

Notice of Decision and Reasons for Decision

Applicant:	'FC5'
Agency:	Transport Accident Commission
Decision date:	17 April 2023
Provisions and exemptions considered:	Sections 8, 30(1), 33(1)
Citation:	'FC5' and Transport Accident Commission (Freedom of Information) [2023] VICmr 31 (17 April 2023)

FREEDOM OF INFORMATION – Clinical Panel Review Forms – internal policy and procedure– Freedom of Information (FOI) request – FOI processing – personal affairs information of Agency officers – information contrary to the public interest

All references to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My review concerns Documents 1a and 1b to which the Agency refused access in full under section 30(1).

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied certain information in documents is exempt from release under sections 30(1) and 33(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with this information deleted in accordance with section 25, access to the documents is granted in part.

A marked-up copy of the documents indicating information to be disclosed and deleted in accordance with my decision has been provided to the Agency.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

17 April 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

Policies, Guidelines or Protocols:

1. Complainants Management Policy
 2. Security Breach Policy (Information)
 3. Failures in compliance with the Transport Accident Act 'the Act'
 4. TAC 'Duty of Care' Policy
 5. Employee Misconduct Policy
 6. Employee Formal Grievance Policy (For external complaints)
 7. The Terms of Reference for the Medical Review Panel and Medical Practitioners
 8. *The EXACT policy NOT an extract from the Data Protection Act and Privacy Policy whereby it restricts the ability for the TAC to allow the access to the PUBLIC record (please see the Whistleblower Protection Act of 1989 and the Health Practitioner Regulation National Law - (ahpra) the First Name, Last Name, AHPRA Number, Qualification of the Medical Practitioner within the Medical Review Panel to whom allegedly wrote the new rTMS treatment plan reducing the rTMS from 1 x rTMS per week to 1 x rTMS per 1 days.*
2. The Agency identified eight documents falling within the terms of the Applicant's request and provided access to seven documents outside the FOI Act (as they are publicly available) and refused access to Document 8 ('Release of Clinical Panel Review Forms') in full under section 30(1). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant seeks review of Document 8 only. This document relates to point 8 of their FOI request and comprises two documents, Documents 1a and 1b.
5. I have examined a copy of the documents subject to review. Document 1a provides internal instructions to Agency staff about information release considerations and a flowchart. Document 1b is an FOI factsheet which is referenced in Document 1a.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

9. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 30(1) – Internal working documents

10. Section 30(1) has three requirements:
- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
11. The exemption does not apply to purely factual material in a document.¹
12. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person employed by or engaged on behalf of an agency, regardless of whether or not they are subject to the *Public Administration Act 2004* (Vic).
13. The Agency refused access in full to Documents 1a and 1b under section 30(1).

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

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

Were the documents made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?

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

¹ Section 30(3).

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

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

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

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

19. I am satisfied the information in the documents was provided in the course of the Agency’s deliberative processes in relation to the Agency’s internal policies and procedures.

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

20. In deciding whether the information exempted by the Agency would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.

21. In this case, I have given weight to the following relevant factors:⁵

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency’s functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

22. In its decision letter, the Agency advised:

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

23. Having reviewed the documents and considered the Agency’s reasons set out in its decision letter and submission made during the review, I am not satisfied disclosure of certain limited information in the documents would be contrary to the public interest for the following reasons:

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

- (a) I acknowledge the Applicant's interest in the Agency's FOI policies and procedures, where those policies may impact a claimant or a member of the general public, including (but not limited to) their rights, privileges or benefits to which they may be entitled, eligible or subject.
- (b) I consider the FOI Act provides that internal policy and procedure documents, such as these, should be publicly available as a matter of course and also note the object of the FOI Act is to facilitate and promote the disclosure of the maximum amount of information as possible.

In summary, section 8(1) provides certain agency documents are to be made available for inspection and purchase when a document is used by agency officers to provide them with guidance when making decisions or recommendations. Particularly, in relation to an agency's enforcement of its statutory functions and the law. I consider section 8 also extends to the Agency carrying out its statutory responsibilities under the FOI Act. Section 8(3) provides that a document to which section 8(1) applies is not required to be made available to the extent it contains exempt information. However, if practicable, the agency's principal officer is required to prepare and make available a 'corresponding document' 'altered only to the extent necessary to exclude the exempt matter'.

- (c) Whilst I note certain information in the documents could be considered sensitive as it relates to the Agency's internal considerations regarding the non-disclosure of certain information under the FOI Act, I consider these deliberations are publicly known under the FOI Act and accord with legislative requirements under the FOI Act. In my view, this reduces the sensitivity of the relevant information in the documents. Further, I do not consider the content of an agency's FOI policies and procedures are particularly sensitive when considered in the context of provisions in the FOI Act which require an agency to weigh up and balance certain factors as to whether a document or information in a document is to be disclosed. For example, whether disclosure of personal affairs information would pose a safety risk to any person.
- (d) I consider there is a public interest in members of the public being able to evaluate and understand how decisions are made by government agencies under the law. By providing access to policy and procedure documents that inform how a decision is to be made, disclosure of such documents informs the public about government decision making processes and, through greater transparency, builds community trust.
- (e) I acknowledge the Agency's concerns that the documents are outdated (ie one of the documents is dated 2017) and may contain errors or have been superseded. However, I consider the Applicant is able to be advised of these facts and encouraged not to rely on these documents as being representative of the Agency's current practices and processes. As such, I do not accept their disclosure would be likely to misinform or confuse the public. I also consider it would be open to the Agency to provide an explanation as to its current FOI processes or policies and any related issues or concerns at the time of releasing the documents, should it consider it is necessary to do so.

