**Freedom of Information Guidelines**

**Part IV – Exempt documents  
Section 38 – Documents to which secrecy provisions of enactments apply**

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

**Part IV – Exempt documents – Section 38**

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

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Section 38 – Documents to which secrecy provisions of enactments apply

Extract of legislation

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| **38** | **Documents to which secrecy provisions of enactments apply** |
|  | A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications. |

Guidelines

The exemption

* 1. A document is exempt under section 38 when three conditions are satisfied:

1. there is a section of a Victorian Act (an enactment) that is in force; **and**
2. the enactment applies specifically to information contained in the document; **and**
3. the enactment prohibits specific persons from disclosing the specified information.

Purpose and scope of the exemption

* 1. Section 38 exempts documents where information in those documents is protected by a secrecy provision.
  2. Prior to the introduction of the Act, there were secrecy provisions in other enactments that prevented the disclosure of certain information. Section 38 was intended to preserve the continued operation of those secrecy provisions.[[1]](#footnote-1)
  3. The section 38 exemption applies to secrecy provisions that are in force, irrespective of whether the provision came into effect before or after the commencement of the Act.[[2]](#footnote-2)
  4. Section 38 applies to secrecy provisions contained in Victorian enactments only.[[3]](#footnote-3)

Secrecy provisions in Commonwealth laws

* 1. The section 38 exemption **does not** apply to Commonwealth laws.[[4]](#footnote-4)
  2. Notwithstanding this, an applicant will still be prevented from accessing information under the FOI Act, if a secrecy provision or a confidentiality provision in a Commonwealth law prohibits disclosure of that information.[[5]](#footnote-5) This is based on section 109 of the Commonwealth Constitution, which provides that a Commonwealth law prevails where there is an inconsistency between a State law or a Commonwealth law.

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| Go to [section 13](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-13/) of the FOI Guidelines for more information about the interaction between the right of access under the FOI Act and Commonwealth laws that prohibit disclosure of information. |

Steps to applying the exemption

* 1. An agency or Minister seeking to apply the section 38 exemption should:
     + Identify the enactment that may apply to the information.
     + Ensure the enactment is in force.
     + Specifically identify the information to be exempted.
     + Determine whether the enactment specifically applies to the information under consideration and be able to explain how or why the enactment specifically applies to the information.
     + Consider whether the enactment prohibits persons referred to in the enactment from disclosing the specific kind of information under consideration.
     + Check to see if the enactment has any exceptions that may apply.

What is an enactment?

* 1. An enactment is defined broadly in [section 5](https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-5/). It means an Act or instrument made under an Act, including rules, regulations, local laws, or by-laws. For example, the *Corrections Act 1986* (Vic).

Is the enactment in force?

* 1. The identified enactment must be in force. This means, it is currently operating and must not have been repealed or otherwise lapsed at the time a decision is made on a request.[[6]](#footnote-6)
  2. If a secrecy provision was previously in force but is no longer in force at the time of the decision, it cannot be applied to exempt a document from release under section 38.

Does the enactment refer specifically to the information in the document?

* 1. For section 38 to apply, the secrecy provision must refer specifically to the kind of information in the document.
  2. One way to determine this, is to consider whether the enactment is concerned with content versus context. An enactment that describes the actual content of a document (or the information) is more likely to be exempt under section 38, compared with an enactment that is concerned with the context of the documents creation or existence.
  3. The following sections contain other general principles from case law, that can be used to help determine whether the secrecy provision applies specifically to the kind of information in the document and prohibits persons from disclosing information of that kind.

Indicators of when an enactment applies specifically

* 1. An enactment ‘applies specifically’ when:
* the enactment is formulated with such precision it refers with particularity to the information;[[7]](#footnote-7)
* the enactment is concerned with the specific nature and quality of the relevant information contained in the document. For example, the enactment identifies the information as ‘information relating to the affairs of another person’. [[8]](#footnote-8)
* it focuses on the information in the document;[[9]](#footnote-9) or
* the secrecy provision applies to a document’s contents, as opposed to only applying based on who is in possession of the document.[[10]](#footnote-10)

