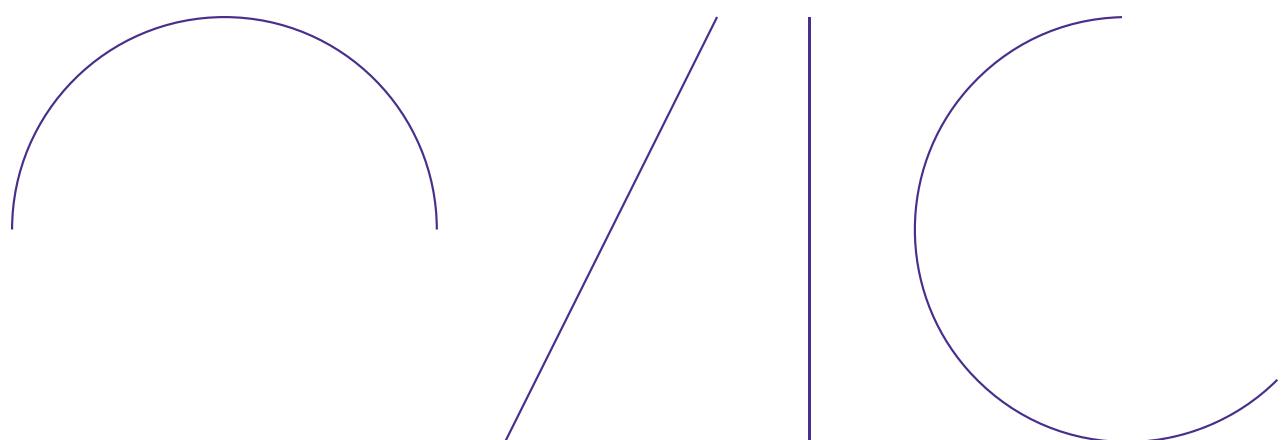




## Part IV – Exempt documents

Freedom of Information Guidelines

FREEDOM OF INFORMATION



# Section 27A – Interpretation

## Extract of legislation

### 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.<sup>1</sup> 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.<sup>2</sup>

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.

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<sup>1</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 27A.

<sup>2</sup> [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.<sup>3</sup> 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.<sup>4</sup>
- 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.<sup>5</sup> 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.<sup>6</sup>
- 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.<sup>7</sup> For example, a document should not be placed before Cabinet for consideration, for the purpose of ensuring the document is exempt under FOI.
- 1.4. The decision to exempt a document under section 28 is discretionary.<sup>8</sup> 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](#).

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

<sup>4</sup> [Department of Premier and Cabinet v Newbury \[2021\] VCAT 331 \[12\]](#).

<sup>5</sup> [Ryan v Department of Infrastructure \[2004\] VCAT 2346 \[32\]](#); [Environment Victoria Inc v Department of Primary Industries \(2013\) VCAT 39 \[29\]](#).

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

<sup>7</sup> [Ryan v Department of Infrastructure \[2004\] VCAT 2346 \[32\]](#); [Smith v Department of Sustainability and Environment \[2006\] VCAT 1228 \[15\]](#).

<sup>8</sup> [Victorian Public Service Board v Wright \[1986\] HCA 16 \[3\]](#).

# 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;<sup>9</sup> 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.<sup>10</sup>
- 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.<sup>11</sup>

#### Discretion to disclose exempt documents

- 1.4. The decision to exempt a document under section 29 is a discretionary power.<sup>12</sup> 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](#).

## 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—

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<sup>9</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 29(1)(a).

<sup>10</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 29(1)(b).

<sup>11</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 29(2).

<sup>12</sup> [Victorian Public Service Board v Wright](#) [1986] HCA 16, [3].

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- (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.<sup>13</sup>

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<sup>13</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869, 25.

- 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.<sup>14</sup> 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.<sup>15</sup>

## Discretion to disclose exempt documents

- 1.3. The decision to exempt a document under section 30(1) is a discretionary power.<sup>16</sup> 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](#).

