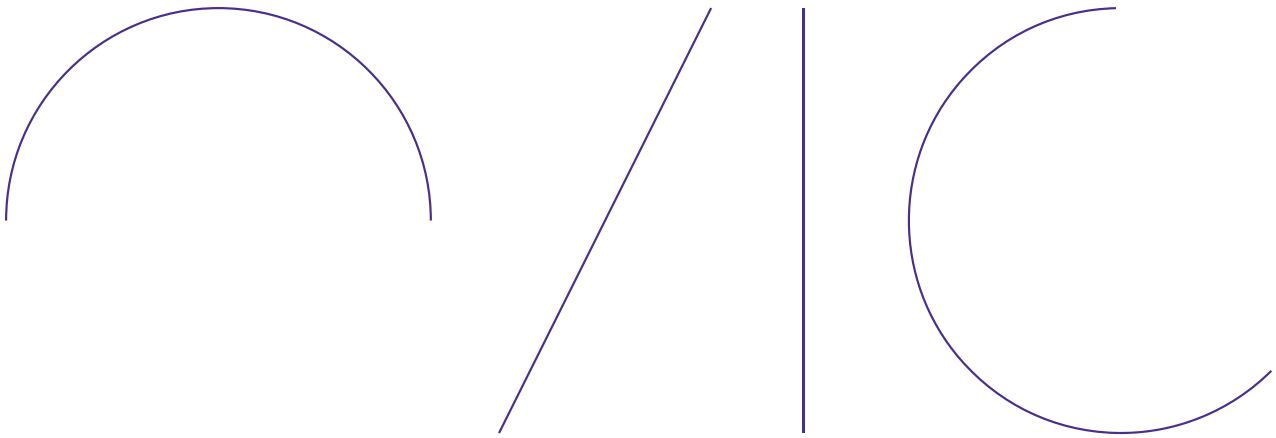
Office of the Victorian Information Commissioner

Part IV – Exempt documents

Freedom of Information Guidelines

FREEDOM OF INFORMATION



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References to legislation

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

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Section 27A – Interpretation

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27A Interpretation

A provision of this Part by virtue of which documents referred to in it are exempt documents—

(a) is not to be construed as limited in its scope or operation in any way by any other provision of this Part by virtue of which documents are exempt documents; and

(b) is not to be construed as not applying to a particular document by reason that another provision of this Part of a kind mentioned in paragraph (a) also applies to that document.

Guidelines

Applying the exemptions

1.1. The different exemptions in sections 28 to 38 operate independently of each other.[1] This means:

- the operation of one exemption is not affected by or limited by another exemption that may also apply to a document;
- a document may be exempt in part or in full under more than one exemption.

1.2. An agency or Minister has the discretion to apply an exemption to a document. This means an agency or Minister can choose to provide access to a document or information where they can properly do so or are required by law to do so even where they consider the document or information is exempt under the Act.[2]

For more information, see section 16 – Access to documents apart from Act.

1.3. Section 27A and the exemptions in section 28 to 38 must be read consistently with the object of the Act in section 3, which is to extend as far as possible the right of the community to access government held information.

[1] *Freedom of Information Act 1982* (Vic), section 27A.

[2] *Freedom of Information Act 1982* (Vic), section 16.

Section 28 – Cabinet documents

Extract of legislation

28 Cabinet documents

(1) A document is an exempt document if it is—

(a) the official record of any deliberation or decision of the Cabinet;

(b) a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet;

(ba) a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;

(c) a document that is a copy or draft of, or contains extracts from, a document referred to in paragraph (a), (b) or (ba); or

(d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

(2) Subsection (1) shall cease to apply to a document brought into existence after the day of commencement of this section when a period of ten years has elapsed since the last day of the year in which the document came into existence.

(3) Subsection (1) does not apply to a document referred to in a paragraph of that subsection to the extent that the document contains purely statistical, technical or scientific material unless the disclosure of the document would involve the disclosure of any deliberation or decision of the Cabinet.

(7) In this section—

(a) ***Cabinet*** includes a committee or sub– committee of Cabinet;

(b) a reference to a document includes a reference to a document whether created before or after the commencement of section 12 of the **Freedom of Information (Amendment) Act 1993**.

Guidelines

Overview of section 28

1.1. Section 28 is intended to ensure the Cabinet process remains confidential.[3] It protects the principle of collective ministerial decision-making and responsibility. The exemption is broad, extending to documents beyond those that are produced to and considered by Cabinet and its committees.[4]

1.2. Section 28 must be read consistently with the object of the Act in 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.[5] If it is unclear whether section 28 applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[6]

1.3. Agencies and Ministers must not use section 28 to refuse access to politically sensitive documents, that would not otherwise be protected without the Cabinet exemption.[7] For example, a document should not be placed before Cabinet for consideration, for the purpose of ensuring the document is exempt under FOI.

Discretion to disclose exempt documents

1.4. The decision to exempt a document under section 28 is discretionary.[8] This means an agency or Minister can choose to provide access to information that would otherwise be exempt, where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

> For more information, see section 16 – Access to documents apart from Act.

[3] Second Reading Speech, Freedom of Information (Amendment) Bill, 7 May 1993, Wade; see *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [16].

[4] *Department of Premier and Cabinet v Newbury* [2021] VCAT 331 [12].

[5] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [32], *Environment Victoria Inc v Department of Primary Industries* (2013) VCAT 39 [29].

[6] *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822 [21] referring to *Ryder v Booth* (1989) VR 869, 877; *Smith v Department of Sustainability and Environment* [2006] VCAT 1228 [15].

[7] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [32]; *Smith v Department of Sustainability and Environment* [2006] VCAT 1228 [15].

[8] *Victorian Public Service Board v Wright* [1986] HCA 16 [3].

Steps to applying the exemption

1.5. An agency or Minister seeking to apply the Cabinet documents exemption should:

- Consider which stream of section 28(1)(a)-(d) applies to the document or information.
- Ensure each element of the relevant stream is satisfied.
- Confirm the documents are not expressly excluded by the section.
- If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite an exemption applying.

Documents captured by section 28

1.6. Section 28(1) exempts five types of Cabinet documents from disclosure:

- the official record of any deliberation or decision of the Cabinet;[9]
- a document that has been prepared by a Minister, or prepared by an agency on behalf of a Minster, for the purpose of submission for consideration by the Cabinet;[10]
- a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet;[11]
- a document that is a copy or draft of, or contains extracts from, a document referred to in the above three dot points;[12] or
- a document which, if disclosed, would involve the disclosure of any deliberation or decision of the Cabinet.[13]

[9] *Freedom of Information Act 1982* (Vic), section 28(1)(a).
[10] *Freedom of Information Act 1982* (Vic), section 28(1)(b).
[11] *Freedom of Information Act 1982* (Vic), section 28(1)(ba).
[12] *Freedom of Information Act 1982* (Vic), section 28(1)(c).
[13] *Freedom of Information Act 1982* (Vic), section 28(1)(d).

One of the five subsections must apply

1.7. A document must fit squarely within one of the five options in section 28(1) to be an exempt document.[14] It is not sufficient for the document to merely have some connection with the Cabinet or to be perceived as having a Cabinet 'aroma'.[15]

Documents not captured by section 28

1.8. Section 28(1) does not apply to:

- a document that is more than 10 years old; [16]
- a document that contains purely statistical, technical, or scientific material, unless it would disclose any deliberation or decision of Cabinet;[17] or
- a document by which a decision of the Cabinet was officially published.[18]

Documents more than 10 years old

1.9. Section 28(1) does not apply to a document '10 years from the last day of the year in which the document came into existence'.[19]

Example

A document created before, or during 2012, is not exempt from release from 1 January 2023.

[14] *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924 [71]; *Ryan v Department of Infrastructure* [2004] VCAT 2346 [33]; *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [23].

[15] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [33]; *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [23].

[16] *Freedom of Information Act 1982* (Vic), section 28(2).

[17] *Freedom of Information Act 1982* (Vic), section 28(3).

[18] *Freedom of Information Act 1982* (Vic), section 28(1)(d).

[19] *Freedom of Information Act 1982* (Vic), section 28(2).

Purely statistical, technical, or scientific information

1.10. Section 28(1) does not apply to a document that contains purely statistical, technical, or scientific material, unless it would disclose any deliberation or decision of Cabinet.[20] Therefore, the information must:

- be purely statistical, technical or scientific; and
- not disclose deliberations or a decision of the Cabinet.[21]

1.11. The words 'statistical', 'technical' and 'scientific' should be given their ordinary meaning.[22]

1.12. In *Mildenhall v Department of Premier and Cabinet* (1995) 8 VAR 284 (**Mildenhall No 1**), Deputy President Macnamara (as he then was), referred to the dictionary definitions of these terms:[23]

- the word 'scientific' includes the social sciences;
- the word 'statistical' refers to the area of study in which the object is the collection and arrangement of numerical facts or data; and
- the word 'technical' adds little to the collective expression used in the section, given its meaning includes things which belong to, relate to, are appropriate to, peculiar to or characteristic of a particular art, science, profession or occupation including the technical arts and applied sciences.

1.13. 'Purely statistical, technical, or scientific information' is different from the broader concept of 'purely factual information' in section 30.[24]

'Purely'

1.14. There is conflicting case law about the effect of the word 'purely' in section 28(3). This part of the Guidelines explains the conflict and provides guidance on how OVIC interprets this section.

1.15. In Mildenhall No 1, Deputy President Macnamara (as he then was), observed that the word 'purely' before the adjectives 'statistical, technical or scientific' means that 'a document which has any features other than 'statistical, technical or scientific' [such as policy, opinion, advice or recommendation] will not be removed from exemption by the subsection'.[25]

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[20] *Freedom of Information Act 1982* (Vic), section 28(3).

[21] *Pullen v Alpine Resorts Commission* (unreported, AAT, Macnamara DP, 23 August 1996) 20.

[22] *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, 294.

[23] *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, 294, applied in *Stretton v Major Transport Infrastructure Authority* [2022] VCAT 1421 [45].

[24] *Pullen v Alpine Resorts Commission* (unreported, AAT, Macnamara DP, 23 August 1996) 21; *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996), 9.

[25] *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, 295.

1.16. *Stretton v Major Transport Infrastructure Authority* [2022] VCAT 1421 (**Stretton**) applied this passage from Mildenhall No 1 to find that an entire document must contain purely statistical, technical, or scientific information, and if any part of the document contains features such as policy, opinion, advice or recommendation, section 28(3) will not apply.[26]

1.17. However, in *Mildenhall v Department of Treasury and Finance (unreported, AAT of Vic, Macnamara DP, 18 March 1996)* (**Mildenhall No 2**), Deputy President Macnamara clarified the statement he had made in Mildenhall No 1:

> *I was not meaning to suggest that the application of section 28(3) could not lead to the release of the purely scientific section of a particular document subject to the deletion of other portions consisting of opinion or advice. The section specifically uses the phrase "to the extent that…". There is nothing in its terms to suggest that Section 25 of the statute (dealing with release subject to deletions) is not applicable.*[27]

For more information on removing exempt and irrelevant information, see section 25 – Deletion of exempt matter or irrelevant material.

1.18. In conducting reviews, OVIC follows the interpretation in Mildenhall No 2. OVIC interprets the word 'purely' to mean that the information (not the whole document) must be purely 'statistical, technical, or scientific' in nature for section 28(3) to apply. If the information contains any other features, such as policy, opinion, advice or recommendation, section 28(3) will not apply.[28]

1.19. Where practicable under section 25(1), an agency or Minister can apply section 28(3) to part of a document, to permit the release of the purely statistical, technical or scientific information in the document, and refuse release of the remaining exempt information.[29]

Example

An applicant requests access to a document prepared for the purpose of briefing a Minister in relation to issues to be considered by the Cabinet.

The agency considers the document is exempt under section 28(1)(ba) (a document prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet).

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[26] *Stretton v Major Transport Infrastructure Authority* [2022] VCAT 1421 [46], [50].

[27] *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996), page 9 (Mildenhall No 2). The decision in *Stretton v Major Transport Infrastructure Authority* [2022] VCAT 1421 [50] appears to have been made without reference to this passage from Mildenhall No 2.

[28] See statement made by Macnamara DP in *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, 294, as clarified by Macnamara DP in *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996), 9.

[29] *Mildenhall v Department of Treasury and Finance* (unreported, AAT of Vic, Macnamara DP, 18 March 1996), 9.

The document contains one page of purely scientific information and one page of statistics mixed with opinion and recommendation.

The agency considers section 28(3) applies to the one page of purely scientific information, but not to the one page of statistics that is mixed in with opinion and recommendation, and that the information does not disclose deliberations by Cabinet. The agency considers it is practicable to provide the applicant with access to the one page of purely scientific information.

In the decision, the agency explains it has applied sections 25(1) and 28(3), to release one page of purely scientific information, and section 28(1)(ba) to refuse access to the remaining information.

Example of section 28(3) applying

Mildenhall v Department of Treasury and Finance (unreported, AAT of Vic, Macnamara DP, 18 March 1996)

Background

The applicant requested access to "all official documents of the Treasurer including briefings and advice provided by Treasury on the City Link Project".

The agency refused access to some documents relying on section 28(1)(ba) (a document prepared for the purpose of briefing a Minister in relation to issues to be considered by Cabinet).

The applicant argued that two of the documents contained purely statistical, technical or scientific information and would therefore not be exempt, because of section 28(3).

Document 1 was a Minute to the Treasurer, providing commentary on matters appearing on the agenda, for discussion at a meeting of a sub-committee of the Cabinet that had been formed to deal with the City Link project.

Document 2 was a half page report on the City Link Authority's budget. It contained a table of budgetary projections and text underneath the table, explaining the contents of the table.

Issue

Did the documents contain purely statistical, technical or scientific information?

Did the purely statistical, technical or scientific information disclose a deliberation or decision of the Cabinet?

Decision

Document 1 – Minute to the Treasurer

Deputy President Macnamara held that some information in the document was purely scientific or technical in nature. However, the release of that information would give a substantial indication of the substance of the Cabinet sub-committee's deliberation. Therefore, section 28(3) could not apply to the information, and it remained exempt under section 28(1)(ba).

Document 2 – budgetary projections

Deputy President Macnamara held that the table and accompanying text were purely statistical in nature, and the table was purely technical in nature because it belonged to a particular profession, being accountancy. The fact that budgetary projections are by their nature estimates and cannot achieve complete exactitude, did not mean that they were not statistical or technical in nature.

The disclosure of the document would not disclose the deliberations of the Cabinet because the fact that Cabinet had deliberated on the budget projections was already public knowledge.

Consequently, section 28(3) applied to the table of budgetary projections and the text underneath it. This meant this information was not exempt under section 28(1)(ba).

Example of section 28(3) not applying

Donnellan v Linking Melbourne Authority (Revised) (Review and Regulation) [2014] VCAT 1027

Background

The applicant requested access to the East West Link business case and annexures.

The agency refused access to the documents under section 28(1)(b) (a document that has been prepared by a Minister or on their behalf or by an agency for the purpose of submission for consideration by Cabinet).

Issue

Did the documents contain purely statistical, technical, or scientific information?

Decision

Statistical, scientific, and technical information in the business case appeared by way of argument, evaluation, proposals and modelling relating to the East West Link project, based on subjective assumptions by, or inputs from, the relevant authors, experts or consultants.

This is not purely statistical, technical or scientific nature and the document was exempt.

What is Cabinet, a Cabinet committee, or a Cabinet sub-committee?

1.20. 'Cabinet' includes a committee or sub-committee of Cabinet.[30] This means the section 28 exemption applies to Cabinet documents, Cabinet committee documents and Cabinet sub-committee documents.

[30] *Freedom of Information Act 1982* (Vic), section 28(7).

Cabinet

1.21. Cabinet is a forum of Ministers chaired by the Premier which decides major policy for the Victorian Government. It comprises all Ministers and considers questions of policy, administration, and legislation.[31]

Cabinet committees and sub-committees

1.22. Cabinet is supported by a range of committees or sub-committees that focus on specific subject matter or issues of government focus including policy and legislative priorities. Cabinet committees are established by a decision of the Premier or the Cabinet.[32]

1.23. The following types of bodies fall within the definition of 'Cabinet':

- Standing committees: ongoing committees that report directly to the Cabinet and support it in its decision-making role and provide oversight of sub-committees and taskforces;
- Sub-committees: ongoing committees that support a specific whole of government policy area, allow for broad Ministerial representation and support standing committees; and
- Taskforces: time-limited committees that are used to develop, implement and oversee the delivery of a specific policy, or related set of policies. Cabinet taskforces should not be confused with taskforces that are led by a Minister.[33]

1.24. The establishment of a committee, sub-committee or taskforce will include specific terms of reference. Evidence of the formal establishment of a committee, sub-committee or taskforce may include an official record of the Premier or the Cabinet's decision and the terms of reference.[34]

1.25. The term 'Committee of Cabinet' was considered in *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719. In that case, the Administrative Appeals Tribunal (AAT):

- interpreted 'Committee of Cabinet' in section 4 of the Commonwealth *Freedom of Information Act 1982* to mean 'a group of persons derived from the Cabinet performing a function for, or on behalf of the Cabinet, or a group having such a connection or association with the Cabinet that the group can be said to belong to the Cabinet';[35] and
- determined that National Cabinet is not a Committee of Cabinet.[36]

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[31] See the Victorian Government 'Cabinet Handbook' (August 2021).

[32] See the Victorian Government 'Cabinet Handbook' (August 2021).

[33] See the Victorian Government 'Cabinet Handbook' (August 2021).

[34] *Asher v Department of Premier and Cabinet* [2008] VCAT 450 [18].

[35] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719 [64].

[36] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719 [210].

1.26. The decision in *Patrick* is highly persuasive and should be followed in Victoria, given it relates to equivalent legislation at the Commonwealth level, and is the only judicial guidance on the meaning of the term 'Committee of Cabinet' and the status of the National Cabinet.

1.27. Applying the *Patrick* decision, the section 28 exemption will not apply to National Cabinet documents, unless the documents otherwise fall within the elements of section 28(1)(a)-(d).

Case example

Patrick and Secretary, Department of Prime Minister and Cabinet [2021] AATA 2719

Background

The applicant made a request under the *Freedom of Information Act 1982* (Cth) (**Commonwealth FOI Act**) to the Department of Prime Minister and Cabinet (**Department**) for documents relating to National Cabinet. The documents requested included minutes of the meeting of National Cabinet, documents providing formal notification to the Governor-General that the National Cabinet was being formed and documents outlining the rules of National Cabinet.

The Department decided the documents were exempt under the Cabinet documents exemption in section 34(1)(b) of the Commonwealth FOI Act (this is similar to the exemption in section 28 of the Victorian FOI Act).

Decision

Justice White of the AAT found the documents did not come within the Cabinet exemption in section 34(1)(b) of the Commonwealth FOI Act because National Cabinet is not a committee of Cabinet within the meaning of section 4 of the Commonwealth FOI Act.

The AAT held 'committee of Cabinet' means a group of persons derived from the Cabinet performing a function for, or on behalf of the Cabinet, or a group having such a connection or association with the Cabinet that the group can be said to belong to the Cabinet.

In making its finding, the AAT relied on the following factors:

- The purpose of the Cabinet documents exemption means that a 'committee of Cabinet' must be so closely related to Cabinet that the considerations which make appropriate the exemption of Cabinet documents also make appropriate the exemption of the documents of a committee of Cabinet.
- Cabinet is a committee of Ministers comprised of Ministers drawn from the party or parties in Government.
- The words 'committee' and 'of' suggest that a 'committee of Cabinet' must be derivative of the Cabinet.

- The Cabinet Handbook definition of 'Cabinet committees' stated that Cabinet Committees derive their power from Cabinet and the Prime Minister is responsible for the membership of Cabinet committees.

The AAT determined National Cabinet is not a 'committee of Cabinet' because:

- National Cabinet was not established by the Federal Cabinet. It was established at a Council of Australian Government meeting on 13 March 2020.
- National Cabinet is not comprised of Ministers of the Federal Government. The National Cabinet is composed of the Prime Minister, State Premiers, and Territory Chief Ministers. Each person is a member of the National Cabinet by reason of the office they hold.
- There was no historical precedent of Committees of Cabinet that included State Premiers or members of Australian Parliaments.
- There was no evidence the Prime Minister has discretion to pick and choose the members of the National Cabinet. The National Cabinet determines its own shape, structure and operation.
- There was no evidence the role of National Cabinet is to assist the Federal Cabinet.
- The States and Territory members of the National Cabinet do not act wholly in accordance with the principles of collective responsibility and Cabinet solidarity.
- The fact the National Cabinet is subject to confidentiality and receives administrative support from the Cabinet division within the Department did not make National Cabinet a committee of Cabinet.

Official record of any deliberation or decision of the Cabinet – section 28(1)(a)

1.28. Section 28(1)(a) exempts from release a document that is an official record of any deliberation or decision of the Cabinet. This is usually evident on the face of a document.

1.29. It is enough for a document to only record either deliberations or decisions; it does not need to do both.

What does OVIC require on review?

1.30. To establish the exemption in section 28(1)(a), an agency or Minister should provide a copy of the official record that evidences a deliberation or decision of the Cabinet.

1.31. During a review, there are special requirements for providing OVIC with the document that an agency or Minister claims is exempt under section 28.

For more information see section 63D – Special requirements for production of documents claimed to be exempt under section 28, 29A, 31 or 31A.

Documents prepared for the purpose of submitting to Cabinet for consideration – section 28(1)(b)

1.32. Section 28(1)(b) exempts from release a document that was prepared by a Minister, or on behalf of a Minister, or by an agency, for the purpose of submitting it to Cabinet for Cabinet's consideration.

1.33. A document that falls under this exemption is likely to relate to an issue over which the Minister has responsibility as part of their Ministerial portfolio.

Example

The Treasurer, or the Department of Treasury and Finance, prepares a submission to the Cabinet about a financial matter (such as the sale of a public asset) that requires the Cabinet's approval.

The purpose of a document's creation

1.34. The document must have been created for the sole, substantial or dominant purpose of submission to the Cabinet for its consideration.[37]

1.35. If there is more than one purpose of a document's creation, it can be useful to ask whether the document would have been created but for the purpose of submission for consideration by the Cabinet.[38] If the document would have been created in any event, this may indicate the purpose of the document's creation was not for submission for consideration by the Cabinet.[39]

[37] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [34]; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924 [72].

[38] *Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11 [13].

[39] *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [80], [82].

1.36. The document does not need to have been, in fact, considered by, or submitted to, the Cabinet.[40] The purpose of the document's creation is the key consideration. However, where there is no evidence of the purpose of the document's creation, the actual use of the document can assist to determine the purpose of its creation.[41]

Consideration by the Cabinet

1.37. The documents must be prepared for consideration by the Cabinet, not merely for the purpose of placing them before the Cabinet.[42]

1.38. It is helpful to consider the following principles outlined in case law when determining this factor:

- 'Consideration' means 'a step in a deliberative process'.[43] For example, a matter which is likely to be discussed at a meeting of the Cabinet, or a matter on which an actual decision of the Cabinet must be made.[44]
- Documents 'for information' or voluminous 'raw information' and 'primary documents' are not likely to be directly considered in the Cabinet regardless of whether they are attached to a Cabinet submission.[45]
- A preliminary or preparatory document used to prepare a Cabinet submission, such as a brief from one department to another to assist in preparing a submission, is not a document prepared for the purpose of submission to the Cabinet for the Cabinet to consider.[46]
- If a summary or executive summary of a report is submitted for consideration by the Cabinet, both the summary and full report can be exempt.[47]
- A report prepared by an external consultant can be 'prepared by an agency' and can be captured even if the consultant did not know the document would go to the Cabinet when created.[48] It is the agency's purpose in commissioning the external consultant to prepare the document that is relevant.[49]

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[40] *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [20]; *Wilson v Department of Premier & Cabinet* [2001] VCAT 663 [16]; *Asher v Department of Infrastructure* [2006] VCAT 1375 [9], [20]; *Ryan v Department of Infrastructure* [2004] VCAT 2346 [34].

[41] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [34]; *Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11 [15]; *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [19].

[42] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [34]-[36]; *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [22].

[43] *Olexander v Department of Premier Cabinet* [2002] VCAT 497 [46].

[44] *Olexander v Department of Premier Cabinet* [2002] VCAT 497 [46].

[45] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [36]–[40]; *Olexander v Department of Premier Cabinet* [2002] VCAT 497 [46].

[46] *Department of Infrastructure v Asher* [2007] VSCA 272 [37], [40], [55].

[47] *Olexander v Department of Premier Cabinet* [2002] VCAT 497 [28]-[29]; *State Owned Enterprise for Irrigation Modernisation in Northern Victoria v Manners* [2010] VSC 516 [28].

[48] *Smith v Department of Sustainability and Environment* [2006] VCAT 1228 [17]; *Asher v Department of Premier and Cabinet* [2008] VCAT 450 [39]-[43], [74].

[49] *Honeywood v Department of Innovation, Industry and Regional Development* [2004] VCAT 1657 [28].

- Where the Cabinet specifically asks for a document to be prepared, the document will be exempt from release.[50]

Example

To be exempt under section 28(1)(b), a document must be prepared with the intention that it be considered by Cabinet.

In *Ryan v Department of Infrastructure* [2004] VCAT 2346, the Victorian Civil and Administrative Tribunal (**VCAT**) stated that a document will not meet this requirement:

- if it is circulated to all Ministers forming the Cabinet merely for information purposes; or
- is prepared with the intention to physically place the document before the Cabinet, but not for the purpose of it being considered by the Cabinet.[51]

In Ryan's case, the requested documents included hundreds of certificates of land title.

VCAT decided that whilst the intention of the Department may have been to submit the certificates to Cabinet, there was no intention that Cabinet would consider the certificates.

VCAT considered it:

> *frankly far fetched to think that members of Cabinet would examine some hundreds of certificates of title. Not only would such a process be tedious, but it would be unlikely to provide facts, without further analysis, which would inform the decision Cabinet had to make*[52]

VCAT commented that:

> *Cabinet ministers are busy people who must absorb a wide range of information in order to make Cabinet decisions. Typically information provided to Cabinet ministers will be in summary form; if all the information provided to Cabinet ministers to enable Cabinet to make decisions was in raw or primary form, the process would be unworkable.*[53]

[50] *Smith v Department of Sustainability and Environment* [2006] VCAT 1228 [17].

[51] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [34]-[36].

[52] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [39].

[53] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [38].

What does OVIC require on review?

1.39. To establish the exemption in section 28(1)(b), an agency or Minister should provide information that demonstrates each element of the exemption. This includes:

- Evidence the document was submitted to the Cabinet (for example, a copy of the Cabinet submission and/or the agenda showing its submission to the Cabinet) where applicable.
- A statement from a person within the relevant business area of the agency and with responsibility for or direct knowledge of the matter. The statement should attest to:
    - the person's responsibilities within the agency;
    - why they are the appropriate person to make the statement; and
    - the personal knowledge of that person regarding the purpose for the creation of the document at the time it was prepared or commissioned.

  Information provided by a person with no responsibility for or direct knowledge of the matter, such as the agency's FOI officer, will generally not be sufficient to establish the purpose for which the document was created.
- Any internal correspondence to demonstrate the purpose for which the document was created.
- Highlighting any information in the document that demonstrates the purpose for which it was created.
- Any additional details about who created the document and the circumstances in which it was created. If considered by, or submitted to, the Cabinet: details of when and by whom it was submitted or requested by the Cabinet.
- If the document was not considered by, or submitted to, the Cabinet:
    - details of why it did not proceed; or
    - copies of internal advice (from the program area that created the document) describing why it did not proceed.

1.40. During a review, there are special requirements for providing OVIC with the document that an agency or Minister claims is exempt under section 28.

For more information see section 63D – Special requirements for production of documents claimed to be exempt under section 28, 29A, 31 or 31A.

Documents prepared for the purpose of briefing a Minister about issues to be considered by the Cabinet – section 28(1)(ba)

1.41. Section 28(1)(ba) exempts from release a document that was prepared for a Minister to brief them about an issue to be considered by the Cabinet.

1.42. A briefing document will usually relate to an issue within the Minister's portfolio but may relate to another Minister's portfolio – where a Minister needs advice about an issue to be deliberated on by the Cabinet.

> **Example**
>
> The Department of Treasury and Finance briefs the Treasurer on financial issues concerning the purchase of land by the Department of Health to build a new hospital.

1.43. While the briefing document does not need to be submitted to Cabinet, the subject of the Ministerial brief must be something to be considered by the Cabinet.

1.44. The exemption has two limbs that must be satisfied:

- first, whether the document was prepared for the purpose of briefing a Minister; and
- second, whether the briefing of the Minister was in relation to an issue that was, assessed objectively at the time the briefing occurred, an issue that was to be considered by the Cabinet.[54]

Document prepared for the purpose of briefing a Minister

1.45. The document must have been created for the sole, substantial or dominant purpose of briefing a Minister.[55]

1.46. If there is more than one purpose of the document's creation, it can be useful to ask whether the document would have been created 'but for' the purpose of briefing a Minister (i.e. if a Minister had not required it to be created).[56] If the document would have been created in any event, this may indicate the purpose of the document's creation was not to brief the Minister.[57]

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[54] *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822 [22]; *Department of Premier and Cabinet v Newbury* [2021] VCAT 331 [14].

[55] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [34]; *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924 [72].

[56] *Herald & Weekly Times v Victorian Curriculum & Assessment Authority* [2004] VCAT 924 [73]; *Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11 [13].

[57] *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 [80], [82].

1.47. The document does not need to have been, in fact, provided to the Minister, so long as it was prepared to brief the Minister.[58] Where there is no evidence of the purpose of the document's creation, the actual use of the document can assist to determine the purpose of its creation, but is not decisive.[59]

1.48. The exemption can apply to documents prepared for the purpose of briefing an incoming Minister, about issues to be considered by the new Cabinet.[60]

Example

Fyfe v Department of Sustainability and Environment [2012] VCAT 222

Background

The applicant sought access to parts of the Blue Book documents prepared by the Department before the 2010 state election, to brief the Opposition if it won the election.

The Opposition won the election.

Issue

Were the Blue Book documents exempt under section 28(1)(ba)?

Decision

Blue Book or Red Book documents prepared to brief an incoming Minister previously in Opposition are exempt under section 28(1)(ba).

Blue Book or Red Book documents give advice to an incoming government about establishing the operations of a new government, including advice about how to establish Cabinet and how Cabinet should make decisions.

Blue Book or Red Book documents are prepared for the dominant purpose of briefing an incoming Premier, with the expectation that the Premier will consider using the book to brief the new Cabinet.

Briefing

1.49. The exemption is limited to documents that have the character of briefing material.[61] A briefing is a short accurate summary of the details of a plan, operation, or policy. The purpose of a briefing is to 'inform', and it will generally contain information or advice prepared for the purpose of being read by, or explained to, a Minister.[62]

[58] *Department of Premier and Cabinet v Newbury* [2021] VCAT 331 [32]; *Ryan v Department of Infrastructure* [2004] VCAT 2346 [34].

[59] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [34]; *Department of Treasury and Finance v Dalla-Riva* [2007] VSCA 11 [15].

[60] *Fyfe v Department of Sustainability and Environment* [2012] VCAT 222.

1.50. Covering letters and facsimile cover sheets are not part of a brief. However, attached documents may form part of the brief.[63]

1.51. A document prepared simply for the purpose of placing it before a Minister is not a 'briefing'.[64]

Relating to an issue to be considered by the Cabinet

1.52. An agency or Minister should objectively assess whether a briefing relates to an issue to be considered by the Cabinet at the time the briefing occurred. The subjective purpose of the document's author is not relevant.[65]

1.53. It must be more than just 'likely' that the Cabinet will consider the issues outlined in the briefing. There must be an intention or expectation that the issue will be considered by the Cabinet (even if not ultimately considered).[66] Evidence that the issue was included in the Cabinet agenda will meet this test.

1.54. The purpose of briefing a Minister in relation to an issue to be considered by the Cabinet must be 'immediately contemplated' when the document is created. The exemption cannot apply:

- merely because Cabinet ultimately considers the issue;[67] or
- it is expected Cabinet is likely to consider the relevant issues in the future or from time to time.[68]

Example

Environment Victoria Inc v Department of Primary Industries [2013] VCAT 39

Background

The applicant requested access to documents relating to a Coal Development and Allocation Strategy (**Strategy**) developed by the former government.

The previous Minister expected the Strategy to be considered by Cabinet.

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[61] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [41].

[62] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [41]; *Department of Premier and Cabinet v Newbury* [2021] VCAT 331 [15].

[63] *Hulls v Department of Treasury and Finance (No 2)* (1994) 14 VAR 295.

[64] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [41]; *Department of Premier and Cabinet v Newbury* [2021] VCAT 331, [15].

[65] *Department of Premier and Cabinet v Newbury* [2021] VCAT 331, [31].

[66] *Mildenhall v Department of Treasury and Finance* (unreported, AAT, Macnamara DP, 18 March 1996), 14.

[67] *Thwaites v Department of Health and Community Services* (unreported, AAT of Vic, Macnamara DP, 4 April 1996), 17.

[68] *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39, [38]-[41].

The Department prepared the documents for the purpose of briefing a Minister of the incoming Government about the Strategy.

The incoming Government did not have a policy in relation to coal allocation going into the election and the Department did not know what the Minister's position was on the Strategy prior to the documents being prepared.

Issue

Were the documents prepared for the Minister, in relation to an issue to be considered by Cabinet?

Decision

The documents were not prepared in the 'immediate contemplation' of a discussion in Cabinet.

The documents were prepared too early in the process, at a time when it was uncertain whether the Minister and the new Government would support the Strategy, and therefore consider it in Cabinet.

The documents were not exempt under section 28(1)(ba).

1.55. A document which is intended to brief a Minister about the process for having an issue brought before the Cabinet, 'relates to' that issue and can therefore be exempt, even though it does not canvass the substance of that issue.[69]

Example of a document falling within section 28(1)(ba)

A briefing document prepared for the purpose of:

- providing advice to the Premier, in summary form, on initiatives that could be taken to secure the viability of Victoria's TAFEs; and
- seeking the Premier's approval to develop a submission to be considered by a Committee of the Cabinet on an anticipated date.

In circumstances where the issue is yet to be considered by the Cabinet, but remains under active consideration by the Minister, with a view to being put forward to the Cabinet.

[69] *Department of Premier and Cabinet v Newbury* [2021] VCAT 331, [17] and [29], following *Marple v Department of Agriculture* (1995) 9 VAR 29.

What does OVIC require on review in support of section 28(1)(ba)

1.56. To establish the exemption in section 28(1)(ba), an agency should provide information that demonstrates each element of the exemption.[70] This may include the following types of information:

- Generally, it will be clear the document is a briefing to a Minister as it will be in the form of a standard template. If the document is not in a standard template, an agency will need to provide supporting evidence or reasons to establish that the document is a briefing to a Minister.
- Details of who created the document and when and who requested its creation, if this information is not already included in the document.
- A statement from a person within the relevant business area of the agency and with responsibility for or direct knowledge of the matter. The statement should attest to:
    - the persons responsibilities within the agency;
    - why they are the appropriate person to make the statement; and
    - the personal knowledge of that person regarding the purpose for the creation of the document at the time it was prepared or commissioned.

  Information provided by a person with no responsibility for or direct knowledge of the matter, such as the agency's FOI officer, will generally not be sufficient to establish the purpose for which the document was created.
- A copy of a Cabinet submission or agenda demonstrating the issue was considered by the Cabinet.
- If the issue was not ultimately considered by the Cabinet, or the Minister, details of why this did not occur.

1.57. During a review, there are special requirements for providing OVIC with the document that an agency or Minister claims is exempt under section 28.

For more information see section 63D – Special requirements for production of documents claimed to be exempt under section 28, 29A, 31 or 31A.

[70] See *'EV5' and Department of Health* (Freedom of Information) [2022] VICmr 223 (19 September 2022) for an example of the exemption not being established due to lack of evidence from the agency.

Copy, draft, or extracts of a Cabinet document – section 28(1)(c)

1.58. Section 28(1)(c) exempts a document that is a copy or draft of, or contains extracts from, a document referred to in sections 28(1)(a), 28(1)(b) or 28(1)(ba), as discussed above.

Copy

1.59. A copy is a reproduction or duplicate of the document, for example a photocopy or printed copy.

Draft

1.60. A draft is a preliminary version of the document. It should be the actual document, often marked as draft.

1.61. A 'draft' does not extend to source documents that were created for other purposes before the submission or briefing, and where they contain information subsequently reproduced in the submission or brief.[71]

Example

Department of Infrastructure v Asher [2007] VSCA 272

Background

The applicant requested access to Quarterly Asset Performance Reports (**Reports**).

Information and passages from the Reports were used in the creation of a submission to Cabinet that was an exempt document under section 28(1)(b).

Issue

Were the Reports a draft of the section 28(1)(b) document?

Decision

Copying and pasting information and passages from the Reports into the Cabinet submission did not make the Reports a 'draft'.

The Reports were not exempt under section 28(1)(c).

[71] *Department of Infrastructure v Asher* [2007] VSCA 272 [44].

Extract

1.62. An extract usually contains a reproduction of part of the text or material such as a quote, paraphrase, or summary.[72] Simply referring to a Cabinet document or incorporating figures that appeared in a table in a Cabinet submission, is not sufficient.[73]

1.63. The document containing extracts must have been created after the official record, Cabinet submission or Ministerial brief was prepared.[74]

1.64. To establish whether a document contains extracts, consider whether:

- there is a footnote or other attribution in the text to show that the information came from an official record, Cabinet submission or Ministerial brief; or
- direct evidence of a process of extracting content from an official record, Cabinet submission or Ministerial brief, to be included in the document.[75]

[72] *Mildenhall v Department of Education* (unreported, VCAT, Glover M, 16 April 1999); *Honeywood v Department of Human Services* [2006] VCAT 2048 [19].

[73] *Mildenhall v Department of Education* (unreported, VCAT, Glover M, 16 April 1999); *Batchelor v Department of Premier and Cabinet* (unreported, AAT of Vic, Fagan P and Coghlan M, 29 January 1998) 23.

[74] *Honeywood v Department of Human Services* [2006] VCAT 2048 [19]; *Smith v Department of Sustainability and Environment* (General) [2006] VCAT 1228 [28].

[75] *Honeywood v Department of Human Services* [2006] VCAT 2048 [19].

Example

Honeywood v Department of Human Services [2006] VCAT 2048

Background

The applicant requested access to a draft briefing note to the Premier.

The Department refused access to the briefing note under section 28(1)(c) on the basis it contained an extract of a Cabinet submission exempt under section 28(1)(b).

Issue

Was the briefing note exempt under section 28(1)(c)?

Decision

VCAT accepted the Department's evidence that the officer who prepared the briefing note opened an electronic copy of the Cabinet submission on her computer and copied and pasted a significant number of paragraphs from the Cabinet submission into the briefing note. Some paragraphs were changed in subtle ways, others were not changed at all.

The evidence established the briefing note contained extracts from the Cabinet submission and was exempt under section 28(1)(c).

What does OVIC require on review in support of section 28(1)(c)?

1.65. To establish the exemption in section 28(1)(c), an agency should provide information that specifies and demonstrates:

- there is a document exempt under section 28(1)(a), 28(1)(b) or 28(1)(ba); and
- the document under review is a copy, draft or extract of the document exempt under subsection 28(1)(a), 28(1)(b) or 28(1)(ba).

1.66. If the document is a copy, provide a copy of the document that is exempt under section 28(1)(a), 28(1)(b) or 28(1)(ba) to demonstrate the document subject to review is a copy.

1.67. If the document is a draft, provide a copy of the document that is exempt under section 28(1)(a), 28(1)(b) or 28(1)(ba) to demonstrate the document subject to review is a draft version.

1.68. If the document is an extract, provide a copy of the document that is exempt under section 28(1)(a), 28(1)(b) or 28(1)(ba) to demonstrate the document subject to review contains an extract of the exempt information.

1.69. During a review, there are special requirements for providing OVIC with the document that an agency or Minister claims is exempt under section 28.

For more information see section 63D – Special requirements for production of documents claimed to be exempt under section 28, 29A, 31 or 31A.

Documents that disclose any deliberation or decision of the Cabinet – section 28(1)(d)

1.70. Section 28(1)(d) exempts a document that would disclose any deliberation or decision of the Cabinet. It does not include a document by which a decision of the Cabinet was officially published.

1.71. This means the exemption will apply to a document that discloses any matter which conveys details about a deliberation or decision of the Cabinet. This should be clear from the document itself.

1.72. Where the decision or recommendation of the Cabinet has been made public already, releasing information is unlikely to 'disclose' the Cabinet decision or deliberation.[76]

1.73. Section 28(1)(d) is designed to protect the process of uninhibited debate and discussion amongst members of the Cabinet and maintain the principle of collective responsibility for any decision which is made.[77]

Deliberation

1.74. 'Deliberation' means the actual debate that took place, not just the subject matter of the debate (what the debate was about). In other words, how the subject matter was treated (how arguments were weighed up and evaluated) by the Cabinet with a view to making a decision, not just the subject matter itself.[78]

1.75. A document may reveal deliberations of Cabinet if the document, on its face:[79]

- discloses that the Cabinet required information of a particular type for the purpose of enabling the Cabinet to determine whether a course of action was practicable or feasible; or
- advances an argument for a particular point of view.

[76] *Honeywood v Department of Innovation, Industry and Regional Development* [2004] VCAT 1657 [26].

[77] *Department of Infrastructure v Asher* [2007] VSCA 272, [56] – [57].

[78] *Department of Infrastructure v Asher* [2007] VSCA 272, [6] and [58].

[79] *Department of Infrastructure v Asher* [2007] VSCA 272, [8].

1.76. In contrast, a document that just reveals that certain information, such as a statistic or description of an event, was placed before Cabinet does not reveal a deliberation or decision of the Cabinet.[80]

1.77. Where the exemption is not clear on the face of the document, an agency or Minister will need to produce evidence to demonstrate how the Cabinet dealt with the document and whether it actually deliberated or made a decision that could be revealed by disclosure of the document.[81]

Examples

Examples of documents disclosing deliberations of Cabinet

- Draft documents showing changes made to the documents after a meeting of the Cabinet may disclose deliberations of the Cabinet based on the subject matter of the changes.[82]
- A document that would enable the reader to infer from its detailed content at least some of the thinking processes of the Cabinet leading to its decision.[83]

Examples of documents that did not disclose deliberations of Cabinet

- Quarterly Asset Performance Reports revealing information about the performance and requirements of government departments, which said nothing about the deliberations of the Cabinet.[84]
- A preliminary document prepared for the purpose of assisting the Board of Melbourne Water to brief the Minister on options to manage issues relating to water supply, flow and quality. The preliminary document did not fall within section 28(1)(d) because disclosure of the document 'would not disclose what Cabinet thought of the options or how it deliberated on them or which ones it chose to accept or reject because… not all the options ever even became part of any Ministerial briefing'.[85]

Decision

1.78. Decision means any conclusions as to a course of action the Cabinet adopts, whether they are conclusions as to final strategy on a matter or conclusions about how a matter should proceed.[86]

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[80] *Department of Infrastructure v Asher* [2007] VSCA 272, [8].

[81] See *Asher v Department of Sustainability and Environment* [2010] VCAT 601.

[82] See *Asher v Department of Premier and Cabinet* [2008] VCAT 450, [106].

[83] See *Hartland v Department of Treasury and Finance* [2016] VCAT 1826, [173].

[84] *Department of Infrastructure v Asher* [2007] VSCA 272, [8].

[85] *Asher v Melbourne Water* [2009] VCAT 1079, [34].

[86] *Dalla-Riva v Department of Treasury and Finance* [2005] VCAT 2083, [30] citing *Toomer and Department of Agriculture, Fishers and Forestry and Ors* [2003] AATA 1301 [88].

What does OVIC require on review in support of section 28(1)(d)

1.79. To establish the exemption in section 28(1)(d), an agency should provide information that demonstrates each element of the exemption. This may include:

- The terms of the document itself, which might be self-explanatory in demonstrating the exempt information relates to a deliberation or decision of the Cabinet. For example, 'Cabinet discussed X', 'Cabinet approved Y' or 'Cabinet considered the implications of Z'.
- Supporting evidence, such as a document exempt from release under sections 28(1)(a), 28(1)(b) or 28(1)(ba), to demonstrate the document subject to review contains a decision or deliberation of the Cabinet. For example, a copy of the Cabinet submission or agenda.
- Confirmation that the deliberation or decision has not been officially published.

1.80. During a review, there are special requirements for providing OVIC with the document that an agency or Minister claims is exempt under section 28.

For more information see section 63D – Special requirements for production of documents claimed to be exempt under section 28, 29A, 31 or 31A.

Neither confirming nor denying the existence of a document

1.81. In some cases, even acknowledging that a document does, or does not exist, can cause harm or be prejudicial. In those cases, an agency or Minister may make a decision and express it in terms that neither confirms nor denies the existence of the requested document.[87]

1.82. An agency or Minister can neither confirm nor deny that a document exists where a document is exempt under section 28, or if it did exist, would be exempt under section 28.[88]

[87] *Freedom of Information Act 1982* (Vic), section 27(2)(b).

[88] *Freedom of Information Act 1982* (Vic), section 27(2)(b).

Section 29 – Documents containing matter communicated by any other State

Extract of legislation

29 Documents containing matter communicated by any other State

(1) A document is an exempt document if disclosure under this Act would be contrary to the public interest and disclosure—

(a) would prejudice relations between the State and the Commonwealth or any other State or Territory; or

(b) would divulge any information or matter communicated in confidence by or on behalf of the government of another country or of the Commonwealth or of any other State or Territory to the government of the State or Territory or a person receiving a communication on behalf of that government.

(2) In deciding whether a document is an exempt document under subsection (1), an agency or Minister, if reasonably practicable, must—

(a) notify any of the following that are relevant that the agency or Minister has received a request for access to the document—

(i) another agency or Minister;

(ii) an agency of another country or the Commonwealth or another State or a Territory

(iii) an authority of another country or the Commonwealth or another State or a Territory; and

(b) seek the view of that agency, authority or Minister as to whether the document should be disclosed.

Guidelines

Purpose and scope of section 29

1.1. Under section 29(1), a document is exempt if disclosure:

- would be contrary to the public interest; and
- disclosure would either:

- prejudice relations between the State of Victoria and the Commonwealth or between the State of Victoria and any other State or Territory;[89] or

- divulge any information or matter communicated in confidence by or on behalf of the government of another country, or the Commonwealth, or any other State or Territory to the government of the State of Victoria or a person receiving a communication on behalf of the State of Victoria.[90]

1.2. This exemption is hard to establish. Both subsections of the exemption require the agency or Minister to establish that disclosure of the document would be contrary to the public interest. If this first limb can be met, the agency or Minister must also establish that disclosure would prejudice relations with another government or divulge information communicated in confidence by another government.