Case examples

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| **Example 1**  [***United Firefighters Union of Australia – Victorian Branch v Victorian Equal Opportunity and Human Rights Commission* (Review and Regulation) [2022] VCAT 1193**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/1193.html)  **Background**  The United Firefighters Union (UFU) requested access to certain documents relating to the Victorian Equal Opportunity and Human Rights Commission’s (VEOHRC) review of Victorian fire services bodies.  In its decision, the VEOHRC refused access to documents, relying on section 38 in conjunction with section 176 of the [*Equal Opportunity Act 2010* (Vic)](https://www.legislation.vic.gov.au/in-force/acts/equal-opportunity-act-2010/030) (**Equal Opportunity Act**).  **The secrecy provision**  The relevant parts of section 176 of the Equal Opportunity Act state:   1. This section applies to every person who is or has been - 2. an appointed member of the Board; or 3. the Commissioner; or 4. a member of the staff of the Commission; or 5. a person (other than a person referred to in paragraph (c)) acting under the authority of the Commission, the Board or the Commissioner; or 6. a person to whom section 15 of the Equal Opportunity Act 1984 applied immediately before its repeal; or 7. a member of the Commission before 1 October 2009. 8. This section applies to information concerning the affairs of any person that is or has been obtained by a person to whom this section applies - 9. in the course of performing functions or duties or exercising powers under this Act or an old Act; or 10. as a result of another person performing functions or duties or exercising powers under this Act or the old Act. 11. A person to whom this section applies must not, either directly or indirectly, make a record of, disclose or communicate to any person any information to which this section applies unless it is necessary to do so for the purposes of, or in connection with, the performance of a function or duty or the exercise of a power under this Act or an old Act.   Penalty: 60 penalty units, in the case of a natural person;  300 penalty units, in the case of a body corporate.  **Decision**  VCAT found that section 176 of the Equal Opportunity Act is a secrecy provision under section 38 for the following reasons:   * the Equal Opportunity Act is an enactment in force; * subsection (2) applied specifically to the information in the documents, being information concerning the affairs of any person that is or has been obtained by a relevant person in the course of performing functions under the Act or an old Act; and * subsection (3) prohibits the persons in sub-section (1) from disclosing that information.   **Example 2**  [***‘FC6’ and Victoria Police* (Freedom of Information) [2023] VICmr 29**](https://ovic.vic.gov.au/decision/fc6-and-victoria-police-freedom-of-information-2023-vicmr-32-21-april-2023/)  **Background**  The Applicant requested access to CCTV relating to the investigation of an incident involving the Applicant.  Victoria Police identified police body-worn camera footage in response to the request, and refused access to the footage under section 38 in conjunction with sections 30D and 30E of the [*Surveillance Devices Act 1999* (Vic)](https://www.legislation.vic.gov.au/in-force/acts/surveillance-devices-act-1999/042) (SD Act).  **The secrecy provision**  ‘Protected information’ is defined in section 30D of the SD Act to include any information obtained from the use of a body-worn camera by a police officer acting in the course of the officer’s duty.  Section 30E(1) of the SD Act prohibits the reckless and intentional disclosure of information obtained from a police body-worn camera.  **Decision**  The Public Access Deputy Commissioner was satisfied:   * the SD Act is an enactment in force; * the footage requested by the applicant meets the definition of ‘protected information’, as defined in section 30D of the SD Act and would contain the specific information prohibited from disclosure under section 30E(1) of the SD Act; * the enactment prohibits persons from disclosing information that would fall within the terms of the Applicant’s request; and * the exceptions in sections 30E(4) and 30E(5) did not apply in this case.   Accordingly, the requested footage was exempt from release under section 38, in conjunction with section 30E(1) of the SD Act. |

Indicators of when an enactment does not apply specifically

* 1. An enactment does not ‘apply specifically’ when it:
* is too general in its application.[[11]](#footnote-11)
* makes a blanket reference to ‘information’;[[12]](#footnote-12)
* is formulated in such general terms it would encompass the particular information without expressly referring to it;[[13]](#footnote-13)
* is concerned with the context in which the document exists;[[14]](#footnote-14)
* identifies the information only as information obtained in pursuance of the Act in which the provision is found, or information obtained by an officer in the course of their duty.[[15]](#footnote-15) This wording is too broad to apply specifically to the information in the document. It says nothing directly about the kind of information, which, depending on the role of the officers, may be of a very wide, almost limitless nature;[[16]](#footnote-16)
* focuses on the document or its status, source, or destination instead of the particular information in the document;[[17]](#footnote-17) For example, a provision referring to ‘Cabinet documents’ does not apply specifically to information of any kind.
* identifies the ‘kind’ of information only by reference to the capacity of the person who is in possession of the information.[[18]](#footnote-18) For example, a provision referring to information ‘prepared for or in the custody of officers of the Department of Health’ does not apply specifically to information of any kind. Whereas a provision referring to ‘biometric information’ is specific enough to identify and apply to information of that kind in a requested document; or
* prohibits disclosure only on the basis of who has possession of the information.[[19]](#footnote-19)

Case examples

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| **Example 1**  [***Al Hakim v Ombudsman* [2001] VCAT 1972**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/1972.html)  **Background**  The Applicant requested access to all investigation documents relating to a complaint the Applicant made to Monash University.  The Ombudsman exempted some documents from release, relying on section 38 in conjunction with section 20 of the [*Ombudsman Act 1973* (Vic)](https://www.legislation.vic.gov.au/in-force/acts/ombudsman-act-1973/117).  **The provision**  The relevant parts of section 20 of the Ombudsman Act state:   1. A person (other than the complainant), who obtains or receives information in the course or as a result of the exercise of the functions of the Ombudsman under this Act – 2. shall not disclose that information except – 3. for the purposes of the exercise of the functions of the Ombudsman and of any report or recommendation to be made under this Act; or 4. for the purposes of any proceedings in relation to an offence against this Act or section 19 of the Evidence (Miscellaneous Provisions) Act 1958; or 5. for the purposes of any communication authorised under section 20A, 20B, 20C or 20D of this Act;   …   1. A person who in contravention of this section discloses information … shall be guilty of an offence against this Act.   **Decision**  Deputy President Davis decided that section 20 pf the Ombudsman Act was not a secrecy provision for the purposes of section 38 of the FOI Act.  The effect of section 20 was to prohibit all persons from disclosing information that it obtained or received pursuant to the Act.  The blanket reference to “information” suggests section 20 applies to any and all information obtained or received in connection with the functions exercised under the Ombudsman Act.  Section 20 contains no reference to the “kind” of information obtained, as required by section 38 of the FOI Act.  **Example 2**  [***‘EL5’ and Knox City Council* (Freedom of Information) [2022] VICmr 132**](https://ovic.vic.gov.au/decision/el5-and-knox-city-council-freedom-of-information-2022-vicmr-132-19-may-2022/)  In this decision, the Agency claimed section 38 in conjunction with section 54 of the [*Food Act 1984* (Vic)](https://www.legislation.vic.gov.au/in-force/acts/food-act-1984/115). The relevant parts of section 54 state:   1. Except as provided by subsection (2), an authorised officer shall not disclose information or publish a document or part of a document obtained by him in connexion with the administration of this Act unless the disclosure or publication is made – 2. With the consent of the person from whom the information or document was obtained; 3. In accordance with any Act or regulation; or   (ba) in connection with the administration of –   1. this Act or the regulations; or 2. any other Act or regulation that applies to, or regulates, the premiss or the activities at the premises to which the disclosure relates; or   (bb) to a person or body administering or enforcing   1. a corresponding law; or 2. a law that relates to the safety or suitability of food; or 3. the Aged Care Act 1997 of the Commonwealth; or 4. any other law of a State or the Commonwealth prescribed by the regulations; or   (bc) to prevent or lessen a serious threat to public health; or   1. for the purposes of any proceedings under or arising out of this Act or a report of any such proceedings.   Penalty: For a first offence 60 penalty units, and for a second or subsequent offence 100 penalty units.  **Decision**  The Public Access Deputy Commissioner decided that section 54 of the Food Act is not a secrecy provision for the purposes of section 38 of the FOI Act.  The Commissioner stated that to satisfy the second requirement of section 38, the enactment must be formulated with such precision that it refers with particularity to the information. It is not sufficient for the enactment to be formulated in general, blanket, terms such that it would encompass the information without expressly describing the information.  In this case, the Commissioner was not satisfied the class of information specified in section 54(1) was specific enough to identify information in the documents, as required by section 38.  The Commissioner found:   * Section 54(1) operates generally as a confidentiality provision to prevent the unauthorised disclosure of information by agency officers in carrying out their roles under the Food Act. The section does not operate as a secrecy provision to prohibit disclosure of a specific kind of information associated with the agency carrying out its functions and exercise of powers under the Food Act. * Section 54(1) is concerned with disclosure of information obtained in the context of administering the Food Act, rather than the disclosure of specific content in a document.   Therefore, the documents were not exempt from release under section 38. |