## 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;

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<sup>14</sup> [Ryan v Department of Infrastructure](#) [2004] VCAT 2346, [32].

<sup>15</sup> [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.

<sup>16</sup> [Smith v Victoria Police](#) [2005] VCAT 654, [60].

- (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—
- notify any of the following that are relevant that the agency or Minister has received a request for access to the document—
    - another agency or Minister;
    - an agency of the Commonwealth or another State or a Territory;
    - an authority of the Commonwealth or another State or a Territory; and
  - 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

- Section 31 contains a number of exemptions, and exceptions to these exemptions.
- The exemption in section 31(1) protects specific types of law enforcement documents (discussed further below). It does not exempt all law enforcement documents.<sup>17</sup> 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).
- 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.
- A document is exempt under section 31(3) if it is created by the:
  - Intelligence and Covert Support Command of Victoria Police (**ICSC**);<sup>18</sup> or
  - Australian Criminal Intelligence Commission (**ACIC**).<sup>19</sup>

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<sup>17</sup> *Penhallurick 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.

<sup>18</sup> See [Akers v Victoria Police \[2022\] VCAT 884](#) [34]-[35] for an example of the application of section 31(3).

<sup>19</sup> The Act refers to the Bureau of Criminal Intelligence. The Australian Criminal Intelligence Commission supersedes the National Crime Authority and Bureau of Criminal Intelligence.

- 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.<sup>20</sup> 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)*.<sup>21</sup>
- 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.

## 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.

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<sup>20</sup> [Akers v Victoria Police \[2022\] VCAT 884 \[33\]](#).

<sup>21</sup> See ['EH9' and Victoria Police \[2022\] VICmr 100](#) for an example of the application of section 31(4).

## 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;<sup>22</sup>
- 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;<sup>23</sup> 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;<sup>24</sup> or
- disclose methods or procedures for preventing, investigating or dealing with:
  - public interest disclosures;<sup>25</sup> 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;<sup>26</sup> or

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<sup>22</sup> Victoria, Parliamentary Debates, Legislative Assembly, [23 June 2016](#), 2868 (Martin Pakula, Attorney-General); [Marke v Victoria Police FOI Division \[2018\] VCAT 1320](#) [113].

<sup>23</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 31A(1)(a).

<sup>24</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 31A(1)(b).

<sup>25</sup> 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).

<sup>26</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 31A(1)(c).

- 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.<sup>27</sup>
- 1.3. Section 31A should be read alongside section 194 of the *Independent Broad-based Anti-corruption Commission Act 2011 (Vic)* (IBAC Act).<sup>28</sup>
- 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.

## 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).

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<sup>27</sup> *Freedom of Information Act 1982 (Vic)*, section 31A(1)(d).

<sup>28</sup> 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].

## 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.<sup>29</sup> 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**).<sup>30</sup>
- 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.<sup>31</sup>
- 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).<sup>32</sup> The non-exempt information should be provided to the applicant provided it is practicable to provide an edited copy of the document.<sup>33</sup>

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<sup>29</sup> 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.

<sup>30</sup> 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.

<sup>31</sup> *Grant v Downs* [1976] HCA 63 [19].

<sup>32</sup> *Birrell v Department of State & Regional Development* [2001] VCAT 50 [12] citing *Waterford v. Commonwealth* [1987] HCA 25 [11] per Deane J.

<sup>33</sup> In accordance with section 25.

# 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**.

## 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.<sup>34</sup> 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.<sup>35</sup>
- 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.<sup>36</sup>

### 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.<sup>37</sup>

### Deceased persons

- 1.6. Section 33(1) applies to the personal affairs information of both living and deceased persons.<sup>38</sup>

### 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.<sup>39</sup> See 'Handling requests for an applicant's own personal affairs information' below for more information.

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<sup>34</sup> [Victoria Police v Marke](#) [2008] VSCA 218.

<sup>35</sup> [Ryan v Department of Infrastructure](#) [2004] VCAT 2346 [32].

<sup>36</sup> [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].

