-22)
  2. The section does not require an agency or Minister to consider the public interest generally.[[23]](#footnote-23)

The meaning of ‘reasonably likely’

* 1. For information communicated in confidence to be exempt under section 35(1)(b), its disclosure must be reasonably likely to impair the agency’s ability to obtain similar information in the future. ‘Reasonably likely’ is not defined in the Act. However, case law suggests that the threshold is:
* an actual likelihood that similar information would not be forthcoming;[[24]](#footnote-24)
* a possibility that is real rather than fanciful or remote;[[25]](#footnote-25)
* more probable than not;[[26]](#footnote-26)
* more likely than not.[[27]](#footnote-27)
  1. It is not sufficient to merely establish that persons would be less candid in future or would feel betrayed or feel resentment if the information were disclosed.[[28]](#footnote-28)

Case example

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| [Mees v University of Melbourne [2009] VCAT 782](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/782.html)  **Background**  The applicant was a staff member at the University. The applicant requested access to emails between employees of the University, containing allegations made against the Applicant by students and other persons.  **Decision**  VCAT found that disclosure of the documents would be contrary to the public interest because it would inhibit persons making complaints against staff of the University, in circumstances where the complaints might be justified.  With respect to establishing an “actual likelihood” that information would not be forthcoming in future, the VCAT stated at [58]-[59]:  It is not necessary for the respondent to show that each person involved would not complain or give evidence in future if their identity was disclosed. It would be impractical for an organisation in the respondent’s position to inquire from every person named whether they would give such information in the future. Even though some, or maybe even the majority of those that gave information, may not have minded it being disclosed, the fact that the information would be disclosed, would, in my view, put off those that objected to the information being disclosed from giving such information in the future. That is, to put it simply, disclosure of this information would have a serious effect on other people giving information in the future. |

Impair the ability to obtain similar information in future

* 1. The term ‘impair’ is not defined in the Act. However, case law suggests:
* the degree of impairment must go beyond a trifling or minimal impairment;[[29]](#footnote-29)
* there must be an actual impairment to the ability of the agency to obtain like information in the future;[[30]](#footnote-30)
* it is not enough that individuals would be somewhat less candid than they otherwise might be[[31]](#footnote-31) or would feel resentment at having their confidence betrayed;[[32]](#footnote-32)
* the necessary level of impairment will be made out if a significant minority of persons in the relevant group would be firmly resistant to providing similar information in the future;[[33]](#footnote-33)
* it is the agency that must be impaired from receiving information, not simply a reluctance on the part of a supplier to provide information;[[34]](#footnote-34)
* the existence of a statutory duty to provide information does not necessarily exclude the possibility that disclosure would be reasonably likely to impair an agency’s ability to obtain similar information in the future, particularly where disclosure might impact the quality and quantity of any future information provided.[[35]](#footnote-35) In comparison, an agency will not be impaired from obtaining a specific type of information in future, if there is legislation which compels a person to provide this type of information to the agency.[[36]](#footnote-36)
  1. “Obtain” is to be interpreted broadly and can include receiving unsolicited information.[[37]](#footnote-37)
  2. ‘Similar information’ is information of the same class or character as the information in the requested documents.[[38]](#footnote-38) The precise content of the information is not relevant.[[39]](#footnote-39)

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| **Example**  The document falling within the request is a complaint made under legislation administered by the agency.  In this situation, the class of information would be complaints made under that legislative provision.  For the purposes of assessing whether section 35(1)(b) applies, the question for the agency, is whether disclosure of the requested document would be reasonably likely to impair the ability of the agency to receive complaints made under the legislative provision in future. |

* 1. The similarity of the source of the information is a relevant consideration.[[40]](#footnote-40)

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| **Example**  A public body provides advice to Victoria Police, in cooperation with a legal investigation.  For the purposes of assessing whether section 35(1)(b) applies, the question is whether a public body in the same class (not the public at large), would be affected by the disclosure, in relation to providing advice to Victoria Police, in response to a criminal investigation. |