Does the enactment prohibit persons referred to from disclosing the information?

A prohibition

* 1. To fall within section 38, the provision must prohibit a person from disclosing the specified information.
  2. A prohibition is usually framed to prevent a person from releasing or disclosing information. Many prohibitions are accompanied by a penalty provision. For example, a fine or imprisonment for contravening the prohibition. Where a penalty provision does exist, it is a persuasive (but not determinative) indication that the enactment falls within section 38.[[20]](#footnote-20)
  3. Disclosure is not prohibited where the instrument:
     + creates a positive right allowing a person to inspect all documents of a class except certain documents of a particular class;[[21]](#footnote-21) or
     + expresses preferred, rather than mandatory, conduct.[[22]](#footnote-22)

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| ***[Darwish v Deakin University](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2002/87.html)* [[2002] VCAT 87](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2002/87.html)**  **The provision**  The relevant provision in this case was Clause 12.17 of the *Procedures of Higher Degree Research*, promulgated by the Academic Board of the University in accordance with regulations made pursuant to the Deakin University Act 1974 (Vic).  Clause 12.17 replaced and reflected the University’s longstanding *Guidelines for Examination of Higher Degree Theses*.  The Guidelines provided that “the names of examiners (both internal and external) are regarded as confidential until after the examination of the thesis is complete and the examiners have agreed to be identified.”  **Decision**  VCAT found that:   * Clause 12.17 contained no prohibition on disclosure and was therefore not a secrecy provision for the purposes of section 38 of the FOI Act. * Clause 12.17 obliged the University to disclose to the candidate the identity of the examiner, if the examiner agrees. The spirit of this provision is that, absent the examiner’s agreement, the examiners name should not be disclosed. But there is no prohibition. It is at the discretion of the University whether to disclose the name of the examiner. |

Persons referred to in the enactment

* 1. This element is easily satisfied. All that is required is for the enactment to prohibit a person or persons (either generally, specifically or otherwise defined) from disclosing the specific information under consideration.
  2. This element does not require the enactment to prohibit disclosure of the relevant information by:
* the person in possession of the document;
* the person to whom the document was provided; or
* the person to whom the document was addressed.[[23]](#footnote-23)

Are there any exceptions to the secrecy provision?

* 1. When considering the prohibition, an agency should look to see if there are exceptions to the prohibition. If an exception applies to the particular situation, then the document will not be exempt under section 38.
  2. For example, if an enactment states that the information may be released with the written consent of the subject of the information, and the FOI applicant is that subject, then the exception is made out and the prohibition does not apply. This is because the FOI request itself is usually considered written consent.[[24]](#footnote-24)

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| ***[Gullquist v Victorian Legal Services Commissioner](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/764.html)* [(Review and Regulation) [2017] VCAT 764](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/764.html)**  The relevant provisions in this decision were sections 6.4.5 and 7.2.15 of the Legal Profession Act 2004 and section 462 of the Legal Profession Uniform Law (Victoria) 2015. The provisions contained a prohibition on disclosure, and an exception that allowed for disclosure of information about a person if that person consented to the disclosure of the information. In this case, the applicant was seeking information about himself.  VCAT found that by making an FOI request, the applicant had consented to the disclosure of his information. The exception to the prohibition applied, and the documents were not exempt under section 38. |

* 1. Some secrecy provisions permit disclosure of information “in performance of functions of the agency” or where disclosure “is required or authorised by law for another purpose.” VCAT has decided in a number of decisions that exceptions of this nature do not permit the disclosure of information under the FOI Act.[[25]](#footnote-25)