1.3. If consultation with the other affected government or governments is reasonably practicable, an agency or Minister must consult before applying the exemption.[91]

Discretion to disclose exempt documents

1.4. The decision to exempt a document under section 29 is a discretionary power.[92] An agency or Minister can choose to provide access to information that would otherwise be exempt, where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

> For more information on providing access to information outside of the Act, see section 16 – Access to documents apart from Act.

Disclosure would be contrary to the public interest

1.5. To be exempt, the agency or Minister must establish that the document's disclosure would be contrary to the public interest.

1.6. 'Would' requires certainty that an event will occur, rather than a mere possibility or likelihood.[93]

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[89] *Freedom of Information Act 1982* (Vic), section 29(1)(a).

[90] *Freedom of Information Act 1982* (Vic), section 29(1)(b).

[91] *Freedom of Information Act 1982* (Vic), section 29(2).

[92] *Victorian Public Service Board v Wright* [1986] HCA 16, [3].

[93] *'DY2' and Department of Health* [2022] VICmr 11, [18]. See also, *Victoria Police v Marke [2008] VSCA 218, [97] in the context of the word "would" in the section 33 exemption.*

1.7. An agency or Minister's decision must be made consistently with the object of the Act in section 3, which is to release information as far as possible, and to only use exemptions to protect essential public interests. The balancing of public interest considerations does not begin from empty scales or a blank page. Instead, the Act requires the balancing to occur from and within a default position that the document or information should be released.[94] If it is unclear whether section 29 applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[95]

1.8. An agency or Minister should, in its decision, explicitly state the relevant public interest considerations on which the decision is based. This requires the agency or Minister to carefully consider, on a case-by-case basis, the relevant public interest considerations for and against disclosure. The decision should explain how they apply to the specific documents or information in the context of the requested document and the potential consequences of its disclosure, referring to the facts, evidence and reasons for the agency or Minister's decision.

For more information on writing a decision, see section 27 of the FOI Guidelines.

1.9. For a document to be exempt under section 29, there must be clear evidence supporting the public interest consideration relied on by the agency or Minister.[96]

Example

An agency asserts that a document's disclosure would be contrary to the public interest because it contains information provided in confidence by another State, and its release would inhibit that other State from providing similar information to the State of Victoria in future. However, there is no evidence from the other State as to whether disclosure of the document would have this effect.

The exemption would not be made out, without clear evidence that the other State would, in fact, be reluctant to provide information of the same kind in future if the document were released.

1.10. Public interest considerations may be relevant to determining whether disclosure would be contrary to the public interest. They are not a fixed set of criteria.

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[94] *McKinnon v Department of Treasury* [2006] HCA 45, [19], in the context of the *Freedom of Information Act 1982* (Cth).

[95] *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822, [21] and *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39, [29], both referring to *Ryder v Booth* (1989) VR 869, 877. While these decisions do not deal with section 29, 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.

[96] *Pescott v Department of Conservation and Environment* (1991) 5 VAR 54.

1.11. The Victorian Civil and Administrative Tribunal (**VCAT**) has found that disclosure of a document would be contrary to the public interest under section 29 where:

- it would impede the free and candid exchange of information between State, Territory or Commonwealth departments in relation to child protection[97] and family violence matters.[98]

- it would impede the frank and confidential communication of intelligence between law enforcement agencies in different jurisdictions in relation to law enforcement matters. [99]

Example

Information sent in confidence by Interpol to Victoria Police referring to named individuals and relaying information concerning those individuals, received from an overseas law enforcement organisation.[100]

Case example

Millar v Department of Premier and Cabinet [2011] VCAT 1230

Background

The applicant requested access to communications between the Premier of Victoria and/or his office and the Prime Minister of Australia and/or his office, relating to a Carbon Pollution Reduction Scheme (**CPRS**) proposed to be introduced by the former Commonwealth Labor government in late 2009.

The Department applied section 29(1)(a) over 17 documents. The documents were communications from the State of Victoria to the Commonwealth about the transition from Victoria's emissions reduction scheme to the proposed Commonwealth scheme. The documents contained information directly relating to the implications for Victoria of that transition.

At the same time as Victoria's communications and dialogue with the Commonwealth, the Commonwealth was also receiving submissions and engaging in dialogue with the other States about the CPRS.

Public interest grounds relied on by the Department

The Department relied on the following public interest grounds:

- protecting uninhibited exchanges between the governments of Australia on questions of policy and resource allocation;

[97] *O'Sullivan and Department of Health and Community Services (No 2)* (1995) 9 VAR 1.

[98] *Akers v Victoria Police* [2003] VCAT 398, [21].

[99] See *Nilsen v Victoria Police* (unreported, AAT of Vic, Megay DP, 15 January 1997).

[100] *Nilsen v Victoria Police* (unreported, AAT of Vic, Megay DP, 15 January 1997).

- encouraging cooperative Federalism within Australia;
- protecting processes that contribute to high quality policy development by the governments of Australia;
- ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy;
- protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision-making process;
- ensuring that the Victorian government remains able to meet private undertakings' legitimate expectations of confidentiality;
- ensuring that private undertakings remain willing to share information with the State; and
- protecting the State of Victoria's negotiating position in relation to present and future proposals concerning climate change.

Applicant's public interest grounds

The applicant's arguments centred around the public interest in knowing what Commonwealth and State governments are doing about climate change.

Decision

VCAT accepted the Department's public interest grounds and summarised them as a public interest in protecting the ability of the State of Victoria to have a sufficient, appropriate and resource efficient mode of access to the Commonwealth, to lobby and perform one-on-one negotiations relating to the detail of relevant federal policy.

Release of the documents would harm the public interest under one or more of the grounds set out by the Department.

The public interest in the subject of climate change and the government's attempts to address it did not outweigh the need for government to be able to correspond with the Commonwealth in a confidential manner when policy is being developed, particularly in a federal system where one State's interest may be pitted against another State's interest.

There is a greater public interest in ensuring the Victorian government can properly put its case to the Commonwealth in negotiating such policy. Government leaders need to be able to communicate in writing and not be restricted to verbal communications. In such matters, written communications need to be kept confidential.

The public interest in ensuring that politicians can negotiate and develop policy by a frank exchange of views and information on a confidential basis outweighs the public interest in knowing about the government's attempts to address climate change.

Public interest considerations – against disclosure

1.12. Public interest considerations that may indicate disclosure of a document would be contrary to the public interest, and therefore should not be released, include the importance of:[101]

- protecting uninhibited exchanges between the governments of Australia on questions of policy and resource allocation;
- encouraging cooperative federalism within Australia;
- protecting processes that contribute to high quality policy development by the governments of Australia;
- ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy;
- protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision-making process;[102]
- ensuring that the Victorian government remains able to meet private undertakings' legitimate expectations of confidentiality;
- ensuring that private undertakings remain willing to share information with the State.

Public interest considerations – in favour of disclosure

1.13. Public interest considerations that may indicate disclosure would not be contrary to the public interest, and that the information should be released, include:[103]

- an understanding that the applicant and members of the public may be capable of understanding that a document was produced at a particular point in time and may not represent the government's final views; and
- the public interest in the community being aware of the information in the documents:
  - so that they can make decisions about their own safety based on accurate information;
  - to create greater transparency about the reasons for decisions made by government that have a significant impact on the community; and

[101] These factors were submitted by the Respondent and accepted by VCAT in *Millar v Department of Premier and Cabinet* [2011] VCAT 1230 and considered by the Information Commissioner in *'DY2' and Department of Health* [2022] VICmr 11.

[102] See example *Clark v Department of Treasury and Finance* [2002] VCAT 1040.

[103] See *'DY2' and Department of Health* [2022] VICmr 11; *'DH3' and Department of Health* [2021] VICmr 193; *'DU2' and Department of Health* [2021] VICmr 309.

- to assist members of the public to hold government to account for its decisions.

1.14. If a document only sets out part of the reasons for a course of action or decision, or is overtaken by events, and the agency is concerned release of the document would be misleading to the public, agencies should consider releasing the document, accompanied by an explanation that places the document in context and removes the risk of confusion.

Case examples

'DY2' and Department of Health [2022] VICmr 11

Background

The applicant requested access to certain documents created by or provided by the Chief Health Officer regarding the return of international students to Victoria in a specified date range.

The agency applied sections 29(1)(a) and (b) over one page of guidelines prepared by the Australian Health Protection Principal Committee (**AHPPC**).

The AHPPC is a decision-making committee for health emergencies made up of state and territory Chief Health Officers and chaired by the Australian Chief Medical Officer. AHPPC provides advice and recommendations to the Australian Ministerial Advisory Council and the National Cabinet. AHPPC was one of the primary bodies advising the National Cabinet on Australia's response to the COVID-19 pandemic.

Issue

Would disclosure of the page in the guidelines be contrary to the public interest?

Public interest factors considered

The Information Commissioner considered the following public interest factors against disclosure, as accepted by the VCAT in *Millar v Department of Premier and Cabinet*:

- protecting uninhibited exchanges between the governments of Australia;
- encouraging cooperative Federalism within Australia;
- protecting processes that contribute to high quality policy development by the governments of Australia;
- ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy; and
- protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision—making process.

Decision

The Information Commissioner was not satisfied disclosure would be contrary to the public interest because:

- The document was watermarked 'draft' and the version history was incomplete. The applicant and members of the public are capable of understanding that the document was produced at a particular point in time and may not represent the final views of the AHPPC.
- The page did not contain substantive information or detail about the matters discussed in the document.
- There is a public interest in ensuring public sector transparency and accountability in relation to how the agency communicated with the Commonwealth regarding responses to the COVID-19 pandemic.

'DH3' and Department of Health [2021] VICmr 193

Background

The applicant requested access to Australian Health Protection Principal Committee (**AHPPC**) papers sent to or from the Chief Health Officer between 1 May and 31 July 2020 concerning contact tracing, hotel quarantine and other matters relating to the government's response to the COVID-19 pandemic.

The agency applied section 25A(5) on the basis that if any documents did exist, they would all be exempt under sections 29(1)(a) and (b).

Issue

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

Decision

The Information Commissioner was not satisfied disclosure would be contrary to the public interest for the following reasons:

- disclosure of the documents may serve the public interest by promoting public sector transparency and accountability in relation to how the Department communicated with the Commonwealth regarding the COVID-19 pandemic;
- the applicant, who is a member of the media, and members of the public, are capable of understanding that particular documents are produced at a particular point in time and may not represent the final views of the agency, or that of AHPPC;
- there may be a strong public interest in the disclosure of the requested information for the following reasons:
    - so that members of the public can make decisions about their own safety based on accurate information;

- to create greater transparency about the reasons for decisions made by government that in current circumstances have a significant impact on the community; and
- to assist members of the public to hold government to account for its decisions about the management of COVID-19 and related matters.

'DU2' and Department of Health [2021] VICmr 309

Background

The applicant requested access to briefs and attachments provided to the Minister for Health or the Chief Health Officer supporting the Public Health Orders that came into effect on 12 February 2021 instituting a 5-day lockdown.

The agency applied sections 29(1)(a) and (b) to refuse access to an attachment to a briefing.

Issue

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

Decision

The Public Access Deputy Commissioner was not satisfied disclosure would be contrary to the public interest for the following reasons:

- the document contains a substantial amount of publicly available information;
- the document contains information that is largely factual;
- the document does not appear to contain any individual contributions of any State or Territory, or the Commonwealth government provided in confidence to the Victorian government;
- disclosure of the document would not have a negative impact on future information sharing and communications between State, Territory and the Commonwealth governments;
- the document appears to be in final form and there is no information to indicate it does not provide an accurate account of the reasons for the Victorian government's decisions in respect of public health directions; and
- the document contains important information about the way the Victorian government responded to COVID-19, including the rationale for public health orders. There is significant public interest in providing members of the community the ability to participate in such processes and to hold governments to account for the decisions it has made.

Would prejudice relations – 29(1)(a)

1.15. To be exempt under section 29(1)(a), the agency or Minister must establish that disclosure of the document would prejudice relations:

- between the State of Victoria and the Commonwealth; or
- between the State of Victoria and any other State or Territory.

Prejudice

1.16. 'Prejudice' means 'to the detriment of', or to produce a 'loss of faith, to turn bad, or the like' to 'sour inter-governmental relationships'.[104]

1.17. The word 'prejudice' also appears in the section 31 exemptions.

1.18. The agency or Minister must produce evidence of prejudice. For example, evidence to show that an agency or Minister would be reluctant to provide information of the same kind in future if the document were released and the specific harm this would cause to inter-governmental relations.[105]

Relations

1.19. Relations means 'what one person or thing has to do with another'.[106]

Case example

In *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719, Justice White of the Administrative Appeals Tribunal, considered the equivalent provision in the Commonwealth FOI Act and concluded that disclosure of the minutes of a National Cabinet meeting would not cause damage to relations between the Commonwealth and a State.

Relevant to Justice White's decision was the lack of evidence that any participant in the National Cabinet, acting rationally, would be hesitant to contribute to debates at future meeting of the National Cabinet if the minutes of the meeting were disclosed.[107]

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[104] *Clark v Department of Treasury and Finance* [2002] VCAT 1040, [23]-[27].

[105] *Pescott v Department of Conservation and Environment* (1991) 5 VAR 54.

[106] *Clark v Department of Treasury and Finance* [2002] VCAT 1040, [24].

[107] *Patrick and Secretary, Department of Prime Minister and Cabinet* [2021] AATA 2719, [267]-[268].

1.20. In contrast, disclosure may prejudice relations between the Victorian government and the Commonwealth government and between the State of Victoria and other States where the disclosure:

- would publicly reveal negotiations between the Victorian government and the Commonwealth government on a matter where there is competition between the States as to Commonwealth funding and resource allocation; and
- the negotiations are at a premature stage where no final decision has been reached.[108]

Examples

Clark v Department of Treasury and Finance [2002] VCAT 1040

VCAT determined that disclosure of the State of Victoria's secret position or secret advice in relation to its preferred position if the Commonwealth government sought to change the Goods and Services Tax:

- would prejudice relations between the State of Victoria and the Commonwealth, in that it would be detrimental to future negotiations between the State of Victoria and the Commonwealth, by compromising the State of Victoria's ability to negotiate effectively; and
- would prejudice relations between the State of Victoria and the other States it is competing with, in that it would be detrimental to its position in relation to its competitors in future negotiations, and the attitudes of the other States towards the State of Victoria may turn sour if they became aware of a position adopted by the State of Victoria in relation to distribution of 'slices of the same pie'.[109]

Millar v Department of Premier and Cabinet [2011] VCAT 1230

Background

The applicant requested access to communications between the Premier of Victoria and/or his office and the Prime Minister of Australia and/or his office, relating to a Carbon Pollution Reduction Scheme (**CPRS**) proposed to be introduced by a former Commonwealth Labor government in late 2009.

The Department applied section 29(1)(a) exemption over 17 documents. The documents were communications from the State of Victoria to the Commonwealth about the transition from Victoria's emissions reduction scheme to the proposed Commonwealth scheme. The documents contained information directly relating to the implications for Victoria of that transition.

[108] See examples, *Clark v Department of Treasury and Finance* [2002] VCAT 1040; *Evans v Ministry for the Arts* (1986) 1 VAR 315, 323; *Millar v Department of Premier and Cabinet* [2011] VCAT 1230.

[109] *Clark v Department of Treasury and Finance* [2002] VCAT 1040, [26].

At the same time as Victoria's communications and dialogue with the Commonwealth, the Commonwealth was also receiving submissions and engaging in dialogue with the other States about the CPRS.

Issue

Would disclosure of the communications prejudice relations between Victoria and the Commonwealth and/or between Victoria and other States and Territories?

Decision

VCAT accepted that release of otherwise confidential documents between the State of Victoria and the Commonwealth would prejudice relations between Victoria and the Commonwealth and Victoria and other States in that it:

- would result in frank exchanges in the course of negotiations being revealed to the public prematurely;
- was liable to reduce the ability of Victoria to convey information to the Commonwealth and seek to be heard by it;
- could damage Victoria's position in negotiating with the Commonwealth on future climate change policy that is yet to be determined; and
- would impact on Victoria's relations with other States in a context where the states and territories were competing for resources and seeking to be accommodated in the development of climate change policy.

Would divulge information communicated in confidence – 29(1)(b)

1.21. To be exempt under section 29(1)(b), the agency or Minister must establish that disclosure of the information would divulge information communicated in confidence by another government to the State of Victoria.

Communicated from

1.22. The confidential communication must come from (by or on behalf of):

- the government of another country;
- the Commonwealth government of Australia; or
- a State or Territory government other than Victoria.

Communicated to

1.23. The recipient of the confidential communication must be the State of Victoria or a person receiving the communication on behalf of the State of Victoria.[110]

Communicated in confidence

1.24. 'Communicated in confidence' is a phrase that is also used in the section 35 exemption.

1.25. The agency or Minister will need to produce evidence to prove the communication was made in confidence.

Example

In *Millar v Department of Premier and Cabinet* [2011] VCAT 1230, VCAT held that part of an email chain sent from the Commonwealth to the State of Victoria was exempt under section 29(1)(b).

The email was sent during negotiations relating to the implications for the State of Victoria of Commonwealth government climate change policy.

VCAT held:

- it did not matter that the email was not marked as being sent 'in confidence'.
- a presumption of confidentiality arose because the email chain related to a policy in development.[111]

Consultation with third parties – section 29(2)

1.26. When considering whether to apply the exemption in section 29(1), an agency or Minister must:

- notify relevant third parties that the agency or Minister has received a request for the document; and
- obtain the third party's views about whether the document or information should be disclosed.

[110] Commentators have expressed the view that the words "or Territory" (where second occurring) in section 29(1)(b) is a legislative drafting error, because the recipient of the information is the State of Victoria: see Emrys Nekvapil SC, Westlaw AU, *Victorian Administrative Law* (online at 6 November 2023) [FOI.29.120].

[111] *Millar v Department of Premier and Cabinet* [2011] VCAT 1230, [67].

1.27. Identifying the relevant third parties will depend on the context and nature of the requested document. Relevant third parties may be another Victorian government agency or Minister, or an agency or authority of another country, the Commonwealth or another State or Territory.

Example

A request is made to the Victorian Department of Premier and Cabinet (**DPC**) for access to an email sent from the Commonwealth Department of the Prime Minister and Cabinet (**PMC**) to DPC and the Victorian Department of Treasury and Finance (**DTF**).

DPC considers the email was sent in confidence and that its disclosure would be contrary to the public interest under section 29(1).

DPC should consult with both PMC and DTF to seek each agency's views on whether the email should be disclosed.

1.28. An agency or Minister is only required to notify and seek the views of a third party where it is reasonably practicable to do so.

For more information on whether consultation is reasonably practicable, see section 33 of the FOI Guidelines.

1.29. Consultation may occur in any manner or form. For example, by telephone, email, post, or a meeting.

1.30. Professional Standard 7.3 requires an agency to keep a record of the consultation undertaken. This includes who was consulted, whether they consented or objected, and any reasons provided.

1.31. When undertaking consultation, an agency or Minister should make the third party aware of the applicable exemption and what must be established for the exemption to apply. For the section 29 exemption, this means informing the third party that the agency or Minister must establish that:

- disclosure would be contrary to the public interest; and
- would prejudice relations between the State of Victoria and the Commonwealth or any other State or Territory; or
- would divulge information communicated in confidence by another government to the State of Victoria.

1.32. Informing the third party of the elements of the exemption will help enable the third party to provide an informed response and ensure their reasons are relevant, if they object to the document being released.

1.33. There is no requirement to notify the third party of the agency or Minister's decision on the request. However, an agency or Minister should consider whether to inform the third party of the outcome of the decision – whether it is to release or refuse access to the document.

1.34. The third party does not have any review rights if they object to disclosure or disagree with a decision to release information.

Section 29A – Documents affecting national security, defence or international relations

Extract of legislation

29A Documents affecting national security, defence or international relations

(1) A document is an exempt document if disclosure of the document under this Act would, or could reasonably be expected to, cause damage to—

(a) the security of the Commonwealth or any State or Territory; or

(b) the defence of the Commonwealth; or

(c) the international relations of the Commonwealth.

(1A) Without limiting subsection (1), a document is an exempt document if it is a document held or created by Victoria Police for the purpose of—

(a) counterterrorism or a purpose relating to counterterrorism; or

(b) the protection of critical infrastructure within the meaning of section 74B of the **Emergency Management Act 2013** on—

(i) the Victorian Critical Infrastructure Register under section 74J of the **Emergency Management Act 2013**; or

(ii) any corresponding register kept by an agency of the Commonwealth.

(1B) Without limiting subsection (1), a document is an exempt document if it is a document—

(a) created for or with respect to emergency risk management arrangements for critical infrastructure resilience under Part 7A of the **Emergency Management Act 2013** for the purposes of administering, complying with, or enforcing that Part; or

(b) which contains information about, or which could lead to the identification of, a document to which paragraph (a) applies.

(1C) Without limiting subsection (1), a document is an exempt document if subsection (1B) as in force before the commencement of section 6 of the **Emergency Management Amendment (Critical Infrastructure Resilience) Act 2014** would apply to or in respect of the document had section 6 of the **Emergency Management Amendment (Critical Infrastructure Resilience) Act 2014** not come into operation.

(1D) In deciding whether a document is an exempt document under this section, an agency or Minister, if reasonably practicable, must—

(a) notify any of the following that are relevant that the agency or Minister has received a request for access to the document—

(i) another agency or Minister;

(ii) an agency of another country or the Commonwealth or another State or a Territory;

(iii) an authority of another country or the Commonwealth or another State or a Territory; and

(b) seek the view of that agency, authority or Minister as to whether the document should be disclosed.

(2) For the purposes of this Act—

(a) a certificate signed by a Department Head or the Chief Commissioner of Police certifying that a document as described in a request is or, if it existed, would be one of a kind referred to in subsection (1), (1A) or (1B) establishes that the document is or, if it existed, would be an exempt document;

(b) a certificate signed by a Department Head or the Chief Commissioner of Police certifying that a document as described in a notice to produce or attend is or, if it existed, would be one of a kind referred to in subsection (1), (1A) or (1B) establishes that the document is or, if it existed, would be an exempt document;

(c) a certificate signed by a Department Head or the Chief Commissioner of Police certifying that information described in a notice to produce or attend would, if included in a document, make that document one of a kind referred to in subsection (1), (1A) or (1B), establishes that the information described is information that if included in a document would make that document an exempt document.

(3) The Information Commissioner must not conduct a review, handle a complaint or conduct an investigation in respect of—

(a) a certificate under subsection (2); or

(b) a question whether a document is, or whether a document including the information would be, of a kind referred to in subsection (1), (1A) or (1B); or

(c) a decision to sign a certificate under subsection (2).

(4) In this section a reference to a document includes a reference to a document whether created before or after the commencement of section 42 of the **Terrorism (Community Protection) Act 2003**.

Guidelines

Overview of section 29A

1.1. There are several exemptions in section 29A, that can make different documents exempt from release under the Act.

1.2. Section 29A(1) protects from disclosure, documents that would or could be reasonably expected to cause damage to the:

- security of the Commonwealth or any State or Territory;
- defence of the Commonwealth; or

- international relations of the Commonwealth.

1.3. Section 29A(1) was inserted to improve terrorist threat intelligence sharing between security and law enforcement agencies and government by protecting the information from inappropriate disclosure.[112]

1.4. Sections 29A(1A), (1B) and (1C) apply to specific types of documents. These narrower exemptions are not intended to limit the application of section 29A(1).

1.5. Sections 29A(1A) and (1B) protect from disclosure:

- documents held or created by Victoria Police for the purpose of counterterrorism or the protection of critical infrastructure; and
- documents created for, or containing information about, or that could lead to the identification of a document created for the purposes of administering, complying with or enforcing Part 7A of the *Emergency Management Act 2013* (Vic), which relates to emergency risk management arrangements for critical infrastructure resilience.[113]

1.6. Section 29A(1C) aims to ensure that an exempt document under former section 29A(1B), as it was prior to the amendment in 2014, continues to be exempt.[114] Amongst other things, the repealed section 29A(1B) exempts a document if its disclosure would, or could reasonably be expected to, endanger the security of any premises within the meaning of the *Terrorism (Community Protection Act) 2003* (Vic).[115]

1.7. Section 29A must be read consistently with the object of the Act in section 3, which is to extend as far as possible the right of the community to access government held information.

1.8. If consultation with relevant third parties is reasonably practicable, an agency or Minister must consult before applying the exemption.[116]

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[112] Victoria, *Parliamentary Debates*, Legislative Assembly, 27 February 2003, 166 (Stephen Bracks, Premier). Section 29A(1) was inserted in 2003 by the *Terrorism (Community Protection) Act 2003* (Vic).

[113] These exemptions were inserted in 2006 by the *Terrorism (Community Protection) (Further Amendment) Act 2006* (Vic) and substituted in 2014 by the *Emergency Management Amendment (Critical Infrastructure Resilience) Act 2014* (Vic).

[114] Section 29A(1C) was inserted in 2014 by the *Emergency Management Amendment (Critical Infrastructure Resilience) Act 2014* (Vic). See *Terrorism (Community Protection) (Further Amendment) Act 2006* (Vic) section 22(2) for wording of section 29A(1B) prior to its substitution in 2014 by the *Emergency Management Amendment (Critical Infrastructure Resilience) Act 2014* (Vic).

[115] For a review decision relating to repealed section 29(1B) see *Willner v City of Melbourne* [2016] VCAT 154.

[116] *Freedom of Information Act 1982* (Vic), section 29A(2).

Discretion to disclose exempt documents

1.9. The decision to exempt a document under section 29A is a discretionary power. This means an agency or Minister can choose to provide access to information that would otherwise be exempt under section 29A, where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

1.10. Access could be provided to an applicant in a form appropriate to the circumstances, such as a providing a copy of the document or information to the applicant or arranging for the applicant to inspect the document or information.[117]

A document that would, or could reasonably be expected to, cause damage to the security, defence, or international relations of the Commonwealth – section 29A(1)

1.11. Section 29A(1) protects from disclosure, documents that would or could be reasonably expected to cause damage to the:

- security of the Commonwealth or any State or Territory;
- defence of the Commonwealth; or
- international relations of the Commonwealth.

1.12. When claiming the exemption, an agency or Minister must consider the content of each document, within context, and in combination with other known information. The exemption will apply if disclosure of the document would, or could reasonably be expected to, cause damage when combined with other pieces of information, notwithstanding that no damage would be caused by disclosure of the document in isolation.[118]

Would or could reasonably be expected to

1.13. The test requires the decision maker to assess the likelihood of the predicted damage occurring after disclosure of a document.[119]

1.14. The word 'could' is a lower threshold than 'would' and requires analysis of reasonable expectation rather than certainty of damage occurring.

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[117] See for example, *Prinn v Department of Defence* [2016] AATA 445.

[118] See 'mosaic theory' in *Re McKnight and Australian Archives* [1992] AATA 225, particularly [28].

[119] *Prinn v Department of Defence* [2016] AATA 445, [61].

1.15. There must be 'real' and 'substantial' grounds for expecting the damage to occur.[120] An agency or Minister must be able to support its decision by evidence or reasoning.[121] A mere allegation, risk or possibility of damage is insufficient. There must be cause and effect which can reasonably be anticipated.[122]

Cause damage

1.16. For the purposes of section 29A, damage is not confined to loss or damage in monetary terms.[123] The damage may be intangible, such an inhibiting future negotiations between the State of Victoria and the Commonwealth or another State or Territory.

1.17. An agency or Minister must consider what damage could occur at the time of making the decision.[124] If, at the time of the decision, disclosure would not cause damage, the document is not exempt under section 29A. It does not matter that disclosure would have caused damage at the time of the document's creation.

Security of a State or Territory

1.18. The security of a State or Territory broadly refers to the protection of the State or Territory and its population from activities that are hostile to, or subversive of the State or Territory's interests.

1.19. An agency or Minister must be satisfied that disclosure of the information would, or could reasonably be expected to, cause damage to the security of the State or Territory. The assessment must be made at the time the decision is made and in the environment that exists at the time.[125]

1.20. 'Damage' to a State or Territory has three aspects:

- safety, protection or defence from something that is regarded as a danger (for example, financial difficulty, attack, theft and political or military takeover);
- the means that may be employed to bring about or to protect against the relevant danger (for example, espionage, theft, infiltration, and sabotage);
- the organisations or personnel providing safety or protection from the relevant danger.[126]

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[120] Commonwealth, *FOI Guidelines*, Part 5 – Exemptions (OAIC, 14 June 2019) [5.27]; *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* [1986] FCA 35 [12] per Sheppard J.

[121] *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* [1986] FCA 35 [12] per Sheppard J and [30] per Bowen CJ and Beaumont J.

[122] *Re O'Donovan and Attorney-General's Department* [1985] AATA 330; *Re Maher and Attorney-General's Department* [1985] AATA 180.

[123] *Re Maher and Attorney-General's Department* [1985] AATA 180, [40].

[124] *Department of Foreign Affairs and Trade v Whittaker* [2005] FCAFC 15, [26].

[125] *Prinn and Department of Defence* [2016] AATA 445, [66]

[126] *Prinn and Department of Defence* [2016] AATA 445 [65].

1.21. Securing information marked as 'Protected' or 'Secret' forms part of the security of the State. However, the protective markings on a document are not of themselves conclusive as to whether release of the document would or could reasonably be expected to cause damage to the security of the State. An agency or Minister must consider the requested documents individually and collectively, within the context of the request and other available information.

> For more information about protective markings, see OVIC's information security resources.

1.22. Where appropriate and permitted, an agency or Minister may decide a document is exempt under section 29A(1), but choose to provide supervised access to the document outside of the Act. For example, supervised inspection of the document on condition that no copies of the document or notes about the document are made.

> For more information see the FOI Guidelines issued by the Australian Information Commissioner, Part 5 Exemptions, Documents affecting national security, defence or international relations (section 33).

Security, defence or international relations of the Commonwealth

1.23. Section 29A(1) is closely modelled off section 33(a) of the Commonwealth *Freedom of Information Act 1982* (**Commonwealth FOI Act**) which also protects the security, defence and international relations of the Commonwealth.

1.24. An agency or Minister should refer to the Australian Information Commissioner's guidelines about the Commonwealth FOI Act, when considering whether disclosure of a document would, or could reasonably be expected to, cause damage to the security, defence or international relations of the Commonwealth.

Security of the Commonwealth

1.25. Security of the Commonwealth broadly refers to the protection of the Commonwealth and its population from activities that are hostile to, or subversive of the Commonwealth's interests.[127]

1.26. In addition, section 4(5) of the Commonwealth FOI Act expands the meaning of 'Security of the Commonwealth' to:

- matters relating to the detection, prevention or suppression of activities, whether within Australia or outside Australia, subversive of, or hostile to, the interests of the Commonwealth or of any country allied or associated with the Commonwealth; and

[127] Commonwealth, *FOI Guidelines*, Part 5 – Exemptions (OAIC, 14 June 2019) [5.29].

- the security of any communications system or cryptographic system of the Commonwealth or of another country used for the:
    - defence of the Commonwealth or of any country allied or associated with the Commonwealth; or
    - conduct of the international relations of the Commonwealth.[128]

Examples where release of a document would cause damage to the security of the Commonwealth

- If the release of a document would prevent a security organisation from obtaining information on those engaged in espionage, it could reasonably be expected to cause damage to national security.[129]
- The disclosure of a defence instruction on the Army's tactical response to terrorism and procedures for assistance in dealing with terrorism would pose a significant risk to security by revealing Australia's tactics and capabilities.[130]
- Documents revealing, or which would assist in revealing, the identity of an ASIO informant were found to be exempt under a similar provision in the *Archives Act 1983* (Cth).[131]

Defence of the Commonwealth

1.27. 'Defence of the Commonwealth' includes:

- meeting Australia's international obligations;
- ensuring the proper conduct of international defence relations; and
- deterring and preventing foreign incursions into Australian territory.[132]

International relations

1.28. 'International relations' means the ability of the Australian Government to maintain good working relations with other governments and international organisations and to protect the flow of confidential information between them.[133]

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[128] *Prinn v Department of Defence* [2016] AATA 445 [31].

[129] *Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110.

[130] *Hocking and Department of Defence* [1987] AATA 602.

[131] *Throssell and Australian Archives* [1987] AATA 453.

[132] Commonwealth, *FOI Guidelines*, Part 5 – Exemptions (OAIC, 14 June 2019) [5.34].

[133] *Bui v Department of Foreign Affairs and Trade* [2005] AATA 97 [21].

1.29. The exemption covers:

- formal diplomatic and ministerial relations; and
- relations between Australian Government agencies and agencies of other countries.[134]

1.30. The mere fact that a government has expressed concern about a disclosure is not enough to satisfy the exemption. However, the phrase does encompass intangible or speculative damage, such as loss of trust and confidence in the Australian Government or one of its agencies.[135]

1.31. The expectation of damage to international relations must be reasonable in all the circumstances, having regard to the nature of the information, the circumstances in which it was communicated and the nature and extent of the relationship.[136] There must be real and substantial grounds for the exemption that is supported by evidence.[137]

Example where the exemption may apply

The disclosure of a document may diminish the confidence which another country would have in Australia as a reliable recipient of its confidential information, making that country or its agencies less willing to cooperate with Australian agencies in future.[138] For example, disclosure of the names of three Costa Rican intelligence officers would reasonably be expected to cause damage to international relations between Australia and Costa Rica.[139]

Example where the exemption will not apply

The disclosure of ordinary business communications between health regulatory agencies revealing no more than the fact of consultation will not, of itself, destroy trust and confidence between agencies.[140]

Counterterrorism and critical infrastructure documents – section 29A(1A)

1.32. Section 29A(1A)(a) exempts documents held or created by Victoria Police:

- for the purpose of counterterrorism; or
- for a purpose relating to counterterrorism.

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[134] *Re Haneef and Australian Federal Police* [2009] AATA 51 [38].

[135] Commonwealth, *FOI Guidelines*, Part 5 – Exemptions (OAIC, 14 June 2019) [5.37]; *Maher and Attorney-General's Department* [1985] AATA 180.

[136] *Slater and Cox (Director-General of Australian Archives)* [1988] AATA 110.

[137] *Secretary, Department of Foreign Affairs v Whittaker* [2005] FCAFC 15.

[138] *Maksimovic and Attorney-General's Department* [2008] AATA 1089.

[139] *Maksimovic and Attorney-General's Department* [2008] AATA 1089.

[140] *Re Public Interest Advocacy Centre and Department of Community Services and Health and Searle Australia Pty Ltd (No 2)* [1991] AATA 723.

1.33. The exemption can extend to documents held by an agency other than Victoria Police, if the document was originally created by Victoria Police for the purpose of counterterrorism or relating to counterterrorism.

1.34. The intent of section 29A(1A)(a) is to protect the confidentiality of intelligence gathered by the police in relation to counterterrorism.[141]

Example

Eracleous v Victoria Police [2022] VCAT 1173

Background

The applicant was arrested and charged with two offences by Victoria Police: stalking and using a telecommunications device to harass.

The charges against the applicant were not specifically labelled as terrorism offences under the Commonwealth *Criminal Code 1995*.

The applicant requested access to documents held by Victoria Police relating to the preliminary investigation and arrest.

The request was refused under section 29A(1A)(a), neither confirming nor denying the existence of any documents under section 27(2)(b).

Victoria Police evidence

The officers involved in the investigation, arrest and prosecution worked in the operations division of the Counter Terrorism Command (CTC) of Victoria Police.

CTC duties may involve prosecutions for offences that are not specifically labelled as terrorism offences under the Commonwealth *Criminal Code 1995*.

All documents held by CTC concerning the applicant related to carrying out those counterterrorism functions. No documents would have been created for a purpose other than counterterrorism.

Decision

VCAT neither confirmed nor denied the existence of any documents, and found that any documents held by CTC must, inevitably, be for the purpose of counterterrorism or a purpose relating to counterterrorism under section 29A(1A)(a) because:

[141] *Eracleous v Victoria Police* [2022] VCAT 1173 [21].

- The investigation, charging and prosecution of the applicant was conducted by officers in the CTC (being the unit of Victoria Police which exists for the purpose of counterterrorism), in the course of their duties in counterterrorism.

- It did not matter that the offences which the applicant was charged with were not labelled as terrorism offences under the Commonwealth *Criminal Code 1995* or under any other Act.

Conclusive certificates certifying a document is exempt

1.35. Under section 29A(2), a Department Head or the Chief Commissioner of Police can sign a certificate to conclusively certify that:

- a document as described in a request; or

- a document or information as described in a notice to produce or attend;[142]

is an exempt document under section 29A(1), (1A) or (1B).

Consultation with third parties under section 29A(1D)

1.36. The consultation requirements for the section 29A exemption are the same as the section 29 exemption (for documents containing matter communicated by any other State).

1.37. When considering whether a document is exempt under section 29A, an agency or Minister must:

- notify relevant third parties that the agency or Minister has received a request for the document; and

- obtain the third party's views about whether the document or information should be disclosed.

1.38. When consulting, the 30-day period for deciding a request may be extended by up to 15 days under section 21(2)(a).

1.39. Identifying the relevant third parties will depend on the context and nature of the requested document. Relevant third parties may be another Victorian government agency or Minister, or an agency or authority of another country, the Commonwealth or another State or Territory.

[142] Conclusive certificates were extended to documents and information described in a notice to produce or attend in 2017 by the *Freedom of Information Amendment (Office of the Victorian Information Commissioner) Act 2017* (Vic), section 13(3).

1.40. An agency or Minister is only required to notify and seek the views of a third party where it is reasonably practicable to do so.

1.41. Consultation may occur in any manner or form. For example, by telephone, email, post, or a meeting.

1.42. When undertaking consultation, a third party should be made aware of the applicable exemption and what must be established for the exemption to apply.[143] This means:

- for the section 29A(1) exemption, informing the third party that the agency or Minister must establish that disclosure would, or could reasonably be expected to, cause damage to the:
  - security of the Commonwealth or any State or Territory; or
  - defence of the Commonwealth; or
  - international relations of the Commonwealth;
- for counterterrorism or critical infrastructure documents, this means informing the third party of the strict requirements of subsections (1A), (1B) or (1C) and of the requirements of any relevant legislation referred to in the relevant subsection.

1.43. Informing the third party of the elements of the exemption will help to enable them to provide an informed response and ensure their reasons are relevant, if they object to the document being released.

1.44. There is no requirement to notify the third party of the agency or Minister's decision on the request. However, as a matter of courtesy, an agency or Minister should inform the third party of the outcome of the decision – whether it is to release or refuse access to the document.

See section 33 of the Guidelines for more information about:

- determining whether consultation is reasonably practicable
- how to conduct consultation
- privacy considerations
- keeping records of consultation under the Professional Standards

[143] See *Professional Standards* (OVIC, 2 December 2019), Note to Standard 7.3.

Neither confirming nor denying the existence of a document

1.45. In some cases, even acknowledging that a document does, or does not exist, can cause damage. In those cases, an agency or Minister may make a decision and express it in terms that neither confirms nor denies the existence of the requested document.[144]

1.46. An agency or Minister can neither confirm nor deny that a document exists where a document is exempt under section 29A, or if it did exist, would be exempt under section 29A.[145]

No oversight or review by OVIC

1.47. The Office of the Victorian Information Commissioner cannot conduct a review, handle a complaint, or conduct an investigation about a:

- section 29A(2) certificate; or
- decision to sign a section 29A(2) certificate; or
- question whether a document is, or whether a document including the information would be, of a kind referred to in subsection (1), (1A) or (1B);[146] or
- fresh decision made by an agency or Minister during a review, if the decision is to refuse to grant access to a document on the basis that the document is exempt under section 29A.[147]

For more information, see:

- section 49A – Applications to Information Commissioner for review
- section 49MA – Procedure after reconsideration under section 49L or 49M

Review by VCAT

1.48. An applicant may apply to VCAT to seek review of a decision of an agency or Minister to refuse access to a document on the basis it is exempt under section 29A.

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[144] *Freedom of Information Act 1982* (Vic), section 27(2)(b).

[145] *Freedom of Information Act 1982* (Vic), section 27(2)(b).

[146] See *'EB5' and Department of Jobs, Precincts and Regions* [2022] VICmr 40 [15].

[147] *Freedom of Information Act 1982* (Vic), section 49MA(4).

1.49. If there is a conclusive certificate in force under section 29A(2), VCAT cannot review the decision to make the section 29A(2) certificate. Instead, VCAT's review is limited to determining whether there are reasonable grounds for the claim that the document is exempt under section 29A.[148] Only judicial members may make this determination and certain parts of the VCAT proceeding must be held in private.

More information:

- section 50 – Applications for review by the Tribunal;
- *Victorian Civil and Administrative Tribunal Act 1998* (Vic), Schedule 1, Part 8, sections 29B – 29D;
- section 53AA – Procedure where Tribunal determines that there do not exist reasonable grounds for claim under section 29A.

[148] *Freedom of Information Act 1982* (Vic), section 50(5A).

Section 29B – Documents of Court Services Victoria

Extract of legislation

29B Documents of Court Services Victoria

A document is an exempt document if it is a document of Court Services Victoria that relates to the exercise of a judicial or quasi-judicial function of a court or VCAT.

Guidelines

Overview

1.1. Section 29B exempts certain documents of Court Services Victoria (**CSV**). For it to apply, the agency or Minister must be satisfied the document:

- is a document of CSV; and
- relates to the exercise of a judicial or quasi-judicial function of a Victorian court or the Victorian Civil and Administrative Tribunal (**VCAT**).

1.2. The exemption will not apply to documents that do not relate to judicial or quasi-judicial functions, such as purely administrative functions.

1.3. Section 29B must be read consistently with the object of the Act in section 3, which is to extend as far as possible the right of the community to access government held information.

Discretion to disclose exempt documents

1.4. The decision to exempt a document under section 29B is a discretionary power. This means an agency or Minister can choose to provide access to information that would otherwise be exempt under section 29B, where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

For more information, see section 16 – Access to documents apart from Act.

Who can apply the section 28B exemption?

1.5. Section 29B applies to documents of CSV.

1.6. CSV provides, or arranges for the provision of, the administrative services and facilities necessary to support the performance of the judicial, quasi-judicial and administrative functions of Victorian courts and tribunals (including VCAT).

1.7. A document may still be a document of CSV, even if it has been provided to another agency.

Example

'DN3' and Department of Justice and Community Safety [2021] VICmr 247

Background

The applicant requested access to their Community Correctional Services (**CCS**) file from the Department.

The CCS file contained a report commissioned by CSV on behalf of the County Court, for the purpose of assessing and determining the applicant's criminal sentencing.

A copy of the report was subsequently provided to the Department.

Issue

Was the report a document of CSV under section 29B?

Decision

Yes, the Public Access Deputy Commissioner was satisfied the report was a document of CSV.

The fact the report was subsequently provided to the Department did not change the inherent status of the document as a 'document of CSV'.

What is a judicial or quasi-judicial function?

1.8. The concepts of 'judicial functions' and 'quasi-judicial functions' are not defined in the Act.

1.9. However, the High Court of Australia's interpretation in *Kline*[149] of sections 5 and 6 of the *Freedom of Information Act 1982* (Cth) (**Commonwealth FOI Act**) helps to explain what these terms mean:[150]

- judicial functions are the substantive powers or functions of a court as well as the matters preparatory to the exercise of such powers and functions; and
- quasi-judicial functions are the substantive powers or functions of a tribunal as well as the matters preparatory to the exercise of such powers or functions.[151]

1.10. The administrative functions of a court or tribunal are not judicial or quasi-judicial functions. 'Administrative function' means the apparatus supporting the exercise of judicial or quasi-judicial functions, such as the management and administration of registry and office resources, logistical support, infrastructure, physical necessities, travel and accommodation or the platform that enables judicial and quasi-judicial functions to occur.[152]

1.11. This means that a document of CSV that relates to the:

- exercise of, or relates to a matter preparatory to, the exercise of a substantive power or function of a Victorian court or VCAT will be exempt under section 29B;
- administrative functions of a Victorian court or VCAT will not be exempt under section 29B.

Example

EO7 and Department of Justice and Community Safety [2022] VICmr 161 (14 June 2022)

The applicant requested access to Magistrates' Court documents that the Court requested as part of its function in assessing and deciding the applicant's criminal sentencing.

The issue was whether the documents related to the exercise of judicial functions of the Magistrates Court.

The Public Access Deputy Commissioner was satisfied the documents related to the exercise of judicial functions of the Magistrates Court because the documents related to a substantive function of the court: to assess and determine the applicant's criminal sentencing. The documents did not merely relate to logistical support or administrative processes of the courts.

[149] *Kline v Official Secretary to the Governor General* [2013] HCA 52.

[150] *Freedom of Information Act 1982* (Cth), sections 5 and 6. These sections in the Commonwealth FOI Act limit the right of access from courts and certain tribunals to documents relating to 'matters of an administrative nature' only.

[151] *Kline v Official Secretary to the Governor General* [2013] HCA 52 [76].

[152] *Kline v Official Secretary to the Governor General* [2013] HCA 52 [41], [47], [71]-[72], [74], [77].

Section 30 – Internal working documents

Extract of legislation

30 Internal working documents

(1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—

(a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers, or an officer and a Minister, in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and

(b) would be contrary to the public interest.

(1A) Subsection (1) applies in relation to a council as if for "Minister" there were substituted "member of the council".

(2) In the case of a document of the kind referred to in section 8(1), the matter referred to in subsection (1)(a) of this section does not include matter that is provided for the use or guidance of, or is used or may be used for, the purpose of making decisions or recommendations, or enforcing enactments or schemes, referred to in section 8(1).

(3) This section does not apply to a document by reason only of purely factual material contained in the document.

(4) This section does not apply to the record of a final decision, order or ruling given in the exercise of an adjudicative function, and any reason which explains that decision, order or ruling.

(5) Where a decision is made under Part III that an applicant is not entitled to access to a document by reason of the application of this section, the notice under section 27 shall state the public interest considerations on which the decision is based.

(6) Subsection (1) shall cease to apply to a document brought into existence after the day of commencement of this section when a period of ten years has elapsed since the last day of the year in which the document came into existence.

Guidelines

Overview

1.1. Section 30(1) exempts documents that contain opinion, advice or recommendation, or consultation or deliberation, where disclosure would be contrary to the public interest. A document is not exempt simply because it is an internal working document.[153]

1.2. Section 30 must be read consistently with the objects of the Act in 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.[154] If it is unclear whether section 30(1) applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[155]

Discretion to disclose exempt documents

1.3. The decision to exempt a document under section 30(1) is a discretionary power.[156] In accordance with the object of the Act, any discretions should be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.

1.4. An agency or Minister can choose to provide access to information that would otherwise be exempt under section 30(1), where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

> For more information on providing access to information outside of the Act, see section 16 – Access to documents apart from Act.

[153] *Graze v Commissioner of State Revenue* [2013] VCAT 869, 25.

[154] *Ryan v Department of Infrastructure* [2004] VCAT 2346, [32].

