Exempt Documents Under Part IV of the *Freedom of Information Act 1982* (Vic)

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A. INTRODUCTION

1. The purpose of this paper is to provide a concise summary of the important classes of 'exempt documents' for which Pt IV of the *Freedom of Information Act 1982* (Vic) (**the FoI Act**) provides. In particular, this paper deals with the following classes of exempt document:

    1.1 Cabinet documents (FoI Act, s 28).

    1.2 Documents affecting intergovernmental relations (FoI Act, s 29).

    1.3 Internal working documents (FoI Act, s 30).

    1.4 Law enforcement documents (FoI Act, s 31).

    1.5 Documents affecting legal proceedings (FoI Act, s 32).

    1.6 Documents affecting personal privacy (FoI Act, s 33).

    1.7 Documents containing confidential business information (FoI Act, s 34).

    1.8 Documents containing material obtained in confidence (FoI Act, s 35).

    1.9 Documents to which statutory obligations of secrecy attach (FoI Act, s 38).

2. Finally, this paper deals with the 'public interest override' contained in s 50(4) of the FoI Act. The other classes of exempt documents provided for in Pt IV are not discussed.

3. While the focus of this paper is on the classes of exempt document described above, it also briefly discusses the broader legislative context in which Pt IV of the FoI Act operates. Thus this paper discusses the general right of access to documents for which the FoI Act provides, the distinction between 'exempt documents' and documents that are wholly excluded from the operation of the FoI Act, and the statutory provisions that provide for the redaction of information from documents produced pursuant to a

request for access. However, as the focus of this paper is on substantive exemptions in general (rather than on matters of procedure or specific exemptions), this paper does not discuss the FoI Act's various 'consultation requirements' (such as those contained in ss 33(2B) to 33(3A)), nor does it discuss the specific provisions relating to family violence and health information contained in ss 33(2AB) to 33(2AC) and ss 33(4) to 33(5).

4. Annexed to this paper are two hypothetical documents (including versions in which possible exemptions are marked up in colour-coded highlighting). These documents relate to absurd hypothetical scenarios and are intended only to illustrate the range of exemptions that are available under Pt IV of the FoI Act. The hypothetical scenarios are not based on real events, and the characters referred to in the documents are entirely fictional.

B. OVERVIEW OF THE FOI ACT

5. Section 13 of the FoI Act provides that:

> Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to—
>
> (a) a document of an agency, other than an exempt document; or
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> (b) an official document of a Minister, other than an exempt document.

6. The term 'agency' includes a range of government bodies, such as departments, local councils and statutory corporations.[1] A document is a 'document of an agency' if it is in the possession of the agency, regardless of whether the agency created the document.[2] A document is 'an official document of a Minister' if it is in the Minister's possession and relates to the affairs of an agency. It will be deemed to be in the Minister's possession if the Minister is entitled to access the document and it is not a document of an agency.[3] The FoI Act thus confers upon members of the general public a broad right to obtain access to government documents that are in the physical

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1 See the definitions of 'agency' and 'prescribed authority' in s 5(1) of the FoI Act.
2 FoI Act, s 5(1).
3 FoI Act, s 5(1).

possession of a Minister or agency, or that are in the constructive possession of a Minister. The focus of this paper is on documents held by agencies.[4]

7. Not all documents in the possession of an agency must be produced pursuant to a request under the FoI Act. Thus certain classes of document are wholly excluded from the FoI Act's access regime by s 14.[5] As the Victorian Civil and Administrative Tribunal observed in *Smeaton v Transport Accident Commission*, '[t]he intention of [s 14] is to deny access under the FOI Act where a person is able to otherwise source documents from the public records. This is not a matter of the documents being exempt under the FOI Act. Rather, they are simply not able to be disclosed under the FOI Act.'[6] In that case, the Tribunal held that access to a court document that could be obtained through inspection of the Supreme Court file did not have to be granted under the FoI Act.[7] Other classes of document are 'exempt documents' within the meaning of Pt IV.[8] The classes of exempt document set out at paragraph 1 above are the focus of this paper.