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| ***[Smeaton v Transport Accident Commission](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/1486.html)* [[2017] VCAT 1486](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/1486.html)**  The relevant provision in this decision was section 131 of the *Transport Accident Act 1986,* which did not apply ‘to the extent necessary to perform duties under this or any other Act, or to perform or exercise such a function or power, either directly or indirectly’.  VCAT found it clear from the text of section 131 that Parliament did not intend to create a situation where the prohibition would not apply where documents may be released under the FOI Act. VCAT stated:   * Firstly, permitting disclosure under the FOI Act would be inconsistent with the secrecy regime created by section 131; and * Secondly, the fact Parliament drafted section 131 to include a specific exception that permits disclosure to identified bodies, was evidence that if Parliament had intended section 131 to be subject to the FOI Act, Parliament would have said so.   [***XYZ v Victoria Police* (General) [2010] VCAT 255**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html?context=1;query=XYZ%20v%20victoria%20police;mask_path=)  The relevant provision in this decision was section 10.1.34 of the *Gambling Regulation Act 2003* which did not apply to a ‘disclosure made by an enforcement agency or a gambling regulator in the performance of functions of the agency’.  The applicant submitted that the word ‘function’ included the function of giving access to non-exempt documents under the Act.  VCAT disagreed, finding that the capacity of Victoria Police to release non-exempt information is not a law enforcement function, therefore the information was exempt under section 38.  [***Tilley v VicRoads* (General) [2010] VCAT 483**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/483.html)  The relevant provision in this decision was section 92(2) of the *Road Safety Act 1986*, which did not apply where disclosure of the information was “required or authorised by law for another purpose.”  The applicant submitted that disclosure under the FOI Act was disclosure required by law for another purpose.  The Agency submitted that Parliament intended that information gained by VicRoads that has commercial sensitivity for the person about whom it is kept only be disclosed for certain purposes. Disclosure was only to be made where the recipient had entered into a confidentiality agreement. If Parliament had intended the exception in section 92 to encompass release under the FOI Act, it would have included a clear exemption.  VCAT accepted the Agency’s submission, finding that disclosure under the FOI Act was not disclosure required or authorised by law for another purpose. |

Councils and section 125 of the Local Government Act 2020

* 1. Section 125(1) of the [Local Government Act 2020 (Vic)](https://www.legislation.vic.gov.au/in-force/acts/local-government-act-2020/019) (**LG Act**) protects ‘confidential information’ from unauthorised disclosure.
  2. The section states:

1. Unless subsection (2) or (3) applies, a person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, must not intentionally or recklessly disclose information that the person knows, or should reasonably know, is confidential information.

Penalty: 120 penalty units.

* 1. Section 125(1) of the LG Act is a secrecy provision for the purposes of section 38 of the FOI Act. However, its application to documents sought under a freedom of information request is limited by sections 125(4) and 125(5) of the LG Act.

What is confidential information under section 125(1) of the Local Government Act?

* 1. Section 3 of the LG Act defines twelve categories of ‘confidential information’ for the purposes of section 125(1) of the LG Act. Each category of confidential information is listed below.

When can’t I use section 125(1) of the Local Government Act with section 38 of the FOI Act?

* 1. Sections 125(4) and 125(5) of the LG Act limits when section 125(1) of the LG Act can be used with section 38 of the FOI Act. They state:

1. Despite section 38 of the **Freedom of Information Act 1982**, a document containing information of the kind described in paragraph (a), (b), (c), (d), (e), (f) or (g) of the definition of ***confidential information*** is not an exempt document within the meaning of the **Freedom of Information Act 1982** by virtue of section 38 of that Act.
2. Despite section 38 of the **Freedom of Information Act 1982**, a document containing information prescribed to be confidential information for the purposes of paragraph (k) of the definition of ***confidential information*** is not an exempt document within the meaning of the **Freedom of Information Act 1982** by virtue of section 38 of that Act if, for the purposes of this subsection, it is a prescribed non-exempt document or prescribed class of non-exempt document.

**Note**

A document referred to in subsection (4) or (5) may still be an exempt document by virtue of another provision of Part IV of the **Freedom of Information Act 1982**.

What is the effect of section 125(4) of the Local Government Act?

* 1. The effect of section 125(4) of the LG Act is that section 38 of the FOI Act **cannot** be used to exempt the following categories of ‘confidential information:’

1. **council business information**, being information that would prejudice the Council’s position in commercial negotiations if prematurely released.
2. **security information**, being information that if released is likely to endanger the security of Council property or the safety of any person.
3. **land use planning information**, being information that if prematurely released is likely to encourage speculation in land values.
4. **law enforcement information**, being information which if released would be reasonably likely to prejudice the investigation into an alleged breach of the law or the fair trial or hearing of any person.
5. **privileged information**, being information to which legal professional privilege or client legal privilege applies.
6. **personal information**, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs.
7. **private commercial information**, being information provided by a business, commercial or financial undertaking that relates to trade secrets; or if released, would unreasonably expose the business, commercial or financial undertaking to disadvantage.

What is the effect of section 125(5) of the Local Government Act?

* 1. The effect of section 125(5) of the LG Act is that section 38 of the FOI Act **cannot** be used to exempt information that is prescribed by the regulations to be confidential information, if the regulations have also prescribed the information to be a non-exempt document or prescribed class of non-exempt document. As of 31 July 2023, there is no prescribed ‘confidential information’ or prescribed non-exempt document or class of non-exempt document in the regulations.

What does this mean?

* 1. Where requested information falls within one of the categories of ‘confidential information’ referred to in section 125(4) or 125(5) of the LG Act, a Council must disclose the ‘confidential information’ in response to a freedom of information request, unless the information is exempt from release under a different exemption in Part IV of the FOI Act.

When can I use section 125(1) of the Local Government Act with section 38 of the FOI Act?