[155] *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822, [21] and *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39, [29], both referring to *Ryder v Booth* (1989) VR 869, 877. While these decisions do not deal with section 30, they refer to the principle set out in *Ryder v Booth* that because the FOI Act is remedial legislation, where ambiguity is encountered the rights given by the Act should be construed liberally and exceptions narrowly.

[156] *Smith v Victoria Police* [2005] VCAT 654, [60].

The exemption

1.5. To be exempt under section 30(1), three conditions must be satisfied:

- the document or information is matter in the nature of:
    - opinion, advice or recommendation prepared by an agency officer or a Minister; or
    - consultation or deliberation that has taken place between agency officers or Ministers; and
- the matter was created during the deliberative process of an agency, Minister, or the government's functions; and
- disclosure of the matter would be contrary to the public interest.

Steps to applying the exemption

1.6. An agency or Minister seeking to apply section 30(1) should:

- Identify the information and confirm from its content and context that the information is:
    - opinion, advice, or recommendation prepared by an agency officer or Minister; or
    - consultation or deliberation that has taken place between agency officers, between Ministers, or between an officer and a Minister;

      (collectively referred to as 'deliberative information' for the purpose of the Guidelines).
- Identify whether an exception applies:
    - guidance or policy used for making decisions that must be available for inspection or purchase under section 8(1);[157]
    - purely factual information; [158]
    - a final decision, order or ruling from an adjudicative function and reasons for that decision, order or ruling;[159] or
    - a document more than 10 years old.[160]

[157] *Freedom of Information Act 1982* (Vic), section 30(2).
[158] *Freedom of Information Act 1982* (Vic), section 30(3).
[159] *Freedom of Information Act 1982* (Vic), section 30(4).
[160] *Freedom of Information Act 1982* (Vic), section 30(6).

- Identify the legislative or operational functions of the agency or Minister that the deliberative information relates to and confirm that it was created in relation to those functions.
- Determine if it would be contrary to the public interest to disclose the information taking into account relevant factors. Where disclosure is contrary to the public interest, the decision must clearly explain why disclosure is contrary to the public interest.[161]
- If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document anyways.

When section 30(1) does not apply

1.7. There are four circumstances where section 30(1) does not apply:

- documents required to be made available for inspection and purchase under section 8;[162]
- purely factual information;[163]
- certain documents relating to adjudicative functions;[164] and
- documents more than 10 years old.[165]

1.8. Other legislation may also limit the application of the exemption to certain documents. An agency or Minister should look at their enabling or other legislation to identify whether it contains this kind of limit.

Example

Section 84(3) of the *Adoption Act 1984* (Vic) prevents the Department of Health and approved adoption agencies from applying section 30 to documents about the assessment of an application for adoption that contain opinion, advice or recommendation or consultation or deliberation between the Secretary or principal officer of the agency.

[161] *Freedom of Information Act 1982* (Vic), section 30(5).
[162] *Freedom of Information Act 1982* (Vic), section 30(2).
[163] *Freedom of Information Act 1982* (Vic), section 30(3).
[164] *Freedom of Information Act 1982* (Vic), section 30(4).
[165] *Freedom of Information Act 1982* (Vic), section 30(6).

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

1.9. Section 8 requires an agency to make certain documents available for inspection and purchase. This includes documents such as manuals, policy and guidance material used by the agency in its operations.

1.10. If a document is required to be made available for inspection and purchase under section 8, then the agency or Minister cannot refuse access to the document under section 30.[166]

Example

Williams v University of Melbourne [2019] VCAT 1215

Background

The applicant sought access to Guidelines for Graduate Access Melbourne program selection officers.

The University refused access to the Guidelines under section 30(1).

Issue

Did section 30(2) apply? Were the Guidelines a document of a kind referred to in section 8(1)? Namely, a guideline that is used or may be used by the agency or its officers for the purpose of making decisions or recommendations with respect to rights, privileges, or benefits to which a person may be entitled or eligible.

Decision

Yes, the Guidelines did meet this description. This meant section 30(2) applied to the Guidelines, they could not be exempt under section 30(1), and should be released to the applicant.

The Victorian Civil and Administrative Tribunal (**VCAT**) held that although the Guidelines were not a formal policy and there was no requirement to use them, it was enough that the document provided guidance and may be used for the purpose of making decisions in relation to a person's eligibility to enter a graduate course by way of the Graduate Access Melbourne program. The guidance did not have to be comprehensive or prescriptive.

VCAT held that any decision about eligibility into the Graduate Access Melbourne program was not a 'right', because it did not provide a guarantee of anything substantive. However, it was a 'benefit' in the sense of a 'favourable or helpful factor or circumstance' and may also be a 'privilege' in the sense of an 'advantage belonging to a person, class or office'.

The persons who are or may be entitled or eligible to the benefit or privilege are those that fall within the identified equity categories in the Guidelines.

[166] *Freedom of Information Act 1982* (Vic), section 30(2).

Purely factual information – section 30(3)

1.11. Section 30(1) does not apply to purely factual information.[167]

1.12. Factual information is information without any opinion or inference – it is information that is objectively the same for any individual.

1.13. Common examples of factual information include:

- statistics, data, times, or dates;
- backgrounds,[168] summaries or chronologies of events. For example, recounting of facts as seen by individuals during an investigation,[169] development of a policy, or file notes informing or recounting past events such as a conversation with a manager.[170] Information of this nature does not cease to be factual simply because there might be some future debate about its accuracy;[171] and
- actual financial expenditure, as opposed to financial advice based on estimates and assumptions.[172]

1.14. When deliberative information is intertwined with factual information and cannot be separated, that intertwined information is exempt.[173]

1.15. However, an agency or Minister must critically examine the information to ensure that the intertwined information is truly inseparable. In many instances it will be practicable to sever the deliberative information from the factual information by redacting a document.

Example

EW2 and The Royal Victorian Eye and Ear Hospital [2022] VICmr 230 (21 October 2022)

The applicant requested access to an *Executive Committee Paper for Information* concerning an audit into surgery cancellations on the day of the applicant's appointment.

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[167] *Freedom of Information Act 1982* (Vic), section 30(3).

[168] See example, *NKY v Department of Education and Training* [2022] VCAT 302, [83]-[87].

[169] See example, *Baker v Department of Education and Training* [2005] VCAT 2263, 11.

[170] See example, *Conyers v Monash University* [2005] VCAT 2509, [32], [35].

[171] *Porter v Victoria Police* [2005] VCAT 962, [23].

[172] *Doyle v Department of Human Services* [2002] VCAT 1768, [20].

[173] *Mees v University of Melbourne* [2009] VCAT 782, [29]-[30].

The Public Access Deputy Commissioner was satisfied that it would be contrary to the public interest to disclose some information in the document that was opinion, advice or recommendation. It contained the outcome of the audit and recommendations and was a draft document with tracked comments by agency officers. It was made in the course of the agency's deliberative processes in reviewing its operating environment, specifically the review of day-of-surgery cancellations and surgical waitlists.

However, the document contained some factual information in the 'background' section of the document and factual information about patients in the Appendix. The Commissioner decided this factual information was not exempt from release under section 30(1) because it was purely factual information for the purpose of section 30(3).

Adjudicative functions – section 30(4)

1.16. Section 30(1) does not apply to a record of a final decision, order, or ruling when exercising an adjudicative function.[174] It also does not apply to any reasons which explain the decision, order, or ruling.

1.17. An 'adjudicative function' generally refers to a judge acting within a court or tribunal, or where a person decides disputes between parties. For example, court or tribunal decisions, and arbitration decisions.

Documents that are more than 10 years old – section 30(6)

1.18. Section 30(1) does not apply to a document when 10 years has passed since the last day of the year when the document was created.[175]

Example

If a document was created during 2013, this exemption cannot be claimed from 1 January 2024.

If a document was created during 2014, this exemption cannot be claimed from 1 January 2025.

If a document was created during 2015, this exemption cannot be claimed from 1 January 2026.

1.19. Section 30(6) does not apply to documents created before 5 July 1983 (being the day after commencement of section 30).

[174] *Freedom of Information Act 1982* (Vic), section 30(4).

[175] *Freedom of Information Act 1982* (Vic), section 30(6).

Officer of an agency

1.20. Section 30(1) applies to opinion, advice, or recommendation prepared by an officer and consultation or deliberation between officers. As such, an agency must establish that the individuals involved are 'officers' for the purposes of the Act.

1.21. The term 'officer' is defined in section 5(1). It includes independent contractors, consultants and legal advisers engaged by an agency to carry out work or provide services.[176]

Opinion, advice, or recommendation

1.22. The words 'opinion', 'advice' and 'recommendation' should be given their plain English meaning.

1.23. Their dictionary definitions are:[177]

- Opinion: a personal view, an estimation, judgement, or belief.
- Advice: an opinion recommended, or offered, as worthy to be followed, or a formal or professional opinion given.
- Recommendation: a representation in favour of a person or thing, or anything that serves to recommend or induce acceptance or favour.

Example

Common examples include:

- emails or other correspondence between agency officers or a Minister deliberating issues or providing advice on a matter;
- parts of reports that analyse evidence and provide subjective views and recommendations; or
- recommendations in briefings to a Minister.

1.24. 'Advice' must be something better than mere 'informing' or 'recounting' events that have occurred.[178]

[176] See example, *Mees v University of Melbourne* (General) [2009] VCAT 782, [31].

[177] See the Macquarie Dictionary.

[178] *Porter v Victoria Police* [2005] VCAT 962, [23]; *Baker v Department of Education and Training* [2005] VCAT 2263, [11].

1.25. To be exempt, the opinion, advice or recommendation must come from an agency officer or Minister, not another source such as a complainant, witness or third party.[179]

1.26. The agency officer or Minister expressing the opinion, advice or recommendation does not need to be from the same agency or Minister that is processing the request.[180]

1.27. It is not necessary for the document to be opinion, advice or recommendation. The issue is whether release of the document would disclose matter of that nature.[181]

1.28. Often, documents with deliberative information are rarely exempt in full because they usually include factual information like a background or description of events leading up to a decision or statistical information to support a course of action.

1.29. Factual records such as meeting minutes and agenda, terms of reference or instructions from one agency officer to another officer generally are not opinion, advice or recommendation.

Consultation or deliberation

1.30. 'Consultation' and 'deliberation' should be given their plain English meaning.

1.31. Their dictionary definitions are:[182]

- Consultation: the action or process of formally consulting or discussing.
- Deliberation: careful consideration before decision.

1.32. To be exempt, the consultation or deliberation must be between agency officers or Ministers. Consultation or deliberation between an officer or Minister and an external third party (that is not engaged by the agency) is not exempt under section 30(1).

1.33. 'Deliberations between officers' includes deliberations between officers of different agencies and does not have to involve officers from the agency processing the request.[183]

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[179] *Shaw v Department of Justice and Regulation* [2018] VCAT 2038, [33] citing *Deasey v Geshke* (unreported, County Court, 1 November 1984) per Judge Hasset at 38.

[180] *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 207.

[181] *Mildenhall v Department of Education* (1998) 14 VAR 87.

[182] See the Macquarie Dictionary.

[183] *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 207.

Example

Department A contracts with a University to perform an evaluation of certain research studies.

The University creates an evaluation group consisting of academics from the University and an officer employed by Department B.

The evaluation group prepares a first draft report. This report contains consultation or deliberation between members of the evaluation group (officers of the University and Department B).

This is enough to satisfy the 'consultation or deliberation' element of section 30(1). It does not matter that the consultation or deliberation does not involve officers from Department A.

Deliberative process

1.34. Where a document contains deliberative information, an agency or Minister must also determine whether the deliberative information was created in a 'deliberative process' related to the functions of an agency, Minister, or the government.

1.35. 'Deliberative process' is widely interpreted to include most processes undertaken by an agency or Minister in relation to their functions.[184] When considering if deliberative information was generated as part of an agency or Minister's deliberative process, an agency or Minister should be able to identify:

- what the agency or Minister's functions are (for example, as set out in legislation); and
- that the information relates to those functions and contributes to how those functions are exercised.

Examples of deliberative processes and an example of an opinion not forming part of a deliberative process

Examples of deliberative processes include:

- the process of decision-making
- the formulation of policy

[184] *Re Waterford and Department of Treasury (No.2)* (1981) 1 AAR 1 referred to in *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 208.

- the process of investigation[185]
- comments on the effect of future contemplated legislation
- medical and psychiatric reports commissioned by agencies for regulatory purposes[186]
- internal audit investigations[187]

Example of opinions not forming part of an agency's deliberative process:

Porter v Victoria Police [2005] VCAT 962

Background

A Senior Sergeant in a particular unit provided two documents to the Superintendent in charge of that unit. The two documents were critical of the applicant, a Senior Constable who was stationed in the unit at that time.

At the time the documents were prepared, the applicant was not in the process of being assessed for promotion or demotion, was not the subject of any contemporaneous performance assessment, was not the subject of any contemplated or ongoing investigation, and her suitability for a nominated position was not in contemplation.

Decision

In the circumstances, the Victorian Civil and Administrative Tribunal concluded that the presentation of the two documents to the Superintendent was not part of Victoria Police's deliberative processes. They were not part of the thought processes of the agency or any reflective consultation.

1.36. A document created after the completion of a deliberative process, but which records that process, can fall within section 30(1).[188]

1.37. The deliberative process does not have to relate to the functions of the agency processing the request.[189] The deliberative process may relate to functions of another agency, or Minister or of the government.

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[185] See examples *Marke v Victoria Police* [2006] VCAT 1364, [63]; *Rosen v Department of Human Services* [2006] VCAT 691, [62]-[63].

[186] See *Nichols v Department of Education and Training* [2021] VCAT 1244 and *Stark v Department of Education and Training* [2015] VCAT 625.

[187] *Kotsiras v Department of Premier & Cabinet* [2003] VCAT 472, [20].

[188] *Scott v Office of the Assistant Treasurer* [2013] VCAT 2015, [24], [26].

[189] *United Firefighters Union of Australia – Victoria Branch v Country Fire Authority* [2018] VCAT 630, [98]-[99]; *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201, 207.

Disclosure would be contrary to the public interest

1.38. For section 30(1) to apply, the agency or Minister must establish that disclosure of deliberative information would be contrary to the public interest.

1.39. 'Would' requires certainty that an event will occur, rather than a mere possibility or likelihood.[190] The need for a high degree of confidence reflects the object of the Act in section 3 to provide public access as far as possible.[191]

1.40. There are many factors that may be relevant to determining whether it would be contrary to the public interest to disclose a document or information.[192] The trend towards modern, transparent and accountable government, has resulted in courts and tribunals limiting these factors.

1.41. An agency or Minister's decision must be made consistently with the object of the Act, which is to release information as far as possible, and to only use exemptions to protect essential public interests. The balancing of public interest factors for and against disclosure does not begin from empty scales or a blank page. Instead, the Act requires the balancing to occur from and within a default position that the document or information should be released.[193]

1.42. An agency or Minister must, in its decision under section 27, state the public interest factors on which the decision is based.[194] This requires the agency or Minister to carefully consider the relevant public interest factors on a case-by-case basis.[195] The decision should explain how the factors apply to the specific documents or information in the context of the requested document and the potential consequences of its disclosure. The decision should refer to the facts, evidence and reasons for the agency or Minister's decision.

Factors relevant to the public interest

1.43. Public interest factors are not a fixed, determinative set of criteria.[196] Rather, they are a list matters that may be relevant. Each request balances these factors based on the unique circumstances of the matter.

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[190] See *'DY2' and Department of Health* [2022] VICmr 11, [18] in the context of the word "would" in the same phrase used in the section 29 exemption. See also *Victoria Police v Marke* [2008] VSCA 218, *[97] in the context of the word "would" in the section 33 exemption.*

[191] *Victoria Police v Marke* [2008] VSCA 218, [96]-[98].

[192] For example, see *Coulson v Department of Premier and Cabinet* [2018] VCAT 229, [25]; *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483, 488; *Secretary to Department of Justice v Osland* (2007) 26 VAR 425, [77].

[193] *McKinnon v Department of Treasury* [2006] HCA 45, [19].

[194] *Freedom of Information Act 1982* (Vic), section 30(5).

[195] *McIntosh v Department of Premier and Cabinet* [2009] VCAT 1528, [22].

[196] *Landes v Vic Roads* [2009] VCAT 2403, [46].

1.44. Public interest factors that are given weight in the context of a modern, transparent and accountable government include:

- the right of every person to gain access to documents under the Act;
- the sensitivity of the issues involved and the broader context of how the documents were created;
- the stage of a decision or policy development at the time the communications were made;
- whether disclosure of the documents would be likely to inhibit communications between agency officers that are essential for the agency to make an informed and well-considered decision or for those officers to properly participate in a process of the agency's functions (such as an audit or investigation, regulatory or law enforcement function);[197]
- whether disclosure of the documents would give merely a part explanation, rather than a complete explanation, for the taking of a particular decision or the outcome of a process, but only where the agency would not otherwise be able to explain upon disclosure of the documents;[198]
- the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final decision by an agency or Minister;
- the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions;
- the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes;[199]
- the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process[200] and building the community's trust in government and its decision making processes;[201]
- whether there is controversy or impropriety around the decision or the decision-making process.

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[197] See examples, *'EL7' and University of Melbourne* (Freedom of Information) [2022] VICmr 134, Annexure 1; '*EH8' and Mornington Peninsula Shire* (Freedom of Information) [2022] VICmr 99, [51]; *Debono v Department of Justice* [2008] VCAT 1791; *'EM4' and Northern Health* (Freedom of Information) [2022] VICmr 140, [59-[60].

[198] See example where this ground was made out in *Major Transport Infrastructure Authority v Davis* [2022] VCAT 123, [79]-[89], and not made out in *'ES4' and Department of Jobs, Precincts and Regions* (Freedom of Information) [2022] VICmr 195.

[199] See example, '*EW7' and Victorian Building Authority* [2022] VICmr 235; '*EQ9' and Department of Environment, Land, Water and Planning* [2022] VICmr 181.

[200] See examples *'EU9' and Yarra City Council* (Freedom of Information) [2022] VICmr 218 and *'EU4' and Game Management Authority* [2022] VICmr 213.

[201] *'ES4' and Department of Jobs, Precincts and Regions (Freedom of Information)* [2022] VICmr 195, [45].

1.45. In the context of clinical assessment reports for an offender in relation to a prevention of violence program, there is a public interest in whether disclosure may interfere with the integrity of the assessment process, in that release of the reports may give prisoners additional insights into clinicians' methods which they could employ to subvert the effectiveness of assessments.[202]

1.46. In the context of public schools, there is a strong public interest in protecting the integrity of staff management processes, including enquiries into staff medical fitness and conduct that depend on information provided confidentially not being subsequently disclosed.[203]

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

1.47. Modern government assumes that members of the public are able to understand that documents are produced at particular points in time and that a document, in isolation, may not represent the complete or final position or decision of an agency or Minister.[204]

1.48. If there are concerns about potential confusion in releasing a document, an agency or Minister should consider providing additional information to the applicant when releasing the document. The additional information could provide the necessary context or clarity to understand the information contained in the document and if relevant, how the information in the document was later used during a decision-making process.[205]

Example where releasing the document was not contrary to the public interest

ES4 and Department of Jobs, Precincts and Regions (Freedom of Information) [2022] VICmr 195[206]

Background

The applicant requested access to ministerial briefing documents prepared by the agency for a former Minister of Local Government.

On review before the Information Commissioner, the agency relied on section 30(1) to exempt certain information relating to public funding.

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[202] *Debono v Department of Justice* [2008] VCAT 1791, [20]; *'EJ2' and Department of Justice and Community Safety* (Freedom of Information) [2022] VICmr 111.

[203] *Stark v Department of Education and Training* [2015] VCAT 625, [39] relied on in *Nichols v Department of Education and Training* [2021] VCAT 1244, [39].

[204] In New South Wales, the fact that disclosure of information might be misinterpreted or misunderstood by any person is irrelevant and must not be taken into account when deciding whether there is an overriding public interest against disclosure of government information: *Government Information (Public Access) Act 2009* (NSW), section 15(d); in Queensland the fact that disclosure of the information could reasonably be expected to result in the applicant misinterpreting or misunderstanding the document is an irrelevant consideration when deciding if it would be contrary to the public interest to disclose a document: *Right to Information Act 2009* (Qld), Schedule , Part 1.

[205] *'EV5' and Department of Health* (Freedom of Information) [2022] VICmr 223, [70].

[206] See also *'EY6' and Department of Health* [2022] VICmr 252, [42]-[53] (decisions made by government agencies that directly affect members of the public or their business); *'DN9' and COVID-19 Quarantine Victoria* [2021] VICmr 253, [23] (expert ventilation reports under the covid-19 hotel quarantine program); *'BQ2' and National Gallery of Victoria* [2020] VICmr 154, [45] (emails recording discussions between agency officers on the use of function areas).

The agency argued it would be contrary to the public interest to release the information because the information was inaccurate and could therefore confuse the public if released.

Decision

The Public Access Deputy Commissioner was not satisfied disclosure of the information would be contrary to the public interest.

The Commissioner considered the agency could address the issue of inaccurate amounts of public funding referenced in the document, and any potential confusion caused, by explaining the errors and providing the correct information to the applicant at the same time the document is disclosed to the applicant.

Also relevant to the Commissioner's decision was:

- The public interest in the community being better informed about the expenditure of public funds and government decision making processes. By providing access to information that demonstrates the basis upon which decisions are made, disclosure of documents like this builds the community's trust in government and its decision making processes.
- The fact the information regarding the expenditure of public funds was not sensitive given there is already publicly available information regarding government assistance provided to businesses and organisations in response to the COVID-19 pandemic.

Example where releasing the document was contrary to the public interest

Major Transport Infrastructure Authority v Davis [2022] VCAT 123

Background

The applicant requested access to an individual site report relating to two level crossings in Melbourne.

The agency refused access to the document under section 30(1) on the basis that the document was a 'desktop' assessment, prepared at an early part of the preliminary decision-making process. A final version of the document was not produced and considered when decisions were made about crossing removals.

The information in the report did not undergo the normal verification and review process to ensure the data and assumptions were accurate. This is usually conducted when a site report is to be used in some way to further a course of investigation or decision. This did not occur because there was no future need for the document. The document contained errors.

Therefore, the agency argued disclosure could cause confusion and inappropriate debate around the decisions eventually made by the agency in relation to crossing removals.

Issue

Was disclosure of the document contrary to the public interest?

Decision

The Victorian Civil and Administrative Tribunal (VCAT) decided that disclosure of the report would be contrary to the public interest on the basis that its disclosure would be likely to lead to confusion and ill-informed debate.

Relevant to the decision was the fact the document, on its face, gave a superficial impression that it was complete and final. In reality, it was a draft internal working document containing preliminary advice or opinion that was incomplete, unchecked, unverified and contained significant factual errors. Senior Member Billings considered these qualities meant that the document could be easily misinterpreted as having some use or value which it does not have.

In the circumstances, Senior Member Billings considered release of the document would not advance debate or facilitate the government being held accountable.

Senior Member Billings considered whether members of the public would be able to understand that the document was created at a particular point in time and may not represent the final decision of the agency, and therefore members of the public would not be confused or misunderstand the document or participate in unnecessary debate if the document were released.

In finding this was not the case, Senior Member Billings accepted the agency's evidence that the intelligence or expertise of potential readers would not overcome the potential for confusion. The reason for this was due to the nature of how the information is presented in the document. It was presented as a concluded view when it was not in fact a concluded view. The factual errors made by the authors would have been picked up and corrected during the agency's verification and harmonisation process, but this process never occurred because the document was not used in further decision-making around level crossing removals.

Senior Member Billings stated there is undoubtedly a public interest in transparency in decision-making, but that public interest is outweighed in the particular circumstances of this document.

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

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

Draft documents

1.50. The draft nature of a document and whether a final version is available are both relevant considerations. However, a document will not be exempt under section 30(1) only because it is in draft form, regardless of whether a final document exists.

1.51. A draft document that simply shows an agency or Minister has changed its position does not mean it is exempt. The disclosure of drafts can show an agency or Minister diligently carried out its functions. Draft documents are only exempt where an agency or Minister can demonstrate that disclosure would be contrary to the public interest.

1.52. Each document must be considered in light of the object of the Act and the public interest factors to determine whether disclosure would be contrary to the public interest in the circumstances.

1.53. An agency or Minister should engage with an applicant at an early stage to confirm whether they seek access to draft documents. Asking the applicant this question can assist to narrow the scope of a request. This potentially limits the number of documents needed to be processed, saving the agency or Minister's time and resources, and promoting timely access to information.

Inhibiting frankness and candour

1.54. The public interest factor that disclosure would 'inhibit frankness and candour' can only be relied upon in very limited situations and must be supported by detailed evidence and reasoning as to why disclosure would be contrary to the public interest.[207] It takes more than a mere assertion that an agency officer would be inhibited from providing frank and candid advice to exempt a document under section 30(1).

1.55. Agencies and Ministers should keep in mind:

- Government trust is built on transparency and government leaders must champion a culture of accountability and transparency.[208]
- It is the duty of public servants to give frank and fearless advice. Greater transparency over this advice, whether under the Act or otherwise, does not change this duty. It should not deter officers from providing robust and full advice in future.[209]

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[207] See example where this ground was upheld in *Nichols v Department of Education and Training* [2021] VCAT 1244, [37].

[208] Association of Information Access Commissioners of Australia and New Zealand, 2023 communique.

[209] *Yarra City Council v Roads Corporation* [2009] VCAT 2646, [38]. Association of Information Access Commissioners of Australia and New Zealand, 2023 communique.

- Public transparency and scrutiny may improve the quality of advice provided to decision-makers.[210]

- There must be evidence to show that officers have actually been inhibited because of the release of the information, and that 'frankness has been a casualty of the legislation'.[211]

1.56. Consistent with these statements, the object of the Act (to make the maximum amount of information available), and the breadth of the public interest test in section 30(1), an agency or Minister should be cautious about using the frankness and candour argument.

1.57. An agency should also keep in mind the professional obligations to provide robust and frank advice under the *Code of Conduct for Public Sector Employees* (Responsiveness, Integrity, Impartiality, Accountability and Leadership). The Code of Conduct requires agency officers to maintain accurate and reliable records, and to make these records available when required. These obligations help to ensure that officers 'implement government policy in an open and transparent manner'.[212]

1.58. Agency officers are responsible for ensuring advice provided to agencies, Ministers and the government is accurate, properly considered and impartial regardless of whether such information is intended to be publicly released.[213]

Example

'EW6' and Development Victoria **(Freedom of Information) [2022] VICmr 234**

Background

The applicant requested access to text messages sent between the personal mobile phone number of an agency officer and other specified agency officers, relating to Development Victoria matters.

The agency refused access to certain documents in full or in part under section 30(1) and other exemptions. The documents recorded communications between agency executive officers regarding staffing availability and a project involving the agency.

The Public Access Deputy Commissioner was satisfied the text messages contained information in the nature of opinion, advice and recommendations prepared by agency officers. The messages also contained consultation between agency officers. They were created in the course of the agency's deliberative processes in relation to agency matters.

Issue

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

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[210] *Graze v Commissioner of State Revenue* [2013] VCAT 869, [26].

[211] *Bracks v Department of State Development* (unreported, AAT, 10 September 1996), 9.

[212] *Code of Conduct for Victorian Public Sector Employees*, section 8: "Demonstrating Accountability".

[213] *'ES4' and Department of Jobs, Precincts and Regions (Freedom of Information)* [2022] VICmr 195.

Decision

The Commissioner was not satisfied that disclosure would be contrary to the public interest because:

- A text message sent between agency officers in their capacity as a public sector executive or officer in relation to matters involving the agency is a 'document' for the purposes of the Act.
- Agency documents can be drafted in a formal or less formal nature. This does not change their status as a 'document' for the purposes of the Act.
- When communicating with each other, agency officers are aware, or should be aware that their communications in whatever form or format, may be the subject of an FOI request.
- Disclosure of the text messages would not alter the way officers communicate and prevent them from taking early, efficient and effective action on matters, as claimed by the agency.
- There is a reasonable expectation that agency officers will create a written record of agency related activities and communications, through which their public sector duties are documented and open to appropriate public scrutiny.
- Agency executives and officers are required to reflect and embody the Victorian public sector values in the Code of Conduct when carrying out their public sector duties.
- Despite the informal and frank nature of the opinions exchanged in the text messages, disclosure would not have a detrimental or lasting impact on the agency's relationships with other agency contacts or external stakeholders.
- If the agency considered disclosure of the text messages would lead to any misunderstanding by the applicant or the general public, it is open to the agency to release the documents with any necessary additional information to minimise any concern about the documents being misunderstood or taken out of context.

Sensitivity of information

1.59. The sensitivity of information is generally diminished where that information is:

- relatively dated, innocuous, or not of particular significance;[214]
- already publicly known;
- only likely to result in mere embarrassment to an officer, agency or Minister; or
- reflects a decision that has already been made or publicly announced.

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

1.60. In contrast:

- The disclosure of information about a current significant issue or project still to be decided may undermine the decision-making process.
- Where the content of a document would disclose information more closely connected to the circumstances of a third party than the applicant, the degree of sensitivity associated with the information is higher.[215]

1.61. When determining the sensitivity of information, an agency or Minister should carefully consider whether the information is, in fact, sensitive with reference to the status of the information and the surrounding circumstances.

Factors that should not be taken into account

1.62. The fact there may be 'no point' in releasing a document or that nothing would be achieved by releasing it, does not mean that it is not in the public interest to release the document.[216]

1.63. An agency or Minister must not prescribe a class of documents as being contrary to the public interest to disclose.[217] All circumstances must be examined and weighed on a case by case basis, with reference to the specific documents or information claimed to be exempt.

Example

Blue, Red and Green books and possible parliamentary questions (**PPQ**) are not exempt under section 30(1) as classes of documents.[218] It is always necessary to consider the context in which each policy book or PPQ is requested and the public interest considerations relevant to the disclosure of the specific content of the document or information.

1.64. Concerns about the reputation of an agency are not relevant.[219]

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[215] See '*EH8' and Mornington Peninsula Shire* (Freedom of Information) [2022] VICmr 99, [51](b).

[216] *Dean v Department of Justice* [2001] VCAT 2031, [28].

[217] *Wells v Department of Premier and Cabinet* [2001] VCAT 1800, [37].

[218] *McIntosh v Department of Premier and Cabinet* [2009] VCAT 1528, [22], [62], [70]; *Wells v Department of Premier and Cabinet* [2001] VCAT 1800.

[219] '*ES4' and Department of Jobs, Precincts and Regions (Freedom of Information)* [2022] VICmr 195, [45]. See also, in New South Wales and Queensland, the fact that disclosure of information could reasonably be expected to cause embarrassment to, or loss of confidence in, the Government is irrelevant when deciding whether it would be contrary to the public interest to disclose a document: *Government Information (Public Access) Act 2009* (NSW), section 15(c); *Right to Information Act 2009* (Qld), Schedule 4, Part 1.

Section 31 – Law enforcement documents

Extract of legislation

31 Law enforcement documents

(1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—

(a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;

(b) prejudice the fair trial of a person or the impartial adjudication of a particular case;

(c) disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law;

(d) disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(e) endanger the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law.

(2) This section does not apply to any document that is—

(a) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law;

(b) a document revealing the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law;

(c) a document containing any general outline of the structure of any programme adopted by an agency for investigating breaches of, or enforcing or administering, the law;

(d) a report on the degree of success achieved in any programme adopted by an agency for investigating breaches of, or enforcing or administering, the law;

(e) a report prepared in the course of routine law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with a particular law other than the criminal law;

(f) a report on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation—

if it is in the public interest that access to the document should be granted under this Act.

(3) Notwithstanding anything to the contrary in this section, a document is an exempt document if it is a document created by the Bureau of Criminal Intelligence or (whether before or after the commencement of section 22 of the **Terrorism (Community Protection) (Further Amendment) Act 2006**) by the Intelligence and Covert Support Command of Victoria Police.

(4) Despite anything to the contrary in this section, a document is an exempt document if it is a document contained in the Register established and maintained under section 62 of the **Sex Offenders Registration Act 2004**.

(5) In deciding whether a document is an exempt document under subsection (1), an agency or Minister, if reasonably practicable, must—

(a) notify any of the following that are relevant that the agency or Minister has received a request for access to the document—

(i) another agency or Minister;

(ii) an agency of the Commonwealth or another State or a Territory;

(iii) an authority of the Commonwealth or another State or a Territory; and

(b) seek the view of that agency, authority or Minister as to whether the document should be disclosed.

(6) In deciding whether it is in the public interest to grant access to a document referred to in subsection (2), an agency or Minister, if reasonably practicable, must—

(a) notify any of the following that are relevant that the agency or Minister has received a request for access to the document—

(i) another agency or Minister;

(ii) an agency of the Commonwealth or another State or a Territory;

(iii) an authority of the Commonwealth or another State or a Territory; and

(b) seek the view of that agency, authority or Minister as to whether the document should be disclosed in the public interest.

Guidelines

Overview of section 31

1.1. Section 31 contains a number of exemptions, and exceptions to these exemptions.

1.2. The exemption in section 31(1) protects specific types of law enforcement documents (discussed further below). It does not exempt all law enforcement documents.[220] However, there are instances where section 31(1) will not apply, where it is in the public interest to grant access to the document. These instances are outlined in section 31(2), which sets out the types of documents that are not exempt under section 31(1).

1.3. The exemptions in sections 31(3) and (4) apply to specific types of documents. If a document falls within these narrow exemptions, the exception in section 31(2) does not apply, and cannot be used to grant access to the document.

1.4. A document is exempt under section 31(3) if it is created by the:

- Intelligence and Covert Support Command of Victoria Police (**ICSC**);[221] or
- Australian Criminal Intelligence Commission (**ACIC**).[222]

1.5. For section 31(3) to apply, it does not matter if the document is in the possession of another agency, so long as it was created by the ICSC of Victoria Police or the ACIC.[223] In contrast, a document created elsewhere, that is in the possession of the ICSC of Victoria Police or the ACIC will not be exempt under section 31(3), as it was not created by these bodies, as is required by section 31(3).

1.6. A document is exempt under section 31(4) if it is contained in the Register of Sex Offenders established and maintained by the Chief Commissioner of Police under section 62 of the *Sex Offenders Registration Act 2004* (Vic).[224]

1.7. Section 31 must be read consistently with the object of the Act in section 3, which is to extend as far as possible the right of the community to access government held information.

[220] *Penhalluriack v Department of Labour and Industry* (unreported, County Court of Victoria, Lazarus J, 19 December 1983) 39; See also *O'Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 177.

[221] See *Akers v Victoria Police* [2022] VCAT 884 [34]-[35] for an example of the application of section 31(3).

[222] The Act refers to the Bureau of Criminal Intelligence. The Australian Criminal Intelligence Commission supersedes the National Crime Authority and Bureau of Criminal Intelligence.

[223] *Akers v Victoria Police* [2022] VCAT 884 [33].

[224] See *'EH9' and Victoria Police* [2022] VICmr 100 for an example of the application of section 31(4).

Discretion to disclose exempt documents

1.8. The decision to exempt a document under section 31(1) is a discretionary power.[225] An agency or Minister can choose to provide access to information that would otherwise be exempt under section 31(1), where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

For more information, see section 16 – Access to documents apart from Act.

Documents required to be released in the public interest

1.9. There are six circumstances where the exemptions in section 31(1) do not apply.[226] This is limited to where there is a public interest in granting access to the document. This means that:

- one of the circumstances must be established;[227] and
- it must be in the public interest to release the document.

1.10. The six circumstances includes where the document:

- reveals that the scope of a law enforcement investigation has exceeded the limits imposed by law;[228]
- reveals illegal methods or procedures were used to prevent, detect, investigate, or deal with matters arising out of breaches or evasions of the law;[229]
- reveals processes an agency uses to investigate, enforce or administer the law;[230]
- reports on the success of programs or processes an agency uses to investigate, enforce or administer the law;[231]

[225] *Smith v Victoria Police* [2005] VCAT 654, [60]; section 16(2) acknowledges that decision makers can release exempt information as long as they are not legally prevented from doing so.

[226] *Freedom of Information Act 1982* (Vic), section 31(2).

[227] In section 31(2).

[228] *Freedom of Information Act 1982* (Vic), section 31(2)(a).

[229] *Freedom of Information Act 1982* (Vic), section 31(2)(b).

[230] *Freedom of Information Act 1982* (Vic), section 31(2)(c).

[231] *Freedom of Information Act 1982* (Vic), section 31(2)(d).

- reports on routine law enforcement inspections or investigations by an agency that enforces or regulates compliance with a particular law other than the criminal law;[232] or
- reports on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation.[233]

Examples

Examples of agencies that enforce or regulate compliance with a particular law other than the criminal law includes:

- Victorian WorkCover Authority;
- Greyhound Racing Victoria;
- Victorian Institute of Teaching;
- Royal Society for the Prevention of Cruelty to Animals (RSPCA);
- Legal Services Board and Commissioner;
- Environment Protection Authority.

1.11. Where one of these circumstances exists, an agency or Minister must then consider whether it is in the public interest that access to the document should be granted. That is, whether there is a public interest ground in favour of disclosure. This is different to the consideration of the public interest in the exemptions in sections 29, 30 and 35, which focus on whether it would be contrary to the public interest to disclose the document.

1.12. The approach to the public interest in section 31(2) is similar to the power of the Victorian Civil and Administrative Tribunal (**VCAT**) in section 50(4) to positively determine that the public interest requires disclosure of an otherwise exempt document.

[232] *Freedom of Information Act 1982* (Vic), section 31(2)(e).

[233] *Freedom of Information Act 1982* (Vic), section 31(2)(f).

Case examples

XYZ v Victoria Police [2010] VCAT 255

Background

The applicant was a police officer employed by Victoria Police. The applicant was investigated by the Ethical Standards Department within Victoria Police and requested access to documents relating to that investigation. The investigation was triggered by the disclosure of information to Victoria Police in breach of the privacy provisions in Federal tax legislation.

Victoria Police relied on section 31(1)(c) to refuse access to the Ethical Standards Department's applications for search warrants on the basis the warrant applications disclosed the identity of a confidential source of information.

The warrant applications used the information that was obtained in breach of the Federal tax legislation and misrepresented that information as having been lawfully obtained.

The applicant argued that section 31(2)(a) applied to the warrant applications, because in relying on information obtained in breach of Federal tax legislation and representing the information as being lawfully obtained, the documents revealed that the scope of the law enforcement investigation had exceeded the limits imposed by law.

Issue

Did the warrant applications fit within the exception in section 31(2)(a)? Did they reveal that the scope of a law enforcement investigation had exceeded the limits imposed by law?

Decision by the Administrative Appeals Tribunal

No. The warrant applications did not fit within the exception in section 31(2)(a). The warrant applications were exempt under section 31(1)(c) to the extent it identified or allowed the identification of the confidential source of information.

The information the Ethical Standards Department received in breach of the privacy provisions in Federal tax legislation was an 'irregularity' occurring in the course of the investigation. This irregularity did not mean the scope of the investigation exceeded the limits imposed by law.

The warrant applications were within the scope of the law enforcement investigation being carried out by the Ethical Standards Department. The investigation into the matters raised in the warrant application was not unlawful or improper.

Someone providing information confidentially about alleged police corruption or misconduct does not lose the protection of section 31(1)(c) because of an irregularity in the course of an investigation which is otherwise lawful in scope.

Fogarty v Office of Corrections (1989) 3 VAR 214

Background

The applicant requested access to documents relating to his detention as a prisoner. The documents included reports about the applicant prepared for the parole board and prisoner classification committee.

Issue

Did the reports about the applicant fit within the exception in section 31(2)(d)? Were they a report on the success of a program used to administer the law?

Decision by the Administrative Appeals Tribunal

No. The reports about a particular prisoner do not meet the criteria for the exception in section 31(2)(d).

In contrast, a report on a review of the classification system for all prisoners may fall within section 31(2)(d) and could be released under section 31(2) if it was in the public interest to do so.

Meaning of certain common terms and phrases

Would or would be reasonably likely to

1.13. The phrase 'would or would be reasonably likely to' is an element in all of the exemptions in section 31(1).

1.14. 'Would' is a high threshold and means that a result or effect will almost certainly come about. That is, disclosure of the information would, in fact:

- cause some identifiable prejudice;[234] or
- identify the confidential source;[235] or
- disclose the method or procedure;[236] or
- endanger the life or physical safety of a person.[237]

[234] *Freedom of Information Act 1982* (Vic), sections 31(1)(a), (b) and (d).

[235] *Freedom of Information Act 1982* (Vic), section 31(1)(c).

[236] *Freedom of Information Act 1982* (Vic), section 31(1)(d).

[237] *Freedom of Information Act 1982* (Vic), section 31(1)(e).

1.15. In contrast, 'would be reasonably likely to' is a slightly lower threshold that requires the chance to be real, but not fanciful or remote.[238]

1.16. When considering the likelihood of prejudice, it may be appropriate in some cases for an agency or Minister to consider the likelihood of the applicant sharing the disclosed information with others and the wider world.[239]

1.17. When considering the section 31(1)(c) exemption (identifying a confidential source), an agency or Minister should consider if the identity of the source of information is explicitly stated, or if the identity can be inferred from the information.

Prejudice

1.18. 'Prejudice' is an element in the sections 31(1)(a), (b) and (d) exemptions. 'Prejudice' means to hinder, impair or undermine. This includes both actual prejudice as well as impending prejudice.[240]

1.19. An agency or Minister must articulate how disclosure of the information causes prejudice and identify the specific harm that would flow from the disclosure of the information.

Examples

- If an alleged offender obtained access to their ongoing investigation file, the investigation would be prejudiced because disclosed information could be used to interfere with evidence or witnesses – section 31(1)(a).
- Information in a document that outlines how an agency deploys personnel in a prison may prejudice how that prison operates if prisoners were to become aware of that information – section 31(1)(a).
- Information in a document that outlines how an agency intends to prosecute a particular case, or details evidence to be used in a particular trial, if disclosed to the defence or otherwise made public, would provide the defence with information that could allow them to modify their defence – section 31(1)(b).
- Disclosure of the methods for determining if a lock has been tampered with could allow offenders to modify their lock tampering techniques to conceal their actions. This would prejudice effective investigations of these offences in future – section 31(1)(d).

[238] *Akers v Victoria Police* [2022] VCAT 979 [26] quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836; *Tucker v Commissioner of State Revenue* [2019] VCAT 2018 [113(b)].

[239] *XYZ v Victoria Police* [2010] VCAT 255 [185].

[240] *Bergman v Department of Justice* [2012] VCAT 363 [66], referring to *Sobh v Police Force of Victoria* [1994] 1 VR 41, 55.

Investigation, enforcement or proper administration of the law – section 31(1)(a)

1.20. Section 31(1)(a) exempts documents where disclosure would be reasonably likely to prejudice, in a particular instance:

- the investigation of a breach or possible breach of the law; or
- enforcement or proper administration of the law.

In a particular instance

1.21. Section 31(1)(a) requires an agency or Minister to identify some specific aspect of the law (the particular instance) to which the information relates, as opposed to a broader, non-specific or generalised area of the law.[241]

1.22. The words 'in a particular instance' qualify the words 'investigation of a breach of the law', 'proper administration' and 'enforcement'. This narrows the scope of this exemption to a specific:

- instance of a breach or possible breach of the law;[242] or
- aspect of investigations of breaches of the law or possible breaches of the law;[243] or
- instance or aspect of the law being enforced or administered.[244]

1.23. The specific instance might be identifiable through the laying of charges, or specific conduct, events, incidents, or individuals.[245]

Example

Information in a document that outlines how an agency deploys personnel in a particular prison or operates that particular prison's security system safely, deals with the administration of the *Corrections Act 1986* (Vic) in a specific prison.[246]

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[241] *Simons v Department of Justice* [2006] VCAT 2053 [36].

[242] *O'Sullivan v Police Force (Vic) (*1986) 1 VAR 171, 175–176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283.

[243] *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 [69].

[244] *O'Sullivan v Police Force (Vic) (*1986) 1 VAR 171, 175–176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283; *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 [69].

[245] *O'Sullivan v Police Force (Vic) (*1986) 1 VAR 171, 175–176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283.

[246] *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586 [27], [28], [50].

1.24. To be a 'particular instance' the circumstances of the investigation or enforcement of the law may need to be current and relevant at the time of the decision.[247]

Examples

Where an investigation is complete and no further action is contemplated, there may not be any 'particular instance' of the enforcement or proper administration of the law that would be prejudiced by release of the report dealing with the investigation.

Whereas, a specific aspect of a concluded investigation may be a 'particular instance', where it is, or is intended to be used, in current or future investigations. In this situation, there is a particular instance of the enforcement or administration of the law that could be prejudiced if the specific aspect of the concluded investigation were released.

Investigation of a breach of the law

1.25. In relation to a law enforcement investigation, a document is exempt under section 31(1)(a) if three conditions are satisfied:

- the information relates to an investigation of a breach or possible breach of the law in a particular instance; and
- the information was prepared either during, or for the purposes of, that investigation;[248] and
- release of the information would or would be reasonably likely to prejudice that investigation.

1.26. The investigation must be an actual investigation about a breach of a specific law. The investigation will usually need to be active, not concluded, at the time of the request. However, an actual breach of the law does not need to be established. It is enough to suspect a breach, resulting in an investigation.

1.27. The information must relate to that specific investigation[249] and must have been prepared during, or for the purposes of, the specific investigation identified.[250]

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[247] *Re Coleman and Director-General, Local Government Department, Pentland* (1985) 1 VAR 9, 12; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283, 309-310.

[248] *Shulver v Victoria Police Force* (1995) 9 VAR 71, 76.

[249] *O'Sullivan v Police Force (Vic) (*1986) 1 VAR 171, 175–176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283.

[250] *Shulver v Victoria Police Force* (1995) 9 VAR 71, 76.

Steps to applying the exemption

1.28. An agency or Minister seeking to apply the section 31(1)(a) exemption should:

1. Identify the specific legislation or regulation that may be breached.
2. Establish there is a specific investigation about a breach or possible breach of that law.
3. Identify and document how the information relates to that breach or possible breach of law.
4. Ensure the information was prepared during, or for the purposes of, that investigation.
5. Determine whether disclosure of the information would, or would be reasonably likely to, prejudice the investigation by establishing and documenting:
    a. what the prejudice is – how would disclosure harm the investigation specifically; and
    b. why the prejudice would, or is reasonably likely to, occur.
6. In doing so, consult with any relevant officer or individual involved in conducting the investigation.
7. Where relevant, consult with any other agency, authority, or Minister on whether the information should be disclosed.[251]
8. Consider whether any exceptions set out in section 31(2) apply to the information, and if so, consult on the whether the document should be disclosed in the public interest.[252]
9. Consider if it is necessary to neither confirm nor deny the existence of a requested document.[253]
10. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

Case example

Akers v Victoria Police [2021] VCAT 1060

The applicant requested access to surveillance footage of his property taken by Victoria Police on a date in 2016 as he believed that his property had been under constant surveillance by the Police.

