

Notice of Decision and Reasons for Decision

Applicant:	'FW8'
Agency:	Transport Accident Commission
Decision date:	10 June 2025
Exemptions and provision considered:	Sections 30(1), 32(1), 33(1), 25
Citation:	'FW8' and Transport Accident Commission (Freedom of Information) [2025] VICmr 35 (10 June 2025)

FREEDOM OF INFORMATION – transport accident – insurance claim – payments of claims – complaints – purely factual information – documents subject to legal privilege – personal affairs information of third parties

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

Notice of Decision

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

My decision on the Applicant's request differs from the Agency's decision and more information is to be released.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Please refer to page 9 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

10 June 2025

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to documents held by the Agency relating to their transport accident.
2. The Agency identified documents falling within the terms of the Applicant's request and:
 - (a) released 3490 pages of documents to the Applicant
 - (b) refused access to 40 documents in full, amounting to 221 pages, under sections 30(1) and 32(1).
3. The reasons for the Agency's decision are set out in its decision letter.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered relevant communications and submissions received from the parties.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
9. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
10. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, [591].

Review of exemptions

Section 30(1) – Internal working documents

11. For more information about section 30 see the FOI Guidelines.²
12. 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.³
13. To be exempt under section 30(1), three conditions must be satisfied:
 - (a) the document or information is matter in the nature of:
 - (i) opinion, advice or recommendation prepared by an agency officer or a Minister or
 - (ii) consultation or deliberation that has taken place between agency officers or Ministers and
 - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions and
 - (c) disclosure of the matter would be contrary to the public interest.
14. There are four circumstances where section 30(1) does not apply:
 - (a) documents required to be made available for inspection and purchase under section 8
 - (b) purely factual information
 - (c) certain documents relating to adjudicative functions and
 - (d) documents more than 10 years old.

Do the documents contain opinion, advice or recommendation, or consultation or deliberation?

15. Some of the information in the documents is purely factual, for example where it relates to payments.
16. I am satisfied the remainder of the information in the documents contain the advice, opinion and recommendation of Agency officers.
17. I am also satisfied information in the documents is consultation and deliberation that has taken place between agency officers because it concerns emails between Agency officers regarding the handling of the Applicant's concerns and complaints.

² <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/>.

³ *Graze v Commissioner of State Revenue* [2013] VCAT 869, 25.

Was the matter was created during the deliberative process of an agency, Minister, or the government's functions?

18. Further, I am satisfied the information was created during the deliberative processes of the agency, being the management of claims made under the *Transport Accident Act 1986* (Vic).

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

19. In deciding whether disclosure of the information would be contrary to the public interest, I have given weight to the following relevant factors:⁴
- (a) the right of every person to gain access to documents under the Act
 - (b) the sensitivity of the issues involved and the broader context of how the documents were created
 - (c) the stage of a decision or policy development at the time the communications were made
 - (d) 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)
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation, for the taking of a particular decision or the outcome of a process, but only where the agency would not otherwise be able to explain upon disclosure of the documents
 - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final decision by an agency or Minister
 - (g) the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions
 - (h) the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes
 - (i) the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process and building the community's trust in government and its decision-making processes
 - (j) whether there is controversy or impropriety around the decision or the decision-making process.

⁴ See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-30/#disclosure-would-be-contrary-to-the-public-interest>.

20. I have decided it would not be contrary to the public interest to disclose the information in the documents for the following reasons:
- (a) some of the emails are to and from the Applicant
 - (b) the remainder of the emails between Agency officers are not sensitive and carefully set out the way the Applicant's enquiries have been managed and the advice of the officers attending to them
 - (c) it is in the public interest to be transparent in how an Agency deals with complaints
 - (d) I do not consider disclosure will have any impact on the Agency's management of the Applicant's, or any other client's, claims.
21. I am therefore not satisfied the documents are exempt under section 30(1).

Section 32(1) – Documents affecting legal proceedings

22. For more information about section 32(1) see the FOI Guidelines.⁵
23. Section 32(1) exempts documents subject to legal professional privilege or client legal privilege. The principles of legal professional privilege are found in common law (case law). Client legal privilege is codified in sections 118 and 119 of the *Evidence Act 2008* (Vic) .
24. To apply section 32(1), it is generally not necessary to distinguish between legal professional privilege and client legal privilege.
25. Both legal professional privilege and client legal privilege protect confidential communications and documents between a lawyer and a client:
- (a) made or prepared for the dominant purpose of obtaining or providing legal advice (**advice privilege**); or
 - (b) prepared for the dominant purpose of use in current or anticipated litigation (**litigation privilege**).⁶
26. The purpose of legal privilege is to promote the public interest in the proper administration of justice. It does this by protecting confidential communications between a lawyer and their client, to allow them to speak freely.⁷

What is advice privilege?

27. A document or information attracts advice privilege, and is exempt under section 32(1), if it would disclose:

⁵ <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-32/>.

⁶ 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.

⁷ *Grant v Downs* [1976] HCA 63, [19].

- (a) 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
- (b) 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
- (c) the contents of a confidential document (whether delivered or not) prepared by a client, their lawyer, or another person (such as an expert) for the dominant purpose of obtaining or providing legal advice.

What is litigation privilege?