* 1. Councils may use section 125(1) of the LG Act with section 38 of the FOI Act to exempt the following categories of ‘confidential information:’

1. **confidential meeting information**, being the records of meetings closed to the public under section 66(2)(a).
2. **internal arbitration information**, being information specified in section 145.
3. **Councillor Conduct Panel confidential information**, being information specified in section 169.
4. **information prescribed by the regulations to be ‘confidential information’,** that has not been prescribed to be a non-exempt document or class of non-exempt document.

(l) information that was confidential information for the purposes of section 77 of the Local Government Act 1989 (Vic).

* 1. A decision to rely on section 125(1) of the LG Act with section 38 of the FOI Act must be supported by detailed reasons. This includes the relevant facts, and an explanation of how and why the information falls into one of the four above categories of ‘confidential information.’

Case example

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| [***Dunlop v City of Port Phillip* [2023] VCAT 500**](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2023/500.html)  **Background**   * The applicant requested access to documents relating to the South Melbourne Market and any complaints made about a stall where he had worked. * Two documents in the scope of the request were the agenda and minutes from a confidential meeting of a special committee of the Council held in 2019, prior to the commencement of the Local Government Act 2020. The agency refused access to both documents under section 38 in conjunction with section 125(1) of the Local Government Act 2020.   **Decision**   * The meetings of the special committee were closed to the public and were therefore confidential information for the purposes of section 77 of the *Local Government Act 1989*. * The documents therefore fell within subsection (l) of the definition of ‘confidential information’ in the LG Act. * The exceptions to the prohibition in subsections 125(4) and (5) did not apply to the documents. * The documents were exempt under section 38 in conjunction with section 125(1) of the Local Government Act. |

Table of section 38 secrecy provisions

* 1. This table outlines enactments in Acts that have been interpreted as secrecy provisions for the purpose of the Act. Section 38 applies to these enactments.