The agency refused to confirm or deny the existence of the documents on the basis that any documents would be exempt under section 31(1)(a) and 31(1)(d).

[251] Per section 31(5).

[252] Per section 31(6).

[253] In accordance with section 27(2)(b).

There was no evidence of any ongoing investigation into the applicant in 2016.

Consequently, disclosure of whether surveillance documents existed (or did not exist) would not prejudice any particular investigation of the enforcement of any particular law, and so the documents, if they existed, could not be exempt under section 31(1)(a).

Enforcement or proper administration of the law

1.29. In relation to the enforcement or proper administration of the law, a document is exempt under section 31(1)(a) if two conditions are satisfied:

- the information relates to the enforcement or proper administration of the law in a particular instance; and
- release of the information would or would be reasonably likely to prejudice the enforcement or proper administration of that law.

1.30. An agency or Minister must identify a specific law and explain how the information relates to the enforcement or administration of the identified law.[254] These terms are broad and have wide application.

1.31. There is a distinction between the 'enforcement of the law' and the 'proper administration of the law':

- Enforcement of the law deals with the actual process of enforcing the law (for example, prosecuting cases or pursuing fines and court orders).[255]
- The proper administration of the law deals with how the law is administered.[256] It requires a connection with the criminal law or with the process of upholding or enforcing the civil law (for example, the collection of information to monitor compliance with the law).[257]

[254] *JCL v Victoria Police* [2012] VCAT 1060 [22] following *O'Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 175-176.

[255] *JCL v Victoria Police* [2012] VCAT 1060 [28].

[256] *JCL v Victoria Police* [2012] VCAT 1060 [28].

[257] *Accident Compensation Commission v Croom* [1991] 2 VR 322, 324; *Cichello v Department of Justice* [2014] VCAT 340 [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 [28] and *Accident Compensation Commission v Croom* [1991] 2 VR 322.

Examples

The proper administration of the law includes:

- The management of prisons and prisoners,[258] the classification of prisoners and the parole of prisoners[259] and the ability to operate the prison security system safely.[260]
- Preliminary investigations and disciplinary proceedings against professionals such as registered medical practitioners,[261] and police officers.[262]
- Investigations into suspected fraudulent activities by claimants and service providers, conducted for the purpose of protecting the Transport Accident Fund and prosecuting wrongdoing under the *Transport Accident Act 1986* (Vic).[263]
- Child protection investigations conducted under the *Children, Youth and Families Act 2005* (Vic).[264]

Steps to applying the exemption

1.32. An agency or Minister seeking to apply the section 31(1)(a) exemption in relation to the enforcement or proper administration of the law should:

1. Identify the specific law (legislation or regulation) that is being enforced or administered.
2. Identify and document how the information relates to enforcing or administering the identified law.
3. Determine whether disclosure of the information would, or would be reasonably likely to, prejudice the enforcement or proper administration of the law by establishing and documenting:
    a. what the prejudice is – how would disclosure harm the enforcement or proper administration of the law; and
    b. why the prejudice would, or is reasonably likely to, occur.
4. In doing so, consult with any relevant officer or individual responsible for enforcing or administering the identified law.

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[258] *Fogarty v Office of Corrections* (1989) 3 VAR 214 [48].

[259] *Knight v Department of Justice* [2012] VCAT 369 [115].

[260] *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586 [27], [50].

[261] *Knight v Medical Board (Vic)* (1991) 5 VAR 171 [184]-[185].

[262] *Marke v Department of Justice and Regulation* [2019] VCAT 479 [42].

[263] *Quick v Transport Accident Commission* [2022] VCAT 622 [31]-[37].

[264] '*CQ8' and Department of Families, Fairness and Housing* [2021] VICmr 44 [39].

5. Where relevant, consult with any other agency, authority, or Minister on whether the information should be disclosed.[265]

6. Consider whether any exceptions set out in section 31(2) apply to the information, and if so, consult on the whether the document should be disclosed in the public interest.[266]

7. Consider if it is necessary to neither confirm nor deny the existence of a requested document in accordance with section 27(2)(b).

8. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

Case examples

Horrocks v Department of Justice [2012] VCAT 241

Background

The applicant requested access to CCTV footage of an incident in the prison involving the applicant. The CCTV footage showed how prison staff react in an emergency.

The agency argued that disclosure of the CCTV would be reasonably likely to prejudice the enforcement or proper administration of the Corrections Act as it related to the administration of the prison.

Decision

VCAT accepted that release of the footage may provide advance notice to prisoners of how prison staff react more generally in emergency situations. This information was not generally known.

Disclosure of this information would be reasonably likely to impede and therefore prejudice the proper administration of the prison.

'EJ2' and Department of Justice and Community Safety [2022] VICmr 111

Background

The applicant requested access to documents relating to their completion of an offending behaviour change program.

Decision

The documents included recommendations by the author to other agency employees for future case management of the applicant.

[265] Per section 31(5).

[266] Per section 31(6).

The Public Access Deputy Commissioner found the documents were exempt under section 31(1)(a).

The Commissioner found that disclosure of this information would impact the ability of agency officers to work collaboratively to support the applicant's rehabilitative progress. This would be reasonably likely to have a detrimental effect on the agency's proper administration of the Corrections Act, namely the supervision of the applicant's sentence. The Commissioner was satisfied that disclosure of this information in the report would prejudice the proper administration of the law in a particular instance.

The presentation of the information in the report also revealed the relevance and weight given to certain aspects of the program, revealing the methodology used by clinicians in behaviour change programs.

The Commissioner found that release of this information could inform future participants behaviour adjustments in the program. This would be reasonably likely to have a detrimental effect on the agency's proper administration of the Corrections Act, namely the management of prisons and prisoners. The Commissioner was satisfied that disclosure of this information in the report would prejudice the proper administration of the law in a particular instance.

Fair trial or legal proceeding – section 31(1)(b)

1.33. A document or information is exempt under section 31(1)(b) if two conditions are satisfied:

- the information relates to the trial of a person or adjudication of a particular case; and
- disclosure of the information would or would be reasonably likely to prejudice the fair trial of the person or adjudication of the particular case.

1.34. A 'particular case' means that there is an identifiable legal proceeding.

1.35. The information must relate to either the criminal trial of a person, or a specific identifiable legal proceeding.[267]

1.36. An agency or Minister should be able to identify the:

- party or parties subject to the legal proceeding;
- offence committed or cause of action (actual or anticipated);
- relevance of the document to the legal proceeding; and
- status of proceeding – whether it is current or anticipated.

[267] *Barnes v Commissioner for Corporate Affairs (No 2)* (1987) 1 VAR 438, 442.

Steps to applying the exemption

1.37. An agency or Minister seeking to apply the section 31(1)(b) exemption in relation to the trial of a person or adjudication of a particular case should:

1. Establish the information relates to the trial of a person, or the impartial adjudication of a particular case that is either:
    a. a current legal proceeding; or
    b. an anticipated legal proceeding.
2. Identify and document how the information relates to the identified trial or adjudication.
3. Determine whether disclosure of the information would, or would be reasonably likely to, prejudice the fair trial of the person or adjudication of the particular case by establishing and documenting:
    a. what the prejudice is – how would disclosure harm the trial or adjudication; and
    b. why the prejudice would, or is reasonably likely to, occur.
4. In doing so, consult with any relevant officer or individual responsible for the trial or adjudication.
5. Where relevant, consult with any other agency, authority, or Minister on whether the information should be disclosed.[268]
6. Consider whether any exceptions set out in section 31(2) apply to the information, and if so, consult on the whether the document should be disclosed in the public interest.[269]
7. Consider if it is necessary to neither confirm nor deny the existence of a requested document in accordance with section 27(2)(b).
8. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

[268] Per section 31(5).

[269] Per section 31(6).

Case examples

JCL v Victoria Police [2012] VCAT 1060

Background

The applicant was the victim of an alleged assault and was a key witness in a pending prosecution against his assailants.

The applicant requested access to documents relating to the alleged assault. This included documents forming part of the brief of evidence, or that would otherwise disclose evidence in the pending prosecution.

Decision

Section 31(1)(b) applied to the documents.

VCAT accepted evidence about the risk of the applicant's evidence in the prosecution being contaminated, or the likely perception by the jury that it was contaminated, because the applicant had read the police documents before giving evidence.

VCAT accepted that this actual or perceived contamination of evidence could be extremely damaging to the prosecution's case because it would have a serious effect on the acceptability or weight to give to the applicant's evidence.

If a key witness altered their evidence because of what they saw in the prosecution evidence, or there was a perception that this had occurred, this would unfairly prejudice the fair trial of the accused and may cause what otherwise may be a successful prosecution to fail.

VCAT also noted that even if the evidence would be inadmissible in court, it might become available to a potential juror who would hear charges against the accused which could also prejudice the fair trial.

RFJ v Victoria Police [2013] VCAT 1267

Background

The applicant requested access to documents relating to an ongoing police investigation of a fire at the applicant mother's home considered to be suspicious. The police did not know who was responsible for the fire and no charges had yet been laid.

Decision

Release of the documents would or would be reasonably likely to prejudice the fair trial of a person accused of arson. If information about the evidence to be given by witnesses was known, this might lead to the contamination or perception of the contamination of witness evidence or undermine the integrity of that witness's evidence.

If the documents contain information inadmissible in a criminal trial and that information came to the attention of potential jurors, the fair trial of the accused would be prejudiced.

Identity of confidential sources – section 31(1)(c)

1.38. A document or information is exempt under section 31(1)(c) if two conditions are satisfied:

- disclosure of the information would, or would be reasonably likely to disclose, or enable a person to ascertain the identity of a confidential source of information; and
- the confidential source has provided information in the context of the enforcement or administration of the law.

Steps to applying the exemption

1.39. An agency or Minister seeking to apply the section 31(1)(c) exemption in relation to the identity of confidential sources of information should:

1. Identify the specific information to which the exemption may apply.
2. Determine whether disclosure of the information would be reasonably likely to disclose, or enable a person to ascertain the identity of a source of information.
3. Establish that the source of information was in fact a confidential source of information.
4. Determine the information was provided in relation to the enforcement or administration of the law and identify the specific law.
5. Where relevant, consult with any other agency, authority, or Minister on whether the information should be disclosed.[270]
6. Consider whether any exceptions set out in section 31(2) apply to the information, and if so, consult on the whether the document should be disclosed in the public interest.[271]
7. Consider if it is necessary to neither confirm nor deny the existence of a requested document in accordance with section 27(2)(b).
8. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

[270] Per section 31(5).

[271] Per section 31(6).

Confidential source of information

1.40. Section 31(1)(c) protects the identity of confidential sources of information. A confidential source is an informer providing information that the alleged perpetrator and public do not know about. There is a public interest in preserving the anonymity of informers. Otherwise, these 'wells of information will dry up' and law enforcement agencies would be hindered from preventing and detecting crime or administering the law.[272]

1.41. Section 31(1)(c) protects the identities of persons providing confidential information to those responsible for investigating corruption, misconduct, or a breach of the law.[273]

1.42. Section 31(1)(c) does not protect:

- Sources of information whose identity is public or obvious.[274] For example, where the identity of the author of the document is known to the applicant.[275]
- Reluctant sources of information.[276] For example, a potential witness in a civil proceeding who would prefer not to be identified before the legal hearing.[277]

1.43. Whether a person is a confidential source of information is a question of fact, determined by having regard to the following factors:

- confidentiality can be express or implied from the circumstances and can be inferred from the nature and contents of a document;[278]
- merely marking a document 'confidential' is not sufficient evidence of an intention that the information was provided confidentially or would remain confidential;[279]
- a legislative basis for information being provided in a confidential manner supports the application of the exemption;[280]
- whether the information is reliable or unreliable, true or false, does not impact whether it was communicated in confidence;[281] and

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[272] *Jarvie v Magistrates' Court* [1995] 1 VR 84, 88.

[273] *XYZ v Victoria Police* [2010] VCAT 255 [154].

[274] *Re Coleman and Director General Local Government Department* (1985) 1 VAR 9, 13.

[275] *Accident Compensation Commission v Croom* [1991] 2 VR 322, 329.

[276] *XYZ v Victoria Police* [2010] VCAT 255 [155]; *Accident Compensation Commission v Croom* [1991] 2 VR 322, 329.

[277] *Accident Compensation Commission v Croom* [1991] 2 VR 322, 329; *XYZ v Victoria Police* [2010] VCAT 255 [155].

[278] *Ryder v Booth* [1985] VR 869, 883; *XYZ v Victoria Police* [2010] VCAT 255 [155], [265].

[279] See *Graze v Commissioner of State Revenue* [2013] VCAT 869 [33]. Whilst this decision relates to the section 35 exemption, the legal principle is equally applicable to section 31(1)(c).

[280] *XYZ v Victoria Police* [2010] VCAT 255 [265]; *Woodford v Ombudsman* [2001] VCAT 721 [95].

[281] *Richardson v Commissioner for Corporate Affairs* (1987) 2 VAR 51 [52]–[53].

- information that would not, by itself, identify the confidential source of information but that would tend to result in the identification of such a confidential source could be exempt.[282]

Provided in the context of the enforcement or administration of the law

1.44. An agency or Minister must be able to identify and document how the specific information provided relates to the enforcement of the law or the administration of the law. These terms are broad and have wide application.

1.45. There is a distinction between the 'enforcement of the law' and the 'proper administration of the law'.

1.46. Enforcement of the law deals with the actual process of enforcing of the law (for example, prosecuting cases or pursuing fines and court orders).[283]

1.47. The proper administration of the law deals with how the law is administered.[284] It requires a connection with the criminal law or with the process of upholding or enforcing the civil law (for example, collecting information to monitor compliance with the law).[285]

Example

The proper administration of the law includes:

- The management of prisons and prisoners,[286] the classification of prisoners and the parole of prisoners[287] and the ability to operate the prison security system safely.[288]
- Preliminary investigations and disciplinary proceedings against professionals such as registered medical practitioners,[289] and police officers.[290]
- Investigations into suspected fraudulent activities by claimants and service providers, conducted for the purpose of protecting the Transport Accident Fund and prosecuting wrongdoing under the *Transport Accident Act 1986* (Vic).[291]

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[282] *Gunawan v Department of Education* (unreported, VCAT, Davis SM, 15 December 1998).

[283] *JCL v Victoria Police* [2012] VCAT 1060.

[284] *JCL v Victoria Police* [2012] VCAT 1060 [28].

[285] *Accident Compensation Commission v Croom* [1991] 2 VR 322, 324. *Cichello v Department of Justice* [2014] VCAT 340 [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 [28] and *Accident Compensation Commission v Croom* [1991] 2 VR 322.

[286] *Fogarty v Office of Corrections* (1989) 3 VAR 214 [48].

[287] *Knight v Department of Justice* [2012] VCAT 369 [115].

[288] *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586 [27], [50].

[289] *Knight v Medical Board (Vic)* (1991) 5 VAR 171 [184]-[185].

[290] *Marke v Department of Justice and Regulation* [2019] VCAT 479, [42].

[291] *Quick v Transport Accident Commission* [2022] VCAT 622, [31]-[37].

- Child protection investigations conducted under the *Children, Youth and Families Act 2005* (Vic).[292]

Case example

Sloan v Secretary to the Department of Justice and Community Safety [2019] VCAT 586

Background

The applicant was a prisoner in a correctional facility and requested access to anonymous handwritten notes provided to prison staff.

Decision

The anonymous notes were exempt under section 31(1)(c).

Prisoners who provide anonymous handwritten notes to prison authorities concerning other prisoners, do so confidentially.

Disclosure of the anonymous notes would enable a person to ascertain the identity of the author of the note. The author's identity could be ascertained by their handwriting and by the prisoners named in the notes, when considered in the context that prisoners are aware of the friendships, alliances and allegiances which exist between prisoners and groups of prisoners.

Anonymous notes provided to prison authorities by a prisoner in a unit concerning other prisoners in that unit are a source of intelligence for prison authorities, relevant to the proper administration of the law, being the ongoing operations of prison security.

Methods or procedures – section 31(1)(d)

1.48. A document or information is exempt under section 31(1)(d) if two conditions are satisfied:

- disclosure of the information would, or would be reasonably likely to disclose methods or procedures for preventing, detecting, investigating, or dealing with breaches of the law; and
- release of the information would, or would be reasonably likely to prejudice the effectiveness of those methods or procedures.

[292] '*CQ8' and Department of Families, Fairness and Housing* [2021] VICmr 44, [39].

Steps to applying the exemption

1.49. An agency or Minister seeking to apply the section 31(1)(d) exemption in relation to disclosure of methods or procedures should:

1. Identify the specific law (legislation or regulation) that is being administered and the specific information – the methods or procedures – to which the exemption may apply.

2. Establish how those methods or procedures relate to preventing, detecting, investigating, or dealing with matters arising out of breaches or evasions of the law.

3. Determine if disclosure of the information would be reasonably likely to disclose the identified methods or procedures, having consideration to whether knowledge of the methods or procedures are widespread or known.

4. Determine whether disclosure of the information would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures by establishing and documenting:

    a. what the prejudice is – how would disclosure harm the effectiveness of those methods or procedures; and

    b. why the prejudice would, or is reasonably likely to, occur.

5. Where relevant, consult with any others, authority, or Minister on whether the information should be disclosed.[293]

6. Consider whether any exceptions set out in section 31(2) apply to the information, and if so, consult on the whether the document should be disclosed in the public interest.[294]

7. Consider if it is necessary to neither confirm nor deny the existence of a requested document in accordance with section 27(2)(b).

8. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

[293] *Freedom of Information Act 1982* (Vic), section 31(5).

[294] *Freedom of Information Act 1982* (Vic), section 31(6).

Methods or procedures

1.50. The methods or procedures identified must not be widespread and well-known.[295] Where methods or procedures are well known, then it is unlikely to cause prejudice to the effectiveness of those methods or procedures. This includes standard investigatory practices like conducting interviews or gathering evidence in a way that could be reasonably inferred from knowledge of the offence being investigated.

1.51. An agency or Minister should precisely identify and document how those methods or procedures relate to preventing, detecting, investigating, or dealing with matters arising from breaches or evasions of the law. For example, a document that describes a specific technique or process for investigating a certain type of criminal offence.

1.52. If disclosure would prejudice the effectiveness of persons using the methods or procedures, this is the same as if the methods or procedures themselves were prejudiced.[296]

Example

A document contains information that shows the method used by members of Victoria Police to investigate a breach of the law.

If this information were disclosed to the person under investigation, members of Victoria Police would be prejudiced when using the method in future, because:

- the person would be able to avoid or counter police responses; and
- police officers would be very reluctant to provide similar information in future, knowing that it could be disclosed to the person under investigation.

This prejudice to the effectiveness of members of Victoria Police is the same as prejudice to the effectiveness of the method itself.

1.53. An agency or Minister should carefully consider whether disclosure of the document 'would' or 'would be reasonably likely' to prejudice the effectiveness of the identified method or procedure. The prejudice must be real, and not fanciful or remote.[297]

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[295] *XYZ v Victoria Police* [2010] VCAT 255, [177].

[296] *Akers v Victoria Police* [2022] VCAT 979 [38], [39] and *JCL v Victoria Police* [2012] VCAT 1060 [59] approving *Western Suburbs Legal Service v Victoria Police* (unreported, Administrative Appeals Tribunal of Victoria, Galvin DP, 18 August 1995).

[297] *Akers v Victoria Police* [2022] VCAT 979 [26] quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836; *Tucker v Commissioner of State Revenue* [2019] VCAT 2018 [113(b)].

Case examples

Akers v Victoria Police [2003] VCAT 398

The agency claimed section 31(1)(d) in relation to a printout of a switched message. The agency claimed that it revealed a procedure for alerting members of the Police when certain events occur.

VCAT found that the information in the document did not disclose a method or procedure that was not already known to the applicant as the information had been revealed in the agency's evidence at hearing. Consequently, the information in the document was not exempt under section 31(1)(d).

Akers v Victoria Police [2021] VCAT 1060

Background

The applicant requested CCTV footage outside a property on 5 December 2016.

The agency refused to confirm or deny the existence of the documents on the basis they would be exempt under section 31(1)(d).

The agency argued that surveillance methods it uses are necessarily covert and not widespread or well known. Revealing the existence or nonexistence of any documents concerning surveillance of the applicant on the specified date would either show that surveillance was taking place, and steps could then be taken by criminals to avoid surveillance; or no surveillance was being conducted and persons wishing to commit crimes would be at liberty to commit offences. This would prejudice the effectiveness of police methods (i.e., surveillance), that are used for preventing, detecting, investigating or dealing with breaches or evasions of the law.

The agency argued that this prejudice is the same for all police surveillance, whether the request relates to current surveillance activity or relates to events which are many years in the past, and irrespective of whether the person to whom the surveillance relates is or is likely to be the subject of existing or future investigation.

Decision

VCAT decided that the particular surveillance documents sought by the applicant were not exempt under section 31(1)(d).

VCAT rejected the agency's submission that police surveillance documents, as a class, were exempt under section 31(1)(d). VCAT stated that a blanket exemption for any documents revealing surveillance would be inconsistent with the obligation to interpret the FOI Act as far as possible to facilitate and promote the disclosure of information. Each case needs to be determined on its own facts, and the evidence presented.

On the evidence and facts of this case, VCAT was not satisfied that the claimed prejudice was real, rather than fanciful or remote. VCAT stated at [58]-[60] of the decision:

> 'Although it may be accepted that section 31(1)(d) has broader operation, it is still necessary for VicPol to establish that, despite Mr Akers' conviction and imprisonment and the period of time that has elapsed since the events in question, disclosing that surveillance was (or was not) being conducted at the Bulla property on 5 December 2016 would prejudice the effectiveness of methods or procedures for investigating breaches or evasions of the law more generally.
>
> While I have no doubt that DI Tymms is *subjectively* of the view that any disclosure about the existence of surveillance or otherwise is problematic, he expressed his views at such a level of generality and without reference to any specific examples of the impact that disclosure may have, that it is hard to accept his opinion in this regard.
>
> Considered *objectively*, there are a number of considerations suggesting that any disclosure as to the existence or otherwise of surveillance at the Bulla property on 5 December 2016 would not prejudice the effectiveness of police surveillance methods and procedures more generally. In this regard:
>
> - identifying whether any documents responsive to the request exist would only reveal whether Mr Akers was subject to surveillance in late 2016, not whether he has been subject to surveillance at any time before or after that time;
> - any surveillance that was conducted in 2016 related to a property that has apparently been sold, rather than the surveillance of any property where Mr Akers currently resides, such that the disclosure that surveillance was conducted at that time and location would not reveal any methods or procedures that remain relevant to Mr Akers now;
> - there is no suggestion, let alone evidence, that Mr Akers is involved in any current criminal activity or intends to engage in any such activity (a point Mr Goodwin was at pains to express in the hearing). As such, there is no evidence to suggest he is a 'subversive' (of the kind referred to by Deputy President Macnamara in *Thorne*) who may be inclined to continually check on his surveillance status in order to permit him to conduct criminal activity; and
> - the processing of Mr Akers' request does not mean that the Tribunal would necessarily reach the same view in relation to a freedom of information request made by a person with a long criminal history who might be expected to be subject to ongoing surveillance, and could therefore use knowledge of any surveillance activities to avoid detection of subsequent criminal activity. Each case would need to be determined on its own facts, and the evidence presented.'

Akers v Victoria Police [2022] VCAT 88[298]

Background

The applicant requested access to Interest Flags in the Victoria Police LEAP database.

Decision

VCAT found the Interest Flags were exempt under section 31(1)(d).

The creation, content, knowledge of and use of the Interest Flags are methods and procedures that Victoria Police use to detect, investigate and otherwise deal with matters arising out of breaches or evasions of the law.

The methods and procedures evident from the Interest Flags are known to and used only by Victoria Police. The information captured in Interest Flags about a person is 'essential to make an assessment as to how to stay safe' when engaging with that person.

If the Interest Flags were released, it would prejudice the effectiveness of Interest Flags in LEAP because Victoria Police would be less likely to use the Interest Flags and the value of the LEAP database would be eroded. Police interactions with the subjects of the records may become more dangerous and investigations may become less effective, ultimately leading to fewer prosecutions for breaches of the law. Further, if the Interest Flags were known, a person could alter their behaviour, which would substantially hinder police operations.

Although the applicant said that he knew how Victoria Police used Interest Flags, VCAT was satisfied that he had no real understanding of what things may trigger an Interest Flag being raised or how they may then be employed by Victoria Police.

Parker v Court Services Victoria [2021] VCAT 461

Background

The applicant requested access to CCTV footage from two cameras behind a specific counter at the Dandenong Magistrates' Court on a particular day.

Decision

VCAT found that the documents were exempt under section 31(1)(d).

Whilst the location and purpose of the CCTV cameras is well known, VCAT accepted evidence that viewing footage from particular cameras would disclose aspects of the operation of the camera that is not known, including, the limits of the range of vision or the coverage of the cameras, including any blind spots and the timing of recordings.

VCAT accepted that this would be reasonably likely to undermine the effectiveness of the CCTV cameras, including as a deterrent measure, by potentially indicating how the cameras could be circumvented. VCAT accepted evidence of past threats and incidents of harm to court premises.

VCAT accepted that in a court environment in which security and law enforcement matters are a foreseeable occurrence, release of the CCTV footage, should any exist, would be reasonably likely to prejudice the effectiveness of security measures and procedures at the Court.

[298] See also *Akers v Victoria Police* [2023] VCAT 442.

Endanger life or physical safety – section 31(1)(e)

1.54. A document or information is exempt under section 31(1)(e) where:

- disclosure of the document or information would or would be reasonably likely to endanger the life or physical safety of a person; and
- where that person:
  - is engaged in, or connected with law enforcement; or
  - has provided confidential information in relation to the enforcement or administration of the law.

Steps to applying the exemption

1.55. An agency or Minister seeking to apply the section 31(1)(e) exemption in relation to information likely to endanger the life or physical safety of a person, should:

1. Specifically identify the information to which the exemption may apply.
2. Determine whether disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of a person with reference to the factors outlined in these Guidelines.
3. Establish that the person whose life or physical safety is endangered is either:
   a. engaged in, or in connection with, law enforcement; or
   b. has provided confidential information in relation to the enforcement or administration of the law.
4. Where relevant, consult with any other agency, authority, or Minister on whether the information should be disclosed.[299]
5. Consider whether any exceptions set out in section 31(2) apply to the information, and if so, consult on the whether the document should be disclosed in the public interest.[300]
6. Consider if it is necessary to neither confirm nor deny the existence of a requested document in accordance with section 27(2)(b).

[299] *Freedom of Information Act 1982* (Vic), section 31(5).

[300] *Freedom of Information Act 1982* (Vic), section 31(6).

7. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

Would or would be reasonably likely to endanger the life or physical safety of a person

1.56. When deciding if disclosure of a document would be reasonably likely to endanger the lives or physical safety of relevant persons, an agency or Minister should consider:

- there must be a real chance of the harm occurring, rather than a fanciful or remote chance;[301]
- the danger need only be reasonably likely, not a certainty;[302]
- the danger to the relevant persons must arise from the disclosure of the specific document rather than from other circumstances;[303]
- the danger could arise from the applicant, but also from others if the information becomes generally known;[304]
- physical safety not only includes actual safety but also the relevant person's perception of whether they are safe;[305]
- it is the impact on the relevant person that is relevant, not the motives of the applicant.[306]

Engaged in, or in connection with law enforcement

1.57. To establish the section 31(1)(e) exemption, the person whose life or physical safety is endangered must:

- be engaged in, or in connection with, law enforcement; or
- have provided confidential information in relation to the enforcement or administration of the law.

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[301] *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 842.

[302] *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 844.

[303] *Re Lawless and Secretary to Law Department* (1985) 1 VAR 42, 50–51.

[304] *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 844; *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586 [52].

[305] *O'Sullivan v Police (Vic)* (2005) 22 VAR 426 [19].

[306] *O'Sullivan v Police (Vic)* (2005) 22 VAR 426 [20].

1.58. Being engaged in, or connected, with law enforcement is generally self-evident from the person's employment.

> **Example**
>
> A police officer, correctional officer, or sheriff's officer.

Provided confidential information

1.59. Whether a person has provided confidential information is a question of fact, determined by having regard to the following factors:

- confidentiality can be express or implied from the circumstances and can be inferred from the nature and contents of a document;[307]
- merely marking a document 'confidential' is not sufficient evidence of an intention that the information was provided confidentially or would remain confidential;[308]
- a legislative basis for information being provided in a confidential manner supports the application of the exemption;
- whether the information is reliable or unreliable, true or false, does not impact whether it was communicated in confidence;[309] and
- information that would not, by itself, identify the confidential source of information but that would tend to result in the identification of such a confidential source could be exempt.[310]

In the context of the enforcement or administration of the law

1.60. An agency or Minister must be able to identify and document how the specific information provided relates to the enforcement of the law or the administration of the law. These terms are broad and have wide application.

1.61. There is a distinction between the 'enforcement of the law' and the 'proper administration of the law'.

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[307] *Ryder v Booth* [1985] VR 869, 883; *XYZ v Victoria Police* [2010] VCAT 255 [155], [265].

[308] *Orchard v Medical Practitioners Board of Victoria* (unreported, VCAT, Megay SM, 17 February 2000).

[309] *Richardson v Commissioner for Corporate Affairs* (1987) 2 VAR 51, 52–53.

[310] *Orchard v Medical Practitioners Board of Victoria* (unreported, VCAT, Megay SM, 17 February 2000).

1.62. Enforcement of the law deals with the actual process of enforcing of the law (for example, prosecuting cases or pursuing fines and court orders).[311]

1.63. The proper administration of the law deals with how the law is administered.[312] It requires a connection with the criminal law or with the process of upholding or enforcing the civil law (for example, collecting information to monitor compliance with the law).[313]

Examples

The proper administration of the law includes:

- The management of prisons and prisoners,[314] the classification of prisoners and the parole of prisoners[315] and the ability to operate the prison security system safely.[316]
- Preliminary investigations and disciplinary proceedings against professionals such as registered medical practitioners,[317] and police officers.[318]
- Investigations into suspected fraudulent activities by claimants and service providers, conducted for the purpose of protecting the Transport Accident Fund and prosecuting wrongdoing under the *Transport Accident Act 1986* (Vic).[319]
- Child protection investigations conducted under the *Children, Youth and Families Act 2005* (Vic).[320]

Case examples

Humane Society International Inc v Royal Botanic Gardens [2002] VCAT 1051

Background

The applicant sought access to the Flying Fox Management Strategy and operational plan for the Royal Botanic Gardens.

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[311] *JCL v Victoria Police* [2012] VCAT 1060 .

[312] *JCL v Victoria Police* [2012] VCAT 1060, [28].

[313] *Accident Compensation Commission v Croom* [1991] 2 VR 322, 324. *Cichello v Department of Justice* [2014] VCAT 340 [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 [28] and *Accident Compensation Commission v Croom* [1991] 2 VR 322.

[314] *Fogarty v Office of Corrections* (1989) 3 VAR 214, [48].

[315] *Knight v Department of Justice* [2012] VCAT 369 [115].

[316] *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586, [27], [50].

[317] *Knight v Medical Board (Vic)* (1991) 5 VAR 171, [184]-[185].

[318] *Marke v Department of Justice and Regulation* [2019] VCAT 479, [42].

[319] *Quick v Transport Accident Commission* [2022] VCAT 622 [31]-[37].

[320] '*CQ8' and Department of Families, Fairness and Housing* [2021] VICmr 44, [39].

The agency claimed the documents were exempt under section 31(1)(e).

Decision

The documents were not exempt under section 31(1)(e).

The activities of the Royal Botanic Gardens Board relating to the control of bats did not form part of the administration of the law because it did not have a connection with:

- the criminal law; or
- the legal process of upholding or enforcing the civil law; or
- monitoring compliance with the law.

Sloan v Secretary to the Department of Justice and Community Safety [2019] VCAT 586

Background

The applicant was a prisoner in a correctional facility. The applicant requested access to anonymous handwritten notes provided to prison staff.

Decision

The anonymous notes were exempt under section 31(1)(e).

Prisoners who provide anonymous handwritten notes to prison authorities concerning other prisoners, do so confidentially.

Disclosure of the anonymous notes would enable a person to ascertain the identity of the author of the note. The author's identity could be ascertained by their handwriting and by the prisoners named in the notes, when considered in the context that prisoners are aware of the friendships, alliances and allegiances which exist between prisoners and groups of prisoners.

Anonymous notes provided to prison authorities by a prisoner in a unit concerning other prisoners in that unit are a source of intelligence for prison authorities, relevant to the proper administration of the law, being the ongoing operations of prison security.

The identification of the author of the notes could endanger the lives or physical safety of that person. There is a reasonable possibility that a prisoner may punish a person they believe to be an informer or who has threatened another prisoner.

Consulting relevant third parties – sections 31(5) and (6)

1.64. Section 31 requires an agency or Minister to consult with a relevant third party in two instances:

- to understand whether the exemption in section 31(1) applies;[321] and
- to decide whether it would be in the public interest to disclose a document captured by section 31(2).[322]

1.65. When consulting, the 30-day period for deciding a request may be extended by up to 15 days under section 21(2)(a).

1.66. Consultation usually arises when the information relates to another agency, or where another agency is involved in the matter. In some cases, there may be no relevant third party to consult.

1.67. An agency or Minister is only required to consult with a third party where it is reasonably practicable to do so.

> For more information on whether consultation is reasonably practicable, see section 33 of the FOI Guidelines.

1.68. Consultation may occur in any manner or form. For example, by telephone, email, post, or a meeting.

1.69. Professional Standard 7.3 requires an agency to keep a record of the consultation. This includes who was consulted, whether they consented or objected, and any reasons provided.

1.70. There is no requirement to notify the third party of the agency or Minister's decision on the request. However, an agency or Minister should consider whether to inform the third party of the outcome of the decision – whether it is to release or refuse access to the document under the Act.

1.71. The third party does not have any review rights if they object to disclosure or disagree with a decision to release information.

[321] *Freedom of Information Act 1982* (Vic), section 31(5).

[322] *Freedom of Information Act 1982* (Vic), section 31(6).

Consultation when deciding whether a document is exempt – section 31(5)

1.72. When considering whether a document is exempt under section 31(1), an agency or Minister must, if reasonably practicable:

- notify any relevant Minister or Commonwealth, State, or Territory agency or authority that a request has been received for the document; and
- seek the third party's views about whether the document or information should be disclosed.

Example

A local council receives a request for documents about an investigation into illegal dumping. The request includes documents the local council provided to the Environment Protection Authority (**EPA**) for further investigation.

Under section 31(5), the local council should notify the EPA of the request and seek the EPA's views on whether the documents should be disclosed.

1.73. When undertaking consultation, an agency or Minister should inform a third party of the relevant subsection of section 31(1) that may be engaged, and what conditions must be established for that exemption to apply.

Example

For the section 31(1)(a) exemption relating to an investigation, the agency or Minister should inform the third party that the exemption will only apply if it is established that:

- the information relates to an investigation of a breach or possible breach of the law in a particular instance; and
- the information was prepared either during, or for the purposes of, that investigation; and
- release of the information would or would be reasonably likely to prejudice that investigation.

1.74. Informing the third party of the elements of the exemption will help enable the third party to provide an informed response and ensure their reasons are relevant, if they object to the document being released.

Consultation when deciding whether it is in the public interest to grant access to a document – section 31(6)

1.75. When considering whether a document should be disclosed under section 31(2), an agency or Minister must, if reasonably practicable:

- notify any relevant Minister or Commonwealth, State, or Territory agency or authority that a request has been received for the document; and
- seek the third party's views about whether there is a public interest in disclosing the document or information.

More information

See section 33 of the FOI Guidelines for more information about:

- determining whether consultation is reasonably practicable;
- how to conduct consultation;
- privacy considerations; and
- keeping records of consultation under the Professional Standards.

Neither confirming nor denying the existence of a document

1.76. In some cases, merely acknowledging that a document does, or does not exist, can harm or prejudice an investigation. In this situation, an agency or Minister may make a decision in terms that neither confirms nor denies the existence of the requested document.[323]

Example

An agency receives a request for documents about an ongoing, covert investigation. Any documents that acknowledged the existence of that covert investigation would likely compromise that investigation by alerting the subject to the investigation.

In this circumstance, the agency can neither confirm nor deny that a document exists pursuant to section 27(2)(b), and state that any document, if it did exist, would be exempt under section 31(1)(a).

[323] Under section 27(2)(b).

Review by Information Commissioner

1.77. During a review, there are special requirements for providing OVIC with a document that an agency or Minister claims is exempt under section 31.

For more information, see section 63D – Special requirements for production of documents claimed to be exempt under section 28, 29A, 31 or 31A.

Section 31A – Documents relating to IBAC

Extract of legislation

31A Documents relating to IBAC

(1) A document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—

(a) prejudice an investigation undertaken by the IBAC; or

(b) disclose, or enable a person to ascertain, the identity of any person or body (other than Victoria Police) who has provided information to the IBAC; or

(c) disclose methods or procedures for preventing, investigating or dealing with protected disclosures, complaints or notifications relating to corrupt conduct or police personnel conduct the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures; or

(d) endanger the lives or physical safety of persons engaged in or in connection with the IBAC's functions or persons who have provided information to the IBAC.

(2) In deciding whether a document is an exempt document under subsection (1), an agency or Minister, if reasonably practicable, must—

(a) notify the IBAC that the agency or Minister has received a request for access to the document; and

(b) seek the IBAC's view as to whether the document should be disclosed.

Note

See also section 194 of the **Independent Broad-based Anti-corruption Commission Act 2011**.

Guidelines

Overview of section 31A

1.1. The purpose of section 31A is to protect the:

- integrity of the Independent Broad-based Anti-corruption Commission's (**IBAC**) investigations, and the effectiveness of methods and procedures for dealing with disclosures, complaints and notifications; [324]
- identity of persons or bodies who provide information to IBAC; and
- lives or physical safety of persons involved in IBAC's functions or who have provided information to IBAC.

1.2. To be exempt under section 31A(1), the agency or Minister must establish that disclosure of the document or information would or would be reasonably likely to:

- prejudice an investigation undertaken by the IBAC;[325] or
- disclose, or enable a person to ascertain, the identity of any person or body (other than Victoria Police) who has provided information to the IBAC;[326] or
- disclose methods or procedures for preventing, investigating or dealing with:
  - public interest disclosures;[327] or
  - complaints or notifications relating to corrupt conduct or police personnel conduct; and
  - the disclosure of the document or information would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures;[328] or
- endanger the lives or physical safety of persons engaged in or in connection with the IBAC's functions or persons who have provided information to the IBAC.[329]

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[324] Victoria, Parliamentary Debates, Legislative Assembly, 23 June 2016, 2868 (Martin Pakula, Attorney-General); *Marke v Victoria Police FOI Division* [2018] VCAT 1320 [113].

[325] *Freedom of Information Act 1982* (Vic), section 31A(1)(a).

[326] *Freedom of Information Act 1982* (Vic), section 31A(1)(b).

[327] As of 1 January 2020, the reference to 'protected disclosures' in section 31A(1)(c) is out of date and should be read as 'public interest disclosures', following the replacement of the protected disclosure scheme with the public interest disclosure scheme in the *Public Interest Disclosures Act 2012* (Vic).

[328] *Freedom of Information Act 1982* (Vic), section 31A(1)(c).

[329] *Freedom of Information Act 1982* (Vic), section 31A(1)(d).

1.3. Section 31A should be read alongside section 194 of the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* (**IBAC Act**).[330]

1.4. A document may be:

- excluded from the right of access under the FOI Act because of section 194 of the IBAC Act; or
- exempt under section 31A.

1.5. Section 31A must be read consistently with the object of the FOI Act in section 3, which is to extend as far as possible the right of the community to access government held information.

Relationship of section 31A to other laws that exclude a document from the operation of the FOI Act

Section 194 of the IBAC Act

1.6. The note at the bottom of section 31A refers to section 194 of the IBAC Act. Section 194 of the IBAC Act excludes certain documents from the FOI Act. This means access to documents falling within section 194 cannot be accessed under the FOI Act.

1.7. The documents captured by section 194 of the IBAC Act fall into two categories:

- documents in the possession of 'any person or body';[331] and
- documents in the possession of the IBAC.[332]

Documents in the possession of an agency or Minister

1.8. Section 194(1) of the IBAC Act applies to documents in the possession of an agency or Minister that contain information relating to:

- a recommendation made by the IBAC under the IBAC Act;[333] or
- an investigation conducted under the IBAC Act;[334] or

[330] Note under section 31A; Victoria, Parliamentary Debates, Legislative Assembly, 23 June 2016, 2868 (Martin Pakula, Attorney-General); *Marke v Victoria Police FOI Division* [2018] VCAT 1320 [111].

[331] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(1).

[332] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(2).

[333] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(1)(a).

[334] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(1)(b).

- a report, including a draft report, on an investigation conducted under the IBAC Act.[335]

1.9. If section 194(1) of the IBAC Act applies, access to the document cannot be provided under the FOI Act.

1.10. For the purposes of section 194(1)(b), 'an investigation conducted under the IBAC Act' means an investigation conducted by the IBAC according to the processes and powers under the provisions of the IBAC Act. It does not mean an investigation conducted by a third party, even if that investigation was referred to the third party by the IBAC.[336]

Example

An applicant makes a request to Victoria Police for access to a document relating to an investigation conducted by Victoria Police under the *Victoria Police Act 2013* (Vic). IBAC referred the investigation to Victoria Police.

Section 194 of the IBAC Act does not apply to this document because it is not an investigation conducted by the IBAC under the IBAC Act.

When considering whether to release the document under the FOI Act, Victoria Police may consider whether the document contains exempt information under sections 31A(b), (c) or (d) and any other applicable exemptions.

Documents in the possession of IBAC

1.11. Section 194(2) of the IBAC Act applies to documents in the possession of IBAC that contain information relating to:

- a complaint;[337] or
- information received by the IBAC under section 56 of the IBAC Act;[338] or
- a notification made to the IBAC under a mandatory notification provision;[339] or
- a preliminary inquiry.[340]

1.12. If section 194(2) applies, access to the document cannot be provided under the FOI Act.

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[335] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(1)(c).

[336] *Marke v Victoria Police FOI Division* [2018] VCAT 1320 [7]-[8], [65]-[69].

[337] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(2)(a).

[338] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(2)(b).

[339] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(2)(c).

[340] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 194(2)(d).

Section 78 of the Public Interest Disclosures Act 2012

1.13. Section 78 of the *Public Interest Disclosures Act 2012* (Vic) (**PID Act**) excludes certain documents from the FOI Act. This means access to documents falling within section 78 cannot be accessed under the FOI Act.

1.14. Section 78 of the PID Act captures documents in the possession of any person or body, to the extent that the document discloses information that:

- relates to a public interest disclosure; or
- relates to an assessable disclosure; or
- is likely to lead to the identification of a person who made a public interest disclosure.

1.15. Under the PID Act, IBAC is one of the agencies responsible for receiving, assessing, and making determinations about public interest disclosures and assessable disclosures.

1.16. Public interest disclosures and assessable disclosures that are assessed to be 'public interest complaints' by IBAC can be investigated under the IBAC Act.

1.17. An agency or Minister should confirm whether a document falls within section 78 of the PID Act, before considering the exemption in section 31A of the FOI Act. If section 78 applies, the document cannot be requested under the FOI Act and therefore the agency does not need to consider the exemption in section 31A.

Section 174K of the Firearms Act 1996

1.18. Section 174K of the *Firearms Act 1996* (Vic) (**Firearms Act**) excludes certain documents from the FOI Act. This means access to documents falling within section 174K cannot be accessed under the FOI Act.

1.19. Section 174K captures documents in the possession of any person or body, to the extent that the document discloses information relating to the performance of the duties and functions or the exercise of the powers of the IBAC or an authorised IBAC officer under the Firearms Act.

1.20. IBAC has three oversight functions under the Firearms Act:

- quarterly review of issued firearms prohibition orders;
- a standing power to monitor the exercise of certain Victoria Police powers; and
- the provision of biennial reports to the Minister of Police.

1.21. Where relevant, an agency should confirm whether a document falls within section 174K of the Firearms Act, before considering the exemption in section 31A of the FOI Act. If section 174K applies, the document cannot be requested under the FOI Act and therefore the agency does not need to consider the exemption in section 31A.

Would or would be reasonably like to prejudice an investigation undertaken by the IBAC – section 31A(1)(a)

1.22. The exemption in section 31A(1)(a) applies to a document or information, if its disclosure would or would be reasonably like to prejudice an investigation undertaken by the IBAC.

1.23. Section 194(1)(b) of the IBAC Act applies to a document containing information relating to a current IBAC investigation. If the document falls within section 194(1)(b), it cannot be requested or provided under the FOI Act.

1.24. There will be situations where a document or information does not fall under section 194(1)(b) of the IBAC Act but does fall within the exemption in section 31A(1)(a) of the FOI Act. This may occur where a document does not relate to a current IBAC investigation, but its disclosure would or would be reasonably likely to prejudice an IBAC investigation.

Example

IBAC conducts a preliminary inquiry (not an investigation) under the IBAC Act. During the preliminary inquiry, IBAC requests information from another agency.

An applicant makes a request for access to the other agency under the FOI Act, for access to the document containing IBAC's preliminary inquiry, and any response from the agency.

The requested documents do not fall within section 194(1)(b) of the IBAC Act, because the documents do not relate to a current IBAC investigation.

The FOI officer consults with IBAC under section 31A(2), to assist in determining whether the documents would be exempt under section 31A(1)(a).

IBAC advises the officer that its preliminary inquiries are not yet complete, and that disclosure of the fact that there is a preliminary inquiry, and information relating to who has been contacted in relation to the preliminary inquiry, would expressly or constructively disclose the subject matter of any resulting IBAC investigation and would be reasonably likely to prejudice that investigation.

The officer considers the subject matter of the documents and the consultation response from IBAC, and determines the documents are exempt from access under section 31A(1)(a).

If, at the time of the request, IBAC's preliminary inquiries were complete and had not resulted in an IBAC investigation, the documents would not be exempt under section 31A(1)(a). However, the exemption in section 31A(1)(c) may apply, if disclosure of the documents would or would be reasonably likely to disclose IBAC's methods or procedures, and prejudice the effectiveness of those methods or procedures.

1.25. The phrase 'would or would be reasonably likely to' is also used in the section 31 exemption for law enforcement documents.

Protecting the identity of any person or body who has provided information to the IBAC – section 31A(1)(b)

1.26. Section 31A(1)(b) applies to a document or information, if its disclosure would or would be reasonably likely to:

- disclose the identity of any person or body (other than Victoria Police); or
- enable a person to ascertain the identity of any person or body (other than Victoria Police);

who has provided information to IBAC.