- 24. However, having reviewed and considered certain information in Document 1b, I am of the view there is a public interest in allowing the Agency to document sensitive factors that may impact on its FOI decision making which also intersect with its statutory functions in assessing and determining accident claims and protecting the personal safety of its staff and other persons involved in the claims process. As such, I am satisfied disclosure of certain limited information in Document 1b would be contrary to the public interest and is to remain deleted.
- 25. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1) and a marked-up copy of the documents indicates information to be disclosed to the Applicant and deleted under this exemption.

Section 33(1) – Personal affairs information of a third party

26. While the Agency did not apply section 33(1), I have determined it is appropriate to consider its potential application to certain personal affairs information given my decision under section 30(1).
27. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI Act would ‘involve’ the disclosure of information relating to the ‘personal affairs’ of a person other than the Applicant (a **third party**);⁶
 - (b) such disclosure would be ‘unreasonable’.

Do the documents contain the personal affairs information of a third party?

28. Information relating to an individual’s ‘personal affairs’ includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.⁷
29. A document discloses a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁸
30. The personal affairs information contained in the document includes the names, position title and telephone contact details of Agency officers.

Would disclosure of personal affairs information be unreasonable?

31. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the interest in protecting an individual’s personal privacy in the circumstances of a matter.
32. The Victorian Court of Appeal has held there is ‘no absolute bar to providing access to documents which relate to the personal affairs of others’.⁹ Further, the exemption under section 33(1) ‘arises only in cases of unreasonable disclosure’ and ‘[w]hat amounts to an unreasonable disclosure of someone’s personal affairs will necessarily vary from case to case’.
33. I consider the following factors are relevant in determining whether disclosure would be unreasonable in the circumstances of this matter:
 - (a) the nature of the personal affairs information and the circumstances in which it was obtained;
 - (b) the likelihood of further disclosure of the information, if released under the FOI Act, which provides for the unrestricted and unconditional release of documents;
 - (c) whether the individuals to whom the information relates object, or would be likely to object, to the release of their personal affairs information in the documents;
 - (d) whether any public interest would be promoted by release of the information;

⁶ Sections 33(1) and 33(2).

⁷ Section 33(9).

⁸ *O’Sullivan v Department of Health and Community Services* (No 2) [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [76].

- (e) the Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved through disclosure; and
- (f) whether the disclosure of information would be, or be reasonably likely to endanger the life or physical safety of any person.¹⁰
34. In relation to information concerning the personal affairs information of Agency officers, the Victorian and Civil Administrative Tribunal (**VCAT**) has accepted there is nothing particularly sensitive about matters concerning or arising out of the course of one's official duties.¹¹
35. In this matter, I acknowledge the Applicant is reasonably likely to be aware of the identity of any Agency officers whose information appears in the documents. However, even in circumstances where a person named in a document is known to an applicant, it may still be unreasonable to release such information under the FOI Act.¹²
36. Subject to an agency demonstrating special circumstances apply, I consider it would not be unreasonable to disclose the name and position title of an agency officer, regardless of their seniority where a document sought is an official document of the agency and provides a record of agency officers carrying out their usual employment duties and responsibilities within a professional context. The nature of such information is to be contrasted with personal affairs information relating to an agency officer in their personal or private capacity.
37. Having reviewed the documents, and given my decision in relation to section 30(1) in which most information in the documents is to be released to the Applicant, I have determined disclosure of the names of the Agency officers and their contact details would be unreasonable given the timeframe since the policy documents were created and the fact the documents would likely have been approved by or on behalf of the Agency, rather than by the individuals named. Further, I do not consider the Applicant's understanding of the documents would be served by the release of this information.
38. Therefore, I have determined the Agency officers' names and contact details are exempt from release under section 33(1). In refusing access to this personal affairs information, I consider any concerns about disclosure of the content of the documents will be mitigated in the circumstances of this matter. However, the Agency officers' position titles are to be released.
39. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1) and a marked-up copy of the documents indicates information to be disclosed to the Applicant and deleted under this exemption.

Section 25 – Deletion of exempt or irrelevant information

40. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
41. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ and the effectiveness of the deletions. Where

¹⁰ Section 33(2A).

¹¹ *Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

¹² *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

¹³ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.¹⁴

42. I have considered the effect of deleting exempt information from the documents. I am satisfied it is practicable to delete the exempt information as to do it would not require substantial time and effort, and the edited documents would retain meaning.
43. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 25 and a marked-up copy of the documents indicates information to be disclosed to the Applicant and deleted under this provision.

Conclusion

44. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 30(1) and 33(1).
45. In making my decision, I consider it is consistent with the object of the FOI Act and section 8 of that Act, as discussed above.
46. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with this information deleted in accordance with section 25, access to the documents is granted in part.
47. A marked-up copy of the documents indicating information to be disclosed and deleted in accordance with my decision has been provided to the Agency.

Review rights

48. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
51. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
52. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹⁸

When this decision takes effect

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

¹⁴ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents –

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1a.	Undated	Release of Clinical Panel Review Forms page	3	Refused in full Section 30(1)	Release in part Sections 30(1), 33(1), 25 A marked-up copy of the document indicating exempt information in accordance with my decision has been provided to the Agency.	Section 30(1): I am satisfied disclosure of the document would not be contrary to the public interest for the reasons outlined in the Notice of Decision above. Section 33(1): I am satisfied disclosure of the third parties' personal affairs information in this document would be unreasonable for the reasons outlined in the Notice of Decision above. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.
1b.	[Date]	Clinical Panellists – FOI Information / Factsheet	2	Refused in full Section 30(1)	Release in part Sections 30(1), 33(1), 25 A marked-up copy of the document indicating exempt information in accordance with my decision has been provided to the Agency.	Section 30(1): I am satisfied disclosure of certain information in the document would be contrary to the public interest for the reasons outlined in the Notice of Decision above. Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.