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| Legislation | Section | Title | Decision |
| [*Adoption Act 1984*](https://www.legislation.vic.gov.au/in-force/acts/adoption-act-1984/075) | 83 | Restriction on access to reports and records | [*‘DY7’ and Department of Families, Fairness and Housing* [2022] VICmr 16](https://ovic.vic.gov.au/decision/dy7-and-department-of-families-fairness-and-housing-freedom-of-information-2022-vicmr-16-25-march-2022/) |
| [*Australian Grand Prix Act 1994*](https://www.legislation.vic.gov.au/in-force/acts/australian-grands-prix-act-1994/045) | 25(6) | Business plan | [*Stewart v Australian Grand Prix Corporation (General)* [2008] VCAT 167](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/167.html) |
| [*Business Licensing Authority Act 1998*](https://www.legislation.vic.gov.au/in-force/acts/business-licensing-authority-act-1998/037) | 18 | Secrecy | [*Richardson v Business Licensing Authority* [2003] VCAT 1053](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/1053.html)  [*Roberts v Department of Justice and Regulation* [2018] VCAT 1560](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2018/1560.html) |
| [*Children, Youth and Families Act 2005*](https://www.legislation.vic.gov.au/in-force/acts/children-youth-and-families-act-2005/135) | 41 | Identity of reporter or referrer confidential | [*‘CF2’ and Department of Health and Human Services* [2020] VICmr 296](https://ovic.vic.gov.au/decision/cf2-and-department-of-health-and-human-services-freedom-of-information-2020-vicmr-296-20-october-2020/)  [*‘BC3’ and Department of Health and Human Services* [2020] VICmr 26](https://ovic.vic.gov.au/decision/bc3-and-department-of-health-and-human-services-freedom-of-information-2020-vicmr-26-13-february-2020/) |
|  | 191 | Confidentiality | *‘CF2’ and Department of Health and Human Services* [2020] VICmr 296  *‘BC3’ and Department of Health and Human Services* [2020] VICmr 26 |
|  | 209 | Confidentiality | *‘CF2’ and Department of Health and Human Services* [2020] VICmr 296  *‘BC3’ and Department of Health and Human Services* [2020] VICmr 26 |
|  | 534 | Restriction on publication of proceedings | [*‘BA8’ and Victoria Police* [2020] VICmr 12](https://ovic.vic.gov.au/decision/ba8-and-victoria-police-freedom-of-information-2020-vicmr-12-24-january-2020/) |
|  | 552 | Confidentiality of reports | [*‘FJ2’ and Department of Families, Fairness and Housing* [2023] VICmr 89](https://ovic.vic.gov.au/decision/fj2-and-department-of-families-fairness-and-housing-freedom-of-information-2023-vicmr-89-20-march-2023/?highlight=FJ2) |
| *[Corrections Act 1986](https://www.legislation.vic.gov.au/in-force/acts/corrections-act-1986/160)* | 104ZZA | Offence to use or disclose personal or confidential information unless authorised | [*Glascott v Department of Justice and Regulation* [2018] VCAT 1491](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2018/1491.html)  [*Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/586.html) |
| [*Coroner’s Act 2008*](https://www.legislation.vic.gov.au/in-force/acts/coroners-act-2008/040) | 115(6) | Access to documents | [*‘CP8’ and Victoria Police* [2021] VICmr 35](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VICmr/2021/35.html)  [*‘CK5’ and Victoria Police* [2020] VICmr 343](https://ovic.vic.gov.au/decision/ck5-and-victoria-police-freedom-of-information-2020-vicmr-343-9-december-2020/) |
| [*Crimes Act 1958*](https://www.legislation.vic.gov.au/in-force/acts/crimes-act-1958/302) | 464JA(4) | Offences in relation to recordings | *Akers v Victoria Police* (Corrected) [2022] VCAT 720 |
| [*Emergency Services Telecommunications Authority Act 2004*](https://www.legislation.vic.gov.au/in-force/acts/emergency-services-telecommunications-authority-act-2004/015) | 33(2) | Secrecy | [*Akers v Victoria Police* [2022] VCAT 723](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/723.html) |
| [*Equal Opportunity Act 2010*](https://www.legislation.vic.gov.au/in-force/acts/equal-opportunity-act-2010/030) | 176 | Secrecy | [*United Firefighters Union of Australia – Victorian Branch v Victorian Equal Opportunity and Human Rights Commission* [2022] VCAT 1193](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/1193.html) |
| [*Evidence (Miscellaneous Provisions) Act 1958*](https://www.legislation.vic.gov.au/in-force/acts/evidence-miscellaneous-provisions-act-1958/199) | 21M | Confidentiality | [*‘AP2’ and Department of Justice and Community Safety* [2019] VICmr 137](https://ovic.vic.gov.au/decision/ap2-and-department-of-justice-and-community-safety-freedom-of-information-2019-vicmr-137-8-october-2019/) |
| [*Family Violence Protection Act 2008*](https://www.legislation.vic.gov.au/in-force/acts/family-violence-protection-act-2008/061) | 144C | Meaning of excluded information | [*‘BY4’ and St Vincent’s Health* [2020] VICmr 233](https://ovic.vic.gov.au/decision/by4-and-st-vincents-health-freedom-of-information-2020-vicmr-233-20-august-2020/) |
|  | 144R | Unauthorised use and disclosure of confidential information | *‘BY4’ and St Vincent’s Health* [2020] VICmr 233 |
| [*Health Complaints Act 2016*](https://www.legislation.vic.gov.au/in-force/acts/health-complaints-act-2016/010) | 151 | Non-disclosure of information – complaint resolution process | [*‘AQ3’ and Health Complaints Commissioner* [2019] VICmr 147](https://ovic.vic.gov.au/decision/aq3-and-health-complaints-commissioner-freedom-of-information-2019-vicmr-147-24-october-2019/) |
|  | 152 | Non-disclosure of information given in conciliation | *‘AQ3’ and Health Complaints Commissioner* [2019] VICmr 147 |
| [*Health Records Act 2001*](https://www.legislation.vic.gov.au/in-force/acts/health-records-act-2001/048) | 27 | No access to health information where information given in confidence | [*Swannie v Bayside Health* [2007] VCAT 1302](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1302.html) |
| [*Health Services Act 1988*](https://www.legislation.vic.gov.au/in-force/acts/health-services-act-1988/179) | 141 | Confidentiality | [*‘CE7’ and Northern Health* [2020] VICmr 292](https://ovic.vic.gov.au/decision/ce7-and-northern-health-freedom-of-information-2020-vicmr-292-9-october-2020/) |
| [*Gambling Regulation Act 2003*](https://www.legislation.vic.gov.au/in-force/acts/gambling-regulation-act-2003/102) | 10.1.30 | General duty of confidentiality | [*The Star Proprietary Limited and Victorian Commission for Gambling and Liquor Regulation* [2020] VICmr 16](https://ovic.vic.gov.au/decision/the-star-proprietary-limited-and-victorian-commission-for-gambling-and-liquor-regulation-freedom-of-information-2020-vicmr-16-31-january-2020/)  [*‘DJ5’ and Victorian Commission for Gambling and Liquor Regulation* [2021] VICmr 213](https://ovic.vic.gov.au/decision/dj5-and-victorian-commission-for-gambling-and-liquor-regulation-freedom-of-information-2021-vicmr-213-2-july-2021/) |
|  | 10.1.34 | Third party disclosures | [*XYZ v Victoria Police* (General) [2010] VCAT 255](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html) |
| [*Judicial Proceedings Reports Act 1958*](https://www.legislation.vic.gov.au/in-force/acts/judicial-proceedings-reports-act-1958/053) | 4(1A) |  | [*MNE v Victoria Police FOI Division* [2017] VCAT 975](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/975.html) |
| [*Labour Hire Licensing Act 2018*](https://www.legislation.vic.gov.au/in-force/acts/labour-hire-licensing-act-2018/006) | 103 | Secrecy provision | [*‘FJ1’ and Labour Hire Authority* [2021] VICmr 339](https://ovic.vic.gov.au/decision/fj1-and-labour-hire-authority-freedom-of-information-2021-vicmr-339-3-november-2021/) |
| [*Legal Aid Act 1978*](https://www.legislation.vic.gov.au/in-force/acts/legal-aid-act-1978/073) | 43 | Officers of VLA not to reveal any information without consent of VLA | [*Seaman v Victoria Legal Aid* [2008] VCAT 589](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2008/589.html) |
| [*Local Government Act 2020*](https://www.legislation.vic.gov.au/in-force/acts/local-government-act-2020/019) | 125 |  | [*Dunlop v City of Port Phillip* [2023] VCAT 500](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2023/500.html)  See guidance above |
| [*Livestock Disease Control Act* 1994](https://www.legislation.vic.gov.au/in-force/acts/livestock-disease-control-act-1994/083) | 107C | Secrecy | [*Johnson v Department of Primary Industries* (General) [2007] VCAT 1656](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2007/1656.html) |
| *Mental Health Act 2014* | 175 | Secrecy | [*‘FC3’ and Mental Health Tribunal* [2023] VICmr 29](https://ovic.vic.gov.au/decision/fc3-and-mental-health-tribunal-freedom-of-information-2023-vicmr-29-20-april-2023/) |
| [*Mineral Resources (Sustainable Development) Act 1990*](https://www.legislation.vic.gov.au/in-force/acts/mineral-resources-sustainable-development-act-1990/126) | 119(2) | Secrecy | [*‘DM8’ and Department of Jobs, Precincts and Regions* [2021] VICmr 243](https://ovic.vic.gov.au/decision/dm8-and-department-of-jobs-precincts-and-regions-freedom-of-information-2021-vicmr-243-2-july-2021/) |
| [*Residential Tenancies Act 1997*](https://www.legislation.vic.gov.au/in-force/acts/residential-tenancies-act-1997/104) | 499 | Confidentiality | [*‘DZ1’ and Department of Justice and Community Safety* [2022] VICmr 19](https://ovic.vic.gov.au/decision/dz1-and-department-of-justice-and-community-safety-freedom-of-information-2022-vicmr-19-3-may-2022/) |
| [*Road Safety Act 1986*](https://www.legislation.vic.gov.au/in-force/acts/road-safety-act-1986/218) | Part 7B | Use and disclosure of information | [*‘AO1’ and VicRoads* [2019] VICmr 127](https://ovic.vic.gov.au/decision/ao1-and-vicroads-freedom-of-information-2019-vicmr-127-30-september-2019/)  [*‘AE3’ and VicRoads* [2019] VICmr 39](https://ovic.vic.gov.au/decision/ae3-and-vicroads-freedom-of-information-2019-vicmr-39-23-may-2019/) |
|  | 90P | Freedom of Information Act 1982 | [*‘FI9’ and the Transport Accident Commission* [2023] VICmr 256](https://ovic.vic.gov.au/decision/fi9and-the-transport-accident-commissioner-freedom-of-information-2023-vicmr-256-19-december-2022/) |
| [*Road Safety Camera Commissioner Act 2011*](https://www.legislation.vic.gov.au/in-force/acts/road-safety-camera-commissioner-act-2011/007) | 20 | Law enforcement documents | [*‘CH5’ and Office of the Road Safety* *Camera Commissioner* [2020] VICmr 317](https://ovic.vic.gov.au/decision/ch5-and-office-of-the-road-safety-camera-commissioner-freedom-of-information-2020-vicmr-317-12-november-2020/) |
| [*Surveillance Devices Act 1999*](https://www.legislation.vic.gov.au/in-force/acts/surveillance-devices-act-1999/042) | 30D | What is protected information? | [*‘AL1’ and Victoria Police* [2019] VICmr 100](https://ovic.vic.gov.au/decision/al1-and-victoria-police-freedom-of-information-2019-vicmr-100-10-september-2019/)  [*‘BF2’ and Victoria Police* [2020] VICmr 53](https://ovic.vic.gov.au/decision/bf2-and-victoria-police-freedom-of-information-2020-vicmr-53-10-march-2020/) |
|  | 30E | Prohibition of use, communication or publication of protected information | *‘AL1’ and Victoria Police* [2019] VICmr 100  *‘BF2’ and Victoria Police* [2020] VICmr 53 |
| [*Taxation Administration Act 1997*](https://www.legislation.vic.gov.au/in-force/acts/taxation-administration-act-1997/083) | 91 | Prohibition on certain disclosures of information by tax officers | [*Tucker v Commissioner of State Revenue* [2019] VCAT 2018](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/2018.html) |
| [*Transport Accident Act 1986*](https://www.legislation.vic.gov.au/in-force/acts/transport-accident-act-1986/154) | 131 | Secrecy Provision | [*Smeaton v Transport Accident Commission* [2017] VCAT 1486](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/1486.html) |
| [*Unclaimed Money Act 2008*](https://www.legislation.vic.gov.au/in-force/acts/unclaimed-money-act-2008/020) | 76 | Prohibition on certain disclosures of information by authorised persons | [*‘AM2’ and State Revenue Office* [2019] VICmr 110](https://ovic.vic.gov.au/decision/am2-and-state-revenue-office-freedom-of-information-2019-vicmr-110-19-september-2019/) |