1.27. The phrase 'would or would be reasonably likely to' is also used in the section 31 exemption for law enforcement documents.

1.28. Disclosing a person or body's identity means their identity:

- is apparent from the information in the document; or
- can be determined by taking reasonable steps to link the information in the document with other information. This will depend on what information is in the document, what other information is available to the applicant and the feasibility of linking the information together. The other information could be publicly available information or information that the applicant knows.

Example

The requested document contains the gender, job title, and workplace of a person who has provided information to the IBAC.

Publicly available information on the website of the workplace indicates there is only one employee with that gender and job title.

In this situation, the person's identity would be reasonably likely to be ascertained if the document was disclosed because the other information needed to ascertain identity is easily accessible.

More information

For more information on identifying a person, see the concept of 'Personal information' in OVIC's IPP Guidelines and OVIC's de-identification guidance.

Protecting the effectiveness of methods or procedures – section 31A(1)(c)

1.29. A document or information is exempt under section 31A(1)(c) if two conditions are satisfied:

- disclosure of the document or information would, or would be reasonably likely to disclose methods or procedures for preventing, investigating or dealing with:
  - public interest disclosures;[341] or
  - complaints or notifications relating to corrupt conduct[342] or police personnel conduct;[343] and
- the disclosure of the document or information would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.

1.30. IBAC has the power to receive and investigate public interest disclosures and complaints and notifications relating to corrupt conduct and police personnel conduct.[344]

1.31. The elements of this exemption are substantially the same as the elements in the section 31(1)(d) exemption for law enforcement documents. Refer to this section of the FOI Guidelines for more information on when this exemption applies, including what 'would or would be reasonably likely to' means.

[341] See section 9 of the *Public Interest Disclosures Act 2012* (Vic).

[342] "Corrupt conduct" is defined in section 4 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

[343] "Police personnel conduct" is defined in section 5 of the *Independent Broad-based Anti-corruption Commission Act 2011* (Vic).

[344] *Independent Broad-based Anti-corruption Commission Act 2011* (Vic), section 15.

Protecting a person's life or physical safety – section 31A(1)(d)

1.32. A document or information is exempt under section 31A(1)(d) where:

- disclosure of the document or information would, or would be reasonably likely to endanger the life or physical safety of a person; and
- where that person is:
  - engaged in, or connected with the IBAC's functions; or
  - has provided information to the IBAC.

1.33. This exemption is similar to the exemption in section 31(1)(e) for law enforcement documents. Refer to this section of the FOI Guidelines for more information on when this exemption applies, including what 'would or would be reasonably likely to' means.

Consultation with IBAC under section 31A(2)

1.34. When considering whether to apply the exemption in section 31A(1), an agency or Minister must, if reasonably practicable:

- notify the IBAC that the agency or Minister has received a request for the document; and
- obtain the IBAC's views about whether the document or information should be disclosed.

1.35. When consulting, the 30-day period for deciding a request may be extended by up to 15 days under section 21(2)(a).

1.36. An agency or Minister is only required to notify and seek the views of the IBAC where it is reasonably practicable to do so. In practice, there are unlikely to be any circumstances where it is not reasonably practicable to consult.

1.37. Consultation with IBAC may occur in any manner or form. For example, by telephone, email, post, or a meeting. An agency or Minister may email IBAC's FOI contact email address foi@ibac.vic.gov.au.

1.38. When undertaking consultation, IBAC should be made aware of the applicable exemption and what must be established for the exemption to apply.[345] Informing IBAC of the information required to establish the elements of the exemption will help enable IBAC to provide an informed response and ensure their reasons are relevant, if they object to the document being released.

1.39. There is no requirement to notify IBAC of the agency or Minister's decision on the request. However, an agency or Minister should consider whether to inform IBAC of the outcome of the decision – whether it is to release or refuse access to the document.

See section 33 of the FOI Guidelines for more information about:

- determining whether consultation is reasonably practicable;
- how to conduct consultation;
- privacy considerations; and
- keeping records of consultation under the Professional Standards.

Discretion to disclose exempt documents

1.40. The decision to exempt a document under section 31A is a discretionary power.[346] An agency or Minister can choose to provide access to information that would otherwise be exempt under section 31A, where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

For more information, see section 16 – Access to documents apart from Act.

1.41. The discretion to disclose an exempt document only applies where the document is subject to the FOI Act. The discretion does not apply to a document that falls within section 194 of the IBAC Act, section 78 of the PID Act or section 174K of the Firearms Act. These provisions exclude the FOI Act from applying to the relevant documents.

[345] See the note to Professional Standard 7.3.

[346] *Smith v Victoria Police* [2005] VCAT 654, [60].

Review by the Office of the Victorian Information Commissioner

1.42. During a review, there are special requirements for providing the Office of the Victorian Information Commissioner with a document that an agency or Minister claims is exempt under section 31A.

> For more information see section 63D – Special requirements for production of documents claimed to be exempt under section 28, 29A, 31 or 31A.

Section 32 – Documents affecting legal proceedings

Extract of legislation

32 Documents affecting legal proceedings

(1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege.

(2) A document of the kind referred to in section 8(1) is not an exempt document by virtue of subsection (1) of this section by reason only of the inclusion in the document of a matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8(1).

Guidelines

Overview

1.1. Section 32(1) exempts documents subject to legal professional privilege or client legal privilege. The principles of LPP are found in common law (judge made law). Client legal privilege is codified in sections 118 and 119 of the *Evidence Act 2008* (Vic) (**Evidence Act**).

1.2. To apply section 32(1), it is generally not necessary to distinguish between legal professional privilege and client legal privilege.[347] For the FOI Guidelines, the term 'legal privilege' is used to refer to both.

1.3. Both legal professional privilege and client legal privilege cover confidential communications:

- providing legal advice (**advice privilege**); and
- prepared for current or anticipated litigation or court proceedings (**litigation privilege**).[348]

[347] This approach is also adopted by the Victorian Civil and Administrative Tribunal. See for example, *Coulson v Department of Premier and Cabinet* [2018] VCAT 229.

[348] See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67 and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.

1.4. The purpose of legal privilege is to promote the public interest in the proper conduct of litigation. It does this by protecting confidential communications between a lawyer and their client, to allow them to speak freely.[349]

1.5. To apply section 32(1), an agency or Minister must establish the elements of either advice privilege or litigation privilege. An agency or Minister should be clear about whether advice privilege or litigation privilege is relied on, and ensure each element is met. See the 'advice privilege' and 'litigation privilege' headings below for information about the elements of each stream of legal privilege.

1.6. Section 32(1) must be read consistently with the object of the Act in section 3, which is to extend as far as possible the right of the community to access government held information.

1.7. If a document contains distinct parts that are legally privileged and distinct parts that are non-privileged, it is only the privileged material that is exempt under section 32(1).[350] The non-exempt information should be provided to the applicant provided it is practicable to provide an edited copy of the document.[351]

Discretion to disclose exempt documents

1.8. The decision to exempt a document under section 32(1) is discretionary.[352] However, it is important to remember that the privilege belongs to the client and so it is only the client who can decide to waive the privilege.

1.9. An agency or Minister can choose to provide access to information that would otherwise be exempt under section 32(1), where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

> For more information, see section 16 – Access to documents apart from Act.

1.10. An agency should consider whether choosing to release privileged information is a loss or waiver of legal privilege. See the 'Has there been a loss or waiver of privilege?' heading below for more information.

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[349] *Grant v Downs* [1976] HCA 63 [19].

[350] *Birrell v Department of State & Regional Development* [2001] VCAT 50 [12] citing *Waterford v. Commonwealth* [1987] HCA 25 [11] per Deane J.

[351] In accordance with section 25.

[352] *Smith v Victoria Police* [2005] VCAT 654, [60].

What is advice privilege?

1.11. A document or information attracts advice privilege, and is exempt under section 32(1), if it would disclose:

- a confidential communication between a client (or their agent) and their lawyer that was made for the dominant purpose of obtaining or providing legal advice; or
- a confidential communication between two or more lawyers acting for their client that was made for the dominant purpose of obtaining or providing legal advice; or
- the contents of a confidential document (whether delivered or not) prepared by a client, their lawyer, or another person for the dominant purpose of obtaining or providing legal advice.

Steps to applying advice privilege

1.12. An agency or Minister seeking to establish that a document is exempt under section 32(1) because it attracts advice privilege should:

1. Identify the exempt communication or document, then identify the parties that created, sent, and received it.
2. Based on the identified parties, establish if:
    a. a communication occurred between a client (or their agent) and their lawyer; or
    b. a communication occurred between two or more lawyers acting for a client; or
    c. a document was prepared by the client, their lawyer or another person.
3. Establish that the 'dominant purpose' for the communication being made or the document's creation was for obtaining or providing legal advice.
4. Establish that the communication or document was intended to be, and remains, confidential.
5. Ensure the privilege has not been waived by either the express or implied conduct of the client.
6. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

What is litigation privilege?

1.13. A document or information will attract litigation privilege, and is exempt under section 32(1), if it would disclose:

- a confidential communication between a client (or their agent) and their lawyer, a client (or their agent) and another person, or between a lawyer acting for the client and another person; or
- the contents of a confidential document (whether delivered or not);

made or prepared for the dominant purpose of the client being provided with legal services about a current, anticipated or pending legal proceeding, where the client is or may be a party.

1.14. For a legal proceeding to be 'anticipated or pending', there must be more than a mere possibility of litigation. There must be a real prospect of litigation, but it does not have to be more likely than not.[353]

Steps to applying litigation privilege

1.15. An agency or Minister seeking to establish that a document is exempt under section 32(1) because it attracts litigation privilege should:

1. Identify the exempt communication or document, then identify the parties that created or received it.
2. Establish one of the following:
    a. the communication occurred between the client and another person; or
    b. the communication occurred between a lawyer acting for the client and another person; or
    c. the document was prepared for the client.
3. Establish that the 'dominant purpose' for the communication or document is in relation to current, anticipated or pending litigation involving the client.
4. Establish that the communication or document was intended to be, and remains, confidential.
5. Ensure the privilege has not been waived by either express or implied conduct of the client.

[353] *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] VSCA 59.

6. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

Considering the elements in applying the exemption

Who is the client?

1.16. The definition in section 117 of the Evidence Act provides guidance on who is a 'Client'. The word 'Client' is not defined in case law.

1.17. Section 117 of the Evidence Act defines 'Client' as including:

- a person or body who engages a lawyer to provide legal services or who employs a lawyer (including under a contract of service);
- an employee or agent of a client; or
- an employer of a lawyer if the employer is:
  - the Commonwealth or a State or Territory; or
  - a body established by a law of the Commonwealth or a State or Territory.

Who is the lawyer?

1.18. The definition in section 117 of the Evidence Act and case law provides guidance on who is a 'Lawyer'.

1.19. Section 117 of the Evidence Act defines a 'Lawyer' as:

- an Australian lawyer (as defined under the Legal Profession Uniform Law Application Act); and
- a non-participant registered foreign lawyer; and
- a foreign lawyer or a natural person who, under the law of a foreign country, is permitted to engage in legal practice in that country; and
- an employee or agent of a lawyer referred to above.

1.20. Under case law, a 'Lawyer' includes:

- a sole practitioner;

- a barrister, also known as counsel;[354]
- an interstate or foreign practitioner;[355]
- a patent attorney;[356]
- a solicitor or legal officer who is in government employment or employed by a government agency (see below for more information);[357]
- a solicitor who is also a trustee;[358]
- a solicitor acting for two parties;
- a solicitor acting for one party and for another person who has a common interest in the litigation but is not a party to the litigation. This is known as common interest privilege;[359] and
- an 'in-house' or corporate lawyer (see below for more information).[360]

1.21. For legal privilege to apply, there must be a lawyer/client relationship.[361] Where there is a dual role, it is important to consider whether the communications or documents relate to the lawyer's legal role or other role (for example, financial services).

1.22. Legal privilege can apply to advice from in-house salaried lawyers.[362] An in-house lawyer must possess the requisite measure of independence for legal professional privilege to attach.[363] This means the communications must be in confidence and given as professional advice in a lawyer/client relationship.[364]

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[354] *Mayor and Corporation of Bristol v Cox* (1884) 26 Ch D 678.

[355] *Ritz Hotels Ltd v Charles of the Ritz Ltd (No 4)* (1987) 14 NSWLR 100; *Kennedy v Wallace* (2004) 213 ALR 108.

[356] *Sepa Waste Water Treatment Pty Ltd v JMT Welding Pty Ltd* (1986) 6 NSWLR 41, [43]; *Pfizer Pty Ltd v Warner Lambert Pty Ltd* (1989) 89 ALR 625.

[357] *Waterford v The Commonwealth* [1987] HCA 25 [4] (per Mason and Wilson JJ), [5]-[6] (per Brennan J).

[358] *O'Rourke v Darbishire* [1920] AC 581.

[359] *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd* (2988) 13 NSWLR 689. See reference made to this privilege in *Martin v Melbourne Health (Review and Regulation)* [2019] VCAT 1190 [40].

[360] *Ritz Hotels Ltd v Charles of the Ritz Ltd (No 4)* (1987) 14 NSWLR 100.

[361] *Young v State Insurance Office* (1986) 1 VAR 267.

[362] *Crozier v Department of Health* [2022] VCAT 1301 [33], following *Attorney General (NT) v Kearney* [1985] HCA 60.

[363] The criterion of independence will be satisfied if it is shown that the in-house lawyer's personal loyalties, duties and interests do not influence the advice given: *Seven Network Ltd v News Ltd* [2005] FCA 1551 [15].

[364] *Waterford v The Commonwealth* [1987] HCA 25 [4] (per Mason and Wilson JJ), [5]-[6] (per Brennan J).

1.23. The relationship between the State and Parliamentary Counsel may be one of client and lawyer if advice is sought from and given by Parliamentary Counsel to the State in relation to the drafting and preparation of draft legislation.[365]

Case examples

Smeaton v Victorian WorkCover Authority [2008] VCAT 166

Background

The applicant requested access to file notes created by a solicitor employed by an insurer. The insurer managed claims on behalf of the agency under the *Accident Compensation Act 1985* (Vic).

The agency located two emails in response to the request and refused access to them under section 32(1).

The two emails contained legal advice and opinion communicated by an in-house lawyer to a manager, both of whom were employed by the insurer, acting as an agent of the agency.

Decision

Legal privilege applied to the two emails.

The evidence confirmed the nature of the lawyer's position was clearly to provide legal advice in relation to the conciliation of the applicant's dispute with the agency.

The lawyer was not performing any administrative or managerial function in relation to the conciliation. If this had been the case, the emails would not have been privileged.

Dalla-Riva MLC v Department of Justice [2007] VCAT 660 [54]

Background

The applicant requested access to documents relating to the establishment of an independent police corruption watchdog.

One of the documents was a discussion paper prepared by a barrister for the Ombudsman, providing advice on a model for dealing with police corruption.

The discussion paper was passed from the Ombudsman to the Department.

The agency claimed the document was privileged and therefore exempt under section 32(1).

Decision

The discussion paper was not exempt under section 32(1).

[365] *Tran v Office of the Chief Parliamentary Counsel* [2022] VCAT 61 [45]-[50] following *State of New South Wales v Betfair Pty Ltd* [2009] FCAFC 160 and *Tabcorp Holdings Limited v State of Victoria (No 2)* [2013] VSC 541.

It was 'far from clear' that the barrister was advising in his capacity as a lawyer, as opposed to someone who has experience and knowledge in relation to anti-corruption models.

It was 'far from clear' that the Department was a client of the barrister, given that the discussion paper was prepared for the Ombudsman.

The document did not read as a barrister's advice on legal matters. For example, some of the advice related to matters such as staffing, computers, and physical and practical requirements.

Is there a confidential communication?

1.24. The definition in section 117 of the Evidence Act provides guidance on what is a 'confidential communication'. It defines a 'confidential communication' as a communication made in such circumstances that, when it was made:

- the person who made it; or
- the person to whom it was made,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

Is there a confidential document?

1.25. The definition in section 117 of the Evidence Act provides guidance on what is a 'confidential document'. It defines a 'confidential document' as a document where, when it was prepared:

- the person who prepared it; or
- the person for whom it was prepared,

was under an express or implied obligation not to disclose its contents.

What was the dominant purpose of the communication?

1.26. Identifying the 'dominant purpose' of a communication is an objective test determined by looking at the primary or substantial reason for the communication.[366]

[366] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67.

1.27. The starting point is to identify the intended use or uses of the document when it was brought into existence.[367] Where there are mixed purposes, the dominant purpose is the primary or substantial reason for the communication.

1.28. The purpose (why) a document is brought into existence is a question of fact. The intention of the document's author does not decide its purpose. For example, if a solicitor commissions the provision of a technical report, the relevant intention will be of the solicitor, not the author of the technical report.[368]

1.29. The dominant purpose test will extend to documents prepared by an agency or Minister that record the legal advice or summary of advice given.[369]

Example

'EX2' and City of Port Phillip [2022] VICmr 239[370]

Background

The applicant requested access to various documents relating to trees growing alongside their dwelling that allegedly caused damage to the dwelling.

The documents included communications between the Council and a claims specialist from a service provider of the Council's insurer. The claims specialist managed the public liability claim involving the applicant.

Council refused access to the documents under section 32(1).

Decision

The Public Access Deputy Commissioner found the documents were not exempt under section 32(1).

Firstly, for legal privilege to apply, there must be a lawyer/client relationship. There was no evidence to establish a lawyer/client relationship between the Council and the claims specialist.

Secondly, there was no evidence that the communications were made for the dominant purpose of obtaining legal advice. Instead, the dominant purpose of the communication between the Council and the claims specialist was for the Council to notify its insurer of the applicant's matter for the purpose of obtaining an indemnity. The correspondence concerned claims management, not legal advice.

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[367] *AWB Limited v Honourable Terence Rhoderic Hudson Cole* (No 5) [2006] FCA 1234 [44(6)].

[368] *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] VSCA 59.

[369] *Standard Chartered Bank of Australia Ltd v Antico* (1995) 36 NSWLR 57 [91]-[93].

[370] For a similar example, see *Ormonde v Darebin City Council* [2008] VCAT 588 [85].

Key concepts about legal advice and dominant purpose

1.30. Legal advice is broadly defined. It includes advice about what a client should do in the legal context, but it does not extend to advice that is purely commercial or of a public relations character.[371]

1.31. A communication from a lawyer to a client that contains observations on administrative or policy matters may still attract legal privilege, so long as the dominant purpose of the communication is to provide legal advice or legal services.[372]

1.32. Legal privilege can extend to a document prepared by a client which records legal advice given to the client by their lawyer.[373] However, a document prepared by a client expressing their own opinions on legal and commercial considerations, following receipt of legal advice, will not be privileged.[374]

1.33. For documents prepared by a client that record legal advice received, the dominant purpose test is applied to the original communication from the lawyer to the client, not to the separate document created by the client.[375]

Has there been a loss or waiver of privilege?

1.34. A document will not be exempt under section 32(1) if legal privilege has been lost or waived.

1.35. Privilege can be either expressly waived, or waiver can be implied from the circumstances.

1.36. Legal privilege can be lost or 'waived' where the client acts inconsistently with the confidentiality of legal privilege.[376]

Example

A client knowingly and voluntarily discloses legal advice to outside parties who have no common interest in the advice or litigation and no obligation of confidentiality.[377]

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[371] *AWB Limited v Honourable Terence Rhoderic Hudson Cole* (No 5) [2006] FCA 1234 [44].

[372] *AIN and Medical Council of NSW* [2013] NSWADT 112 [72].

[373] *Conyers v Monash University* [2005] VCAT 2509 [7] citing *Standard Chartered Bank of Australia v Antico* (1993) 36 NSWLR 87, 92-93; *Country Fire Authority v Lockyer* [2019] VCAT 667 [62].

[374] *Price v Castlemaine District Community Health Centre* [2001] VCAT 1974 [15]-[16] citing *Standard Chartered Bank of Australia v Antico* (1993) 36 NSWLR 87, 92-93.

[375] *Price v Castlemaine District Community Health Centre* [2001] VCAT 1974 [15], citing *Standard Chartered Bank of Australia Ltd v Antico* (1995) 36 NSWLR 87, 91.

[376] Sections 121 to 126 in the *Evidence Act 2008* (Vic) deal with different circumstances in which client legal privilege may be lost.

[377] See examples where privilege had been waived: *'EX9' and City of Darebin* [2022] VICmr 246, where the agency disclosed the contents of the legal advice to other Victorian government agencies; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 2)* [2014] FCA 481, where the client voluntarily disclosed legal advice to its insurers for the purposes of the insurer assessing the client's insurance claim. In *Asahi*,

1.37. Whether a client has acted inconsistently with the confidentiality of legal privilege is determined objectively. This means that a decision maker may determine that waiver is implied, notwithstanding that the subjective intention of the client was to maintain privilege.[378]

1.38. Waiver of privilege by express words or conduct will generally be clear.

> **Example**
>
> A client (the agency) intentionally discloses the substance of legal advice to the media.[379]

1.39. Implied waiver is more difficult to determine. Waiver can be implied where a client acts inconsistently with the confidentiality required for legal privilege. Waiver can also be unintended.

> **Example**
>
> An agency publishes an extract, or summary, of the advice on its website or forum outside of the agency.

1.40. The fine balance in implied waiver is demonstrated in *Mann v Carnell*[380] where the High Court found disclosure of the substance of the legal advice for the purposes of explaining and justifying the actions of a member of Parliament did not waive legal privilege, but disclosure of the substance of the legal advice to further the client's own personal or commercial interests did waive legal privilege.

1.41. Legal privilege will not attach to confidential communications between a lawyer and client that are used by the client for the purpose of furthering or facilitating criminal, fraudulent or other misconduct that carries a civil penalty.[381] To lose the privilege, there must be evidence of the confidential communication furthering or facilitating the client's illegal or improper purpose. The privilege cannot be displaced by mere allegation of illegal or improper conduct.[382]

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the interests of the parties were not the same and there was real potential for the interests of the insurer and the client to be disparate and competing.

[378] *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 2)* [2014] FCA 481.

[379] '*DU8' and Department of Premier and Cabinet* [2021] VICmr 315; *Osland v Secretary to the Department of Justice* [2008] HCA 37.

[380] *Mann v Carnell* (1999) 201 CLR 1.

[381] See *Duffy v Victorian Workcover Authority* [2013] VCAT 545 [27]-[28]; *Evidence Act 2008* (Vic), section 125.

[382] *Attorney General (NT) v Kearney* [1985] 158 CLR 500; *Duffy v Victorian Workcover Authority* [2013] VCAT 545.

Examples of privileged documents

1.42. Legal privilege protects the disclosure of:

- communications between a client and their lawyer for the dominant purpose of requesting and providing legal advice, or for the dominant purpose of receiving legal services in relation to current or anticipated legal proceedings – for example, emails and letters;[383]
- documents that record legal work carried out by the lawyer for the benefit of the client, for the dominant purpose of providing advice or in reference to current or anticipated litigation – for example, legal advice, file notes, research memoranda, collations and summaries of documents and chronologies, whether provided to the client or not;[384]
- documents prepared by officers or employees of the client, for the dominant purpose of helping the client's lawyer give advice to the client – for example, chronologies that set out relevant facts and evidence;[385]
- documents gathered by the lawyer or client in preparation for litigation even if there is no communication between lawyer and client – for example, draft witness statements and transcripts of interviews with witnesses;[386] and
- draft documents or comments made on a draft document by a lawyer. In this situation, the lawyer is providing advice when preparing, reviewing, or making comments on a draft document in which they are the legal adviser – for example, draft correspondence containing marked up comments from the client's lawyer.[387]

Case example

'EW7' and Victorian Building Authority [2022] VICmr 235

Background

The applicant requested access to the investigation file concerning a complaint the applicant made about building issues with a property.

[383] See examples *Morgan v Department of Human Services* [2008] VCAT 2420; *Smeaton v Victorian WorkCover Authority* [2017] VCAT 1482.

[384] *AWB Limited v Honourable Terence Rhoderic Hudson Cole* (No 5) [2006] FCA 1234 [44](8). See example *Smeaton v Transport Accident Commission* [2017] VCAT 1485.

[385] See example, *Crozier v Department of Health* [2022] VCAT 1301 [38].

[386] *Dingle v Commonwealth Development Bank of Australia* [1989] FCA 499 [11]-[14], cited with approval in *Mostafa v Victorian WorkCover Authority* [2013] VCAT 782 [30].

[387] See *Conyers v Monash University* [2005] VCAT 2509 [7]; *Re City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR 170, 202.

The agency refused access to one document under section 32(1). The document was an email thread between agency officers, and the originating email within the thread attached a memorandum of legal advice from the agency's inhouse lawyers.

The agency refused access to other documents under section 32(1) where the documents contained information summarising the inhouse lawyer's legal advice.

Decision

The Public Access Deputy Commissioner found the originating email and attached memorandum of legal advice were exempt under section 32(1) because:

- the email was sent between agency officers and inhouse lawyers;
- the communications were generated in the performance of a legal function, as distinct from the commercial activities of the agency;
- it was clear from the content of the documents that the communications were intended to be confidential;
- the communications were made for the dominant purpose of the agency obtaining professional legal services and advice; and
- there was no information to indicate legal privilege had been waived.

The Commissioner was satisfied that part of the remaining email thread contained a summary of the legal advice and was therefore exempt under section 32(1).

However, the remaining correspondence between agency officers in the email thread was not exempt under section 32(1) because it did not contain a summary of the legal advice. Instead, it contained the officer's own opinions arising from the legal advice. The opinions did not summarise the legal advice and no details of the legal advice could be inferred from the opinions expressed.

Privileged copies

1.43. When copies of documents are attached to a request for legal advice, those attachments will be subject to privilege if the dominant purpose for which the copies were created was to seek legal advice. This is the case even if the original documents were not privileged.[388]

1.44. The original documents (as opposed to the copies attached to a request for legal advice) are not exempt under section 32(1) and may still be disclosed under the Act if they are not otherwise exempt.

[388] *Frugtniet v Legal Services Board* [2014] VCAT 1299; *Birrell v Department of State and Regional Development and Department of Premier and Cabinet* [2001] VCAT 50.

Example

An agency creates a file note on their content management system of an incident, and subsequently sends a copy of the file note to their in-house lawyer for legal advice on the incident.

The file note on the content management system does not attract legal privilege.

The copy sent to the in-house lawyer will attract legal privilege.

Material unlikely to be privileged

1.45. Common examples of communications that do not ordinarily attract legal privilege include:

- invoices merely showing the cost and not the substance of legal advice provided to an agency. In some instances, invoices can be edited to remove the detail of the services provided so that any privileged information is removed;[389]
- a letter from a client's lawyer to another person, who is not the client or agent;
- witness statements or other investigative material, created for an agency's routine administrative purposes, irrespective of possible future legal proceedings;[390]
- information that merely describes the topic that is the subject of legal advice, but does not disclose the advice itself;[391]
- documents to or from an agency's lawyer that do not involve a request for legal advice or the response;[392] and
- documents involving an agency's lawyer that are of an administrative nature.[393]

Certain section 8(1) documents are not exempt – section 32(2)

1.46. Section 8(1) lists certain categories of documents that must be available for inspection and purchase by the agency. Documents that must be made available for inspection and purchase under section 8(1) are not exempt under section 32(1).

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[389] *Chopra v Department of Education and Training* [2019] VCAT 1860 [55]-[57]; *Commissioner of State Revenue v Tucker* [2021] VCAT 238 [107]-[132].

[390] See *Ormonde v Darebin City Council* [2008] VCAT 588; cf *Martin v Melbourne Health* [2019] VCAT 1190, where an expert report was privileged because it was solely produced for the client's lawyer for the purposes of providing legal advice to the client.

[391] See *McCulloch v University of Melbourne* [2001] VCAT 2246 [53]-[54].

[392] *Re City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR 170, 200.

[393] *Smeaton v Victorian Workcover Authority* [2008] VCAT 166 [19].

1.47. This includes the following kinds of documents used by the agency in making decisions or recommendations:

- manuals;
- policies and procedures;
- records of decisions;
- letters of advice to persons outside the agency;
- guidance material;
- precedents; and
- documents containing interpretations or excerpts of legislative schemes administered by the agency.

1.48. The purpose of section 32(2) is to ensure that the public has access to any legal advice that is contained in a section 8(1) document used by the agency in making decisions or recommendations, such as a policy or procedure.[394]

[394] *Birrell v Department of State and Regional Development and Department of Premier and Cabinet* [2001] VCAT 50.

Section 33 – Document affecting personal privacy

Extract of legislation

33 Document affecting personal privacy

(1) A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

(2) Subject to subsection (2AB), (2AC) or (4), the provisions of subsection (1) do not have effect in relation to a request by a person for access to a document by reason only of the inclusion in the document of matter relating to that person.

(2A) An agency or Minister, in deciding whether the disclosure of a document under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, must take into account, in addition to any other matters, whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.

(2AB) Without limiting subsection (2A), if—

(a) the request is made to an agency that is an information sharing entity or an authorised Hub entity, or to a Minister for access to an official document of an agency that is an information sharing entity or an authorised Hub entity; and

(b) the document contains information relating to the personal affairs of the person making the request; and

(c) the person making the request is a person of concern, or a person who is alleged to pose a risk of committing family violence—

in deciding whether the disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person, the agency or Minister must also take into account whether the disclosure would increase the risk to a primary person's safety from family violence.

(2AC) Without limiting subsection (2A), if—

(a) the request is made to an agency that is an information sharing entity, an authorised Hub entity or a restricted information sharing entity or to a Minister for access to an official document of an agency that is an information sharing entity, an authorised Hub entity or a restricted information sharing entity; and

(b) the document contains information relating to the personal affairs of the person making the request—

in deciding whether the disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person, the agency or Minister must also take into account whether the disclosure would increase the risk to the safety of a child or group of children.

(2B) An agency or Minister, in deciding whether the disclosure of a document under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, must—

(a) notify the person who is the subject of that information (or if that person is deceased, that person's next of kin) that the agency or Minister has received a request for access to the document; and

(b) seek that person's view as to whether disclosure of the document should occur; and

(c) state that if the person consents to disclosure of the document, or disclosure subject to deletion of information relating to the personal affairs of the person, the person is not entitled to apply to the Tribunal for review of a decision to grant access to that document.

(2C) Despite subsection (2B), 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

(ab) the person to be notified is a primary person, and the notification would be reasonably likely to increase the risk to that person's safety from family violence; or

(b) it is not reasonably practicable to do so.

(3) If a request by a person other than a person referred to in subsection (2) is made to an agency or Minister for access to a document containing information relating to the personal affairs of any person (including a deceased person) and the agency or Minister decides to grant access to the document, the agency or Minister, if reasonably practicable, must notify the person who is the subject of that information (or that person's next of kin) 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(3).

(3A) 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).

(4) If—

(a) a request is made to an agency or Minister for access to a document of the agency, or an official document of the Minister, that contains health information concerning the person making the request; and

(b) the principal officer or the Minister, as the case may be, believes on reasonable grounds that the provision of the health information would pose a serious threat to the life or health of the person—

the principal officer or Minister must not give access to the document so far as it contains that information and—

(c) the procedure set out in Division 3 of Part 5 of the Health Records Act 2001 applies as if the refusal of access were a refusal under section 26 of that Act; and

(d) the document is an exempt document.

(5) Where but for this subsection the principal officer of an agency to which the provisions of subsection (4) may apply would not be a person registered under the Health Practitioner Regulation National Law to practise in the medical profession (other than as a student), the agency shall appoint a person registered under the Health Practitioner Regulation National Law to practise in the medical profession (other than as a student) to be the principal officer of the agency for the purposes of subsection (4).

(6) Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document of a kind referred to in subsection (1) where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be an exempt document by virtue of this section.

(7) Nothing in this section shall be construed so as to affect the procedures for access to adoption records contained in the **Adoption Act 1984**.

(8) Nothing in this section shall be construed so as to affect the procedures for access to information kept in a register maintained under Division 1 of Part 6 of the **Assisted Reproductive Treatment Act 2008**.

(9) In this section—

information relating to the personal affairs of any person includes information—

(a) that identifies any person or discloses their address or location; or

(b) from which any person's identity, address or location can reasonably be determined;

information sharing entity—

(a) in subsection (2AB), has the same meaning as in the **Family Violence Protection Act 2008**; and

(b) in subsection (2AC), has the same meaning as in the **Child Wellbeing and Safety Act 2005**;

person of concern has the meaning given in section 144B of the **Family Violence Protection Act 2008**;

primary person has the meaning given in section 144E of the **Family Violence Protection Act 2008**;

restricted information sharing entity has the same meaning as in the **Child Wellbeing and Safety Act 2005**.

Guidelines

The exemption

1.1. A document or information is exempt under section 33(1) if two conditions are satisfied:

- the document or information relates to the 'personal affairs' of a natural person (living or deceased); and
- disclosure of that personal affairs information is unreasonable in all the circumstances.

Purpose and scope of the exemption

1.2. Section 33(1) protects an individual's privacy where their right to privacy outweighs the public interest in disclosing their information.[395] This will only occur when disclosing the individual's personal affairs information is unreasonable.

1.3. Section 33(1) must be read consistently with the object of the Act in 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.[396]

1.4. If it is unclear whether section 33(1) applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[397]

Natural persons

1.5. Section 33(1) is only concerned with the personal affairs information of natural persons. The exemption cannot be applied to corporations or other legal entities.[398]

Deceased persons

1.6. Section 33(1) applies to the personal affairs information of both living and deceased persons.[399]

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[395] *Victoria Police v Marke* [2008] VSCA 218.

[396] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [32].

[397] *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822 [21] referring to *Ryder v Booth* (1989) VR 869, 877; *Smith v Department of Sustainability and Environment* [2006] VCAT 1228 [15].

[398] *Targridge Pty Ltd v Road Traffic Authority* (1988) 2 VAR 604; *Melbourne University v Robinson* [1993] 2 VR 177.

[399] See examples, *Crocker v Ambulance Victoria* [2016] VCAT 2156; *'EJ9' and Northern Health* [2021] VICmr 337.

Applicant's own personal affairs information

1.7. Generally, an applicant's own personal affairs information cannot be exempt under section 33(1), unless the circumstances in sections 33(2AB), (2AC) or (4) apply.[400] See 'Handling requests for an applicant's own personal affairs information' below for more information.

Discretion to disclose exempt documents

1.8. The decision to exempt a document under section 33(1) is a discretionary power.[401] This means an agency or Minister can choose to provide access to information that would otherwise be exempt under section 33, where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

> For more information, see section 16 – Access to documents apart from Act.

1.9. When considering the release of personal affairs information outside the Act, an agency must consider its obligations under the Information Privacy Principles (**IPPs**) in the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**).

> **Example**
>
> Doctors and health professionals providing medical treatment and care to an individual should reasonably expect their names and details to be disclosed to their patients, and therefore disclosure of this information will likely comply with IPP 2.

More information

> For more information about the IPPs, see OVIC's IPP Guidelines and other privacy resources.

Steps to applying the exemption

1.10. An agency or Minister seeking to apply the section 33(1) exemption should:

1. Identify the personal affairs information contained in the document, or the personal affairs information that would be revealed if the document was disclosed.

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[400] *Freedom of Information Act 1982* (Vic), section 33(2).

[401] *Victorian Public Service Board v Wright* [1986] HCA 16 [3].

2. Consult with the applicant to see if they would like access to other individuals' personal affairs information and explain the scope of the personal affairs information (for example, names and phone numbers). Ask the applicant whether they agree to narrow the scope of the request to remove all or some personal affairs information.

3. Identify and isolate the applicant's own personal affairs information. This is not exempt unless:

    a. the request is made to an information sharing entity or authorised Hub entity,[402] which considers that the release of the applicant's own information to the applicant would increase the risk to:

        i. a primary person's[403] safety from family violence;[404] or

        ii. a child or group of children's safety;[405] or

    b. the request is for the applicant's own health information, where the principal officer (or a health practitioner appointed by the agency) reasonably believes providing the applicant with the information would pose a serious threat to the life or health of the applicant;[406] or

    c. the applicant's own personal affairs information is intertwined with personal affairs information of third parties and is unable to be effectively isolated.

4. Unless one of the exceptions in section 33(2C) applies, consult with the individuals whose personal affairs information appears in the document, to seek their views on whether it should be released.

    a. Consider whether an extension of time under section 21(2)(a) is permitted due to the need for consultation under section 33(2B).

5. Determine whether release of a third party's personal affairs information is unreasonable in all the circumstances having regard to the considerations in these Guidelines, such as:

    a. The nature of the information in the document and the circumstances in which it was obtained.

    b. The applicant's reasons for seeking access and the likelihood of further disclosure.

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[402] Defined in section 33(9).

[403] Defined in section 33(9).

[404] *Freedom of Information Act 1982* (Vic), section 33(2AB).

[405] *Freedom of Information Act 1982* (Vic), section 33(2AC).

[406] *Freedom of Information Act 1982* (Vic), section 33(4).

c. The wishes or interests of the subject of the information.

d. Public interest factors for or against disclosure.

e. Life and physical safety.

6. If a decision is made to release personal affairs information, notify any affected third party who did not consent to the disclosure of their personal affairs information, or did not reply. Inform them of the decision, their right to appeal to the Victorian Civil and Administrative Tribunal (VCAT) and how long they have to apply to VCAT (60-days).

7. Wait until the conclusion of any appeal period or VCAT proceedings before providing the documents to the applicant. If there are other documents falling within the request that do not contain the third party's personal affairs information, these can be released to the applicant at the same time as the decision, without needing to wait for the appeal period to end.

Does the document contain or reveal personal affairs information?

1.11. The first element of the exemption requires the document to contain or reveal 'information relating to the personal affairs of any person' (personal affairs information).

1.12. The concept of personal affairs information is broad. Information will relate to the personal affairs of a person if it 'concerns or affects that person as an individual'.[407] This includes information relating to health, private behaviour, home life, or personal or family relationships of individuals.[408]

1.13. Section 33(9) defines personal affairs information to include:

- information that identifies any person;
- information that discloses a person's address or location; or
- any information from which a person's identity, address or location can reasonably be determined.

1.14. The concept of 'personal affairs information' is not the same as 'confidential information'. The mere fact that information was obtained in confidence from a person does not make it information about the personal affairs of that person.[409]

[407] *Hanson v Department of Education & Training* [2007] VCAT 123.

[408] Re F and Health Department (1988) 2 VAR 458, quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 [103], [109].

[409] *Akers v Victoria Police* [2003] VCAT 397 [104]; *Conyers v Monash University* [2005] VCAT 2509 [17].

Examples of personal affairs information

Common examples of documents containing personal affairs information include a:

- person's name[410] or signature;[411]
- person's clinical/medical file or record;[412]
- person's contact details including a home address, telephone or mobile number, or email address;[413]
- photograph,[414] audio recording or CCTV footage of a person;[415]
- person's criminal history or details of a victim of crime;[416] or
- person's opinion expressed about another person.[417]

Disclosing or revealing personal affairs information

1.15. Section 33(1) exempts a document if its 'disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person'.

1.16. A document will involve the disclosure of personal affairs information if the applicant or any member of the public could directly or indirectly identify an individual or their address or location from the information.[418]

1.17. A document will indirectly disclose personal affairs information if it contains information from which any person's identity, address or location can reasonably be determined. This means that a document can be exempt under section 33(1) where the document itself does not contain personal affairs information, but its disclosure would reveal personal affairs information.

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[410] *Akers v Victoria Police* [2003] VCAT 397.

[411] See example *Akers v Victoria Police* [2022] VCAT 723 [124].

[412] See example *'EP2' and The Royal Children's Hospital* [2022] VICmr 165.

[413] See examples *Mond v Department of Justice* [2005] VCAT 2817; *Monash University v Naik* [2021] VCAT 557.

[414] See example *Love v Department of Education* [2023] VCAT 123.

[415] *Horrocks v Department of Justice* [2012] VCAT 241 [49], quoted in *Evans v Victoria Police* [2020] VCAT 426 [63].

[416] See examples *'AB5' and Victoria Police* [2019] VICmr 14; *Akers v Victoria Police* [2003] VCAT 397.

[417] *Mond v Building Commission of Victoria* [2012] VCAT 796 [21]-[23].

[418] *O'Sullivan v Department of Health & Community Services (No 2)* (1995) 9 VAR 1, 14; *Beauchamp v Department of Education* [2006] VCAT 1653 [42]; *NKY v Department of Education and Training* [2022] VCAT 302 [67]-[68].

1.18. Personal affairs information can be revealed or indirectly disclosed by connecting or linking the information in the disclosed document with other information available to the applicant.[419]

Examples

Wellington v Surf Coast Shire Council [2022] VCAT 942

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 33(1) and other exemptions.

Issue

Could a person's identity be reasonably determined from disclosure of the verbatim survey responses?

Decision

VCAT was satisfied that disclosure of the verbatim survey responses, although anonymised, would enable a person's identity to be reasonably determined, and therefore disclose personal affairs information. VCAT determined that disclosure would be unreasonable and upheld section 33(1).

VCAT accepted that those who participated in the surveys, or the people about whom comments and assessments were made in the survey responses, could be identified. Some people could be identified by the applicant, others by other Councillors or staff members, and others by members of the wider community, who could either identify persons on the face of the documents, or by using their own distinct knowledge.

VCAT found there was a real chance that many of the individual comments could be attributed to an identifiable individual by persons with knowledge of the personalities involved and only 'rudimentary organisational knowledge'.

Some survey responses referred to specific titles and other descriptors which could immediately identify the individual concerned. Other responses contained a 'tone' that could readily identify known individuals in the organisation.

[419] *Harrison v Victoria Police* [2022] VCAT 280, [153].

Williams v Victoria Police [2005] VCAT 2516

Background

The applicant's son was involved in a schoolyard fight that was investigated by the school. As part of the investigation, the school gathered handwritten statements from other students. These documents were provided to the police as part of a police investigation.

The applicant requested access to the statements from Victoria Police.

Issue

If the statements were transcribed and the students' names removed, would the statements still reveal personal affairs information of the students?

Decision:

VCAT accepted the Department's evidence that releasing transcribed statements with students' name removed could still reveal the students' identities:

> *For instance, some students have particularly weak English and are known for the limited vocabulary with which they write. Other students' accounts that appear generic may include information or expression that other students would recognise and link to a particular student.*[420]

For more information about connecting or linking information from different sources to identify a person, see OVIC's resources on de-identification.

Personal information under the PDP Act

1.19. The definition of 'personal affairs information' under the Act is broader and captures more information than the definition of 'personal information' in the PDP Act.[421] For example:

- Personal affairs information under the Act includes 'health information',[422] whereas 'personal information' under the PDP Act does not.
- Personal affairs information under the Act includes the personal affairs information of deceased persons, whereas the PDP Act only protects the privacy of living persons.

[420] *Williams v Victoria Police* [2005] VCAT 2516, [42].

[421] *Privacy and Data Protection Act 2014* (Vic), section 3.

[422] As defined in section 3 of the *Health Records Act 2001* (Vic).

Would disclosure be unreasonable?

1.20. Personal affairs information is not automatically exempt.[423] A document is only exempt under section 33(1) if the disclosure of personal affairs information would be 'unreasonable' in the circumstances.[424]

1.21. To be satisfied that disclosure 'would' be unreasonable, an agency or Minister must have a high degree of confidence about that conclusion. 'Would' means that a result or effect will almost certainly occur.[425] It is not enough to conclude that disclosure of a document might or could result in the unreasonable disclosure of personal affairs information.[426] The need for a high degree of confidence reflects the object of the Act in section 3 to provide public access as far as possible.[427]

1.22. An agency or Minister must carefully weigh the facts and matters that 'relevantly, logically, and probatively' bear upon whether disclosure of the personal affairs information is unreasonable in the circumstances.[428] This will vary with each case.

1.23. When deciding whether disclosure would be unreasonable, an agency or Minister must consider whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.[429] This mandatory consideration, and other common considerations, are explained below.

Consider the information in the document

1.24. When deciding whether disclosure would be unreasonable, consider:

- The nature of the information in the document.[430]
    - The more sensitive the information, the more likely that disclosure would be unreasonable (for example, personal information of children is inherently sensitive).[431]
    - The more innocuous the information, the less likely that disclosure would be unreasonable.[432]

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[423] Note that section 6(2) of the *Privacy and Data Protection Act 2014* (Vic) states that nothing in that Act affects the operation of the FOI Act or any right, privilege, obligation or liability conferred or imposed under that Act or any exemption arising under that Act.

[424] *AB v Department of Human Services* [2001] VCAT 2020 [38]; *Victoria Police v Marke* [2008] VSCA 218, [22].

[425] *Victoria Police v Marke* [2008] VSCA 218, [97].

[426] See examples where the agency did not produce sufficient evidence to establish that disclosure would be unreasonable: *Akers v Victoria Police* [2022] VCAT 723 [132]-[147]; *Country Fire Authority v Rennie* [2021] VCAT 492, [51]-[57].

[427] *Victoria Police v Marke* [2008] VSCA 218, [96]-[98].

[428] *Victoria Police v Marke* [2008] VSCA 218, [98].

[429] *Freedom of Information Act 1982* (Vic), section 33(2A).

[430] *Page v Metropolitan Transit Authority* (1988) 2 VAR 243, 246.

[431] *NKY v Department of Education and Training* [2022] VCAT 302 [70]; *Love v Department of Education* [2023] VCAT 123, [30].

[432] See example *Crocker v Ambulance Victoria* [2016] VCAT 2156.

- If the information has no current relevance or is aged, the less likely that disclosure would be unreasonable.

- The circumstances in which the information was obtained.[433]
  - If the information was obtained in confidence, disclosure of that information is more likely to be unreasonable.[434] However, confidentiality does not create a presumption in favour of unreasonableness.

- The extent to which the information is available to the public.
  - If the information is largely in the public domain, disclosure is less likely to be unreasonable.[435]

Consider the applicant's reasons for seeking the information

1.25. When deciding whether disclosure would be unreasonable, consider why the applicant seeks the information, including:

- the applicant's interest in the information;[436]
- the applicant's purpose for seeking access;[437]
- the applicant's motives for seeking access;[438]
- whether the applicant is likely to disclose the information.[439]

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[433] *Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 246.

[434] *Levy v Department of Sustainability & Environment* [2011] VCAT 417 [18]; *AB v Department of Education & Early Childhood Development* [2011] VCAT 1263 [57]; *Akers v The Royal Society for the Prevention of Cruelty to Animals* (Review and Regulation) [2023] VCAT 602 [222].

[435] See example *Harrison v Victoria Police* [2022] VCAT 280 [153]-[154].

[436] *Penhalluriack v Department of Labour and Industry* (unreported, County Court, Vic, Lazarus J, 19 December 1983); *Knight v Public Correctional Enterprise* [2002] VCAT 1769 [13]; *McNamara v Department of Human Services* [2004] VCAT 1085 [10]; *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562 [25].