* 1. With respect to persons who are the subject of an investigation, responding to complaints made against them, VCAT has found that release of the person’s response would not impair the ability of the agency to obtain similar information in future, and is not exempt under section 35(1)(b). VCAT noted that internal policies of the agency required cooperation in such investigations and observed:

the interest a respondent to an allegation has in exculpating themselves from complaints made against them is sufficient incentive to give an adequately forthright account of themselves. Aside from the positive public interest favouring transparency in a complaints process, the public interest will be further served because an officer responding to a complaint will take greater care in ensuring accuracy and a lack of exaggeration in the knowledge that persons outside the organisation may scrutinise that response.[[41]](#footnote-41)

Case examples

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| **[United Firefighters Union of Australia – Victorian Branch v Victorian Equal Opportunity and Human Rights Commission [2022] VCAT 1193](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/1193.html)**  **Background**  The applicant requested all emails, letters and attachments sent or received by the Agency in relation to its review of equity and diversity of the CFA and MFB.  The agency claimed some of the documents subject to review were exempt under section 35(1)(b).  **Decision**  VCAT found that the documents had been communicated in confidence based on:   * The agency’s extensive evidence about a ‘confidentiality framework’ set up to undertake the review which would “document the expectation that all communications would be kept strictly confidential.” * Relevant documents included memoranda of understanding which included clauses confirming that the review was to be conducted on the basis that the agency would keep the documents and information it received confidential. * The agency also made applications to the Justice Human Research Ethics Committee for ethics approval of the research methodology, these applications included how confidentiality was to be explained to participants and how it was to be maintained.   VCAT found that disclosure would be contrary to the public interest as it would be reasonably likely to impair the agency’s ability to obtain similar information in the future. VCAT accepted the agency’s evidence that releasing the documents would significantly limit the agency’s ability to obtain sensitive and confidential information to support its functions under the Equal Opportunity Act. The agency described confidentiality as a key concern for stakeholders who provide information to the agency.  [**Country Fire Authority v Rennie [2021] VCAT 492**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2021/492.html)  **Background**  The applicant requested access to certain documents relating to his service with the CFA. One of the documents was an email chain between CFA officers, communicating about how to deal with issues relating to the applicant.  **Decision**  VCAT found the emails were not communicated in confidence. No direct evidence was provided by the agency to show that it was. VCAT stated at [85] “broad brush statements that issues are sensitive is not enough”.  VCAT found the emails contained “routine process-based innocuous factual information”.  VCAT found at [86]-[88]:  “…there is no realistic basis to believe that the ability of officers to communicate regarding agency policies in future would be inhibited by the release of this paragraph.  The legislative provision is not catering for overly sensitive or highly strung agency officers.  A reasonable officer in the reasonable execution of their duties should understand that some, if not most, of their communications about individuals may be subject to the FOI Act, unless a properly articulated exemption applies.”  [**Simpson v VicRoads [2011] VCAT 321**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2011/321.html)  **Background**  The applicant requested correspondence and documents in relation to his eyesight and health. The applicant had become aware that the agency had receive correspondence from his ex-wife in relation to those matters.  Access was denied to one document under sections 33(1), 35(1)(b) and 38.  The agency gave evidence that:   * any member could make a notification about the medical fitness of a person to drive; * these notifications can be made anonymously; * any information is confidential and not disclosed to the driver; * the agency would not advise the notifier of the outcome of its investigation; and * a significant part of the medical review process relies on the participation of the community.   **Decision**  VCAT found that the information was provided to the agency in confidence based on the evidence provided by the agency.  VCAT then found that disclosure would be contrary to public interest as it would impair the agency’s ability to obtain similar information in future because the number of private notifications is significant and the specific information provided by them is vital to the proper operation of the medical review system. |

Third party consultation

* 1. Where an agency identifies information that appears to have been communicated in confidence, subject to certain exceptions, the third party that communicated the information must be consulted to seek their views on the circumstances surrounding the communication before making a decision.