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4 For this reason, this paper does not address paragraph (b) of the definition of 'exempt document' in s 5(1) of the FoI Act, which provides that 'an official document of a Minister that contains some matter that does not relate to the affairs of an agency or of a department' is an exempt document.

5 Section 14(1)(a) of the FoI Act provides that:

> A person is not entitled to obtain access under this Part to—
>
> (a) a document which contains information that is open to public access, as part of a public register or otherwise, in accordance with another enactment, where that access is subject to a fee or other charge;
>
> (b) a document which contains information that is available for purchase by the public in accordance with arrangements made by an agency; or
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> (c) a document that is available for public inspection in the Public Record Office of Victoria;
>
> (d) a document which is stored for preservation or safe custody in the Public Record Office of Victoria being a document which is a duplicate of a document of an agency.

6 [2017] VCAT 1486 at [42]. The Tribunal's use of the terms 'deny access' and 'not able to be disclosed' should be read in light of the principle in s 16(2) of the FoI Act. Nothing in s 14 of the FoI Act prevents an agency from granting access to a document that falls within its scope.

7 [2017] VCAT 1486 at [43]. In this regard, r 28.05(1) of the *Supreme Court (General Civil Procedure) Rules 2015* provides that:

> When the office of the Court is open, any person, on payment of the proper fee, may inspect and obtain a copy of any document filed in a proceeding.

8 For present purposes, an 'exempt document' is 'a document which, by virtue of a provision of Part IV, is an exempt document': see FoI Act, s 5(1).

8. The fact that access to a document is not required to be granted under the FoI Act does not of itself prevent an agency from making the document available to a person who has requested it. Thus s 16(2) of the FoI Act provides that:

> Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.

9. In addition, s 16(1) provides that agencies are to administer the FoI Act 'with a view to making the maximum amount of government information promptly and inexpensively available to the public.' Consistently with this principle, where review is sought of a decision not to grant access to a document, the relevant agency bears the onus of establishing that the decision should be affirmed.[9]

10. A person who seeks access to documents under the FoI Act must make a request in writing under s 17(1). A decision whether to grant or refuse access to the documents requested must be made in accordance with the time limits prescribed by s 21. A decision to deny access to a document in whole or in part must be accompanied by reasons that satisfy the requirements of s 27(1). This requires an agency to set out its reasons for deciding that 'the applicant is not entitled to access to the document in accordance with the request'. Ordinarily, a statement of reasons will identify the documents that were considered for release by the relevant agency, identify any documents that the agency considers are exempt documents (and state why those documents are exempt) and identify any documents to which access has been granted in a redacted form (and state why the documents have been redacted).

11. Importantly, the FoI Act expressly provides that an agency may grant access to a document in a redacted form. Thus s 25 provides that:

> Where—
>
> (a) a decision is made not to grant a request for access to a document on the ground that it is an exempt document or that to grant the request would

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9 FoI Act, s 55(2).

> disclose information that would reasonably be regarded as irrelevant to the request;
>
> (b) it is practicable for the agency or Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document or a document that would not disclose such information (as the case requires); and
>
> (c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy—
>
> the agency or Minister shall grant access to such a copy of the document.

12. Section 25 is of great significance to the practical operation of the scheme established by the FoI Act. This is because many government documents contain small amounts of personal information and passing references to other sensitive matters that, but for the operation of s 25, would make them exempt documents within the meaning of Pt IV and would wholly prevent them from being produced pursuant to a request for access to documents.

13. However, ss 25 and 27(1) must be read in light of s 27(2), which provides that:

> In a notice under subsection (1), an agency or Minister—
>
> (a) is not required to include any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document;
>
> (ab) is not required to confirm or deny the existence of any document, if confirming or denying the existence of that document would involve the unreasonable disclosure of information relating to the personal affairs of any person for the reason that it would increase the risk to a primary person's safety from family violence;
>
> (ac) is not required to confirm or deny the existence of any document, if confirming or denying the existence of that document would involve the unreasonable disclosure of information relating to the personal affairs of any person for the reason that it would increase the risk to the safety of a child or group of children;
>
> (b) if the decision relates to a request for access to a document that is an exempt document under section 28, 29A, 31 or 31A or that, if it existed, would be an exempt document under section 28, 29A, 31 or 31A, may state the

> decision in terms which neither confirm nor deny the existence of any document.