[437] *Targridge Pty Ltd v Road Traffic Authority* (1988) 2 VAR 604; *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562 [25]; *McNamara v Department of Human Services* [2004] VCAT 1085 [10]; *Zacek v Medical Practitioners Board (Vic)* [2005] VCAT 114 [61]; *Levy v Department of Sustainability & Environment* [2011] VCAT 417 [17].

[438] *Pinder v Medical Practitioners Board* (1996) 10 VAR 75 at 90; *Knight v Public Correctional Enterprise* [2002] VCAT 1769 [19]; *Akers v Victoria Police* [2003] VCAT 398 [57]; *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562 [58]; *Conyers v Monash University* [2005] VCAT 2509 [18]; *Williams v Victoria Police* [2005] VCAT 2516 [32].

[439] *Victoria Police v Marke* [2008] VSCA 218.

1.26. An agency or Minister may also consider whether the applicant's purpose for seeking access to the information is likely to be achieved by granting them access to that information.[440] Where there would be no benefit to the applicant if the information were released, disclosure is more likely to be unreasonable.

1.27. If the applicant's reason for seeking access is for the purpose of embarrassing or otherwise harming the persons concerned, disclosure is more likely to be unreasonable.[441]

1.28. Where there is a dispute or strained relations between the applicant and the third party, release of the third party's personal affairs information is more likely to be unreasonable.[442]

Consider the public interest

1.29. When deciding whether disclosure would be unreasonable, consider:

- Whether any public or important interest would be promoted by release of the information.[443] There is a distinction between a matter which is in the public interest and a matter which is interesting to the public or merely a curiosity to the public.[444]

- Whether disclosure of the information would be contrary to a public interest other than the public interest in protecting the privacy of the individuals referred to in the document. For example, disclosure is more likely to be unreasonable if the agency or Minister's ability to obtain similar information in the future would be impaired by such disclosure.[445]

Case example

Willner v City of Port Phillip [2015] VCAT 1320

Background

The applicant requested access to 24 hours of CCTV footage from outside the St Kilda town hall, which identified individuals. The applicant's purpose for seeking access to the CCTV footage was to use it in an art exhibition.

[440] *Hanson v Department of Education & Training* [2007] VCAT 123, [16]; *Pritchard v Victoria Police* [2008] VCAT 913, [31]; *Pezzimenti v Victorian WorkCover Authority* [2008] VCAT 449, [24].

[441] *Greater Shepparton City Council v Hamilton* [2021] VCAT 1316 [18]-[22], [36].

[442] *'FA6' and Department of Energy, Environment and Climate Action* [2023] VICmr 14, [21].

[443] *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562 [65], [66]; *Morgan v Port Phillip City Council* [2008] VCAT 978 [45].

[444] *Director of Public Prosecutions v Smith* [1991] 1 VR 63 [75]; *Gibson v Latrobe City Council* [2008] VCAT 1340 [74]; *Davies v Victoria Police* [2022] VCAT 713, [62].

[445] *Richards v Transport Accident Commission* [2005] VCAT 1444; see example *'FB5' v Department of Education* [2023] VICmr 22 [31], [34].

Issue

Was disclosure of the personal affairs information unreasonable?

Decision

VCAT held that it would be unreasonable to disclose the personal affairs information of persons appearing in the CCTV footage.

VCAT noted that the applicant's purpose for seeking access to the CCTV footage appeared commendable and that there is a public interest in the facilitation of discussion by encouraging the public to think about the issue of government surveillance.

However, this was outweighed by the public interest in maintaining community trust in the government's use of CCTV footage. That trust is based on CCTV being used only for security and governmental related purposes. If the CCTV footage were released, and used in the context of an art exhibition, this may undermine public acceptance of CCTV.

The CCTV footage was taken with the expectation that it would not be made available to the public and would only be used for security purposes. The people identified in the footage were likely to object to its release.

1.30. It may be unreasonable to release internal documents forming part of a police investigation in circumstances where the person being investigated was not charged or not yet charged.[446]

Consider the subject of the information

1.31. When deciding whether disclosure would be unreasonable, consider:

- Whether the person to whom the information relates objects to the information being disclosed.[447]
    - The fact that the person does not want the information disclosed is a relevant consideration to be taken into account, but is not determinative.[448] Conversely, the fact that a person does not object to disclosure does not necessarily mean section 33 does not apply.[449] The capacity of a person who does not object to disclosure to understand the implications of release is a relevant factor.[450]

[446] *Kyriazis v Victoria Police* [2011] VCAT 365; *JCL v Victoria Police* [2012] VCAT 1060.

[447] *Page v Metropolitan Transit Authority* (1988) 2 VAR 243, 245–246.

[448] *Marke v Victoria Police* [2007] VSC 522, [45].

[449] *McNamara v Deakin University* [2011] VCAT 1089, [49].

[450] *McNamara v Department of Human Services* [2010] VCAT 1237, [41].

- Whether the release of the information could lead to the person to whom it relates suffering stress and anxiety.[451]
    - Even though the applicant may know the persons involved, the decision-maker must consider the applicant's likely reaction on seeing the personal information in the documents, and what the applicant might do with those documents.[452] It may be found that disclosure is likely to cause stress and anxiety, even if that is not the applicant's intention.[453]
- Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.
    - Disclosure may still be unreasonable even if it would not be reasonably likely to endanger the life or physical safety of any person.[454]

See section 53A of the FOI Guidelines for information about:

- VCAT reviews; and
- seeking the views of the person whose personal affairs information appears in the document, as part of the VCAT review process.

Consider whether the personal affairs information is of agency officers and employees

1.32. Personal affairs information of agency officers or employees is not automatically exempt. Often, staff (regardless of their seniority) are identified while carrying out their role as a public sector employee. Their personal information is not usually sensitive, except for direct contact information such as a mobile phone number or email address in some instances.

1.33. Whether it is unreasonable to release information always depends on the circumstances of the request.[455] An agency or Minister must consider if disclosure of an employee's personal information to a particular applicant would be unreasonable in the circumstances.

[451] *Reilly v Kilmore & District Hospital* (1993) 6 VAR 16; *Koch v Swinburne University* [2004] VCAT 1513 [34]; *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562; *Hanson v Department of Education & Training* [2007] VCAT 123, [16].

[452] *AB v Department of Education & Early Childhood Development* [2011] VCAT 1263, [58].

[453] *Edwards v Museum Victoria* [2011] VCAT 1421, [40(b)].

[454] *Teong v Monash University* (2003) 20 VAR 153 [21]. In *Brygel v Victoria Police* [2014] VCAT 1199, [56], VCAT found it unnecessary to consider section 33(2A) where it had already found that section 33(1) was satisfied.

[455] *Harrison v Victoria Police* [2022] VCAT 280 [149].

1.34. An agency or Minister must take into account the factors above as well as:

- The seniority of an employee.
    - The more senior their role, the greater their level of accountability for decisions, and the more likely their details are in the public domain. In those circumstances, disclosure is not unreasonable unless special circumstances apply.[456]
- The relevance of the employee to the issue that is the subject of an applicant's request.
    - If the employee was directly involved in the matter, then disclosure of their involvement is unlikely to be unreasonable. If an employee had an administrative role or was not directly involved in a decision making capacity, then disclosure may be unreasonable.
- Whether the identity or personal information of the employee is known to the applicant or the public.
    - For example, despite their seniority, if the employee has a public facing role such as service delivery or attending public meetings, then the disclosure of their name is less likely to be unreasonable.
- Other matters relevant to the employee.
    - This may include personal safety concerns either in relation to the applicant or another person,[457] or the sensitivity of the employee's role in the agency (for example, an undercover police officer).

Example

Harrison v Victoria Police [2022] VCAT 280

Background

The applicant requested access to documents relating to an internal investigation by Victoria Police Professional Standards Command. The applicant was one of three police officers investigated.

One officer consented to release of his information. The other officer, Officer A, objected to release of his information.

The investigation related in part to the working relationship between the applicant and Officer A. As such, there was a large amount of overlapping information that concerned both the applicant and Officer A.

[456] *Marke v Victoria Police* [2020] VCAT 557; *'FB4' and Moonee Valley City Council* [2023] VICmr 21 [53].

[457] *Monash University v Naik* [2021] VCAT 557 [45], [47], [48]; *Chopra v Department of Education* [2019] VCAT 1941.

Victoria police refused access to some of Officer A's and Officer B's personal affairs information on the basis it was exempt under section 33(1).

Issue

Was the disclosure of Officer A's personal affairs information unreasonable?

Decision

Officer A's personal affairs information

VCAT held that most of the overlapping, common information, was not exempt under section 33(1). This information included Officer A's name, professional roles and duties and professional involvement in the incident that was the subject of the investigation.

This information was not unreasonable to release because it was information already in the public domain and there was no evidence that the applicant would make inappropriate use of the information if released. VCAT considered it irrelevant that the applicant's purpose would not be achieved by disclosure of the information.

However, VCAT held that information relating primarily to Officer A was exempt under section 33(1). While this information contained some professional information and arose in a professional context, it also contained personal opinion and factual information which was inherently personal to Officer A.

VCAT was satisfied that there was no public or other important interest which would be promoted by release of that kind of information. Release would interfere in a substantial way with the privacy of Officer A. Taking this into account, as well as how the information was referred to in the document and the broader investigatory context, release of this information was unreasonable.

Officer B's personal affairs information

VCAT held that it was not unreasonable to release Officer B's name. There was no evidence that Officer B participated confidentially in the investigation process. VCAT found that given his seniority, it was more probable than not that he was a willing participant and aware that an investigation might require disclosure of his contribution to the subject of the investigation.

VCAT held that it was also not unreasonable to release the summary of the information Officer B gave as to his dealings with the applicant. This information related to Officer B's official or professional life and not his personal affairs.

However, information in the summary that contained personal opinion and factual information inherently personal to Officer B was unreasonable to release.

Consider whether disclosure would endanger life or physical safety – mandatory consideration under section 33(2A)

1.35. When deciding if disclosure is unreasonable, an agency or Minister must consider if disclosure would endanger the life or physical safety of any person.[458]

1.36. Relevant factors that an agency or Minister must take into account include:

- there must be a real chance of danger occurring, rather than a fanciful or remote chance;[459]
- the danger to persons must arise from the disclosure of the specific document, rather than from other circumstances;[460]
- the risk does not need to be from the applicant themselves; it may be from anyone, should the information become generally or publicly known;[461]
- physical harm does not need be a certainty, the test is that the danger to physical safety is 'reasonably likely';[462]
- physical safety is not only about actual safety; it is also about the relevant person's perception as to whether they are safe;[463] and
- it is the impact on the relevant person or persons that is relevant, not the motives of the applicant.[464]

[458] *Freedom of Information Act 1982* (Vic), section 33(2A).

[459] *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562 [51]; *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 842.

[460] *Re Lawless and Secretary to Law Department* (1985) 1 VAR 42, 50–51.

[461] *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 844.

[462] *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836, 844.

[463] *O'Sullivan v Victoria Police* [2005] VCAT 532 [19]; *Huang v Frankston City Council* [2021] VCAT 634, [54]-[55].

[464] *O'Sullivan v Victoria Police* [2005] VCAT 532, [19].

Handling requests for an applicant's own personal affairs information

1.37. Generally, an applicant should be granted access to their own personal affairs information.[465]

1.38. However, there are exceptions to this general rule, including where:

- there is a family violence matter;[466]
- there is a child safety matter;[467] and
- the applicant requests access to their own health information.[468]

Example

A local council receives a request for access to documents relating to the applicant's complaint about local rubbish collection.

The council's function of collecting rubbish is not part of the family violence or child safety information sharing schemes. This means sections 33(2AB) and (2AC) do not apply.

The documents falling within the request do not contain the applicant's own health information. This means section 33(4) does not apply.

The documents do contain the applicant's own personal affairs information (name, contact details, address and opinions shared in the complaint). This means section 33(2) applies and the applicant's personal affairs information cannot be exempt under section 33(1).

After considering the factors in section 16 of the FOI Guidelines, and the council's public transparency policy and proactive and informal release policy, the council considers it is appropriate to provide the applicant with access to the documents in full outside the Act.

The council informs the applicant that it will process their request outside the Act and provide the applicant with access to the documents in full.

The council refunds the application fee to the applicant and sends a copy of the documents to the applicant's preferred email address.

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[465] *Freedom of Information Act 1982* (Vic), section 33(2).

[466] *Freedom of Information Act 1982* (Vic), section 33(2AB).

[467] *Freedom of Information Act 1982* (Vic), section 33(2AC).

[468] *Freedom of Information Act 1982* (Vic), section 33(4).

Family violence matters

1.39. If an applicant requests a document of an agency:

- where that agency is an information sharing entity[469] or an authorised Hub entity;[470] and
- the document contains information relating to the applicant's personal affairs; and
- the applicant is a person of concern, or a person who is alleged to pose a risk of committing family violence;

then in assessing whether disclosure would be unreasonable, the agency must also consider whether the disclosure of the document would increase the risk to a primary person's safety from family violence.[471]

1.40. The *Family Violence Protection Act 2008* (Vic) defines a primary person as an individual that an information sharing entity reasonably believes is at risk of being subjected to family violence.[472] A primary person may include an affected family member, a child, or a protected person.[473]

1.41. If disclosure would be unreasonable, section 33(1) applies, even though the relevant information may relate only to the personal affairs of the applicant.

1.42. An agency may, in notifying the applicant of its decision in these circumstances, neither confirm nor deny the existence of a document.[474]

Child safety matters

1.43. If an applicant requests a document of an agency:

- where that agency is an information sharing entity,[475] authorised Hub entity,[476] or restricted information sharing entity; and

[469] Prescribed in Schedule 1 of the *Family Violence (Information Sharing and Risk Management) Regulations 2018* (Vic).

[470] Defined in section 144SB of the *Family Violence Protection Act 2008* (Vic).

[471] *Freedom of Information Act 1982* (Vic), section 33(2AB).

[472] *Family Violence Protection Act 2008* (Vic), section 144E.

[473] 'Protected person' is defined in section 4 of the *Family Violence Protection Act 2008* (Vic).

[474] *Freedom of Information Act 1982* (Vic), sections 33(6) and 27(2)(b).

[475] Prescribed in Schedule 1 of the *Family Violence (Information Sharing and Risk Management) Regulations 2018* (Vic).

[476] Defined in section 144SB of the *Family Violence Protection Act 2008* (Vic).

- the document contains information relating to the applicant's personal affairs;

then in assessing whether disclosure would be unreasonable, the agency must also consider whether the disclosure of the document would increase the risk to the safety of a child or group of children.[477]

1.44. If disclosure would be unreasonable, section 33(1) applies, even though the relevant information may relate only to the personal affairs of the applicant.

1.45. An agency may, in notifying the applicant of its decision in these circumstances, neither confirm nor deny the existence of a document.[478]

Health information

1.46. 'Health information' is defined in section 3 of the *Health Records Act 2001* (Vic) (**Health Records Act**). Broadly, it relates to information or opinions about medical services provided to an individual.

Providing access outside the Act

1.47. An agency or Minister is encouraged, where possible, to make individuals' own health information available to them without the requirement for an access request under the Act.

1.48. Mechanisms for informal release exist under both the *Health Services Act 1988* (Vic) and *Health Records Act*.

1.49. Providing information through informal or administrative processes is generally more efficient for the agency or Minister and more cost-effective for applicants.

> For more information, see OVIC's Practice Note - Release of health records held by Victorian public sector agencies.

Providing access under the Act

1.50. Section 33(4) sets out additional processes when a request is made to an agency or Minister for an applicant's own health information.

1.51. If the principal officer of an agency or the Minister believes on reasonable grounds that providing health information to the applicant would pose a serious threat to their life or health, the principal officer or the Minister must not give access to a document so far as it contains that information.[479]

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[477] *Freedom of Information Act 1982* (Vic), section 33(2AC).

[478] *Freedom of Information Act 1982* (Vic), sections 33(6) and 27(2)(b).

[479] *Freedom of Information Act 1982* (Vic), sections 33(4).

1.52. If a principal officer or Minister does not give access, it is taken to be a refusal to provide access under section 26 of the Health Records Act and the document is considered an exempt document for the purposes of the FOI Act.

1.53. For agencies, the decision under section 33(4) must be made by a principal officer who is a registered health practitioner under the Health Practitioner Regulation National Law.[480] Where the agency's principal officer is not a registered health practitioner, the agency must appoint one to make this decision. There is no requirement for the Minister to be a medical practitioner.

1.54. The procedure set out in the Health Records Act provides an avenue for access to be provided through an appropriate health service provider nominated by the applicant and approved by the agency, where appropriate.

1.55. As a matter of practice, an agency or Minister may establish policies and procedures for assessing and determining whether reasonable grounds exist to indicate that the release of the document would pose a serious threat. In making this decision, an agency or Minister may consider:

- if there is a history indicating the person has, or has previously had, serious mental health issues (for example, suicidal tendencies, severe anxiety or depression, or psychiatric treatment); or
- whether there is a reasonable belief, based on credible and reliable evidence that the release of the health information would pose a serious threat to the applicant.

1.56. These considerations are not simple and may require an agency or Minister to obtain the view of a registered medical health practitioner. If the applicant consents, this could include the applicant's regular treating doctor.

Third party consultation

1.57. When an agency or Minister decides that a document contains the personal affairs information of a third party (someone other than the applicant), the agency or Minister must consult with that person (subject to limited exceptions) about whether their personal affairs information should be disclosed to the applicant.

[480] *Freedom of Information Act 1982* (Vic), sections 33(5).

The requirement to consult and related considerations

1.58. In deciding whether to exempt a document under section 33(1), an agency or Minister must:

- notify a third party who is the subject of the information (or if deceased, their next of kin) that a request has been received; and
- seek that individual's view as to whether they consent or object to disclosure of the document or information; and
- advise the individual that if they consent to disclosure, they are not entitled to apply to VCAT to review a decision to grant access to the document.[481]

1.59. The third party's view is not determinative. It is only one factor to be considered in deciding whether it is unreasonable to release the personal affairs information in the circumstances. [482]

1.60. When consulting, the 30-day period for deciding a request may be extended by up to 15 days under section 21(2)(a).

1.61. Where appropriate, an agency or Minister should ask the applicant if they need third party information. If not, the scope of the request can be reduced to exclude third party information and avoid the need to consult with some or all third parties. This approach also assists the applicant by reducing processing times while giving access to the substance of a document.

1.62. If the applicant does want personal affairs information, the applicant could be encouraged to refine their request to limit the types or nature of the third party information they seek, and therefore limit the consultation required.

1.63. When consulting, Professional Standard 7.3 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

1.64. A 'child' is defined in section 5 as a person under the age of 18 years.

1.65. Where the third party to be consulted is a child, an agency or Minister may notify either the child and / or their parent/guardian.[483]

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[481] *Freedom of Information Act 1982* (Vic), section 33(2B).

[482] *Marke v Victoria Police* [2007] VSC 522 [45].

[483] *Freedom of Information Act 1982* (Vic), sections 33A(1). Section 33A outlines an agency's or Minister's obligations when consulting with a child.

1.66. There is an exception to notifying a parent or guardian. If an agency is an information sharing entity,[484] the parent or guardian of the child must not be notified if the:

- child is a primary person;[485] and
- parent or guardian is a person of concern[486] or is alleged to pose a risk of family violence to that child.[487]

1.67. When considering who to notify, an agency or Minister should consider the exceptions to consultation in section 33(2C). The exceptions address situations where there are risks to life and safety, the risk of undue distress, or where consultation is unreasonable or not reasonably practicable in the circumstances.

Consultation with a next of kin

1.68. Where the third party is a deceased person, the person's next of kin should be consulted.

1.69. The term 'next of kin' is not defined in the Act. An agency can adopt its own appropriate approach, based on the operating context or business, or the nature of the document.

1.70. The *Human Tissue Act 1982* (Vic), *Coroners Act 2008* (Vic), *Guardian and Administration Act 2019* (Vic), and *Administration and Probate Act 1958* (Vic) offer guidance as to who may be the appropriate next of kin in certain circumstances.

1.71. The next of kin may include a:

- parent;
- spouse or domestic partner;
- brother or sister who is 18 years or older;
- son or daughter who is 18 years or older; or
- person who was a guardian immediately before a child's death.

[484] Defined in section 144D of the *Family Violence Protection Act 2008* (Vic).

[485] Defined in section 144E of the *Family Violence Protection Act 2008* (Vic).

[486] Defined in section 144B of the *Family Violence Protection Act 2008* (Vic).

[487] *Freedom of Information Act 1982* (Vic), section 33A(2).

Example

'AB9' and Edenhope & District Memorial Hospital (Freedom of Information) [2019] VICmr 18

Background

The applicant requested access to the medical records of their deceased sibling for the purpose of maintaining family medical histories.

The agency refused access to the documents in full under section 33(1) on the basis that disclosure of the deceased sibling's personal affairs information to the applicant would be unreasonable.

Consultation with next of kin

The agency had to consult with the deceased person's next of kin, to seek their views on whether the documents should be disclosed to the applicant. The agency considered the deceased person's domestic partner to be their next of kin and consulted with that individual about disclosure of the documents.

The applicant considered themselves to be the next of kin and that disclosure of the information would not be unreasonable.

Decision

The Public Access Deputy Commissioner noted that the term 'next of kin' is not defined in the FOI Act and considered the definition in section 3 of the *Human Tissues Act 1982* (Vic) (Human Tissues Act) to be useful.

In that section, a deceased person's 'senior available next of kin' is defined to mean their spouse or domestic partner, where the deceased person had a spouse or domestic partner immediately before the person's death and that person is available. Under section 3, the applicant would only be considered the next of kin if the deceased person did not have a spouse or domestic partner, adult child or living parent immediately before their death.

The Commissioner accepted that the deceased person's domestic partner was the deceased person's next of kin and it was appropriate for the agency to consult with that person. The deceased person's domestic partner did not consent to the disclosure of the medical records to the deceased person's sibling.

The Commissioner decided that disclosure of the personal affairs information to the applicant would be unreasonable. The sensitive nature of the medical records, and the wishes of the next of kin weighed heavily against disclosure of the documents.

When consultation is not required

1.72. There are important circumstances when notification is not required, including:

- 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 the person to be notified is a 'primary person',[488] and the notification would be reasonably likely to increase the risk to that person's safety from family violence; or
- where it is not reasonably practicable to do so.[489]

Undue distress

1.73. The fact an applicant has requested access to a public sector employee's personal information and may make further requests to the agency in future, is not enough to establish that notifying the employee of the request and conducting consultation would be likely to cause the person 'undue distress'.[490]

1.74. An applicant may 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.[491]

When is consultation not reasonably practicable?

1.75. The term 'reasonably practicable' is not defined in the Act.

1.76. The *Macquarie Dictionary* defines 'practicable' as 'capable of being put into practice, done or effected, especially with the available means or with reason or prudence; feasible'. Something will be practicable if it is capable of being put into practice.[492] The word 'reasonably' requires an assessment or judgment.[493]

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[488] Section 33(9) provides that a 'primary person' has the meaning given in section 144E of the *Family Violence Protection Act 2008* (Vic).

[489] *Freedom of Information Act 1982* (Vic), section 33(2C).

[490] *Akers v Victoria Police* [2022] VCAT 723, [35]-[43].

[491] *Akers v Victoria Police* [2022] VCAT 723, [35]-[43].

[492] *Uebergang v Australian Wheat Board* (1980) 145 CLR, 9.

[493] *Al Kateb v Godwin* [2004] HCA 37, [121].

1.77. An agency or Minister must exercise its reasonable and fair judgement to properly consider the reasonable practicability of consultation with each third party. The fact an agency or Minister is considering not releasing the document is not a reason, in and of itself, to not consult a third party.

1.78. The fact consultation is possible does not necessarily mean it is reasonably practicable.

Example

A request is made for access to a 15-year-old document containing the names and contact details of 20 individuals.

It is unlikely to be reasonably practicable for the agency to undertake consultation having regard to the:

- age of the document;
- information no longer being current or sensitive; and
- likelihood the third parties would reasonably consent or not object to the disclosure of their names.

1.79. In some circumstances, an agency or Minister may need to only consult with certain individuals with whom consultation is reasonably practicable.

Example

A request is made for access to a 7-year-old document containing the business affairs information of a company that has since been wound up and the personal information of a former employee who recently resigned from the agency.

The agency does have recent contact details of the former employee but has not been able to locate contact details for the liquidator of the wound-up company.

It is not reasonably practicable to consult with the wound-up company. It is likely to be reasonably practicable to consult with the former employee.

1.80. Professional Standard 7.1 requires agencies to consider all relevant factors when determining if consultation is practicable and provides examples of factors that may be relevant when deciding whether to consult.

1.81. Factors outlined in Professional Standard 7.1 include:

- The likelihood a third party will not consent to disclosure of information or a document.

- If it is reasonable to expect a third party would be concerned about disclosure, or the agency or Minister is not sure whether a third party would consent to disclosure, this is a strong factor in favour of consulting.

- If a third party would be reasonably unlikely to consent to the release of information under any circumstances, and the agency is sure that access will not be provided, an agency may decide that consultation is not practicable. For example, the third party is a victim of crime, and the applicant is the perpetrator.[494]

- If an agency is confident that a third party would not object to release of the information, an agency may decide that consultation is not practicable. For example, where the information is not sensitive in nature, has already been disclosed, or the third party has previously informed the agency or Minister that they have no concerns with information of this nature being released.

- The age of the information or document.

  - If the information or a document is historical or no longer current, an agency may decide that consultation is not practicable. Particularly where the contact details for a third party are no longer current or the agency could not easily find them in a timely way. Where any sensitivity about information or a document has diminished due to the passage of time, an agency may decide that consultation is not practicable given the reasonable likelihood that a third party would consent or not object to the disclosure of their name.

  - For example, building plans from 20 years ago contain a third party's name, as the author of the plans. The building has since been demolished. There is no sensitivity about the information in the document and the third party's name appears in the document in a professional capacity. It is reasonably likely the third party would not object to disclosure of their name.

- The number of third parties to be notified.

  - Where the number of third parties to be notified is disproportionate to an agency's size, resources and capacity to undertake consultation, it will be open to an agency to conclude consultation is not practicable.

  - For example, a document contains the names and contact details of 100 individuals. If the individuals need to be contacted separately, consultation is unlikely to be practicable. If the individuals are agency employees and could be easily contacted by email or other means (such as mail merge), consultation is more likely to be practicable.

[494] *Crocker v Ambulance Victoria* [2016] VCAT 2156.

- Whether the agency has, or is reasonably able to find, current contact details.
    - If the address, phone number, or email of a third party are out of date and cannot be reasonably found, an agency may decide that consultation is not practicable.
    - For example, a request is made for a 7-year-old document containing the business affairs information of a third party and the personal affairs information of its employee. A search of online business registries reveals the company is now deregistered, and no contact details can be found for the former employee after a Google and White Pages search for the employee's name. The agency determines consultation is not practicable with the business or the third party.

1.82. Where consultation is not practicable, an agency must record why.[495] A record is not required to specify each third party and can be general in nature.

Example

A request is made for a 30-year-old document containing the names of 15 individuals. The agency cannot find contact details for the individuals.

Under *Professional Standard 7.2*, the agency records that a request was made for the document and that consultation was not practicable with any individual because contact details could not be found.

How to conduct consultation

1.83. Consultation may occur in any manner or form (for example, by telephone, email, post, or a meeting).

1.84. When undertaking consultation, an agency or Minister should tell a third party the applicable exemption and what must be established for the exemption to apply.[496] This will help to enable a third party to provide an informed response and ensure their reasons are relevant, if they object to the document being released.

1.85. Providing a third party with a copy of the requested information or document can also assist them to make a more informed decision. Any information that is irrelevant to the third party or otherwise exempt should be deleted before the document is provided for consultation purposes.

[495] Professional Standard 7.2.

[496] See note to Professional Standard 7.3.

1.86. An agency or Minister should tell a third party that their views on disclosure of the information are not determinative. The views of a third party are only one consideration alongside all other relevant considerations, including the object of the Act to make available the maximum amount of information possible subject to limited exceptions and exemptions required to protect essential public, private and business interests.

1.87. Where consultation is routine or common with a particular third party, it may be appropriate to consider ways to expedite the consultation process. For example, a policy which governs the consultation process and when third parties will be consulted. The policy should make clear that attention must still be given to the context of each request and that each request turns on its own circumstances.

Privacy considerations

1.88. The Act does not specify what information an agency or Minister should provide to a third party when undertaking consultation. It may be necessary for a third party to know the identity of the applicant, to decide whether to consent to release of a document, and how to frame any specific objections.

1.89. An agency should consider its obligations under the PDP Act when disclosing an applicant's identity to a third party. IPP 2.1 in Schedule 1 of the PDP Act allows personal information, such as the name of an applicant, to be disclosed for the primary purpose for which it was collected only, unless an exception applies. Some exceptions include where:

- the disclosure is for a related secondary purpose the applicant would reasonably expect their information to be used in this way – IPP 2.1(a); or
- the applicant consents to the disclosure of their name – IPP 2.1(b).

1.90. Before disclosing the applicant's name to a third party for consultation, an agency or Minister should ensure it is satisfied it has consent or authority to do so.

For more information about IPP 2, see the Guidelines to the Information Privacy Principles.

Keeping records of consultation under the Professional Standards

1.91. Where consultation is undertaken, under Professional Standard 7.3 an agency must record:

- who was notified;
- whether the third party did or did not respond to the consultation;
- if the third party responded, whether they consented or objected to release; and
- where provided, the third party's reasons for objecting.

1.92. Where consultation is not practicable, an agency must record why.[497] A record is not required to specify each third party and can be general in nature.

1.93. A record might include a file note, or an exchange of emails or letters.

1.94. Keeping a record of consultation helps to demonstrate that an agency has meaningfully and comprehensively consulted with the third party. It also makes it easier for an agency to provide information to OVIC on review.

Notifying a third party of the decision

1.95. If a third party (or if deceased, their next of kin) objected to the release of their personal affairs information, or did not respond to the consultation, and a decision is made to release that third party's personal affairs information, the agency or Minister must, if reasonably practicable, notify the third party (or their next of kin) of:

- the decision to grant access to the document; and
- their right to apply to VCAT to review the decision.[498]

1.96. There is no requirement to notify a third party that consented to the release of their personal affairs information, as long as the decision reflects what the third party agreed to release.[499]

1.97. An agency or Minister should tell the applicant that the document will only be released at the end of the third party's 60-day review period. This period begins on the day the third party is notified of the decision.

> Learn more about notifying applicants of third party review rights in section 27.

1.98. If a third party was not consulted because it was not reasonably practicable, it is likely that it will also not be reasonably practicable for the agency or Minister to notify the third party of the decision to grant access to the document.[500]

1.99. If it is not reasonably practicable to notify a third party, the agency or Minister will still need to wait 60 days before releasing the document to the applicant.[501]

> For more information, see section 50 – Applications for review by the Tribunal.

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[497] Professional Standard 7.2.

[498] *Freedom of Information Act 1982* (Vic), section 33(3).

[499] *Freedom of Information Act 1982* (Vic), section 33(3A).

[500] *Freedom of Information Act 1982* (Vic), section 35(1C).

[501] A third party has review rights, irrespective of whether they are notified of the decision. See *Freedom of Information Act 1982* (Vic), section 50(3).

1.100. If a third party who objected to disclosing their information applies to VCAT to review a decision to release their information, an agency or Minister must not disclose the documents until the VCAT proceedings are finalised and directions are made.

For more information, see section 50 – Applications for review by the Tribunal.

Neither confirming nor denying the existence or non-existence of a document – section 33(6)

1.101. In some instances, disclosing information about the existence or non-existence of a document may itself be an unreasonable disclosure of an individual's personal affairs information under section 33(1).

1.102. An agency or Minister may, in responding to an access request, neither confirm nor deny the existence or non-existence of a document.[502] Before an agency or Minister does this, they must be satisfied including the details of their document search would involve the unreasonable disclosure of personal affairs information.[503]

Example

An agency receives a request from a member of the public for 'the complaint lodged by Mr X about my driving'. The applicant knows, due to surrounding factual information, that only two individuals could have made the complaint, being either Mr X or Mr Y.

If the agency were to disclose that it has a document matching the description in the application, the applicant would know Mr X made the complaint about them. That fact is, in itself, information relating to Mr X's personal affairs. Disclosing the existence of the complaint may amount to an unreasonable disclosure of Mr X's personal actions.

However, if the agency were to disclose that it did not have a complaint matching the description in the application, it would effectively confirm that the complaint was in fact made by Mr Y. That fact would reveal information relating to Mr Y's personal affairs, the disclosure of which may also be unreasonable.

In these circumstances, the agency may respond to the applicant's request by making a decision that neither confirms nor denies the existence of any documents, to avoid the unreasonable disclosure of information relating to the personal affairs of either Mr X or Mr Y.

[502] *Freedom of Information Act 1982* (Vic), section 33(6).

[503] *AOZ v JLV* [2019] VCAT 31 [204].

In this scenario, before applying section 33(6), the decision maker must be satisfied that disclosing the identity of the complainant to the applicant would be unreasonable, in either case.

1.103. Section 27(2) includes similar provisions when writing a decision:

- Section 27(2)(a) enables an agency or Minister to not include information in a notice of decision that would cause the notice of decision to become an exempt document;
- Sections 27(2)(ab) and (ac) allow an agency or Minister to neither confirm nor deny the existence of a document in a notice of decision, if to do so would increase the risk to:
  - a primary person's safety from family violence; or
  - the safety of a child or group of children.

For more information, see section 27 – Reasons etc. to be given.

Adoption records

1.104. The purpose of section 33(7) is to ensure that requests for access to adoption records are processed according to the procedures in the *Adoption Act 1984* (Vic).[504]

1.105. Adoption records means any documents which may be identified as having reference to or as standing in relation to the adoption in question.[505]

Assisted Reproductive Treatment Register

1.106. The purpose of section 33(8) is to ensure that requests for access to information kept in the assisted reproductive treatment register maintained under Division 1 of Part 6 of the *Assisted Reproductive Treatment Act 2008* (Vic) (**Assisted Reproductive Treatment Act**) are processed according to the procedures in that Act.

1.107. Sections 49 and 49A of the Assisted Reproductive Treatment Act lists the types of information required to be kept in the register by registered assisted reproductive treatment providers and doctors. The procedures for access to information in the register are found in Division 3 of Part 6 of that Act.

[504] See Part 6 of the *Adoption Act 1984* (Vic).

[505] *Thomas v Royal Women's Hospital* (1988) 2 VAR 618, 626.

Section 33A – Notice requirement where person is a child – document affecting personal privacy or information communicated in confidence

Extract of legislation

33A Notice requirement where person is a child— document affecting personal privacy or information communicated in confidence

(1) For the purposes of sections 33 and 35, if the person who is required to be notified about a request is a child, the agency or Minister may notify either or both of the following—

(a) the child;

(b) a parent or guardian of the child.

(2) An agency that is an information sharing entity or a Minister responsible for that agency must not notify a parent or guardian of a child under subsection (1) if—

(a) the child is a primary person; and

(b) the parent or guardian is a person of concern or is alleged to pose a risk of family violence to that child.

(3) In this section—

person of concern has the meaning given in section 144B of the **Family Violence Protection Act 2008**;

primary person has the meaning given in section 144E of the **Family Violence Protection Act 2008**;

Guidelines

1.1. Section 33A outlines an agency's or Minister's obligations when consulting with a child under section 33 and section 35.

1.2. The obligation to consult a child under section 33 will arise where a document contains or would reveal personal affairs information of the child.

1.3. The obligation to consult a child under section 35 will arise where a document contains or would reveal information communicated in confidence by the child to an agency or Minister.

Consultation with a child

1.4. A 'child' is defined in section 5 as a person under the age of 18 years.

1.5. Where the third party to be consulted is a child, an agency or Minister may notify either the child and/or their parent/guardian.[506]

1.6. There are some exceptions to consulting with a child, outlined below.

Family violence exception

1.7. If an agency is an information sharing entity,[507] the parent or guardian of the child must not be notified about the request if:

- the child is a primary person;[508] and
- the parent or guardian is a person of concern[509] or is alleged to pose a risk of family violence to that child.[510]

Other exceptions to consultation

1.8. When considering whether to consult with a child and/or their parent or guardian, an agency or Minister should consider the other exceptions to consultation in section 33 and section 35.

1.9. The exceptions address situations where there are risks to life and safety, the risk of undue distress, or where consultation is unreasonable or not reasonably practicable in the circumstances.

1.10. Where an exception applies, the agency or Minister is not required to conduct consultation.

For more information, see the FOI Guidelines on:

- section 33(2C) for personal affairs information
- section 35(1B) for information communicated in confidence

[506] *Freedom of Information Act 1982* (Vic), section 33A(1).
[507] Defined in section 144D of the *Family Violence Protection Act 2008* (Vic).
[508] Defined in section 144E of the *Family Violence Protection Act 2008* (Vic).
[509] Defined in section 144B of the *Family Violence Protection Act 2008* (Vic).
[510] *Freedom of Information Act 1982* (Vic), section 33A(2).

Section 34 – Documents relating to trade secrets etc.

Extract of legislation

34 Documents relating to trade secrets etc.

(1) A document is an exempt document if its disclosure under this Act would disclose information acquired by an agency or a Minister from a business, commercial or financial undertaking and the information relates to—

(a) trade secrets; or

(b) other matters of a business, commercial or financial nature and the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.

(2) In deciding whether disclosure of information would expose an undertaking unreasonably to disadvantage, for the purposes of paragraph (b) of subsection (1), an agency or Minister may take account of any of the following considerations—

(a) whether the information is generally available to competitors of the undertaking;

(b) whether the information would be exempt matter if it were generated by an agency or a Minister;

(c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and

(d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—

and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

(3) An agency or Minister, in deciding whether the disclosure of information would expose an undertaking unreasonably to disadvantage, if reasonably practicable, must—

(a) notify the undertaking that the agency or Minister has received a request for access to the document; and

(b) seek the undertaking's view as to whether disclosure of the document should occur; and

(c) state that if the undertaking consents to disclosure of the document, or disclosure subject to deletion of information likely to expose the undertaking to disadvantage, the undertaking is not entitled to apply to the Tribunal for review of a decision to grant access to that document.

(3A) If the agency or Minister, after consultation, decides to disclose the document, the agency or Minister must notify the undertaking from which the document was acquired 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(3A).

(3B) An agency or Minister is not required to notify an undertaking that 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).

(4) A document is an exempt document if—

(a) it contains—

(i) a trade secret of an agency; or

(ii) in the case of an agency engaged in trade or commerce—information of a business, commercial or financial nature—

that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage;

(b) it contains the results of scientific or technical research undertaken by an officer of an agency, and—

(i) the research could lead to a patentable invention;

(ii) the disclosure of the results of an incomplete state under this Act would be reasonably likely to expose a business, commercial or financial undertaking unreasonably to disadvantage; or

(iii) the disclosure of the results before the completion of the research would be reasonably likely to expose the agency or the officer of the agency unreasonably to disadvantage; or

(c) it is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document and the use or uses for which the document was prepared have not been completed.

Guidelines

Overview

1.1. Section 34 contains several exemptions, which protect:

- trade secrets of a business, commercial or financial undertaking;[511]
- other business, commercial or financial information of an undertaking, where disclosure would likely expose the undertaking to an unreasonable disadvantage;[512]
- trade secrets of an agency;[513]

[511] *Freedom of Information Act 1982* (Vic), section 34(1)(a).

[512] *Freedom of Information Act 1982* (Vic), section 34(1)(b).

[513] *Freedom of Information Act 1982* (Vic), section 34(4)(a)(i).

- other business, commercial or financial information of agencies engaged in trade or commerce;[514]
- the results of scientific or technical research undertaken by an agency;[515] and
- examination papers, examiner's reports and similar documents, where the document's use is not yet completed.[516]

1.2. If an agency or Minister is considering whether section 34(1)(b) applies, they must consult with the relevant third party when making a decision.[517] There is no requirement to consult with third parties when considering the other exemptions in section 34.

1.3. There are certain considerations that an agency or Minister may consider when deciding if section 34(1)(b) applies.[518]

1.4. Section 34 must be read consistently with the object of the Act in 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.[519] If it is unclear whether section 34 applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[520]

Discretion to disclose exempt documents

1.5. The decision to exempt a document under section 34 is discretionary.[521] This means an agency or Minister can choose to provide access to information that would otherwise be exempt under section 34, where it is proper to do so and where the agency or Minister is not legally prevented from providing access.

For more information on providing access to information outside of the Act, see section 16 – Access to documents apart from Act.

[514] *Freedom of Information Act 1982* (Vic), section 34(4)(a)(ii).

[515] *Freedom of Information Act 1982* (Vic), section 34(4)(b).

[516] *Freedom of Information Act 1982* (Vic), section 34(4)(c).

[517] *Freedom of Information Act 1982* (Vic), section 34(3).

[518] *Freedom of Information Act 1982* (Vic), section 34(2).

[519] *Ryan v Department of Infrastructure* [2004] VCAT 2346, [32].

[520] *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822, [21] and *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39, [29], both referring to *Ryder v Booth* (1989) VR 869, 877. While these decisions do not deal with section 34, 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.

[521] *Victorian Public Service Board v Wright* [1986] HCA 16, [3].

Meaning of common terms and phrases in section 34(1)

1.6. To be exempt under section 34(1)(a) or section 34(1)(b), the information must have been acquired by the agency or Minister from a business, commercial or financial undertaking.

Information acquired

1.7. The phrase 'information acquired' involves some positive handing over of information to an agency in a precise form.[522]

1.8. The actual document itself does not itself need to be acquired from an undertaking.[523] It may also disclose relevant information acquired from the undertaking.[524] For example, a document may contain information extracted or paraphrased from information acquired from an undertaking.

1.9. The information can be acquired from an undertaking through a third party.[525] For example, the undertaking's agent or accountant, or a barrister submitting an invoice to a law firm, who then submits the invoice to the agency for payment.[526]

1.10. However, information generated by an agency about the undertaking, or mutual information arising out of negotiations or collaboration between an agency and an undertaking, is generally not 'acquired' by the agency from the undertaking.[527]

1.11. The terms of a concluded contractual agreement may or may not contain information acquired from the undertaking.[528] Each case needs to be examined on its own merits to determine whether in fact:

- an agency acquired information from the undertaking; and
- whether disclosure of the terms of the concluded contract would disclose the acquired information.[529]

1.12. Records of transactions entered into by an agency with an undertaking may or may not reveal information acquired by the agency from the undertaking. Each case needs to be determined on its own facts.[530]

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[522] *Thwaites v Department of Human Services* (1999) 15 VAR 1, 14.

[523] *Gill v Department of Industry, Technology and Resources* (1985) 1 VAR 97, 106.

[524] *Gill v Department of Industry, Technology and Resources* (1985) 1 VAR 97, 106; *Holbrook v Department of Natural Resources* (1997) 13 VAR 1, 8.

[525] *Re City Parking Pty Ltd* (1996) 10 VAR 170, [198].

[526] See example, *Commissioner of State Revenue v Tucker* [2021] VCAT 238, [157].

[527] *Holbrook v Department of Natural Resources* (1997) 13 VAR 1, 8.

[528] *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [19]-[20].

[529] *Specialist Diagnostic Services Pty Ltd v Western Health* [2016] VCAT 17, [50]-[51].

[530] *Holbrook v Department of Natural Resources & Environment* (1997) 13 VAR 1, 8.

1.13. Where an agreement records the price payable between an agency and a business undertaking for a good, service, concession or other right, disclosing that information may reveal the price at which the business undertaking is prepared to do business. This is information acquired from the undertaking.[531] Whereas, an amount representing a retrospective compromise, revealing information mutual to the agency and the undertaking may not meet the requirement.[532]

Business, commercial, or financial undertaking

1.14. The phrase 'business, commercial or financial undertaking' generally refers to an entity, such as a company or organisation, that is engaged in business, trade, or commerce for a financial profit or gain.[533]

1.15. An undertaking that is partly government funded or partly controlled by government officers can still be a 'business, commercial or financial undertaking' for the purposes of section 34(1).[534]

Case examples

Examples

Mildenhall v Department of Treasury & Ors **(1994) 7 VAR 342**

Background

The applicant requested access to all documents relating to the award of the Grand Prix to Victoria.

The agency refused access to some documents on the basis they were exempt in whole or in part under section 34(1). The agency argued that disclosure of the documents would disclose information acquired from a business, financial or commercial undertaking.

Business, commercial or financial undertaking

In 1991 the Victorian State Government formed a public company limited by guarantee called Melbourne Major Events Co Ltd (**MME**) for the purpose of identifying and attracting major sporting and cultural events to Victoria.

Some features of the memorandum and articles establishing MME included that MME was prohibited from carrying on a business for the profit of its members, was not able to acquire property without the approval of the State Treasurer, the Premier of the State of Victoria was able to appoint directors and the directors were required to exercise their powers within financial guidelines, expenditure rules and procedures set by the directors in consultation with the State Treasurer.

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[531] *Holbrook v Department of Natural Resources & Environment* (1997) 13 VAR 1, 8.

[532] *Holbrook v Department of Natural Resources & Environment* (1997) 13 VAR 1, 8.

[533] See *Commissioner of State Revenue v Tucker* [2021] VCAT 238, [156], citing *Marple v Department of Agriculture* (1995) 9 VAR 29.

[534] *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [21].

In 1993 MME obtained the right to host the Grand Prix in Melbourne, and established a wholly owned subsidiary company, Melbourne Grand Prix Promotions Pty Ltd (**MGPP**), to promote the Grand Prix in Melbourne. MGPP was a proprietary company whose shares were all owned by MME and its directors were the same as MME. The memorandum of MGPP contained similar provisions to MME.

Both MME and MGPP were subject to the now repealed *Corporations Law*.

Decision – were MME and MGPP a 'business, commercial or financial undertaking'?

On this question, Judge Fagan, President of the then Administrative Appeals Tribunal of Victoria held:

- Both companies had been carrying on activities as a business, commercial or financial undertaking. They were involved in the business of attracting major cultural and sporting events to Victoria and encouraging private sector funding of those events. The events themselves are substantial business, commercial and financial undertakings. MME sought sponsorship for itself and acted as a promoter of some events and supplied certain commercial services for a fee. Judge Fagan considered MGPP's memorandum and articles, the purpose for which it was set up and the activities thus far undertaken by MGPP and found it clear that it was a business, commercial or financial undertaking.

- The fact the major activities carried on by MME and MGPP related to attracting or managing major events in Melbourne within the parameters of the terms of each company's memorandum and articles of association did not remove the two companies of the character of a business, commercial or financial undertaking.

- What a company does with profits, gains and assets it acquires from its activities is a matter for it within the limits of its memorandum and articles. The restriction on the disposition of profits, gains and assets, does not of itself prevent it from being a company of a business, commercial or financial undertaking in all cases.

- In this case, MME and MGPP were still permitted to carry on business for profit or gain, for the purposes of the lawful objects of the company. For example, the acquisition of assets could be devoted to the objects of the company rather than the individual members.