The requirement to consult and related considerations

* 1. In deciding whether the exemption in section 35(1)(a) or section 35(1)(b) applies, section 35(1A), requires an agency or Minister to:
* notify the following persons that a request has been received:
  + the person or government that communicated the information or matter; **or**
  + the person or government on whose behalf the information or matter was communicated; **and**
* seek their view as to whether the information was communicated in confidence; **and**
* if the section 35(1)(b) exemption is being considered, seek their view as to whether disclosure of the information would be reasonably likely to impair the ability of an agency or Minister to obtain similar information in the future; and
* seek their view as to whether they consent or object to disclosure of the information**; and**
* advise the person or government that if they consent to disclosure, they are not entitled to apply to VCAT for a review of a decision to grant access to the document.
  1. When consulting, an agency or Minister should inform the third party of the relevant subsection of section 35(1) that may be engaged, and what conditions must be established for that exemption to apply.
  2. Informing the third party of the elements of the exemption will enable the third party to provide an informed response and ensure their reasons are relevant, if they object to the document being released.
  3. The third party’s view is not determinative. It is only one factor to be considered when deciding whether the exemption applies. A person may strongly object to release, but if an agency or Minister is not satisfied that all conditions of the exemption are made out, the document must be released.
  4. When consulting, the 30-day timeframe to decide a request may be extended by up to 15 days under section 21(2)(a).

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| For more information, see [section 21 – Time within which formal requests to be decided](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-21/). |

* 1. Consultation may occur in any manner or form. For example, by telephone, email, post, or a meeting.
  2. [Professional Standard 7.3](https://ovic.vic.gov.au/book/professional-standards/#7._Practicability_of_consulting_third_parties_) requires a record of the consultation to be kept. This includes who was consulted, whether they consented or objected, and any reasons provided.

Consultation with a child

* 1. A ‘child’ is defined in [section 5](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-5/) as a person under the age of 18 years.
  2. [Section 33A](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33a/) outlines an agency and Minister’s obligations in relation to consultation with a child. Section 33A(1) states that where the third party to be consulted is a child, an agency or Minister may notify either or both of the child and their parent/guardian.
  3. Section 33A(2) contains an exception to notifying a parent or guardian. If an agency is an information sharing entity,[[42]](#footnote-42) the parent or guardian of the child must not be notified if:
* the child is a primary person;[[43]](#footnote-43) and
* the parent or guardian is a person of concern[[44]](#footnote-44) or is alleged to pose a risk of family violence to that child.
  1. When considering who to notify, an agency or Minister should consider the exceptions to consultation in section 33(2C) and 35(1B). The exceptions address situations where there are risks to life and safety, the risk of undue distress, or where consultation is unreasonable or not practicable in the circumstances.

When consultation is not required

* 1. There are important circumstances when notification is not required. These are set out in section 35(1B):
* where the notification would be reasonably likely to:
* endanger the life or physical safety of that person;
* cause that person undue distress;
* is otherwise unreasonable in the circumstances; or
* where it is not practicable to do so.

Undue distress

* 1. The fact an applicant has requested access to information provided in confidence by a person and may make further FOI requests to the agency in future, is not sufficient, of itself, to establish that notifying the person of the request and conducting consultation would be likely to cause the person “undue distress”.[[45]](#footnote-45)
  2. The Act allows an applicant to make multiple requests for access. Responding to those requests is part of an agency’s duty under the Act. Annoyance or even distress at needing to respond to the requests does not meet the threshold of “undue” distress.[[46]](#footnote-46)

More information

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| See [section 33](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/) of the FOI Guidelines for more information about:   * determining whether consultation is not practicable * how to conduct consultation * privacy considerations * keeping records of consultation under the Professional Standards |

Notifying a third party of a decision

* 1. If a third party objected to the release of the information they communicated to the agency or Minister, or did not respond to the consultation, and a decision is made to release that information, section 35(1C) requires the agency or Minister to notify the person who communicated the information or matter, of:
* the decision to grant access to the document; and
* their right to apply to VCAT for a review of the decision.
  1. There is no requirement to notify a third party that consented to the release of the information, provided the decision reflects release of the information or document, as agreed by the third party (section 35(1D)).
  2. The applicant should be advised the document will only be released at the end of the third party’s 60 day review period, which begins on the day the third party is notified of the decision.

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| Read more about notifying applicants of third party review rights in [section 27](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-27/). |

* 1. If a third party who objected to disclosure exercises their right to seek review by VCAT, an agency or Minister must not disclose the documents until the VCAT proceedings are finalised and directions made.