14. Thus there may be circumstance in which a decision maker cannot grant access to a document in a redacted form (or even confirm that the document exists, or that documents of that nature exist).

15. Finally, it is important to note that the categories of exempt document for which Pt IV of the FoI Act provides overlap significantly. In this regard, the FoI Act expressly provides that the various provisions of Pt IV are not intended to limit each other's scope and that a single document may attract more than one of the exemptions for which Pt IV provides.[10]

C. EXEMPT DOCUMENTS

C-1 OVERVIEW

16. Part IV of the FoI Act defines the classes of document that are exempt documents. This paper discusses in detail the nine classes of exempt document identified at paragraph 1 above. Other classes of exempt document – such as documents relating to national security and international relations (FoI Act, s 29A), documents of Court Services Victoria (FoI Act, s 29B) and documents relating to the Independent Broad-based Anti-corruption Commission (FoI Act, s 31A) – are not discussed in this paper.

C-2 THE 'PUBLIC INTEREST' GENERALLY

17. Many of the provisions contained in Pt IV of the FoI Act require a decision maker to decide whether granting access to a document would be in (or would be contrary to) the 'public interest'.[11] For this reason, it is appropriate to make some general observations about the meaning of that expression before dealing with the specific provisions of Pt IV.

18. Determining whether something is in the 'public interest' requires the making of value judgments on which reasonable people may reach different conclusions. As such, it is

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10 See FoI Act, s 27A.

11 See, for example, ss 29(1), 30(1), 31(2), 34(2)(d), 35(1)(b), 50(4).

not possible to set out a general test for determining when something will be in the public interest. Rather, in each case, the relevant decision maker must evaluate where the public interest lies by reference to the specific facts of the case, to the terms and structure of the legislation that requires the determination to be made, and to their own evaluation of the importance of any positive or negative effects that would flow from a particular decision. Thus in *Bare v Independent Broad-based Anti-corruption Commission*, Santamaria JA stated that:

> Legislation frequently expressly requires decision makers to take into account the 'public interest'. The term has no fixed meaning; generally speaking, it will take its colour from the context in which it is used. Questions involving the public interest 'will seldom be properly seen as having only one dimension'. Such questions 'will require consideration of a number of competing arguments about, or features or "facets" of, the public interest'. The concept of the 'public interest' cannot be defined within precise boundaries; opinions have differed and will always differ as to what is within the public interest; the categories of public interest are not closed.
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> The concept is protean; but, it is not at large. The injunction that the 'public interest' be considered requires a decision maker to step aside from the immediate circumstances that prompted or required the decision to be made and to consider a range of circumstances broader than those that are of immediate consequence to persons directly affected by the decision. What satisfies consideration of the public interest will be determined, in the first place, by the legislation that requires reference to it.[12]

19. Similarly, in *O'Sullivan v Farrer*, four members of the High Court stated that 'the expression "in the public interest", when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters'.[13]

20. In the context of the FoI Act, it is important to note that there is a distinction between 'the public interest' and 'things members of the public would find interesting'. Thus in *Director of Public Prosecutions v Smith*, the Full Court of the Supreme Court of Victoria stated that while the FoI Act 'does not contain any definition of the public interest … used in the context of this statute it does not mean that which gratifies curiosity or merely provides information or amusement.'[14] Rather, in the context of the FoI Act, '[t]he public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society

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12 (2015) 48 VR 129 at 301-2 [548]-[549] (citations omitted).
13 (1989) 168 CLR 210 at 216 (Mason CJ, Brennan, Dawson and Gaudron JJ).
14 [1991] 1 VR 63 at 74.

and for the well being of its members', as distinct from events that 'attract public attention'.[15]

21. It follows that in determining whether the public interest favours granting access to a document, a decision maker will generally have to consider 'big picture' matters like whether keeping a document secret would undermine public confidence in an arm of government, or whether releasing the document would undermine the capacity of an arm of government to function effectively. However, questions of personal safety and reputation may also be relevant to whether the public interest favours disclosing the contents of a document.