- The degree of control of the Premier and Treasurer was considerable, but not absolute. Partial government control of a company by government officers will not of itself deprive a company of the quality of a business, commercial or financial undertaking. Modern governments are often and perhaps necessarily involved in management of enterprises of this character.

Stewart v Department of Tourism, Sport and the Commonwealth Games [2003] VCAT 45

Background

The applicant sought access to an agreement between the State of Victoria and the Australian Commonwealth Games Association (**ACGA**), an agreement between the ACGA and Melbourne 2006 Pty Ltd, and any contracts, agreement and memoranda of understanding between those parties in relation to the staging of the Commonwealth Games in 2006.

Melbourne 2006 Pty Ltd was an entity set up by the State of Victoria to run the 2006 Commonwealth Games, which would be wound up following completion of the Commonwealth Games. It was subject to a considerable element of control by government officers and contained unusual features in its constitution and operations.

The Department refused access to some documents on the basis they were exempt under section 34.

Decision – was Melbourne 2006 Pty Ltd a business, financial or commercial undertaking?

Judge Bowman found that Melbourne 2006 Pty Ltd was clearly a business or commercial undertaking.

Melbourne 2006 Pty Ltd bore 'considerable resemblance' to the two companies, MME and MGPP, that were found to be business, commercial or financial undertakings in *Mildenhall v Department of Treasury & Ors* (1994) 7 VAR 342.

The annual report of Melbourne 2006 supported this finding, referring to such things as the grant of licences to commercially exploit the Games on a worldwide basis, broadcast rights, and world-wide sponsorship rights.

Section 34(1)(a) – trade secrets of a business, commercial or financial undertaking

1.16. A document or information is exempt under section 34(1)(a) if two conditions are satisfied:

- the document or information was acquired from a business, commercial, or financial undertaking; and
- the document or information contains trade secrets of the undertaking.

1.17. See above for guidance about the first condition. See below for guidance about the second condition.

Steps to applying the exemption

1.18. An agency or Minister seeking to apply section 34(1)(a) should:

1. Specifically identify the information considered to be a trade secret.

2. Determine whether the information was acquired from a business, commercial or financial undertaking, identifying when it was received and from what undertaking;

3. Consult with the undertaking to seek its views on whether the information constitutes a trade secret, and whether it consents to disclosure.[535] If not, obtain reasons and supporting documentation about why the information constitutes a trade secret.

    a. Consider seeking an extension of time under section 21(2)(b) if additional time is required to conduct consultation.

4. Determine if the information constitutes a trade secret of the undertaking, and should be exempt.

5. If a decision is made to release the information, and the undertaking did not consent to the disclosure, or did not reply, notify the affected undertaking of the decision and their right to appeal to the Victorian Civil and Administrative Tribunal (VCAT), including the 60-day appeal period.

6. Wait until the review period has ended, and where applicable, the conclusion of any appeal or VCAT proceedings before providing the documents to the applicant.

    a. If there are other documents falling within the request that do not contain the affected undertaking's information, these can be released to the applicant at the same time as the decision notice, without needing to wait for the appeal period to end.

Trade secrets

1.19. To be exempt under section 34(1)(a), the information acquired from the business, commercial or financial undertaking must constitute a trade secret of the undertaking.

1.20. The phrase 'trade secret' is not defined in the Act. Determining what is a 'trade secret' is primarily a question of fact for the decision maker.[536]

[535] The Act does not require an agency or Minister to consult under section 34(1)(a). However, consultation is strongly encouraged.

[536] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241, [30]-[32] in relation to the equivalent provision in the Commonwealth FOI Act, followed in *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [27].

1.21. A trade secret is generally proprietary knowledge of the undertaking but does not include every piece of commercially sensitive information.[537]

Examples

Secret formulas, processes, or methods used in production of goods or provision of services.

1.22. There are several factors indicating that information may constitute a trade secret.[538]

1.23. These include:

- the extent to which the information is known outside of the undertaking's business;
- measures taken by the undertaking to guard the secrecy of the information;
- the value of the information to the undertaking and competitors;
- the effort and money spent by the undertaking in developing the information; and
- the ease or difficulty with which others might acquire or duplicate the secret.

1.24. Information may be a trade secret even if it is not of a technical character.[539]

1.25. Information is generally not considered to be a trade secret where the processes, procedures, or methods are well known or widespread (including in that industry), could be assumed, or are publicly available.

Example

Tilley v VicRoads [2010] VCAT 483

Background

The applicant requested access to documents relating to a special registration scheme for heavy vehicles.

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[537] *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366, [27]; *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [26].

[538] *Re Bankers Trust Australia Ltd v Ministry of Transport* (1989) 2 VAR 33, 38-9 in relation to the equivalent provision in the Commonwealth FOI Act; *Re Organon (Aust) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588, [24] in relation to the equivalent provision in the Commonwealth FOI Act . These factors are "merely guides": *Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241, [37].

[539] *Searle Australia Pty Ltd v Public Interest Advocacy Centre* [1992] FCA 241, 33; *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [26].

The agency refused access to some information on the basis it contained information relating to trade secrets acquired from companies who applied to be part of the scheme.

Decision

The documents contained information relating to trade secrets.

The evidence satisfied the factors for a trade secret:

- The documents contained information provided by company A to VicRoads about a vehicle design, which was 'innovative, has significant commercial value, cost significant time and money, is secret and would be valuable to MSD's competitors. The innovation should increase vehicle stability and thus improve safety and allow for an increased payload. The vehicle has not yet been built.'
- With respect to Company B, the vehicle design was an innovative improvement to an existing vehicle. The design had significant commercial value and a significant amount of time and money had been spent on developing it. The information had been kept secret and would be valuable to Company B's competitors.
- The appearance of the vehicle did not disclose the trade secrets. The vehicle was either in operation or parked in a secure depot. To physically measure it would require access and a significant amount of time. Drivers had entered into a confidentiality agreement with Company B with their employer with regard to their knowledge of the vehicle.

Consultation with the undertaking

1.26. An agency or Minister is not required to consult with an undertaking under section 34(1)(a).

1.27. However, it is the undertaking, not the agency or Minister, that is likely to possess the required knowledge to determine whether the information constitutes a trade secret. Therefore, where it is not clear that information is a trade secret, an agency or Minister should consult with the undertaking, if reasonably practicable, to properly understand the nature of the information.

1.28. When consulting, an agency or Minister should:

- notify the undertaking of the request;
- ask the undertaking whether the information is a trade secret and if so, why; and
- maintain records of the consultation.[540]

[540] As required by Professional Standard 7.3, for agencies.

Section 34(1)(b) – business, commercial or financial information of a third party undertaking

1.29. A document or information is exempt under section 34(1)(b) if three conditions are satisfied:

- the document or information was acquired from a business, commercial, or financial undertaking; and
- the information relates to matters of a business, commercial or financial nature; and
- disclosure of the information is likely to expose the undertaking unreasonably to disadvantage (based on matters listed in section 34(2) and any other relevant considerations).

Steps to applying the exemption

1.30. An agency or Minister seeking to apply section 34(1)(b) should:

1. Specifically identify the information considered to be business, commercial or financial information.
2. Determine whether the information was acquired from a business, commercial or financial undertaking, identifying when it was received and from what undertaking.
3. Determine whether the information relates to matters of a business, commercial or financial nature.
4. Consult with the undertaking to seek its views on disclosure of the information and how disclosure would expose it unreasonably to disadvantage.
    a. Consider whether an extension of time under section 21(2) is permitted due to the need for consultation under section 34.
5. Critically and objectively consider whether disclosure would be likely to expose the undertaking unreasonably to disadvantage by identifying and establishing three elements:
    a. what the disadvantage is;
    b. whether the disadvantage is likely to occur; and
    c. whether the disadvantage is unreasonable.

    If the undertaking consents to disclosure or fails to object to disclosure without explanation, this is a strong indication that the document is not exempt.

6. If a decision is made to release the information, notify any affected undertakings that did not consent to the disclosure, of the decision and their right to appeal to the Victorian Civil and Administrative Tribunal (VCAT), including the 60-day appeal period.

7. Wait until the conclusion of the review period, and if applicable any appeal or VCAT proceedings before providing the documents to the applicant.

    a. If there are other documents falling within the request that do not contain the affected undertaking's information, these 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 that relates to matters of a business, commercial or financial nature

1.31. See the heading 'meaning of common terms and phrases' above, for guidance about the first condition of the exemption – which is that the information must have been acquired from a business commercial or financial undertaking.

1.32. The second condition requires the acquired information to have a business, commercial, or financial nature. 'Business', 'commercial' and 'financial' should each be given their ordinary meaning.[541]

Examples

- business plans and strategies;
- planning applications and background commercial information;
- commercial information in tender documents;
- financial reports or records; or
- invoices that include estimates, rates, fees and personnel applied to each task and the methodology applied to the tasks.[542]

1.33. Information will 'relate to' matters of a business, financial or commercial nature if there is a sufficient or material connection or relationship between the information that would be disclosed by the disclosure of the documents and matters of a business, financial or commercial nature.[543]

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[541] *Gibson v Latrobe CC* [2008] VCAT 1340, [25].

[542] *Commissioner of State Revenue v Tucker* [2021] VCAT 238, [158].

[543] *Commissioner of State Revenue v Tucker* [2021] VCAT 238, [158], citing *J & G Knowles & Associates Pty Ltd v Commissioner of Taxation* [2000] FCA 196.

Likely to expose the undertaking unreasonably to disadvantage

1.34. When determining if disclosure is likely to expose the undertaking unreasonably to disadvantage, three distinct elements must be identified and considered:

- what the disadvantage is;
- why and when disadvantage is likely to occur; and
- the disadvantage is unreasonable.

Identifying the disadvantage

1.35. In considering whether disclosure will expose an undertaking to unreasonable disadvantage, an agency or Minister should, along with any other relevant consideration, have regard to the factors set out in section 34(2).

1.36. These are:

- whether the information is generally available to competitors of the undertaking;
- whether the information would be exempt if it were generated by an agency or a Minister;
- whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
- whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls.

1.37. Other relevant considerations include whether disclosure would:

- give a competitor of the undertaking a competitive financial advantage;
- enable that competitor to engage in destructive competition with the undertaking; or
- lead to unwarranted conclusions about the undertaking's financial affairs and position that result in commercial and market consequences.[544]

[544] *Dalla-Riva v Department of Treasury and Finance* [2007] VCAT 1301, [33].

1.38. Under section 34(2)(d), examples of public interest factors in favour of disclosure include:

- transparency and accountability, particularly in the expenditure of public money;
- scrutiny of government decisions, especially involving allegations of wrong-doing;
- allowing the public to be better informed about decisions like the privatisation of government services; and
- contributing to informed public debate.

1.39. Government transparency and accountability requires private organisations contracting with government to expect more public scrutiny over their dealings. This includes the possibility that their business, financial or commercial information may be disclosed to the public under the Act.[545] The exemption in section 34(1)(b) balances government transparency and public accountability against protecting legitimate commercial interests.

Example

Asher v Victorian WorkCover Authority [2002] VCAT 369

In this case, VCAT observed:

> *… practices that are completely acceptable, and indeed expected between private sector organisations take on a different hue when the contract is between public and private entities and public money is involved.*

VCAT found that disclosure of information in an advertising contract between the respondent and a private company (some dollar amounts and narrative detailing what service was to be provided and for how much) would not be likely to expose the undertaking unreasonably to disadvantage.

There was greater weight to be placed on the need for transparency and accountability than on the tenuous evidence that the company would be disadvantaged in relation to its competitors.

Although the information was not generally available to competitors, that was only one of the factors for consideration and that factor, by itself, did not mean the information should not be disclosed.

Disclosure of material that formed part of the private company's tender proposal (namely, a costing of a particular advertising campaign strategy) would not be likely to expose that company unreasonably to disadvantage.

Disclosure of the hourly rate of a firm engaged to supervise probity aspects of the tender process would not expose that firm unreasonably to disadvantage.

[545] *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427, [477].

The meaning of 'likely'

1.40. Disclosure of the information must be likely to cause unreasonable disadvantage. 'Likely' is given its plain English meaning – seeming like truth, fact, or certainty, or reasonably to be believed or expected.[546] The test is one of likelihood rather than certainty. It means 'probable, such as well might happen or be true'.[547]

1.41. An agency or Minister should carefully consider if disclosure is 'likely' to cause unreasonable disadvantage, as opposed to it being a mere possibility. This should be outlined in the agency or Minister's reasons for its decision.

Unreasonable

1.42. An agency or Minister must establish that disclosure would likely cause 'unreasonable' disadvantage – not just any level of disadvantage.

1.43. Whether disclosure is likely to expose an undertaking unreasonably to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that are likely to follow from disclosure of the information. An agency or Minister must be able to articulate in their reasons why the disadvantage is unreasonable, as opposed to mere disadvantage.

1.44. Where the business, commercial or financial information is so small and inconsiderable or so incidental to an undertaking's central operations, its disclosure is unlikely to meet the threshold of unreasonable disadvantage.[548]

1.45. The timing of the access decision is a relevant factor that may affect the level of disadvantage likely to be suffered by an undertaking.[549]

Example

Stewart v Department of Tourism, Sport and the Commonwealth Games **[2003] VCAT 45**

Background

The applicant requested access to two contracts relating to the staging of the 2006 Commonwealth Games.

At the time, several important marketing and financial arrangements for the Commonwealth Games were about to be negotiated, including the sale of items related to the Commonwealth Games and various television and broadcasting rights.

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[546] See Macquarie Dictionary.

[547] *Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702, [38].

[548] *Holbrook v Department of Natural Resources* (1997) 13 VAR 1, 8.

[549] *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [32]-[38], [48].

The agency argued that the breach of the contracts' confidentiality clause, through disclosure of the contracts under the Act, would expose the undertaking unreasonably to disadvantage as it would demonstrate an inability of the undertaking to keep confidential, the information in the documents.

Decision

VCAT held that disclosure of the two contracts would be likely to expose the undertakings unreasonably to disadvantage.

VCAT observed:

> *Obviously a confidentiality clause cannot simply be inserted in every contract involving an agency so as to defeat the purposes of the Act. The circumstances of each case and document must be considered. However, the timing of events does seem to me to be a legitimate argument. In the context of such timing, it seems to me to be at least arguable that the disclosure of relevant information in breach of a confidentiality clause and impacting upon the anticipation of confidential dealings may of itself be sufficient to satisfy the requirement that it "would be likely to expose the undertaking unreasonably to disadvantage.*

Further, VCAT found that, given the timing, it made sense that disclosure of the contracts could discourage rightsholders and event promoters from engaging in business in Victoria. Sponsors and rightsholders are unwilling to have the details of their commercial arrangements made public. The ability to keep this information confidential increases the number of companies who would be prepared to negotiate such commercial agreements with Melbourne 2006 and therefore increase the potential revenues from the Commonwealth Games. VCAT commented at [48]:

> *I might say that the timing of the application had some bearing upon my thinking. Without in any way prejudging the matter, it might be that an application such as this would have greater prospects of success if the financial arrangements referred to … were concluded matters. The fact that such matters are not concluded seems to me to have bearing upon the disadvantage likely to be suffered unreasonably by the undertakings … In applications such as this, there are many factors to be considered. Doubtless in some applications the degree of alleged disadvantage remains a constant. In others, the degree of disadvantage may increase, decrease or disappear altogether with the effluxion of time.*

Case examples where unreasonable disadvantage not established

Case examples where unreasonable disadvantage was not established, include:

- Disclosure of a purchase order which revealed the total costs charged by an independent assessor for conducting an investigation for the agency. The document did not reveal the assessors approach to the investigation, which is information that would have given competitors a bidding advantage.[550]

- Disclosure of the indemnity limits of a building surveyor's professional indemnity insurance, contained in the building surveyor's certificate of currency for the insurance. The evidence demonstrated the certificates were designed to be shown to third parties and the building surveyor was not concerned about his competitors receiving the certificate.[551]

- Disclosure of emails from the staff of the agency to a cleaning contractor, relating to work the contractor had done, was doing, or ought to have been doing under various contracts to clean high-rise public housing in Victoria. VCAT noted the absence of direct evidence from the cleaning contractor, and the fact that deficiencies in the performance of the contract were legitimate matters of wider public interest.[552]

- A document disclosing the background and scope of work an auditing firm had been asked to perform, and nothing more, did not disclose the firm's methodology (and was therefore not harmful to the firm's competitive position). Whereas, an audit report that detailed how transactions were sampled or explained the actual analysis of the job at hand 'might properly be regarded as unique to a firm and thus worthy of protection from commercial competitors and capable of being described as methodology'.[553]

Case examples where unreasonable disadvantage was established

Case examples where unreasonable disadvantage was established, include:

- Information in contractual documents between a government health services provider and a private pathology and diagnostic services provider which revealed turnaround times for pathology tests performed by the contractor. Information about turnaround times was not known to the contractor's competitors and disclosure of the information would give the undertaking's competitors an unfair advantage in future public hospital tender processes.[554]

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[550] *AOZ v JLV* [2019] VCAT 31, [182].

[551] *Faine v Victorian Building Authority* [2019] VCAT 111, [31].

[552] *Fitzherbert v Department of Health and Human Services* [2019] VCAT 201, [56]-[57]; see also *Department of Education and Training v Australian Education Union* [2019] VCAT 1667, [68]-[73] and '*FD1' and Department of Health* [2023] VICmr 36, [22]; '*FD2' and Department of Justice and Community Safety* [2023] VICmr 37, [69]-[70], where the agencies' exemption claims failed due to lack of direct evidence from the undertaking.

[553] *Kotsiras v Department of Premier & Cabinet* [2003] VCAT 472, [37].

[554] *Specialist Diagnostic Services Pty Ltd v Western Health* [2016] VCAT 17, [82]-[84].

- Law firm invoices containing hours worked and hourly rates (as opposed to gross totals), and documents containing fee estimates.[555] The evidence demonstrated that the hourly rates for an individual law firm are not generally available and are confidential and commercially sensitive information for each firm. Disclosure would enable a competitor to engage in destructive competition with the business.

- Project models regarding negotiating a contract price for an upgrade to CityLink.[556]

- A state purchase contract for providing print management and associated services.[557]

- Disclosure of a consultant's methodology, where its competitors had not developed and did not use the same methodology. The methodology was described by the consultant as a systematic way of structuring and putting information together which had been developed over time, with substantial time and effort, that set the consultant apart from its competitors. Disclosing the methodology would cause the consultant unreasonable disadvantage because it would enable competitors to take its methodology and have a ready-made starting point.[558]

Requirement to consult with an undertaking – section 34(3)

1.46. In deciding whether disclosure would expose an undertaking unreasonably to disadvantage, an agency or Minister must, if reasonably practicable:

- notify the undertaking of the request;

- ask the undertaking how and why disclosure would expose it unreasonably to disadvantage, if at all;

- ask whether the undertaking consents to the disclosure of the information, or disclosure subject to deletion; and

- advise that if the undertaking consents to disclosure, or disclosure subject to deletions, it cannot apply to VCAT for review of the decision.[559]

1.47. When seeking the views of the undertaking, an agency or Minister should tell the undertaking that all elements of section 34(1)(b) must be made out before the exemption may apply. Informing the undertaking of the elements of the exemption will help to enable the undertaking to provide an informed response and ensure their reasons are relevant, if they object to the document being released.

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[555] *Chopra v Department of Education and Training* [2019] VCAT 1860, [59]-[66]; *Commissioner of State Revenue v Tucker* [2021] VCAT 238, [166]-[167], [170].

[556] *CityLink Melbourne Limited v Department of Transport* [2020] VCAT 1078.

[557] *Tucker v Commissioner of State Revenue* [2019] VCAT 2018.

[558] *Green v Department of Human Services* [2014] VCAT 1233.

[559] *Freedom of Information Act 1982* (Vic), section 34(3).

1.48. An agency or Minister should request and obtain detailed information from an undertaking about:

- what the disadvantage is;
- whether the disadvantage is likely to occur; and
- why the disadvantage is unreasonable.

1.49. The undertaking's view is not determinative. It is only one factor to be considered. An undertaking may strongly object to release, but that is not enough to satisfy the exemption. If an agency or Minister is not satisfied that all elements of the exemption are made out, an agency or Minister must release the document.

1.50. Conversely, if the undertaking consents to disclosure or fails to object to disclosure without explanation, this is a powerful reason in favour of finding that the document is not exempt.[560] The object of section 34(1) is to protect the undertaking's information. An agency or Minister will have difficulty establishing that release of a document would disadvantage the undertaking if the undertaking is asked to provide their views, and does not express concerns about release.

1.51. When consulting, the 30-day timeframe to decide a request may be extended by up to 15 days under section 21(2)(a).

1.52. An agency or Minister is only required to consult with an undertaking where it is reasonably practicable.

1.53. Consultation may occur in any manner or form. For example, by telephone, email, post, or a meeting.

1.54. Professional Standard 7.3 requires a record of the consultation to be kept. This includes who was consulted, whether they consented or objected, and any reasons provided.

More information

See section 33 of the FOI Guidelines for more information about:

- determining whether consultation is not reasonably practicable;
- how to conduct consultation;
- privacy considerations; and
- keeping records of consultation under the Professional Standards.

[560] *Hulls v Victorian Casino & Gaming Authority* (1998) 12 VAR 483, 495.

Notifying an undertaking of a decision to disclose information – section 34(3A) and (3B)

1.55. If an undertaking objects to releasing the information or document, or did not respond to the consultation, and a decision is made to release the document or information, the agency or Minister must notify the undertaking of the:

- decision to grant access to the document; and
- undertaking's right to apply to VCAT for a review of the decision.[561]

1.56. There is no requirement to notify an undertaking that consented to the release of the information or document, provided the decision reflects release of the information or document, as agreed by the undertaking.[562]

1.57. The applicant should be advised the document will only be released at the end of the 60-day review period, which begins on the day the undertaking is notified of the decision.

> Learn more about notifying applicants of third party review rights in section 27.

1.58. If an undertaking who objected to disclosure applies to VCAT for review, an agency or Minister must not disclose the documents until the VCAT proceedings are finalised and directions made.

> For more information, see section 50 – Applications for review by the Tribunal.

Practicability of notifying an undertaking of the decision

1.59. If the undertaking was not consulted because it was not reasonably practicable, the agency or Minister does not have to notify the undertaking of a decision to grant access to the document.[563] If the undertaking is not notified of the decision, the agency or Minister will still need to wait 60 days before releasing the document to the applicant.[564].

1.60. If the undertaking was consulted but cannot be located at the time of the decision, the agency or Minister should send the notice to the last known address of the undertaking and wait 60 days before releasing the information to the applicant.[565]

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[561] *Freedom of Information Act 1982* (Vic), section 34(3A).

[562] *Freedom of Information Act 1982* (Vic), section 34(3B).

[563] *Freedom of Information Act 1982* (Vic), section 34(3A).

[564] A third party has review rights, irrespective of whether they are notified of the decision. See *Freedom of Information Act 1982* (Vic), section 50(3A).

[565] *Freedom of Information Act 1982* (Vic), sections 34(3) and 34(3A).

1.61. If the agency or Minister is reasonably satisfied that the undertaking no longer exists at the time of the decision, the agency or Minister does not have to notify the undertaking of the decision. The agency or Minister should search the company database on the Australian Securities and Investment Commission website or the business name register on the Consumer Affairs Victoria website to confirm the status of the business. An Internet search is not sufficient.

Section 34(4)(a)(i) – trade secret of an agency

1.62. A document or information is exempt under section 34(4)(a)(i) if two conditions are satisfied:

- the document or information contains a trade secret of an agency; and
- disclosure would be likely to expose the agency unreasonably to disadvantage.

1.63. For guidance about the second condition, see the heading below 'Likely to expose the agency unreasonably to disadvantage'.

Steps to applying the exemption

1.64. An agency or Minister seeking to apply the section 34(4)(a)(i) exemption should:

1. Specifically identify the information considered to be a trade secret.
2. Determine if the information is in fact a trade secret of the agency.
3. Critically and objectively consider whether disclosure would be likely to expose the agency unreasonably to disadvantage by identifying and establishing three elements:
    a. what the disadvantage is;
    b. whether the disadvantage is likely to occur; and
    c. the disadvantage is unreasonable.
4. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

What is a trade secret?

1.65. A 'trade secret' is not defined in the Act, however it is generally considered to be proprietary knowledge of the agency.

Examples

Secret formulas, processes, or methods used in production of goods or provision of services.

1.66. There are a number of indicators that may show whether information constitutes a trade secret.[566]

1.67. These include:

- whether the information is of a technical character;
- the extent to which the information is known outside of the agency;
- measures taken by the agency to guard the secrecy of the information;
- the value of the information to the agency and any competitors;
- the effort and money spent by the agency in developing the information; and
- the ease or difficulty with which others might acquire or duplicate the secret.

1.68. Information is generally not considered to be a trade secret where the processes, procedures, or methods are well known or widespread (including in that industry), could be assumed, or are publicly available.

1.69. Timing is also a relevant consideration, as something which was originally secret may lose its secret character over time.

Section 34(4)(a)(ii) – business, commercial or financial information of an agency engaged in trade or commerce

1.70. A document or information is exempt under section 34(4)(a)(ii) if three conditions are satisfied:

- the agency is engaged in trade or commerce; and
- the document contains information of a business, commercial or financial nature; and
- disclosure of the information would be likely to expose the agency unreasonably to disadvantage.

1.71. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself or part of its operations, in a manner similar to a commercial entity.

[566] *Re Bankers Trust Australia Ltd v Ministry of Transport* (1989) 2 VAR 33, 38-9*; Re Organon (Aust) Pty Ltd v Department of Community Services and Health* (1987) 13 ALD 588, [24].

1.72. For guidance about the third condition, see the heading below 'Likely to expose the agency unreasonably to disadvantage'.

Steps to applying the exemption

1.73. It is best practice for an agency or Minister seeking to apply the section 34(4)(a)(ii) exemption to:

1. Specifically identify the information considered to be business, commercial or financial information.
2. Establish that the agency is engaged in trade or commerce in relation to the information. Note that 'governmental' activities (delivering statutory services or functions) are often not trade or commerce.
3. Determine whether the information relates to matters of a business, commercial, or financial nature.
4. Critically and objectively consider whether disclosure would be likely to expose the agency unreasonably to disadvantage by identifying and establishing three elements:
    a. what the disadvantage is;
    b. that the disadvantage is likely to occur; and
    c. that the disadvantage is unreasonable.
5. If the exemption is made out, consider whether to exercise the discretion in section 16(2) to provide access to the information or document despite the exemption applying.

An agency engaged in 'trade or commerce'

1.74. The words trade or commerce are expressions of fact and terms of common knowledge.[567]

1.75. Whether an agency is engaged in trade or commerce depends on the specific facts and circumstances. It requires clear evidence that the agency is doing more than delivering government services or functions.

1.76. Trade or commerce activities must 'of their nature, bear a trading or commercial character'.[568]

1.77. Whether an agency is engaged in trade or commerce is decided at the date of the request.[569]

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[567] *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50, per Deane J, Brennan J agreeing, [44].

[568] *Gibson v Latrobe City Council* [2008] VCAT 1340; *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594, 604.

[569] *Marple v Department of Agriculture* (1995) 9 VAR 29, 47.

1.78. An agency can be engaged in trade or commerce even if its activities are mainly governmental.[570]

1.79. The business, commercial or financial information must be connected to the trade or commerce activity that the agency is engaged in (not government services or functions).

1.80. Just because an agency is engaging in commercial or financial transactions, does not necessarily mean it is engaging in trade or commerce. Tendering out projects, entering commercial contracts, managing budgets, or buying goods and services does not necessarily constitute engaging in trade or commerce for the purpose of this exemption.[571]

Example

In *Pallas v Road Corporation* [2013] VCAT 1967, VCAT found that an agency that enters into contracts to deliver statutory services or functions, is not doing so for the purposes of trade or commerce, they are doing so to fulfil their statutory functions and deliver governmental services.

1.81. The approach in *Pallas* has not been universally adopted by VCAT. Other decisions consider that when carrying out governmental functions for which the agency in question was created for, the agency can still be engaging in trade or commerce when engaging contracted service providers.[572]

Case examples

Examples

Davis v Department of Transport [2022] VCAT 721

The applicant requested access to a master plan and business case for future government consideration of a long-term upgrade to a train station owned by the State Government, including precinct development and commercial opportunities.

VCAT accepted that the Department was engaged in trade or commerce with respect to the project on behalf of the State, and it would be officers of the Department who would be engaged in any future negotiations with the private sector about development options for the site.[573] In this situation, the agency is engaged in trade or commerce as the landlord or potential vendor of real estate.

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[570] *Commissioner of State Revenue v Tucker* [2021] VCAT 238, [175] citing *Gibson v Latrobe City Council* [2008] VCAT 1340; *Marple v Department of Agriculture* (1995) 9 VAR 29; *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 and *Re Thwaites and Metropolitan Ambulance Service* (1996) 9 VAR 427.

[571] See examples where the agency was found not be engaged in 'trade or commerce': *'CT9' and Department of Environment, Land, Water and Planning* [2021] VICmr 73, [38]-[39]; *'EZ4' and Department of Treasury and Finance* [2023] VICmr 4, [61]-[63].

[572] *Chopra v Department of Education and Training* [2019] VCAT 1860; *Commissioner of State Revenue v Tucker* [2021] VCAT 238, [174].

[573] Following *City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR 170, 185. In *City Parking*, the respondent was held to be an agency engaged in trade or commerce as landlord, tenant or potential vendor of real estate.

Save Albert Park Inc v Australian Grand Prix Corporation [2008] VCAT 168

The Australian Grand Prix Corporation was engaged in trade or commerce.[574]

VCAT rejected the applicant's argument that because the respondent was the sole body established to conduct the Grand Prix in Melbourne each year, it did not have competitors and did not operate in a competitive commercial environment.

VCAT noted it was apparent from the evidence (including the powers given to the Australian Grand Prix Corporation) that its role was not to just stage the Grand Prix but also to try to achieve financial and commercial success. This was through its efforts in promoting the event, and through the overall financial and commercial management of the event. In doing this, the Corporation must compete with other entertainment.

VCAT noted it did not need to be positively satisfied that the Corporation competes with interstate events, or even with all other types of available entertainment.

Information of a business, commercial or financial nature

1.82. The information must have a business, commercial, or financial nature. 'Business', 'commercial' and 'financial' should each be given their ordinary meaning.[575]

Examples

- business plans and strategies;
- background planning and commercial information;
- financial reports and records;
- development options for property owned by the State Government;[576]
- matters relating to broadcasting and sponsorship rights and licences, marketing and fundraising.[577]

[574] See also *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [41].

[575] *Gibson v Latrobe CC* [2008] VCAT 1340, [25].

[576] *Davis v Department of Transport* [2022] VCAT 721, [58].

[577] *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [42].

'Likely to expose the agency unreasonably to disadvantage'

1.83. To be an exempt document under section 34(4)(a)(i) or section 34(4)(a)(ii), the disclosure of the document must be likely to expose the agency unreasonably to disadvantage.

1.84. When determining if disclosure is likely to expose the agency unreasonably to disadvantage, three distinct elements must be identified and considered:

- what the disadvantage is;
- why and when disadvantage is likely to occur; and
- the disadvantage is unreasonable.

Unreasonable disadvantage

1.85. An agency must be able to explain how disclosing the information would unreasonably expose the agency to disadvantage. Tribunals and courts describe 'disadvantage' in terms of the business, commercial or financial implications of disclosure. In particular, whether disclosure is likely to:

- reduce an agency's capacity to compete in a competitive market for buying and selling goods or services;[578]
- reduce an agency's capacity to negotiate future commercial contracts;[579]
- strengthen the bargaining position of entities the agency negotiates with, at the expense of the agency competing for marketplace share;[580] or
- expose the rates that an agency is prepared to accept for various services – and if so, the likely impact on the agency's operations.

The meaning of 'likely'

1.86. Disclosure of the information must be likely to cause unreasonable disadvantage. 'Likely' should be given its plain English meaning – seeming like truth, fact, or certainty, or reasonably to be believed or expected. The test is one of likelihood rather than certainty. It means 'probable, such as well might happen or be true'.[581]

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[578] *Binnie v Department of Industry, Technology & Resources* (1986) 1 VAR 345, 348.

[579] *Binnie v Department of Industry, Technology & Resources* (1986) 1 VAR 345, 348; *Davis v Department of Transport* [2022] VCAT 721, [58].

[580] *Save Albert Park Inc v Australian Grand Prix Corporation* [2008] VCAT 168, [77].

[581] *Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702, [38].

1.87. An agency should carefully consider if disclosure is 'likely' to cause unreasonable disadvantage, as opposed to it being a mere possibility. The agency should then articulate that consideration in the written decision.

Unreasonable

1.88. An agency must establish that disclosure would likely cause 'unreasonable' disadvantage – not just any level of disadvantage. Whether disclosure is likely to expose the agency unreasonably to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that are likely to follow from disclosure of the information.

1.89. An agency must be able to articulate in their reasons why the disadvantage is unreasonable, as opposed to mere disadvantage.

1.90. Whether disadvantage would be unreasonable involves the consideration of all circumstances, including factors both in favour of, and against disclosure, such as:[582]

- the nature of the information;
- whether there is any public interest in disclosure or nondisclosure;
- the circumstances in which the information was obtained or created;
- whether the information has any current relevance; and
- the identity of the applicant and the likely motives of the applicant.

1.91. The word 'unreasonably' should be seen in the context of the balancing process between competing factors of the perceived need for confidentiality and the need for public accountability and transparency on the part of the government, its departments and agencies.[583]

[582] *Asher v Department of Innovation, Industry & Regional Development* [2005] VCAT 2702, [42]-[43]; *Fitzherbert v Department of Health and Human Services* [2019] VCAT 201, [61].

[583] *Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702, [38].

Examples – unreasonable disadvantage not established

Examples where unreasonable disadvantage to the agency was not established, include:

- Disclosure of the tender of the successful tenderer for the contract to manage swimming pools owned by the Council would not expose the Council unreasonably to disadvantage. It was unlikely that the companies tendering for the contract could simply refuse to deal with bodies subject to the FOI Act. There is a measure of disadvantage to government agencies in not being able to offer confidentiality to the business undertakings with whom they do business. However, in the context of freedom of information legislation, the disadvantage is not unreasonable.[584]

- Disclosure of a consultant's Public Sector Comparator (**PSC**) final report, which compared private sector bids for the Mitcham-Frankston Freeway Project with the cost to government of delivering that project, was not likely to expose the agency unreasonably to disadvantage. Relevant to this decision was:

    - its timing, in that the contract for the project had already been awarded and contractual negotiations had been concluded for some time. Therefore, disclosure would not impact the state of mind of bidders for the project and would not impact on the contractual relationship between the government and the successful bidder;

    - the significant public interest in transparency of the PSC process, to assess whether the process is of value for unique one-off projects, given how expensive PSC reports are to prepare, and the fact the government had chosen private delivery of the project, rather than a public/private partnership, before the PSC report was finalised; and

    - the importance of ensuring that public debate on an issue is informed by the facts. VCAT considered release of the facts in the PSC report would inform, rather than mislead the public.[585]

- A draft document prepared two years before the date of request, that did not go forward to the Minister, was superseded by events and not developed any further, and accurate at the time of its preparation, was not likely to expose the Department unreasonably to disadvantage if disclosed.[586]

[584] *Byrne v Swan Hill Rural City Council* (2000) 16 VAR 366, [43].

[585] *Dalla-Riva v Department of Treasury & Finance* [2005] VCAT 2083, [90]-[97], [100]-[103].

[586] *Honeywood v Department of Innovation, Industry and Regional Development* [2004] VCAT 1657, [29].

Examples – unreasonable disadvantage established

Examples where unreasonable disadvantage to the agency was established, include:

- Disclosure of two contracts would be likely to expose the agency unreasonably to disadvantage. It was important to protect the confidentiality of the information at the particular time because the agency was about to begin marketing the Commonwealth Games and dealing with sponsors, suppliers and licensees.[587]

- Disclosure of internal emails concerning financial modelling for contract negotiations between VicRoads and CityLink, documents containing the scope of work for advice on negotiations and internal commercial assessments, would be likely to expose the Department unreasonably to disadvantage. Relevantly:

    - the discussions were confidential, reflected ongoing concerns and contained current information as to how the State values and assesses commercial proposals, including the State's assessment of CityLink's proposal;

    - the information was relevant and sensitive, and its disclosure was likely to expose the State to unreasonable disadvantage in future negotiations with CityLink;

    - there was no current evidence of a public interest in accountability and transparency that outweighed the strong interest in the information remaining confidential.[588]

- Disclosure of the maintenance log of a cleaning contractor, containing job prices, unit prices and total prices charged, would expose the Department unreasonably to disadvantage in future maintenance tenders. The tender process includes a schedule of rates for specific work items. By releasing the maintenance log and comparing it to the tender schedule of rates, competitors of the contractor would be able to determine the charges the Department had previously accepted, over and above the tender schedule of rates, leading to the Department paying higher prices for maintenance services.[589]

[587] *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [43].

[588] *CityLink Melbourne Limited v Department of Transport* [2020] VCAT 1078, [147], [150]-[155].

[589] *Fitzherbert v Department of Health and Human Services* [2019] VCAT 201, [62]-[72].

Example – invoices for legal services

Commissioner of State Revenue v Tucker [2021] VCAT 238 and *Chopra v Department of Education and Training* [2019] VCAT 1860

Background

In both cases, the applicants requested access to invoices for legal services, expenditure claims, purchase orders and estimate of legal fees.

The agencies refused access to these documents under section 34(4)(a)(ii) and other exemptions.

Evidence

The agencies argued that release of the documents:

- would set a floor for the price of legal services, and the breach of confidentiality may drive law firms out of the market, narrowing the field, and further driving up prices for legal services; and
- would give a misleading impression of typical legal expenditure by the agencies in the types of matters brought by the applicants, who were frequent litigants against the agencies. This may unreasonably undermine the agencies' ability to properly defend proceedings brought against them by these frequent litigants.

Decision

In each case, VCAT accepted the agencies' evidence, and found that disclosure of the invoices and other expenditure documents would expose the agencies unreasonably to disadvantage.

Highly relevant to the finding that the disadvantage to the agencies was 'unreasonable', was the fact that in each case, the applicants had a long history of dispute with the respective agencies and would be able to link information in the documents with existing knowledge or draw inferences from the information in the documents because of existing knowledge.

VCAT found there was considerable risk the applicants would use the information in the documents mischievously to further their campaigns against the agencies, including by taking the information out of context, commencing further litigation, and exposing officers of the agencies and employees of the law firm, to unwarranted and misplaced criticism.

Example – Master plan and business case

Davis v Department of Transport [2022] VCAT 721

Background

The applicant requested access to a master plan and business case for future government consideration of a long-term upgrade to a train station owned by the State Government, including precinct development and commercial opportunities.

The Department refused access in part to the document under section 34(4)(a)(ii) and other exemptions.

Evidence

The Department argued that it is obliged to maximise any commercial benefits to the taxpayer when engaging in property dealings and transactions.

Disclosure of financial estimates, and other business and commercial information in the document, would be likely to prejudice current or future commercial negotiations carried out by the State, or undermine the State's commercial position.

The Department pointed to an undisclosed item in the document, explaining that it placed a value on a potential future transaction. The Department argued that disclosure of that information to potential future purchasers would be commercially disadvantageous to the State, and the very indication that the State may be considering options of this kind, had the potential to disadvantage the State commercially.

Disclosure would allow potential purchasers to access information from which they could strengthen their bargaining position at the expense of the Department and ultimately the taxpayer.

Decision

VCAT accepted that the Department was engaged in trade or commerce with respect to the project on behalf of the State, and it would be officers of the Department who would be engaged in any future negotiations with the private sector about development options for the site.

VCAT accepted the Department's evidence that it would be likely to be exposed unreasonably to disadvantage if the document was disclosed.

Consultation with another agency – section 34(4)(a)(i) and (ii)

1.92. The Act does not require an agency to consult with any other agency to which the information relates before making a decision under section 34(4)(a)(i) or (ii). There is also no right to seek review by the other agency. However, the other agency may have a right to apply to be joined as a party under section 60 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

Section 34(4)(b) – results of scientific or technical research

1.93. A document or information is exempt under section 34(4)(b)) if:

1. it contains the results of scientific or technical research (**research**); and
2. the research is undertaken by an officer of an agency; and
   a. the research could lead to a patentable invention (section 34(4)(b)(i)); or
   b. the research is not yet completed, and disclosure of the incomplete results would be reasonably likely to:
      i. expose a business, commercial or financial undertaking unreasonably to disadvantage (section 34(4)(b)(ii)); or
      ii. expose the agency or the officer of the agency unreasonably to disadvantage (section 34(4)(b)(iii)).

Scientific or technical research

1.94. The words 'scientific' and 'technical' should be given their ordinary meaning.[590]

1.95. The word scientific includes physics, chemistry and the social sciences.[591]

1.96. The word technical includes things which belong to, relate to, are appropriate to, peculiar to or characteristic of a particular art, science, profession or occupation including the technical arts and applied sciences.[592]

Officer of an agency

1.97. The term 'officer' is defined in section 5(1). It includes independent contractors and consultants engaged by an agency to carry out work or provide services.[593]

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[590] See *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, in the context of the words 'scientific' and 'technical' in the section 28(3) exemption.

[591] *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, 294 in relation to section 28(3), approved in *Johnson v Cancer Council of Victoria* [2016] VCAT 1596, [254] in relation to 34(4)(b)(iii).

[592] *Mildenhall v Department of Premier and Cabinet (No 1)* (1995) 8 VAR 284, 294-5 in relation to section 38(3), approved in *Johnson v Cancer Council of Victoria* [2016] VCAT 1596, [254] in relation to 34(4)(b)(iii).

[593] See example, *Mees v University of Melbourne (General)* [2009] VCAT 782, [31].

Patentable invention

1.98. A patent protects any device, substance, method or process that is new, inventive or useful.

For more information visit IP Australia.

Disclosure of incomplete results would be reasonably likely to expose undertaking or agency to disadvantage

1.99. The exemption will not apply to the results of research if the research has been finalised.[594]

1.100. A research project may extend over months or years, with many stages, and with interim or preliminary results being achieved at those various stages. The exemption is intended to apply to results achieved at these earlier stages of a research project.[595]

1.101. Examples of where there may be an unreasonable disadvantage include where premature disclosure would be reasonably likely to:

- lead to a misleading conclusion as to the likely results and outcome of the research project; or
- affect the undertaking's competitiveness in overseas markets.[596]

For more information, see the sections above:

- Section 34(1)(b) – likely to expose the undertaking unreasonably to disadvantage; and
- Likely to expose the agency unreasonably to disadvantage.

See also section 35(1)(b) – the meaning of 'reasonably likely'.

[594] *Re Coultbart and Princess Alexandra Hospital and District Health Service* (2001) 6 QAR 94, referred to with apparent approval in *Johnson v Cancer Council of Victoria* [2016] VCAT 1596, [255].

[595] *Re Coultbart and Princess Alexandra Hospital and District Health Service* (2001) 6 QAR 94, referred to with apparent approval in *Johnson v Cancer Council of Victoria* [2016] VCAT 1596, [255].

[596] *Hopper v Department of Agriculture and Rural Affairs* (unreported, AAT of Vic, Harding PM, 20 December 1990).

Case example

Johnson v Cancer Council of Victoria [2016] VCAT 1596

Background

The applicant requested access to survey questions and response data from surveys conducted by the Cancer Council of Victoria, regarding cigarette plain packaging.

The Council is a research institute recognised by the National Health and Medical Research Council. It conducts behavioural research studies using a science-based approach, which aim to assist in the prevention and early detection of cancer.

The Council refused access to some working datasets under section 34(4)(b)(iii) in that disclosure of incomplete search results would be reasonably likely to expose the agency or an officer of an agency unreasonably to disadvantage.

The Council argued that the working datasets were not final datasets. They contained cleaned and coded data that underlie published papers, but also contain data intended to form the basis of future planned published papers.

Decision

VCAT found:

- The datasets did contain the results of scientific research undertaken by the Council.
- Based on witness evidence, 5 of the 6 datasets did contain results of research that was not yet completed, because the results were to be the subject of additional research papers, to be published in the future.
- One dataset related to completed research, and could not be exempt under section 34(4)(b)(iii).

VCAT found disclosure of the incomplete research results would be reasonably likely to expose the Council and the researchers acting on behalf of the Council, unreasonably to disadvantage. In making this finding, VCAT accepted the evidence of the Council's researchers that:

- deliberation is an integral part of the scientific method. Researchers expect that privacy will be maintained to promote open and frank exchange of ideas within the research teams and mentoring from supervisors;
- premature release of data will disadvantage the Council's researchers who are conducting the project, by permitting others who have nothing to do with the study to analyse and make use of the data before the Council's researchers have the opportunity to complete their analyses of the data and prepare papers;

- the research process is undertaken on the understanding that the work is in draft form, so that there is opportunity to detect and correct errors, and identify alternative interpretations of findings prior to the research being scrutinised by independent scientific reviewers when the paper is submitted for publication;

- the research process involves researchers challenging each other and their work, analysing data from different perspectives, expressing sceptical views, identifying weaknesses, reaching dead-ends, re-examining hypotheses, and methods and revising data upon receiving new information. Premature publication of data would cause disadvantage;

- in empirical studies, researchers are judged on their final manuscript and published description and summary of the results of analysis – not on draft or non-final datasets;

- draft documents are unlikely to contain the full justifications or the complete methodology which would be set out in full manuscripts;

- draft documents do not present data in a format suitable for public dissemination and may contain data errors or unclear responses;

- draft documents contain non-final datasets that are later revised, and conclusions that are later refined, honed or omitted as a result of scientific peer review;

- release of internal or draft research documents may result in confusion or misrepresentation of the research in public particularly if draft documents differ from published data;

- there may be unfair or unreasonable criticism of the research or researcher if preliminary or uncorrected research material is subjected to public scrutiny before it is subject to correction and peer review processes;

- opponents of research may take advantage of the release of draft or incomplete documents to make allegations of scientific dishonesty or bias which may adversely affect the reputation of a researcher, even if ultimately unfounded or unsubstantiated;

- inappropriate scrutiny of draft documents may damage the effectiveness of the final published reports.

Other disadvantages to the Council or its researchers include:

- loss of access to schools for research and cancer prevention education;

- reduced willingness of the public, including cancer patients, to participate in other research projects;

- loss of competitive edge for attracting high calibre staff and securing funding;

- loss of trust among donors and volunteers;

- loss of privacy of the data;
- risk of unethical use of the data in breach of ethics approvals; and
- risks to the scientific process.

Section 34(4)(c) – examination papers and examiner reports

1.102. A document or information is exempt under section 34(4)(c)) if:

- it is:
  - an examination paper; or
  - a paper submitted by a student during an examination; or
  - an examiner's report; or
  - similar document; and
- the use or uses for which the document was prepared have not been completed.