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| For more information, see [section 50 – Applications for review by the Tribunal](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-50/). |

1. [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-1)
2. [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 35, 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-2)
3. [Sportsbet v Department of Justice [2010] VCAT 8](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/8.html#fnB21), [77], referring to [Woodford v Ombudsman [2001] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/721.html). [↑](#footnote-ref-3)
4. [Sportsbet v Department of Justice [2010] VCAT 8](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/8.html#fn21), [73]. [↑](#footnote-ref-4)
5. See [Sportsbet v Department of Justice [2010] VCAT 8](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/8.html#fn21), [73]-[76]. [↑](#footnote-ref-5)
6. [Sportsbet v Department of Justice [2010] VCAT 8](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/8.html#fn21), [77]-[78], referring to *Birnbauer v Inner & Eastern Health Care Network* (1999) 16 VAR 9, 17. [↑](#footnote-ref-6)
7. [Sportsbet v Department of Justice [2010] VCAT 8](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/8.html#fn21), [77]. [↑](#footnote-ref-7)
8. [XYZ v Victoria Police [2010] VCAT 255](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html), [288]. [↑](#footnote-ref-8)
9. *Ryder v Booth* [1985] VR 869, 883. [↑](#footnote-ref-9)
10. [Woodford v Ombudsman [2001] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/8.html#fnB21), [95];[XYZ v Victoria Police [2010] VCAT 255](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html), [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562. [↑](#footnote-ref-10)
11. *Ryder v Booth* [1985] VR 869, 883; [XYZ v Victoria Police [2010] VCAT 255](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html), [265]. [↑](#footnote-ref-11)
12. *Ryder v Booth* [1985] VR 869, 883. [↑](#footnote-ref-12)
13. *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 366. [↑](#footnote-ref-13)
14. *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 366. [↑](#footnote-ref-14)
15. [Williams v Victoria Police (2007) 27 VAR 1194](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1194.html), [75]. [↑](#footnote-ref-15)
16. [Woodford v Ombudsman [2001] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/8.html#fnB21), [93]-[98]. [↑](#footnote-ref-16)
17. *Stewart v Victoria Police* (1987) 2 VAR 192, 198. [↑](#footnote-ref-17)
18. *Shulver v Victoria Police Force* (995) 9 VAR 71, 86-88; [Hoskin v Department of Education and Training [2003] VCAT 946](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/946.html), [21]. [↑](#footnote-ref-18)
19. [Ambikapathy v Victorian Legal Aid [1999] VCAT 1361](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/1999/1361.html), [17]; [Marke v Victoria Police [2006] VCAT 1364](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2006/1364.html), [56]. [↑](#footnote-ref-19)
20. [Williams v Victoria Police [2005] VCAT 2516](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2005/2516.html), [49]; [Marke v Victoria Police [2006] VCAT 1364](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2006/1364.html), [98]; [Corry v Victoria Police [2010] VCAT 282](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/282.html), [32]. [↑](#footnote-ref-20)
21. [Casey CC v Environment Protection Authority (General) [2010] VCAT 453](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/453.html), [28]. In this case the information was communicated by persons from a UK environmental agency to the EPA. See also, [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), [49], where the information was communicated by officers from other departments to the Department. [↑](#footnote-ref-21)
22. For examples where the evidence produced by the agency was insufficient, because there was no direct evidence that the ability to obtain similar information would be impaired, see [Victorian National Parks Association Inc v Department of Sustainability & Environment [2012] VCAT 710](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2012/710.html); and [AOZ v JLV [2019] VCAT 31](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/31.html), [108]-[112], [184]. [↑](#footnote-ref-22)
23. *Ryder v Booth* [1985] VR 869, 872-873, 880; [Mees v University of Melbourne [2009] VSC 493](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2009/493.html), [42]; [XYZ v Victoria Police [2010] VCAT 255](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html), [267]. [↑](#footnote-ref-23)