C-3 CABINET DOCUMENTS: SECTION 28

22. Section 28(1) of the FoI Act provides that:

> 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.

23. For the purposes of s 28, 'Cabinet' includes any committee or sub-committee of Cabinet (even though the existence of such committees and sub-committees is not

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15 [1991] 1 VR 63 at 76.

always acknowledged).[16] However, the scope of s 28(1) is limited by ss 28(2) and 28(3), which provide that:

> (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.

24. Section 28 reflects the long-established principle in Westminster systems of government that the internal deliberations of cabinet must generally remain confidential until the matters to which they relate have ceased to be current and controversial. A number of different justifications for this rule have been put forward. Thus in *Conway v Rimmer*, Lord Reid stated that 'the most important reason [for cabinet confidentiality] is that such disclosure would create or fan ill-formed or

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16 FoI Act, s 28(7). There is a convention under which the existence of committees and sub-committees of Cabinet is not acknowledged. However, this convention is not always abided by: see *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 at [33]. The reasons for the convention are discussed in *The Collective Responsibility of Ministers – An Outline of the Issues*, House of Commons Library Research Paper 04/82, 15 November 2004 at 13-14:

> A revealing insight into the reasons for confidentiality as perceived by a Prime Minister can be gleaned from James Callaghan's (confidential) minute of February 1978 on disclosure of the existence of Cabinet Committees. Rodney Brazier outlined the issues contained in the minute:
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> > The most comprehensive prime ministerial statement of the reasons for secrecy over Cabinet committees is contained in Mr Callaghan's personal minute of 1978, Disclosure of Cabinet Committees. Those reasons may be summarized in nine points; brief comments will be offered on each. (a) 'The manner of deciding policy questions is essentially a domestic one for any government.' This is a singularly unconvincing, if not coy, reason because Cabinet committees and the like attract legitimate interest as vital aspects of the machinery of government ... (b) 'The status of a decision could be disputed if it were acknowledged to have been reached by a committee rather than by the full Cabinet.'... (c) 'The existence of some committees could not be disclosed for reasons of national security.' Within an understanding of national security somewhat narrower than that promulgated by the government in recent years, that must be right. (d) 'The absence of a committee on a particular subject, such as poverty, does not mean that the government attaches no importance to it;' (e) 'the existence in particular of ad hoc committees should not be disclosed because they are ephemeral.' Both those points could be fully met by official explanation-and, in relation to the former, by a government's deeds in relation to the subject-matter. (f) 'Disclosure could reveal that sensitive things were under discussion,' and (g) 'that something was in train about which the government was not ready to make an announcement.' Now both points are really indirect ways of saying that publicity would be inconvenient for a government, as MPs and others might want to contribute to the arguments before a policy was agreed. (h) 'Disclosure of standing committees alone would give a misleading picture.' That could, again, be met by explanation, or by disclosure of all committees (national security permitting). (i) 'Any departure from the convention of non-disclosure would be more likely to whet appetites than to satisfy them.' That phrase encapsulates the regrettable view adopted by civil servants and Ministers down the decades that secrecy is the norm, information and explanation the exception.

captious public or political criticism.'[17] A different justification was identified in *The Commonwealth v Northern Land Council*, in which six members of the High Court stated that maintaining secrecy in cabinet documents is a matter of 'ensuring that decision-making and policy development by Cabinet is uninhibited. The latter may involve the exploration of more than one controversial path even though only one may, despite differing views, prove to be sufficiently acceptable in the end to lead to a decision which all members must then accept and support.'[18] A third justification for the rule of cabinet confidentiality was identified in *Sankey v Whitlam*, in which Mason J stated that the true reason for the rule lies in the collective nature of cabinet decision making – if the confidentiality of cabinet discussions were not maintained, the doctrine that the 'individual attitudes and opinions' of Ministers are 'merged in the general resolution of the whole body' of the Government could not be maintained.[19] Similarly, in his 1989 work *Ministerial Responsibility*, the English constitutional theorist Geoffrey Marshall described cabinet confidentiality as a fundamental constitutional principle that enables the Government to be seen to make decisions collectively and to be held to account *as a Government* by Parliament (and, through Parliament, by the electorate).[20] All of these justifications for maintaining secrecy in the deliberations of cabinet have their merits, and they are not mutually exclusive.