1.103. The purpose of the exemption is to protect the efficacy of the testing and the integrity of the examination process.[597]

1.104. The term 'examination' has a broad definition and can include non-academic related examinations.[598] For example, selection reports containing questions prepared for recruitment processes.

1.105. A 'marking guide' has been found to be a 'similar document' for the purposes of this exemption.[599]

1.106. If the use or uses of a document have been completed, the exemption cannot apply.[600]

1.107. The exemption does not involve any public interest considerations. Any potential prejudice or disadvantage to the agency in a document's disclosure, or public interest in a document not being disclosed, is irrelevant.[601]

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[597] '*AP8' and Victorian Curriculum Assessment Authority* [2019] VICmr 143, [18].

[598] '*AU3' and Victoria Police* [2019] VICmr 184, [49].

[599] *McKean v University of Melbourne* [2007] VCAT 1310, [22]; '*AP8' and Victorian Curriculum Assessment Authority* [2019] VICmr 143, [18].

[600] *McKean v University of Melbourne* [2007] VCAT 1310, [25].

[601] *McKean v University of Melbourne* [2007] VCAT 1310, [25]-[26]; *Melbourne University v McKean* [2008] VSC 325, [30].

1.108. The words 'prepared' and 'completed' should be given their ordinary meaning.[602]

1.109. The 'use' or 'uses' of a document, must be a use 'for which the document was prepared', not a use of the information contained in the document or secondary use, created or realised after the document's preparation.[603]

Examples

- An examination paper prepared solely for use in a particular examination, in a particular subject, in a particular semester, cannot be exempt under section 34(4)(c) if a decision is made to use examination questions and other material contained in the document in the following year's examination.
- Whereas a marking guide prepared for ongoing use in assessments in future examinations, that will, in fact, be used by the agency again, can be exempt under section 34(4)(c), as the marking guide's future use was a use for which the document was prepared, and there is evidence to support that the use is not yet complete.[604]

1.110. The issue is whether the use or uses for which a document has been prepared have been completed, not whether the uses for which the information in a document, as it appears in other documents held by the agency, has been completed.[605]

Example

The fact an agency may store examination questions drawn from examination papers on a database for future use, does not change the fact that the examination papers themselves were prepared for particular examinations, in particular subjects, in particular semesters.

VCAT has held that an examination paper's use is completed at the end of the examination assessment period, when the results are published.[606]

[602] *McKean v University of Melbourne* [2007] VCAT 1310, [29].

[603] *McKean v University of Melbourne* [2007] VCAT 1310, [28].

[604] See example, '*AP8' and Victorian Curriculum Assessment Authority* [2019] VICmr 143, [20]-[22].

[605] *Melbourne University v McKean* [2008] VSC 325, [27]; followed in '*AU3' and Victoria Police* [2019] VICmr 184, [51].

[606] *McKean v University of Melbourne [2007] VCAT 1310*, [29]; see also '*AU3' and Victoria Police* [2019] VICmr 184, [52].

Section 35 – Documents containing material obtained in confidence

Extract of legislation

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

(c) 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 reasonably 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

1.1. Section 35 contains two exemptions that relate to information communicated in confidence by or on behalf of a person or a government to an agency or Minister. This includes where 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;[607] and
- 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.[608]

1.2. 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.

1.3. Section 35 must be read consistently with the object of the Act in 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.[609] 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.[610]

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[607] *Freedom of Information Act 1982* (Vic), section 35(1)(a).

[608] *Freedom of Information Act 1982* (Vic), section 35(1)(b).

[609] *Ryan v Department of Infrastructure* [2004] VCAT 2346, [32].

[610] *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822, [21] and *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39, [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.

Discretion to disclose exempt documents

1.4. The decision to exempt a document under section 35 is a discretionary power. This means 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.

For more information on providing access to information outside of the Act, see section 16 – Access to documents apart from Act.

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

1.5. 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.

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 or Minister

1.6. 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'.

1.7. 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.[611]

1.8. 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.

[611] *Sportsbet v Department of Justice* [2010] VCAT 8, [77], referring to *Woodford v Ombudsman* [2001] VCAT 721.

1.9. Documents created by an agency or its own officers should be considered under section 30(1) – the internal working documents exemption. For example, a brief prepared by departmental officers to their Minister should be considered under section 30, not section 35.[612]

1.10. In very limited circumstances, section 35 may apply to particularly sensitive and confidential information communicated to an agency by its own officers.[613] 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.[614]

Example

XYZ v Victoria Police [2010] VCAT 255

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

1.11. Whether information was communicated in confidence is a question of fact,[615] determined from the perspective of the communicator.[616]

1.12. An agency should consider direct or circumstantial evidence about the confidentiality the person expected when they communicated the information, taking into account:

- confidentiality can be express or implied from the circumstances;[617]

[612] See *Sportsbet v Department of Justice* [2010] VCAT 8, [73]-[76].

[613] *Sportsbet v Department of Justice* [2010] VCAT 8, [77]-[78], referring to *Birnbauer v Inner & Eastern Health Care Network* (1999) 16 VAR 9, 17.

[614] *Sportsbet v Department of Justice* [2010] VCAT 8, [77].

[615] *Ryder v Booth* [1985] VR 869, 883.

[616] *Woodford v Ombudsman* [2001] VCAT 721, [95]; *XYZ v Victoria Police* [2010] VCAT 255, [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

[617] *Ryder v Booth* [1985] VR 869, 883; *XYZ v Victoria Police* [2010] VCAT 255, [265].

- it is not necessary to consider whether legal obligations of confidence are set up by the communication in question;[618]
- 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;[619]
- merely marking a document 'confidential' is not sufficient evidence of an intention that the information remains confidential.[620] Conversely a document does not have to be marked 'confidential' to establish that it contains information communicated in confidence;[621]
- a legislated process to provide confidential information may support applying the exemption;[622]
- information disclosed to the public generally (for example, by the media) can remove confidentiality;[623]
- 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;[624]
- the reliability of information does not affect whether it was communicated in confidence;[625] 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.[626]

Case examples

Wellington v Surf Coast Shire Council (Review and Regulation) [2022] VCAT 942

Background

A local Councillor requested access to complete copies of the results of the three most recent Council staff satisfaction surveys.

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[618] *Ryder v Booth* [1985] VR 869, 883.

[619] *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 366.

[620] *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 366.

[621] *Williams v Victoria Police* (2007) 27 VAR 1194, [75].

[622] *Woodford v Ombudsman* [2001] VCAT 721, [93]-[98].

[623] *Stewart v Victoria Police* (1987) 2 VAR 192, 198.

[624] *Shulver v Victoria Police Force* (995) 9 VAR 71, 86-88; *Hoskin v Department of Education and Training* [2003] VCAT 946, [21].

[625] *Ambikapathy v Victorian Legal Aid* [1999] VCAT 1361, [17]; *Marke v Victoria Police* [2006] VCAT 1364, [56].

[626] *Williams v Victoria Police* [2005] VCAT 2516, [49]; *Marke v Victoria Police* [2006] VCAT 1364, [98]; *Corry v Victoria Police* [2010] VCAT 282, [32].

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, 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

Background

The applicant requested several documents relating to an alpine cattle grazing trail. The agency applied section 35 to emails received from the University of Sydney outlining a research proposal, because:

- the agency and the academics discussed confidentiality and 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 before 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

Background

The applicant made a request for documents relating to allegations against him regarding 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 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

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

- disclosure would divulge information or matter:
  - communicated in confidence;
  - by or on behalf of a person or a government to an agency or a Minister; and
- the information would be exempt matter if it were generated by an agency or a Minister.

1.14. The first condition is discussed above under 'meaning of certain common terms and phrases.'

Steps to applying the exemption

1.15. An agency or Minister seeking to apply section 35(1)(a) should:

1. Specifically identify any information or matter that appears to have been communicated in confidence.
2. 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.

3. 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.

4. Unless an exception in section 35(1B) applies, consult with the relevant third party or parties who communicated the information to determine:

    a. if the information was communicated in confidence, and if so, any supporting evidence; and

    b. whether the document should be disclosed to the applicant, including any reasons; and

    c. whether the third party consents to disclosure of the document, or disclosure subject to deletions.

5. Consider whether an extension of time under section 21(2) is permitted due to the need for consultation under section 35(1A).

6. 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:

    a. identify the relevant exemption in Part IV of the Act (typically section 30(1)); and

    b. ensure each element of that exemption is met.

7. 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.

8. Wait until the conclusion of any appeal period or VCAT proceedings before providing the documents to the applicant.

    a. 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

1.16. The second condition of section 35(1)(a) is that the information must be exempt under one of the other exemptions in Part IV, if the information had been generated by an agency, rather than communicated to the agency from an external person.

1.17. 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).

Example – section 30

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.

Under section 30(1), a document is exempt 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.

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.[627]

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.

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

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

- disclosure would divulge information or matter:
  - communicated in confidence;
  - by or on behalf of a person or a government to an agency or a Minister; and
- 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.

[627] *Casey CC v Environment Protection Authority* (General) [2010] VCAT 453, [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, [49], where the information was communicated by officers from other departments to the Department.

1.19. The first condition is discussed above under 'meaning of certain common terms and phrases'.

Steps to applying the exemption

1.20. An agency or Minister seeking to apply the section 35(1)(b) exemption should:

1. Specifically identify any information or matter that appears to have been communicated in confidence.

2. 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.

3. 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.

4. 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.

5. Unless an exception in section 35(1B) applies, consult with the relevant third party or parties who communicated the information to determine:

    a. if the information was communicated in confidence, and if so, any supporting evidence; and

    b. whether the document should be disclosed to the applicant, including any reasons; and

    c. whether the third party consents to disclosure of the document, or disclosure subject to deletions.

6. Consider whether an extension of time under section 21(2) is permitted due to the need for consultation under section 35(1A).

7. 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.

8. Wait until the conclusion of any appeal period or VCAT proceedings before providing the documents to the applicant.

    a. 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

1.21. 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.[628]

1.22. The section does not require an agency or Minister to consider the public interest generally.[629]

The meaning of 'reasonably likely'

1.23. 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;[630]
- a possibility that is real rather than fanciful or remote;[631]
- more probable than not;[632]
- more likely than not.[633]

1.24. 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.[634]

Case example

Mees v University of Melbourne [2009] VCAT 782

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.

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[628] 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; and *AOZ v JLV* [2019] VCAT 31, [108]-[112], [184].

[629] *Ryder v Booth* [1985] VR 869, 872-873, 880; *Mees v University of Melbourne* [2009] VSC 493, [42]; *XYZ v Victoria Police* [2010] VCAT 255, [267].

[630] *Mees v University of Melbourne* [2009] VCAT 782, [58].

[631] *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836.

[632] *Ryder v Booth* [1985] VR 869, 880.

[633] *RJE v Secretary to the Department of Justice* [2008] VSCA 265, [53].

[634] *Ryder v Booth* [1985] VR 869, referred to in *Mees v University of Melbourne* [2009] VCAT 782, [54].

Decision

Disclosure of the documents would be contrary to the public interest because it would inhibit persons making complaints against staff of the University, where the complaints might be justified.

With respect to establishing an 'actual likelihood' that information would not be forthcoming in future, the VCAT stated:

> *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

1.25. 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;[635]
- there must be an actual impairment to the ability of the agency to obtain like information in the future;[636]
- it is not enough that individuals would be somewhat less candid than they otherwise might be[637] or would feel resentment at having their confidence betrayed;[638]
- 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;[639]
- it is the agency that must be impaired from receiving information, not simply a reluctance on the part of a supplier to provide information;[640]

[635] *Ryder v Booth* [1985] VR 869, 880.

[636] *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68].

[637] *Birnbauer & Davies v Inner & Eastern Health Care Network* [1999] VCAT 1363, [68]; approved in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549, [69].

[638] *Sifredi v Medical Practitioners Board* [1999] VCAT 87 (affirmed on appeal *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33); *Ryder v Booth* [1985] VR 869, 872.

[639] *Sifredi v Medical Practitioners Board* [1999] VCAT 87 (affirmed on appeal *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33).

[640] *Kosky v Department of Human Services* [1998] VCAT 290, [22].

- 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.[641] 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.[642]

1.26. 'Obtain' is to be interpreted broadly and can include receiving unsolicited information.[643]

1.27. 'Similar information' is information of the same class or character as the information in the requested documents.[644] The precise content of the information is not relevant.[645]

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.

1.28. The similarity of the source of the information is a relevant consideration.[646]

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.

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[641] See *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361, 370; *Woodford v Ombudsman* [2001] VCAT 721, [99]-[101].

[642] *Barling v Medical Board* (Vic) (1992) 5 VAR 542, 565.

[643] *Graze v Commissioner of State Revenue* [2013] VCAT 869, [54].

[644] *Richards v Law Institute of Victoria* (unreported, County Court, Vic, Dixon J, 13 August 1984), 9.

[645] *Richards v Law Institute of Victoria* (unreported, County Court, Vic, Dixon J, 13 August 1984), 9.

[646] *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.

1.29. 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.*[647]

Examples

Case examples

United Firefighters Union of Australia – Victorian Branch v Victorian Equal Opportunity and Human Rights Commission [2022] VCAT 1193

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.

[647] *AOZ v JLV* [2019] VCAT 31, [129]-[130]; following *Corry v Victoria Police* [2010] VCAT 1096 and *Medical Practitioners Board of Victoria v Sifredi* [2000] VSC 33.

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

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 'broad brush statements that issues are sensitive is not enough'.

VCAT found the emails contained 'routine process-based innocuous factual information'.

VCAT found:

> *…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

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

1.30. Where an agency identifies information that appears to have been communicated in confidence, subject to certain exceptions, the agency must consult with the third party that communicated the information on the circumstances surrounding the communication before making a decision.

The requirement to consult and related considerations

1.31. 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.

1.32. 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.

1.33. 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.

1.34. 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.

1.35. When consulting, the 30-day timeframe to decide a request may be extended by up to 15 days under section 21(2)(a).

1.36. Consultation may occur in any manner or form. For example, by telephone, email, post, or a meeting.

1.37. Professional Standard 7.3 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

1.38. A 'child' is defined in section 5 as a person under the age of 18 years.

1.39. 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.

1.40. Section 33A(2) contains an exception to notifying a parent or guardian. If an agency is an information sharing entity,[648] the parent or guardian of the child must not be notified if:

- the child is a primary person;[649] and
- the parent or guardian is a person of concern[650] or is alleged to pose a risk of family violence to that child.

[648] Defined in section 144D of the Family Violence Protection Act 2008 (Vic).

[649] Defined in section 144E of the Family Violence Protection Act 2008 (Vic).

[650] Defined in section 144B of the Family Violence Protection Act 2008 (Vic).

1.41. 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 reasonably practicable in the circumstances.

When consultation is not required

1.42. There are important circumstances in section 35(1B) when notification is not required:

- 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 reasonably practicable to do so.

Undue distress

1.43. 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'.[651]

1.44. 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.[652]

More information

See section 33 of the FOI Guidelines for more information about:

- determining whether consultation is not reasonably practicable;
- how to conduct consultation;
- privacy considerations;

[651] 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* [2022] VCAT 723 [35]-[43].

[652] *Akers v Victoria Police* [2022] VCAT 723 [35]-[43].

- keeping records of consultation under the Professional Standards.

Notifying a third party of a decision

1.45. 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.

1.46. 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)).

1.47. 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.

Read more about notifying applicants of third party review rights in section 27.

1.48. 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.

For more information, see section 50 – Applications for review by the Tribunal.

1.49. If the third party was not consulted because it was not reasonably practicable, the agency or Minister does not have to notify the third party of a decision to grant access to the document. If a third party is not notified of the decision, the agency or Minister will still need to wait 60 days before releasing the document to the applicant.[653]

For more information, see section 50 – Applications for review by the Tribunal.

[653] A third party has review rights, irrespective of whether they are notified of the decision. See *Freedom of Information Act 1982* (Vic), section 50(3AB).

Section 36 – Disclosure contrary to the public interest

Extract of legislation

36 Disclosure contrary to the public interest

(1) A document is an exempt document if—

(a) in the case of documents of a department or prescribed authority its premature disclosure under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to have a substantial adverse effect on the economy of Victoria, including but not limited to, revealing consideration of a contemplated movement in bank interest rates or in sales tax, the imposition of credit controls, the sale or acquisition of land or property by the Crown, urban re-zoning, the formulation of land use and planning controls and the formulation of State imposts; or

(b) in the case of documents of a department or prescribed authority its disclosure under this Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided for the use or guidance of, officers of an agency on the procedures to be followed or the criteria to be applied in negotiation, including financial, commercial and labour negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to the financial property or personnel management and assessment interests of the Crown or of an agency.

(2) A document is an exempt document if—

(a) in the case of a document of a council, its premature disclosure under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to have a substantial adverse effect on the economy of the municipal district, including but not limited to, revealing consideration of a contemplated movement in rates, fees, charges, interest charges or other levies, the sale or acquisition of land or property by the council, urban re-zoning, the formulation of land use and planning controls and the formation of imposts; or

(b) in the case of a document of a council, its disclosure under this Act would be contrary to the public interest by reason that it would disclose instructions issued to, or provided for the use of guidance of, officers of a council on the procedures to be followed or the criteria to be applied in negotiation, including financial, commercial and labour negotiation, in the execution of contracts, in the defence, prosecution and settlement of cases, and in similar activities relating to the financial property or personnel management and assessment interests of the council.

Guidelines

Overview of section 36

1.1. There are several exemptions in section 36, which are designed to only protect 'essential public interests'.[654] The exemptions have many discrete elements and can be difficult to establish.

1.2. In summary:

- sections 36(1)(a) and (2)(a) exempt documents that would prematurely disclose information capable of having a substantial adverse effect on the economy of the State or of a local government area; and

- sections 36(1)(b) and (2)(b) exempt documents that would disclose instructions given to officers of an agency for their use or guidance, on the procedures to be followed or the criteria to be applied in negotiations relating to the financial, property or personnel management and assessment interests of the Crown, or of an agency, or of a council.

1.3. The exemptions in section 36(1)(a) and (b) apply to documents of a department or prescribed authority. The exemptions in section 36(2)(a) and (b) apply to documents of a council. They cover similar subject matter to the exemptions in section 36(1).

1.4. Section 36 must be read consistently with the object of the Act in 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.[655] If it is unclear whether section 36 applies to a document, the exemption should be interpreted narrowly, in a way that favours access to information.[656]

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[654] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 1982, 1064 (John Cain, Premier of Victoria).

[655] *Ryan v Department of Infrastructure* [2004] VCAT 2346 [32].

[656] *Hennessy v Minister Responsible for the Establishment of an Anti-Corruption Commission* [2013] VCAT 822 [21] referring to *Ryder v Booth* (1989) VR 869, 877; *Smith v Department of Sustainability and Environment* [2006] VCAT 1228 [15]. While these decisions do not deal with section 36, 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 the exceptions narrowly.

Discretion to disclose exempt documents

1.5. The decision to exempt a document under section 36 is a discretionary power.[657] An agency can choose to provide access to information that would otherwise be exempt under section 36, where it is proper to do so and where the agency is not legally prevented from providing access.

For more information, see section 16 – Access to documents apart from Act.

Documents that would prematurely disclose information that would substantially adversely affect the economy

1.6. Section 36(1)(a) and section 36(2)(a) are similar. Section 36(1)(a) applies to departments and prescribed authorities. Section 36(2)(a) applies to councils.

Elements of section 36(1)(a) – documents of departments and prescribed authorities

1.7. A document is exempt under section 36(1)(a) if its premature disclosure would be contrary to the public interest because it would be reasonably likely to have a substantial adverse effect on the economy of Victoria.

1.8. A 'substantial adverse effect on the economy of Victoria' may include revealing consideration of:

- a contemplated movement in bank interest rates or sales tax;
- the imposition of credit controls;
- the sale or acquisition of land or property by the Crown;
- urban rezoning;
- the formulation of land use and planning controls; and
- the formulation of State imposts.[658]

[657] *Victorian Public Service Board v Wright* [1986] HCA 16 [3].

[658] *Freedom of Information Act 1982* (Vic), section 36(1)(a).

Elements of section 36(2)(a) – documents of councils

1.9. A document is exempt under section 36(2)(a) if its premature disclosure would be contrary to the public interest because it would be reasonably likely to have a substantial adverse effect on the economy of the local government area.

1.10. A 'substantial adverse effect on the economy' of the local government area may include revealing consideration of:

- a contemplated movement in rates, fees, charges, interest charges or other levies;
- the sale or acquisition of land or property by the council;
- urban rezoning;
- the formulation of land use and planning controls; and
- the formulation of imposts.[659]

Applying the exemptions

1.11. A document will only be exempt under sections 36(1)(a) and (2)(a) if its premature disclosure would be contrary to the public interest.

1.12. A document is not automatically exempt because it contains information of the same character or nature as the examples used in the exemption of information that may have a substantial adverse effect on the economy.[660] For example, a document is not exempt just because it reveals consideration of urban rezoning. It must also be contrary to the public interest to release that information.

1.13. To establish that the premature disclosure of the document would be contrary to the public interest, the department, prescribed authority, or council must produce evidence of:

- the character or nature of the information which would be disclosed by releasing the document;
- the economy of Victoria or the relevant local government area; and
- what the substantial adverse effect on the economy would be if the specific information in the document was prematurely disclosed.[661]

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[659] *Freedom of Information Act 1982* (Vic), section 36(2)(a).

[660] *Pallas v Roads Corporation* [2013] VCAT 1967 [26]-[28], [54].

[661] *Pallas v Roads Corporation* [2013] VCAT 1967 [26]-[28], [54]; *Thwaites v Austin & Repatriation Medical Centre (formerly North Eastern Health Care Network)* (unreported, VCAT, Davis M, 28 April 1999), [27]-[28].

Case examples where the exemption did not apply

Examples

Thwaites v Austin & Repatriation Medical Centre (formerly North Eastern Health Care Network) (unreported, VCAT, Davis M, 28 April 1999)

Background

The applicant requested access to two documents, being a consultant's report prepared on behalf of the agency and a submission prepared by the agency for the Victorian government relating to options for utilising the private sector in a proposed redevelopment and funding model for the Austin public hospital.

At the time of the applicant's request, the private sector tender process was anticipated to begin later that year. The potential tenderers were to be given a project brief that did not contain financial information of the kind in the requested documents.

The agency refused access to the documents relying on the exemptions in sections 34(1)(a), 34(4)(a) and 36(1)(a).

The agency undertook to provide the applicant with the requested documents once the tender process had been completed.

Agency's reason for applying section 36(1)(a)

The agency argued that payment to the successful tenderer for the supply of medical and health services relating to the new Austin Hospital would be $8-10 billion over a period of 15-20 years. As this was a large payment, it would have a substantial effect on the Victorian economy.

The agency did not produce evidence of the Victorian budget or what the economic loss would be if the documents were released.

Decision on section 36(1)(a)

To establish section 36(1)(a), it is necessary for the agency to show evidence of the economy of Victoria and how the disclosure of the documents would have a substantial adverse effect on it. For example, producing evidence of the gross state product or the expenditures and receipts of the economy of Victoria, and evidence of the percentage potential adverse impact that release of the documents would have on the Victorian economy.

The agency produced some evidence to suggest that the potential bidders may be able to couch their bids in a certain form if they were aware of the monetary amount at which the State would be better off to privatise rather than keep the health service in the public sector.

However, this evidence was insufficient to show a substantial adverse effect on the economy of Victoria.

Pallas v Roads Corporation [2013] VCAT 1967

Background

The applicant requested access to documents provided by the agency to the Minister for Roads in 2010, relating to a study of options to address traffic congestion on a major arterial road in Melbourne. The applicant initiated the study in 2008, when he was the Minister for Roads.

The agency refused access to some documents which were in draft form and had not been endorsed by the agency or the Government. The agency relied on several exemptions, including section 36(1)(a).

Issue

The agency argued that release of the draft documents would provide information of a character described in section 36(1)(a): 'the sale or acquisition of land or property by the Crown, urban rezoning and the formulation of land use and planning controls'.

The agency argued that the character of the information alone was enough to establish that disclosure would be reasonably likely to have a substantial adverse effect on the economy and that it was not necessary to provide further evidence of the economic impact of release.

Decision

The documents were not exempt under section 36(1)(a).

The mere nature of the information in the document is not enough, on its own, to establish the exemption. To establish the exemption, it is necessary for the agency to produce evidence that:

- characterises the material that would be disclosed; and
- establishes a necessary substantial, adverse effect on the economy by its premature disclosure.

The agency did not produce any evidence of how the information in the document would be reasonably likely to have a substantial adverse effect on the economy of Victoria.

Case example where the exemption applied

Clark v Department of Treasury and Finance [2002] VCAT 1040

Background

The applicant requested access to two documents that recorded advice of agency officers regarding Victoria's preferred position in certain inter-governmental negotiations concerning the goods and services tax (**GST**).

Decision

The documents were exempt under section 36(1)(a).

Disclosure of the documents would be premature whilst the Inter-Governmental Agreement (**IGA**) that was entered into when the GST was introduced remained operative.

Disclosure of the documents would be reasonably likely to have a substantial adverse effect on the economy of Victoria.

Reasons

The IGA dealt with key and substantial economic matters and the negotiations involved very large amounts of money.

Disclosure of advice concerning Victoria's preferred position concerning the GST would reveal this information to the other party to the negotiations (the Commonwealth) and to other States competing for part of the GST. This would put Victoria at a disadvantage in those negotiations.

Contracts and legal disputes relating to financial, commercial, or labour matters

1.14. Section 36(1)(b) is similar to section 36(2)(b). Section 36(1)(b) applies to documents of departments and prescribed authorities. Section 36(2)(b) applies to documents of councils.[662]

1.15. A document is exempt under section 36(1)(b) or 36(2)(b) if disclosure would be contrary to the public interest because the document would disclose;

- instructions issued to, or provided for;

[662] *United Firefighters Union of Australia – Victoria Branch v Metropolitan Fire and Emergency Services Board* [2018] VCAT 631 [145] citing *City Parking Pty Ltd v City of Melbourne* (1996) 10 VAR 170.

- the use or guidance of officers of an agency or council;
- on the procedures to be followed or the criteria to be applied in negotiation, including:
    - financial, commercial and labour negotiation;
    - in the execution of contracts;
    - in the defence, prosecution and settlement of cases; and
    - in similar activities;
- relating to the financial, property or personnel management and assessment interests of the Crown or of an agency or of a council.

1.16. The exemption is limited to documents disclosing procedures or criteria to be applied in negotiation, not to any documents relating to financial, property or personnel management in general.

1.17. The 'contrary to the public interest' element here focuses on the nature of the information in the requested document. This means that if the information is of the nature as that described in section 36(1)(b) or section 36(2)(b), its disclosure is contrary to the public interest.

1.18. The exemption may apply to a document containing instructions about a particular negotiation, as well as a document containing instructions on general practices and procedures relating to negotiation.[663] However, this should be considered on a case-by-case basis. See the case examples below for more information about when this may apply.

Case examples

Exemption established

United Firefighters Union of Australia – Victoria Branch v Metropolitan Fire and Emergency Services Board [2018] VCAT 631

The requested documents formed part of internal communications about the agency's negotiating position for the purposes of its enterprise bargaining process with the applicant.

Senior Member Proctor held that the exemption in section 36(1)(b) may apply to a document containing instructions about a particular negotiation, as well as a document containing instructions on general practices and procedures relating to negotiation.

[663] *United Firefighters Union of Australia – Victoria Branch v Metropolitan Fire and Emergency Services Board* [2018] VCAT 631 [151]-[158].

They found section 36(1)(b) applied to the documents because their disclosure would be contrary to the public interest because it would disclose instructions issued to, or provided for, the use or guidance of agency officers concerning the criteria to be applied in labour negotiation relating to the financial and/or personnel management interests of the agency. Disclosure of the documents could undermine the agency's industrial negotiations with the applicant.

Exemption not established

'BV4' and Glen Eira City Council [2020] VICmr 205[664]

The requested documents were in relation to a workplace investigation into discrete issues relating to particular circumstances.

Section 36(2)(b) did not apply to the documents. The information in the documents did not fall within the scope of the exemption and the information was not of a nature contemplated by the exemption. The Public Access Deputy Commissioner noted:

> I am not satisfied the relevant information falls within the scope of this exemption, nor is it information of the nature contemplated by this exemption. The document can be distinguished from those reviewed by VCAT in the *United Firefighters Union* decision, as they do not involve labour negotiations intended to apply to a class of persons. Nor am I satisfied disclosure of the document would be likely to weaken the bargaining position of the Agency in future labour and personnel management negotiations. Accordingly, I am not satisfied the document is exempt under section 36(2).

The documents did not involve labour negotiations intended to apply to a class of persons. Disclosure of the documents would not be likely to weaken the bargaining position of the agency in future labour and personnel management negotiations.

[664] See also *'EH6' and Labour Hire Authority* [2022] VICmr 97 and *'CX2' and Department of Premier and Cabinet* [2021] VICmr 102 for other examples where the evidence did not establish that the document contained information of the same nature as described in the exemption.

Section 37 – Certain documents arising out of companies and securities legislation

Extract of legislation

37 Certain documents arising out of companies and securities legislation

(1) A document is an exempt document if it is, or is a copy of or of a part of, or contains an extract from—

(a) a document for the purposes of the Ministerial Council prepared by, or received by an agency or Minister from the Commonwealth, another State or an authority of the Commonwealth or another State;

(b) a document the disclosure of which would disclose the deliberations or decisions of the Ministerial Council, other than a document by which a decision of that council was officially published; or

(c) a document furnished to the National Companies and Securities Commission or the Australian Securities and Investments Commission by the Commonwealth or another State or an authority of the Commonwealth or another State and relating solely to the functions of the Commission in relation to the law of the Commonwealth or another State or the laws of two or more States.

(2) This section has effect as if the Northern Territory were a State.

Guidelines

1.1. There are no FOI Guidelines on section 37.

Section 38 – Documents to which secrecy provisions of enactments apply

Extract of legislation

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

1.1. 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

1.2. Section 38 exempts documents where information in those documents is protected by a secrecy provision.

1.3. Before 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.[665]

1.4. The section 38 exemption applies to secrecy provisions that are in force. It does not matter whether the provision came into effect before or after the commencement of the Act.[666]

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[665] See *Graze v Commissioner of State Revenue* (Review and Regulation) [2013] VCAT 869, [37].

[666] *Department of Premier and Cabinet v Hulls* [1999] VSCA 117, [40].

1.5. Section 38 applies to secrecy provisions contained in Victorian enactments only.[667]

Secrecy provisions in Commonwealth laws

1.6. The section 38 exemption does not apply to Commonwealth laws.[668]

1.7. However, an applicant will still be prevented from accessing information under the Act, if a secrecy provision or a confidentiality provision in a Commonwealth law prohibits disclosure of certain information.[669] This is because section 109 of the Commonwealth Constitution provides that a Commonwealth law prevails where there is an inconsistency between a State law and a Commonwealth law.

> See section 13 of the FOI Guidelines for more information about the interaction between the right of access under the Act and Commonwealth laws that prohibit disclosure of information.

Steps to applying section 38

1.8. 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.

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[667] *Interpretation of Legislation Act 1984* (Vic), section 38: "**Act** means an Act passed by the Parliament of Victoria".

[668] *Rich v Victoria Police* (unreported, AAT of Vic, Preuss PM, 14 February 1997), 43-44.

[669] *XYZ v Victoria Police* [2010] VCAT 255, [49].

What is an enactment?

1.9. An enactment is defined broadly in 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?

1.10. 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.[670]

1.11. 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?

1.12. For section 38 to apply, the secrecy provision must refer specifically to the kind of information in the document.

1.13. One way to determine this, is to consider whether the enactment talks about 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 document's creation or existence.

1.14. 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

1.15. An enactment 'applies specifically' when:

- the enactment is formulated with such precision it refers with particularity to the information;[671]

[670] *Van Der Craats v City of Stonnington* [2015] VCAT 2039, [27].

[671] *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.

- 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'. [672]

- it focuses on the information in the document;[673] or

- the secrecy provision applies to a document's contents, as opposed to only applying based on who is in possession of the document.[674]

Case examples

United Firefighters Union of Australia – Victorian Branch v Victorian Equal Opportunity and Human Rights Commission (Review and Regulation) [2022] VCAT 1193

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 with section 176 of the *Equal Opportunity Act 2010* (Vic) (**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 -
>
> (a) an appointed member of the Board; or
>
> (b) the Commissioner; or
>
> (c) a member of the staff of the Commission; or
>
> (d) a person (other than a person referred to in paragraph (c)) acting under the authority of the Commission, the Board or the Commissioner; or
>
> (e) a person to whom section 15 of the Equal Opportunity Act 1984 applied immediately before its repeal; or
>
> (f) a member of the Commission before 1 October 2009.

[672] *Hulls v Victorian Casino & Gaming Authority* (1998) 12 VAR 483, 496.

[673] *Hulls v Victorian Casino & Gaming Authority* (1998) 12 VAR 483, 496; *Dept of Premier and Cabinet v Birrell (No 2)* [1990] VR 51, per Murphy J.

[674] *Department of Justice v Western Suburbs Legal Service Inc* [2009] VSC 68, [21].

(2) 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 -

(a) in the course of performing functions or duties or exercising powers under this Act or an old Act; or

(b) as a result of another person performing functions or duties or exercising powers under this Act or the old Act.

(3) 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 because:

- 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.

'FC6' and Victoria Police (Freedom of Information) [2023] VICmr 29

Background

The Applicant requested access to CCTV footage 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 with sections 30D and 30E of the *Surveillance Devices Act 1999* (Vic) (**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;
- 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;
- enactment prohibits persons from disclosing information that would fall within the terms of the Applicant's request; and
- exceptions in sections 30E(4) and 30E(5) did not apply in this case.

The requested footage was exempt from release under section 38, with section 30E(1) of the SD Act.

Indicators of when an enactment does not apply specifically

1.16. An enactment does not 'apply specifically' when it:

- is too general in its application.[675]
- makes a blanket reference to 'information';[676]
- is formulated in such general terms it would encompass the particular information without expressly referring to it;[677]
- is concerned with the context in which the document exists;[678]
- 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.[679] 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;[680]

[675] *News Corporation Ltd v National Competition & Securities Commission* (1984) 1 FCR 64, 68; *Firmstone v State Revenue Office* [2003] VCAT 953, [27].

[676] *Tilley v VicRoads* [2010] VCAT 483, [58]; *Al Hakim v Ombudsman* [2001] VCAT 1972, [37].

[677] *News Corporation Ltd v National Competition & Securities Commission* (1984) 1 FCR 64, 68.

[678] *Hulls v Victorian Casino & Gaming Authority* (1998) 12 VAR 483, 496.

[679] *Al Hakim v Ombudsman* [2001] VCAT 1972, [39]; *Firmstone v State Revenue Office* [2003] VCAT 953, [27].

[680] *Kavvadias v Commonwealth Ombudsman* [1984] FCA 55, [9]-[10].

- focuses on the document or its status, source, or destination instead of the particular information in the document;[681] 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.[682] 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.[683]

Case examples

Al Hakim v Ombudsman [2001] VCAT 1972

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).

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 –

(a) shall not disclose that information except –

(i) 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

(ii) 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

(iii) for the purposes of any communication authorised under section 20A, 20B, 20C or 20D of this Act;

[681] *Hulls v Victorian Casino & Gaming Authority* (1998) 12 VAR 483; *Dept of Premier and Cabinet v Birrell (No 2)* [1990] VR 51, per Murphy J.

[682] *News Corporation Ltd v National Competition & Securities Commission* (1984) 1 FCR 64, 68; *Richardson v Business Licensing Authority* [2003] VCAT 1053, [14].

[683] *Department of Justice v Western Suburbs Legal Service Inc* [2009] VSC 68, [21].

…

(2) 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 of the Ombudsman Act was not a secrecy provision.

The effect of section 20 was to prohibit all persons from disclosing information that it obtained or received under the Act.

The blanket reference to 'information' suggests that 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.

'EL5' and Knox City Council (Freedom of Information) [2022] VICmr 132

The Agency applied section 38 with section 54 of the *Food Act 1984* (Vic).

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 –

(a) With the consent of the person from whom the information or document was obtained;

(b) In accordance with any Act or regulation; or

(ba) In connection with the administration of–

(i) this Act or the regulations; or

(ii) 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–

(i) a corresponding law; or

(ii) a law that relates to the safety or suitability of food; or

(iii) the Aged Care Act 1997 of the Commonwealth; or

(iv) 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

(c) 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.

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.

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.

The documents were not exempt under section 38.

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

A prohibition

1.17. The provision must prohibit a person from disclosing the specified information.

1.18. 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 not following the prohibition. Where a penalty provision does exist, it is a persuasive (but not determinative) indication that the enactment falls within section 38.[684]

1.19. 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;[685] or
- expresses preferred, rather than mandatory, conduct.[686]

Example

Darwish v Deakin University [2002] VCAT 87

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 under 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.
- 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.

[684] *Telstra Corp v Vic Roads* [2001] VCAT 1699, [17].

[685] *Barnes v Commissioner for Corporate Affairs* (No 2) (1987) 1 VAR 438, 440-441.

[686] *McCulloch v University of Melbourne* [2001] VCAT 2246, [41]-[43].

Persons referred to in the enactment

1.20. 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.

1.21. 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.[687]

Are there any exceptions to the secrecy provision?

1.22. 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.

1.23. For example, if an enactment states that the information may be released with the written consent of the subject of the information, and the 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.[688]

Example

Gullquist v Victorian Legal Services Commissioner (Review and Regulation) [2017] VCAT 764

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.

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[687] *Department of Justice v Western Suburbs Legal Service Inc* [2009] VSC 68, [21].

[688] *Gullquist v Victorian Legal Services Commissioner* [2017] VCAT 764, [80].

1.24. 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.[689]

Case examples

Smeaton v Transport Accident Commission [2017] VCAT 1486

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:

- permitting disclosure under the FOI Act would be inconsistent with the secrecy regime created by section 131; and
- 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

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.

[689] See examples, *Akers v Victoria Police* [2022] VCAT 723, [67]; *Smeaton v Transport Accident Commission* [2017] VCAT 1486; *XYZ v Victoria Police* [2010] VCAT 255; *Tilley v VicRoads* [2010] VCAT 483.

Tilley v VicRoads (General) [2010] VCAT 483

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

1.25. Section 125(1) of the *Local Government Act 2020* (Vic) (**LG Act**) protects 'confidential information' from unauthorised disclosure.

1.26. 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.

1.27. 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 an FOI 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?

1.28. Section 3 of the LG Act defines 12 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?

1.29. 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:

(4) 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.

(5) 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?

1.30. 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:'

(a) **council business information**, being information that would prejudice the Council's position in commercial negotiations if prematurely released.

(b) **security information**, being information that if released is likely to endanger the security of Council property or the safety of any person.

(c) **land use planning information**, being information that if prematurely released is likely to encourage speculation in land values.

(d) **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.

(e) **privileged information**, being information to which legal professional privilege or client legal privilege applies.

(f) **personal information**, being information which if released would result in the unreasonable disclosure of information about any person or their personal affairs.

(g) **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?

1.31. 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.

1.32. 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?

1.33. 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?

1.34. 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:'

- confidential meeting information, being the records of meetings closed to the public under section 66(2)(a).
- internal arbitration information, being information specified in section 145.
- Councillor Conduct Panel confidential information, being information specified in section 169.
- 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.
- information that was confidential information for the purposes of section 77 of the Local Government Act 1989 (Vic).

1.35. 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

Dunlop v City of Port Phillip [2023] VCAT 500

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 confidential information for the purposes of section 77 of the *Local Government Act 1989*. The documents 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

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

Legislation	Section	Title	Decision
Adoption Act 1984	83	Restriction on access to reports and records	*'DY7' and Department of Families, Fairness and Housing* [2022] VICmr 16
Australian Grand Prix Act 1994	25(6)	Business plan	*Stewart v Australian Grand Prix Corporation (General)* [2008] VCAT 167

Business Licensing Authority Act 1998	18	Secrecy	*Richardson v Business Licensing Authority* [2003] VCAT 1053 *Roberts v Department of Justice and Regulation* [2018] VCAT 1560
Children, Youth and Families Act 2005	16ZE	Prohibition on publishing certain information	*'FO6' and Department of Education (Freedom of Information)* [2024] VICmr 19 (5 February 2024)
	41	Identity of reporter or referrer confidential	*'CF2' and Department of Health and Human Services* [2020] VICmr 296 *'BC3' and Department of Health and Human Services* [2020] VICmr 26
	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
	552	Confidentiality of reports	*'FJ2' and Department of Families, Fairness and Housing* [2023] VICmr 89
Commission for Children and Young People Act 2012	55	Disclosure of information prohibited	*'ET3' and Commission for Children and Young People (Freedom of Information)* [2022] VICmr 203 (25 August 2022)

Corrections Act 1986	104ZZA	Offence to use or disclose personal or confidential information unless authorised	*Glascott v Department of Justice and Regulation* [2018] VCAT 1491 *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586
Coroner's Act 2008	115(6)	Access to documents	*'CP8' and Victoria Police* [2021] VICmr 35 *'CK5' and Victoria Police* [2020] VICmr 343
Crimes Act 1958	464JA(4)	Offences in relation to recordings	*Akers v Victoria Police* (Corrected) [2022] VCAT 720
Equal Opportunity Act 2010	176	Secrecy	*United Firefighters Union of Australia – Victorian Branch v Victorian Equal Opportunity and Human Rights Commission* [2022] VCAT 1193
Evidence (Miscellaneous Provisions) Act 1958	21M	Confidentiality	*'AP2' and Department of Justice and Community Safety* [2019] VICmr 137
Family Violence Protection Act 2008	144C	Meaning of excluded information	*'BY4' and St Vincent's Health* [2020] VICmr 233
	144R	Unauthorised use and disclosure of confidential information	*'BY4' and St Vincent's Health* [2020] VICmr 233
	166(2)	Restriction on Publication of Proceeding in Magistrate's Court	'*DW6' and Department of Education and Training* (Freedom of Information) [2021] VICmr 329

Health Complaints Act 2016	151	Non-disclosure of information – complaint resolution process	*'AQ3' and Health Complaints Commissioner* [2019] VICmr 147
	152	Non-disclosure of information given in conciliation	*'AQ3' and Health Complaints Commissioner* [2019] VICmr 147
Health Records Act 2001	27	No access to health information where information given in confidence	*Swannie v Bayside Health* [2007] VCAT 1302
Health Services Act 1988	141	Confidentiality	*'CE7' and Northern Health* [2020] VICmr 292
Gambling Regulation Act 2003	10.1.30	General duty of confidentiality	*The Star Proprietary Limited and Victorian Commission for Gambling and Liquor Regulation* [2020] VICmr 16 *'DJ5' and Victorian Commission for Gambling and Liquor Regulation* [2021] VICmr 213
	10.1.34	Third party disclosures	*XYZ v Victoria Police* (General) [2010] VCAT 255
Judicial Proceedings Reports Act 1958	4(1A)	Prohibition of reporting of names	*MNE v Victoria Police FOI Division* [2017] VCAT 975
Labour Hire Licensing Act 2018	103	Secrecy provision	*'FJ1' and Labour Hire Authority* [2021] VICmr 339
Legal Aid Act 1978	40K	Freedom of Information Act 1982	*'FD6' and Victoria Legal Aid (Freedom of Information)* [2023] VICmr 41 (10 May 2023

	43	Officers of VLA not to reveal any information without consent of VLA	*Seaman v Victoria Legal Aid* [2008] VCAT 589
Legal Profession Uniform Law Application Act 2014	462	Prohibition on disclosure of information	*'EL4' and Victorian Legal Services Board (Freedom of Information)* [2022] VICmr 131 (18 May 2022)
Local Government Act 2020	125		*Dunlop v City of Port Phillip* [2023] VCAT 500
Livestock Disease Control Act 1994	107C	Secrecy	*Johnson v Department of Primary Industries* (General) [2007] VCAT 1656
Mental Health Act 2014	175	Secrecy	*'FC3' and Mental Health Tribunal* [2023] VICmr 29
Mineral Resources (Sustainable Development) Act 1990	119(2)	Secrecy	*'DM8' and Department of Jobs, Precincts and Regions* [2021] VICmr 243
Residential Tenancies Act 1997	499	Confidentiality	*'DZ1' and Department of Justice and Community Safety* [2022] VICmr 19
Road Safety Act 1986	Part 7B	Use and disclosure of information	*'AO1' and VicRoads* [2019] VICmr 127 *'AE3' and VicRoads* [2019] VICmr 39
	90P	Freedom of Information Act 1982	*'FI9' and the Transport Accident Commission* [2023] VICmr 256
Road Safety Camera Commissioner Act 2011	20	Law enforcement documents	*'CH5' and Office of the Road Safety Camera Commissioner* [2020] VICmr 317

Surveillance Devices Act 1999	30D	What is protected information?	*'AL1' and Victoria Police* [2019] VICmr 100 *'BF2' and Victoria Police* [2020] VICmr 53
	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	91	Prohibition on certain disclosures of information by tax officers	*Tucker v Commissioner of State Revenue* [2019] VCAT 2018
Transport Accident Act 1986	131	Secrecy Provision	*Smeaton v Transport Accident Commission* [2017] VCAT 1486
Unclaimed Money Act 2008	76	Prohibition on certain disclosures of information by authorised persons	*'AM2' and State Revenue Office* [2019] VICmr 110

Table of provisions that section 38 does not apply to

1.37. 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.

Legislation	Section	Title	Decision
Building Act 1993	229J	Confidentiality	*'ET4' and Victorian Building Authority* [2022] VICmr 204
Commercial Passenger Vehicle Industry Act 2017	254	Definition	*'DW7' and Commercial Passenger Vehicles Victoria (Freedom of Information)* [2021] VICmr 330

Food Act 1984	54(1)	Secrecy	*'EL5' and Knox City Council* [2022] VICmr 132
Infrastructure Victoria Act 2015	25	Infrastructure Victoria must seek consent before disclosing confidential information	*'BT1' and Infrastructure Victoria (Freedom of Information)* [2020] VICmr 183
Melbourne University Standing Resolution 3.2.1			*McCulloch v University of Melbourne* [2001] VCAT 2246
Ombudsman Act 1973	20	Disclosing or taking advantage of information	*Woodford v Ombudsman* [2001] VCAT 721 *Al-Hakim v Ombudsman* [2001] VCAT 1972
Veterinary Practice Act 1997	77	Duty of Confidentiality	*'FJ3' and Veterinary Practitioners Registration Board of Victoria* [2023] VICmr 257
Workplace Injury Rehabilitation and Compensation Act 2013	595	Secrecy provisions	*'BV4' and Glen Eira City Council* [2020] VICmr 205
Worker Screening Act 2020	130	Confidentiality of Information	*'EG1' and Department of Education and Training (Freedom of Information)* [2022] VICmr 83

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