24. [Mees v University of Melbourne [2009] VCAT 782](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/782.html), [58]. [↑](#footnote-ref-24)
25. *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836. [↑](#footnote-ref-25)
26. *Ryder v Booth* [1985] VR 869, 880. [↑](#footnote-ref-26)
27. [RJE v Secretary to the Department of Justice [2008] VSCA 265](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2008/265.html), [53]. [↑](#footnote-ref-27)
28. *Ryder v Booth* [1985] VR 869, referred to in [Mees v University of Melbourne [2009] VCAT 782](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2009/782.html), [54]. [↑](#footnote-ref-28)
29. *Ryder v Booth* [1985] VR 869, 880. [↑](#footnote-ref-29)
30. [Birnbauer & Davies v Inner & Eastern Health Care Network [1999] VCAT 1363](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/1999/1363.html), [68]. [↑](#footnote-ref-30)
31. [Birnbauer & Davies v Inner & Eastern Health Care Network [1999] VCAT 1363](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/1999/1363.html), [68]; approved in [Smeaton v Victorian WorkCover Authority [2012] VCAT 1549](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2012/1549.html), [69]. [↑](#footnote-ref-31)
32. [Sifredi v Medical Practitioners Board [1999] VCAT 87](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/1999/87.html) (affirmed on appeal [Medical Practitioners Board of Victoria v Sifredi [2000] VSC 33](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2000/33.html)); *Ryder v Booth* [1985] VR 869, 872. [↑](#footnote-ref-32)
33. [Sifredi v Medical Practitioners Board [1999] VCAT 87](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/1999/87.html) (affirmed on appeal [Medical Practitioners Board of Victoria v Sifredi [2000] VSC 33](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2000/33.html)). [↑](#footnote-ref-33)
34. [Kosky v Department of Human Services [1998] VCAT 290](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/1998/290.html?context=1;query=kosky;mask_path=au/cases/vic/VCAT), [22]. [↑](#footnote-ref-34)
35. See *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 370; [Woodford v Ombudsman [2001] VCAT 721](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/721.html), [99]-[101]. [↑](#footnote-ref-35)
36. *Barling v Medical Board* (Vic) (1992) 5 VAR 542, 565. [↑](#footnote-ref-36)
37. [Graze v Commissioner of State Revenue [2013] VCAT 869](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/869.html), [54]. [↑](#footnote-ref-37)
38. *Richards v Law Institute of Victoria* (unreported, County Court, Vic, Dixon J, 13 August 1984), 9. [↑](#footnote-ref-38)
39. *Richards v Law Institute of Victoria* (unreported, County Court, Vic, Dixon J, 13 August 1984), 9. [↑](#footnote-ref-39)
40. *Re Coleman and Director-General. Local Government Department, Pentland* (1985) 1 VAR 9, 14; *Dickson v Victoria Police Force* (unreported, AAT of Vic, Rizkalla DP, 20 August 1993) 5-8. [↑](#footnote-ref-40)
41. [AOZ v JLV [2019] VCAT 31](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/31.html), [129]-[130]; following [Corry v Victoria Police [2010] VCAT 1096](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/1096.html) and [Medical Practitioners Board of Victoria v Sifredi [2000] VSC 33](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2000/33.html). [↑](#footnote-ref-41)
42. Defined in section 144D of the [Family Violence Protection Act 2008 (Vic)](https://www.legislation.vic.gov.au/in-force/acts/family-violence-protection-act-2008/061)*.* [↑](#footnote-ref-42)
43. Defined in section 144E of the [Family Violence Protection Act 2008 (Vic)](https://www.legislation.vic.gov.au/in-force/acts/family-violence-protection-act-2008/061). [↑](#footnote-ref-43)
44. Defined in section 144B of the [Family Violence Protection Act 2008 (Vic)](https://www.legislation.vic.gov.au/in-force/acts/family-violence-protection-act-2008/061). [↑](#footnote-ref-44)
45. See comments made by Senior Member Dea in the context of the same phrase “undue distress” used in the section 33 exceptions to consultation, in [Akers v Victoria Police](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/723.html) [2022] VCAT 723 [35]-[43]. [↑](#footnote-ref-45)
46. [Akers v Victoria Police](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/723.html) [2022] VCAT 723 [35]-[43]. [↑](#footnote-ref-46)