25. Disputes over the application of s 28(1) of the FoI Act generally concern ss 28(1)(b) and 28(1)(ba). At a factual level, such disputes are likely to turn on whether a document was prepared 'for the purpose' of a submission to cabinet or 'for the purpose' of briefing a Minister in relation to an issue to be considered by cabinet. In *Davis v Major Transport Infrastructure Authority*, the Tribunal set out a series of principles that may assist in determining whether a document was prepared for one of the purposes set out in s 28(1). Thus the Tribunal stated that:

> The actual use made of a document may be relevant in ascertaining the purpose for which it was created, but is not decisive of that question.
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> It is not necessary to prove that the document was actually submitted to the Cabinet; nor that Cabinet actually considered the document, although evidence as to the actual

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17 [1968] AC 910 at 952.

18 (1993) 176 CLR 604 at 616 (Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ).

19 (1978) 142 CLR 1 at 97-8, referring with approval to the report of the *Committee of Privy Councillors on Ministerial Memoirs* published in January 1976.

20 See *The Collective Responsibility of Ministers – An Outline of the Issues*, House of Commons Library Research Paper 04/82, 15 November 2004 at 9-10.

> use to which the document was put could shed light on the purpose for which it was created.
>
> A document will only be exempt if the sole purpose or one of the substantial purposes, or the dominant purpose, or one of a number of significantly contributing purposes, for which it was prepared was for it to be submitted to the Cabinet for consideration.
>
> The purpose of the preparation of the document must be for submission for consideration by the Cabinet and not merely preparation for the purpose of physically placing the document before the Cabinet.[21]

26. In determining the purposes for which a document was created, the question is whether *that specific document* would have been created if that purpose had not existed. If a document was created in a specific form so that it could form part of a cabinet submission or briefing, it does not matter that some other, similar document might have been created even if there had been no possibility of the document's forming part of such a submission or briefing.[22]

C-4 DOCUMENTS AFFECTING INTERGOVERNMENTAL RELATIONS: SECTION 29

27. Section 29(1) of the FoI Act provides that:

> 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.

28. Where a document concerns matters of an 'operational' nature (such as the location of a proposed aviation museum), it may fall within the scope of s 29(1) if granting access to it would reveal the positions of one or more governments on an issue in respect of which intergovernmental negotiations are ongoing.[23] Thus whether negotiations over the subject matter of the document are ongoing or have concluded may determine

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21 [2020] VCAT 965 at [19]-[22].

22 *Davis v Major Transport Infrastructure Authority* [2020] VCAT 965 at [77]-[82].

23 See *Re Evans and Ministry for the Arts* (1986) 1 VAR 315; *Davis v Department of Premier and Cabinet* [2001] VCAT 1848.

whether granting access to the document would be contrary to the public interest. On the other hand, where a document relates to matters of policy that require joint action between States (or between States and the Commonwealth) or that involve conflict between the interests of different States, there is a substantial public interest in ensuring that the State is 'able to correspond with the Commonwealth [or another State] in a manner that will remain confidential where policy is being developed, especially in a Federal system where one state's interest may be pitted against the interest of another', and that 'politicians are able to negotiate and develop policy by a frank exchange of views and information on a confidential basis'.[24] In such a case, the public interest in ensuring that governments can negotiate with each other and share policy ideas in an atmosphere of complete candour may be decisive.

C-5 INTERNAL WORKING DOCUMENTS: SECTION 30

29. Section 30(1) of the FoI Act provides that:

> 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.