<sup>37</sup> [Targridge Pty Ltd v Road Traffic Authority](#) (1988) 2 VAR 604; [Melbourne University v Robinson](#) [1993] 2 VR 177.

<sup>38</sup> See examples, [Crocker v Ambulance Victoria](#) [2016] VCAT 2156; ['EJ9' and Northern Health](#) [2021] VICmr 337.

<sup>39</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 33(2).

# 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.

# 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—
- it contains—
    - a trade secret of an agency; or
    - 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;
  - it contains the results of scientific or technical research undertaken by an officer of an agency, and—
    - the research could lead to a patentable invention;
    - 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
    - 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
  - 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.

## Overview

1.1. Section 34 contains several exemptions, which protect:

- trade secrets of a business, commercial or financial undertaking;<sup>40</sup>
- other business, commercial or financial information of an undertaking, where disclosure would likely expose the undertaking to an unreasonable disadvantage;<sup>41</sup>
- trade secrets of an agency;<sup>42</sup>

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<sup>40</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 34(1)(a).

<sup>41</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 34(1)(b).

<sup>42</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 34(4)(a)(i).

- other business, commercial or financial information of agencies engaged in trade or commerce;<sup>43</sup>
  - the results of scientific or technical research undertaken by an agency;<sup>44</sup> and
  - examination papers, examiner's reports and similar documents, where the document's use is not yet completed.<sup>45</sup>
- 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.<sup>46</sup> 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.<sup>47</sup>
- 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.<sup>48</sup> 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.<sup>49</sup>

## Discretion to disclose exempt documents

- 1.5. The decision to exempt a document under section 34 is discretionary.<sup>50</sup> 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](#).

<sup>43</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 34(4)(a)(ii).

<sup>44</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 34(4)(b).

<sup>45</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 34(4)(c).

<sup>46</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 34(3).

<sup>47</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 34(2).

<sup>48</sup> [Ryan v Department of Infrastructure](#) [2004] VCAT 2346, [32].

<sup>49</sup> [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.

<sup>50</sup> [Victorian Public Service Board v Wright](#) [1986] HCA 16, [3].

# 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.

## 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;<sup>51</sup> 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.<sup>52</sup>
- 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.<sup>53</sup> 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.<sup>54</sup>

## Discretion to disclose exempt documents

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<sup>51</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 35(1)(a).

<sup>52</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 35(1)(b).

<sup>53</sup> [Ryan v Department of Infrastructure](#) [2004] VCAT 2346, [32].

<sup>54</sup> [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.

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# 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.

## Overview of section 36

- 1.1. There are several exemptions in section 36, which are designed to only protect ‘essential public interests’.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup>

## Section 37 – Certain documents arising out of companies and securities legislation

### Extract of legislation

#### 37 Certain documents arising out of companies and securities legislation

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<sup>55</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 1982, 1064 (John Cain, Premier of Victoria).

<sup>56</sup> *Ryan v Department of Infrastructure* [2004] VCAT 2346 [32].

<sup>57</sup> *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.

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- (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.

# 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.<sup>58</sup>
- 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.<sup>59</sup>

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<sup>58</sup> See *Graze v Commissioner of State Revenue (Review and Regulation)* [2013] VCAT 869, [37].

<sup>59</sup> *Department of Premier and Cabinet v Hulls* [1999] VSCA 117, [40].

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1.5. Section 38 applies to secrecy provisions contained in Victorian enactments only.<sup>60</sup>

### Secrecy provisions in Commonwealth laws

1.6. The section 38 exemption does not apply to Commonwealth laws.<sup>61</sup>

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.<sup>62</sup> 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.

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<sup>60</sup> [Interpretation of Legislation Act 1984 \(Vic\)](#), section 38: “Act means an Act passed by the Parliament of Victoria”.

<sup>61</sup> *Rich v Victoria Police* (unreported, AAT of Vic, Preuss PM, 14 February 1997), 43-44.

<sup>62</sup> [XYZ v Victoria Police \[2010\] VCAT 255](#), [49].