28. A document or information will attract litigation privilege, and is exempt under section 32(1), if it would disclose:
- (a) 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 (for example, an expert); or
 - (b) the contents of a confidential document (whether delivered or not);
 - (c) 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.
29. 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.⁸
30. I am satisfied the documents identified by the Agency are confidential communications between a client (the Agency) and their lawyer for the purposes of obtaining and providing legal advice and were prepared for a current legal proceeding.

Has there been a loss or waiver of privilege?

31. A document will not be exempt under section 32(1) if legal privilege has been lost or waived.
32. Privilege can be either expressly waived, or is deemed to have been waived where the client acts inconsistently with the confidentiality of legal privilege (for example, by disclosing the substance of the advice).⁹
33. I am satisfied legal privilege has not been waived.
34. I am therefore satisfied the documents identified by the Agency are subject to either advice or litigation privilege and exempt under section 32(1).

⁸ *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* [2002] VSCA 59.

⁹ *Mann v Carnell* (1999) 201 CLR 1. Sections 121 to 126 in the *Evidence Act 2008* (Vic) deal with different circumstances in which client legal privilege may be lost.

Section 33(1) – Documents affecting personal privacy of third parties

35. I have considered whether section 33(1) applies only to those documents I have determined are not exempt in full under section 30(1). Where section 32(1) applies, the documents are exempt in full and no further consideration of section 33(1) is required.
36. For more information about section 33(1) see the FOI Guidelines.¹⁰
37. Section 33(1) protects an individual's privacy where their right to privacy outweighs the public interest in disclosing their information.¹¹ This will only occur when disclosing the individual's personal affairs information is unreasonable.
38. A document or information is exempt under section 33(1) if two conditions are satisfied:
- (a) the document or information relates to the 'personal affairs' of a natural person (living or deceased); and
 - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.

Do the documents contain personal affairs information of other individuals?

39. 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'.¹² This includes information relating to health, private behaviour, home life, or personal or family relationships of individuals.¹³
40. The documents contain the names, email addresses and position titles of Agency officers.
41. The documents also contain a small number of names and other personal information of other third parties.
42. This is personal affairs information of third parties for the purposes of the FOI Act.

Consultation

43. As the Agency did not consider section 33(1) in its decision, it did not consult with third parties.

Would disclosure of the personal affairs information be unreasonable?

44. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:¹⁴
- (a) the nature of the personal affairs information;
 - (b) the circumstances in which the information was obtained;

¹⁰ <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/>.

¹¹ *Victoria Police v Marke* [2008] VSCA 218.

¹² *Hanson v Department of Education & Training* [2007] VCAT 123.

¹³ *Re F and Health Department* (1988) 2 VAR 458, quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 [103], [109].

¹⁴ See <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-33/#would-disclosure-be-unreasonable>.

- (c) the extent to which the information is available to the public;
 - (d) the Applicant's interest in the information;
 - (e) whether any public or important interest would be promoted by release of the information;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.
45. I am satisfied it would be unreasonable to release the names and email addresses of Agency officers where those documents have not been emailed directly to or from the Applicant. This is because they appear to be less senior Agency officers without direct decision-making power over the Applicant's claims.
46. However, I am not satisfied the position titles in the documents would be unreasonable to disclose as there would be a number of Agency officers with those position titles, and disclosure would provide a level of transparency for the Agency's decision making.
47. Where the documents have been emailed to or from the Applicant, it would not be unreasonable to release the Agency officer names in the documents.

Section 25 – Deletion of exempt or irrelevant information

48. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
49. Deciding whether it is 'practicable' to delete exempt or irrelevant information requires an agency or Minister to consider:
- (a) the effort involved in making the deletions from a resources point of view;¹⁵ and
 - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.¹⁶
50. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete exempt information from certain documents, because it would not require substantial time and effort, and the edited documents would retain meaning. However, as discussed below, I have decided it is not practicable to delete exempt information from those documents I have decided are exempt under section 32(1).

¹⁵ *Mickelburgh v Victoria Police* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967, [82].

¹⁶ *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.

Conclusion

51. I am not satisfied the documents are exempt under section 30(1); however, I am satisfied certain information is exempt under sections 32(1) and 33(1).
52. Documents 1 to 5, 10 to 16, 21 to 26 and 32 to 34 are to be released as follows:
- (a) for internal documents and emails, section 33(1) applies to the names and email addresses of Agency officers, except for emails directly between the Applicant and the Agency
 - (b) no exemption applies to emails between the Agency and the Applicant.
53. Documents 6 to 9, 17 to 20, 27 to 31 and 35 to 40 are exempt in full under section 32(1).
54. Where it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted in part, where it is not access is denied in full.

Timeframe to seek a review of my decision

55. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁷
56. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
57. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
58. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
59. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.²⁰

Third party review rights

60. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.²¹

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

²⁰ Sections 50(3F) and 50(3FA).

²¹ Sections 49P(5), 50(3) and 52(3).

61. In the circumstances, I have decided notifying the relevant third parties of their review rights is not practicable as it is not sensitive information, and directly identifying information is only being released in emails directly between the Applicant and those officers.

When this decision takes effect

62. While I have decided it is not practicable to notify third parties, my decision does not take effect until the third parties' 60 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Annexure 1 – Schedule of Documents