30. However, s 30 does not apply to a document 'by reason only of purely factual material contained in the document.'[25] Further, s 30(4) provides that s 30(1) '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.' Finally, like s 28(2), s 30(6) provides that s 30(1) ceases to apply to a document 'when a period of ten years has elapsed since the last day of the year in which the document came into existence.'

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24 *Millar v Department of Premier and Cabinet* [2011] VCAT 1230 at [65]

25 FoI Act, s 30(3).

31. Section 30(1) is premised on the principle that '[p]ublic servants must feel free to give robust and independent advice to Ministers and other decision-makers, to test and challenge assumptions, to canvass options, and to consider all possibilities.'[26] However, s 30(1) is not limited in its application to documents created by 'public servants' (in the sense of persons employed by the State of Victoria in accordance with Pt 3 of the *Public Administration Act 2004* (Vic)). In this regard, the word 'officer' is defined broadly in s 5(1) of the FoI Act:

> ***officer***—
>
> (a) in relation to an agency, other than a council, includes a member of the agency, a member of the staff of the agency, and any person employed by or for the agency, whether that person is one to whom the provisions of the **Public Administration Act 2004** apply or not; and
>
> (b) in relation to a council, includes a member of the council, a member of the staff of the council and any person employed by or for the council;

32. It follows that pursuant to s 30(1), a document *may* be exempt if it records some kind of communication within an agency (or between multiple agencies) about the merits of a particular decision or policy (as opposed to a communication about raw data that may be relevant to the decision or policy). If this threshold is passed, the public interest in granting access to the document must be balanced against the public interest in maintaining confidentiality in it. In determining where the public interest lies, a range of matters may be taken into account.[27] Thus in *Friends of Mallacoota Inc v Department of Planning and Community Development*, Judge Hampel stated that:

> Regard must be had to both the nature of the information and the nature of the document.
>
> The more sensitive or contentious the issues involved in the communication, the more likely it is that the communication should not be disclosed.
>
> Draft internal working documents or preliminary advices and opinions are more generally than not be [sic] inappropriate for release. That is particularly so when the final version of the document has been made public.
>
> It is contrary to the public interest to disclose documents reflecting possibilities considered but not eventually adopted, as such disclosure would be likely to lead to

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26 *Friends of Mallacoota Inc v Department of Planning and Community Development* [2011] VCAT 1889 at [67].

27 In this regard, see the discussion at Part C-2 above.

> confusion and ill informed debate, to give a spurious standing to such documents or promote pointless and captious debate about what might have happened rather than what did.
>
> Decision-makers should be judged on the final decision and their reasons for it, not on what might have been considered or recommended by others in preliminary or draft internal working documents.
>
> It is contrary to the public interest to disclose documents that would have an adverse effect on the integrity or effectiveness of a decision-making, investigative or other process.[28]

33. This is not an exhaustive list of the matters that may be relevant to the question whether it would be contrary to the public interest to grant access to an internal working document. As the authorities referred to at Part C-2 above show, 'the public interest' is by its very nature a broad concept that cannot be limited by formulaic rules or checklists.

C-6 LAW ENFORCEMENT DOCUMENTS: SECTION 31

34. Section 31(1) of the FoI Act provides that:

> 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

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28 [2011] VCAT 1889 at [51].

(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.

35. Section 31(1) is subject to s 31(2), which provides that *in certain circumstances* (such as where a document reveals unlawful activity on the part of a law enforcement agency, or where a document is a report of an investigation into a person to whom the report has already been disclosed), s 31 does not apply to a document 'if it is in the public interest that access to the document should be granted under this Act.' However, s 31(2) does not *generally* authorise a decision maker to decide that a law enforcement document should be released in the public interest. That is a matter for s 50(4).[29] Notwithstanding this, s 31(1) may require a decision maker to make value judgments about the effect that granting access to a document would be likely to have (such as whether it is realistic to believe that granting access to a document would undermine a particular investigative technique, having regard to such matters as the age of the document and the notoriety or obviousness of the technique).[30]

36. While s 31 is most relevant to police documents, it applies to documents held by a range of agencies. For example, a document that contains information that would enable a person to prejudice or undermine the proper functioning of a prison may be a document the disclosure of which would be likely to 'prejudice the enforcement or proper administration of the law in a particular instance' within the meaning of s 31(1)(a).[31] Similarly, s 31(1)(c) reflects the well-established form of public interest immunity that protects information that might reveal the identity of a confidential informer.[32] The rationale for this rule is that if the identity of confidential sources of law enforcement information were routinely revealed in legal proceedings, 'sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime.'[33] At common law, 'informer immunity' has been extended to apply to documents that would tend to reveal the identity of persons who have provided

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29 Section 50(4) is discussed in detail at Part D below.