Table of provisions that section 38 does not apply to

* 1. This table outlines enactments that have been interpreted to not be secrecy provisions for the purpose of the Act. Section 38 does not apply to the enactments listed in the table.

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| Legislation | Section | Title | Decision |
| [*Building Act 1993*](https://www.legislation.vic.gov.au/in-force/acts/building-act-1993/136) | 229J | Confidentiality | [*‘ET4’ and Victorian Building Authority* [2022] VICmr 204](https://ovic.vic.gov.au/decision/et4-and-victorian-building-authority-freedom-of-information-2022-vicmr-204-26-august-2022/) |
| [*Food Act 1984*](https://www.legislation.vic.gov.au/in-force/acts/food-act-1984/116) | 54(1) | Secrecy | [*‘EL5’ and Knox City Council* [2022] VICmr 132](https://ovic.vic.gov.au/decision/el5-and-knox-city-council-freedom-of-information-2022-vicmr-132-19-may-2022/) |
| Melbourne University Standing Resolution 3.2.1 |  |  | [*McCulloch v University of Melbourne* [2001] VCAT 2246](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/2246.html) |
| [*Ombudsman Act 1973*](https://www.legislation.vic.gov.au/in-force/acts/ombudsman-act-1973/117) | 20 | Disclosing or taking advantage of information | [*Woodford v Ombudsman* [2001] VCAT 721](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/721.html)  [*Al-Hakim v Ombudsman* [2001] VCAT 1972](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/1972.html) |
| [*Veterinary Practice Act 1997*](https://www.legislation.vic.gov.au/in-force/acts/veterinary-practice-act-1997/044) | 77 | Duty of Confidentiality | [*‘FJ3’ and Veterinary Practitioners Registration Board of Victoria* [2023] VICmr 257](https://ovic.vic.gov.au/decision/fj3-and-veterinary-practitioners-registration-board-of-victoria-freedom-of-information-2023-vicmr-257-16-december-2022/) |
| [*Workplace Injury Rehabilitation and Compensation Act 2013*](https://www.legislation.vic.gov.au/in-force/acts/workplace-injury-rehabilitation-and-compensation-act-2013/047) | 595 | Secrecy provisions | [*‘BV4’ and Glen Eira City Council* [2020] VICmr 205](https://ovic.vic.gov.au/decision/bv4-and-glen-eira-city-council-freedom-of-information-2020-vicmr-205-28-july-2020/) |

1. See [*Graze v Commissioner of State Revenue* (Review and Regulation) [2013] VCAT 869](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2013/869.html), [37]. [↑](#footnote-ref-1)
2. [*Department of Premier and Cabinet v Hulls* [1999] VSCA 117](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/1999/117.html), [40]. [↑](#footnote-ref-2)
3. [*Interpretation of Legislation Act 1984* (Vic)](https://www.legislation.vic.gov.au/in-force/acts/interpretation-legislation-act-1984/130), section 38: “**Act** means an Act passed by the Parliament of Victoria”. [↑](#footnote-ref-3)
4. *Rich v Victoria Police* (unreported, AAT of Vic, Preuss PM, 14 February 1997), 43-44. [↑](#footnote-ref-4)
5. [*XYZ v Victoria Police* [2010] VCAT 255](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html), [49]. [↑](#footnote-ref-5)
6. [*Van Der Craats v City of Stonnington* [2015] VCAT 2039](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2015/2039.html), [27]. [↑](#footnote-ref-6)
7. *News Corporation Ltd v National Competition & Securities Commission* (1984) 1 FCR 64, 68; *Re Horesh and Ombudsman* (1986) 1 VAR 149 cited in *Hulls v Victorian Casino & Gaming Authority*(1998) 12 VAR 483, 495. [↑](#footnote-ref-7)
8. *Hulls v Victorian Casino & Gaming Authority*(1998) 12 VAR 483, 496. [↑](#footnote-ref-8)
9. *Hulls v Victorian Casino & Gaming Authority*(1998) 12 VAR 483, 496; [*Dept of Premier and Cabinet v Birrell (No 2)* [1990] VR 51](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VicRp/1990/5.html), per Murphy J. [↑](#footnote-ref-9)
10. [*Department of Justice v Western Suburbs Legal Service Inc*[2009] VSC 68](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2009/68.html), [21]. [↑](#footnote-ref-10)
11. *News Corporation Ltd v National Competition & Securities Commission* (1984) 1 FCR 64, 68; [*Firmstone v State Revenue Office* [2003] VCAT 953](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/953.html), [27]. [↑](#footnote-ref-11)
12. [*Tilley v VicRoads* [2010] VCAT 483](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/483.html), [58]; [*Al Hakim v Ombudsman* [2001] VCAT 1972](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/1972.html), [37]. [↑](#footnote-ref-12)
13. *News Corporation Ltd v National Competition & Securities Commission* (1984) 1 FCR 64, 68. [↑](#footnote-ref-13)
14. *Hulls v Victorian Casino & Gaming Authority*(1998) 12 VAR 483, 496. [↑](#footnote-ref-14)
15. [*Al Hakim v Ombudsman* [2001] VCAT 1972](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/1972.html), [39]; [*Firmstone v State Revenue Office* [2003] VCAT 953](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/953.html), [27]. [↑](#footnote-ref-15)
16. [*Kavvadias v Commonwealth Ombudsman* [1984] FCA 55](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/1984/55.html), [9]-[10]. [↑](#footnote-ref-16)
17. *Hulls v Victorian Casino & Gaming Authority*(1998) 12 VAR 483; [*Dept of Premier and Cabinet v Birrell (No 2)* [1990] VR 51](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VicRp/1990/5.html), per Murphy J. [↑](#footnote-ref-17)
18. *News Corporation Ltd v National Competition & Securities Commission* (1984) 1 FCR 64, 68; [*Richardson v Business Licensing Authority* [2003] VCAT 1053](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2003/1053.html), [14]. [↑](#footnote-ref-18)
19. [*Department of Justice v Western Suburbs Legal Service Inc*[2009] VSC 68](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2009/68.html), [21]. [↑](#footnote-ref-19)
20. [*Telstra Corp v Vic Roads* [2001] VCAT 1699](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/1699.html), [17]. [↑](#footnote-ref-20)
21. *Barnes v Commissioner for Corporate Affairs* (No 2) (1987) 1 VAR 438, 440-441. [↑](#footnote-ref-21)
22. [*McCulloch v University of Melbourne* [2001] VCAT 2246](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2001/2246.html), [41]-[43]. [↑](#footnote-ref-22)
23. [*Department of Justice v Western Suburbs Legal Service Inc*[2009] VSC 68](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2009/68.html), [21]. [↑](#footnote-ref-23)
24. [*Gullquist v Victorian Legal Services Commissioner* [2017] VCAT 764](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/764.html), [80]. [↑](#footnote-ref-24)
25. See examples,[*Akers v Victoria Police* [2022] VCAT 723](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2022/723.html), [67]; [*Smeaton v Transport Accident Commission* [2017] VCAT 1486](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2017/1486.html);[*XYZ v Victoria Police* [2010] VCAT 255](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/255.html); [*Tilley v VicRoads* [2010] VCAT 483](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2010/483.html). [↑](#footnote-ref-25)