30 See, for example, *Brooks v Victoria Police* [2018] VCAT 1833 at [15]-[20], in which the Tribunal accepted that police methodologies described in an affidavit made in support of a search warrant application in 2005 were still employed in 2018 and that revealing them would therefore undermine the capacity of police to continue employing those methodologies.

31 See, for example, *Knight v Department of Justice* [2012] VCAT 369 at [12]; *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586 at [28].

32 See, for example, the discussion of Charles JA in *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22 at 46-7 [104].

33 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171 at 218 (Lord Diplock).

information in confidence to gambling regulators,[34] child protection authorities[35] and professional regulatory bodies.[36] The same position applies under the FoI Act. Thus a person who provides information in confidence to a professional disciplinary body is 'a confidential source of information in relation to the enforcement or administration of the law' within the meaning of s 31(1)(c).[37]

C-7 DOCUMENTS AFFECTING LEGAL PROCEEDINGS: SECTION 32

37. Section 32 of the FoI Act provides that:

> 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.

38. The terms 'legal professional privilege' and 'client legal privilege' are not interchangeable. In this regard, legal professional privilege is 'a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents' and 'is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings.'[38] Client legal privilege, on the other hand, is a statutory rule of evidence that derives from ss 118 and 119 of the *Evidence Act 2008* (Vic) (**the Evidence Act**) and its equivalents. Client legal privilege operates only to protect information from compulsory disclosure in legal proceedings to which the Evidence Act applies.

39. However, for practical purposes (and for the purposes of the FoI Act), legal professional privilege and client legal privilege are substantially the same thing. Both legal professional privilege and client legal privilege comprise two sub-categories of privilege: 'advice privilege' and 'litigation privilege'.[39] Advice privilege attaches to

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34 *R v Lewes Justices; Ex parte Secretary of State for the Home Department* [1973] AC 388.

35 *D v National Society for the Prevention of Cruelty to Children* [1978] AC 171; *In the matter of A (A Child)* [2013] 2 AC 66.

36 *Middendorp Electric Co Pty Ltd v Law Institute of Victoria* [1994] 2 VR 313.

37 See, for example, *Department of Health v Jephcott* (1985) 8 FCR 85.

38 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552 [9]-[10] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

39 Under the Evidence Act, advice privilege and litigation privilege are distinct forms of privilege (see Evidence Act, ss 118 and 119). While it perhaps remains unclear whether at common law there are 'two discrete species of this privilege having distinct provinces and differing rationales' or 'a unified doctrine which, though having two applications ie, advice and litigation, has a single rationale' (see *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 at 361 [8] (Finn J)), the question has no real practical significance.

confidential communications that have the dominant purpose of enabling a legal practitioner to provide a client with legal advice. The concept of 'legal advice' is interpreted pragmatically – it extends both to advice on the content of relevant legal principles and to advice on 'what should prudently and sensibly be done in the relevant legal context.'[40] In determining whether adducing evidence would result in the disclosure of a confidential communication or document containing legal advice, '[t]he question is whether what is disclosed by adducing the evidence explicitly reveals the confidential communication or the contents of the confidential document, or supports an inference of fact as to the content of the confidential communication or document, which has a definite and reasonable foundation.'[41] Evidence does not reveal the content of confidential legal advice if it 'as a whole, or particular statements within it, cause a reader to wonder or speculate whether legal advice had been obtained and what was the substance of that advice.'[42]

40. Litigation privilege attaches to confidential communications that have the dominant purpose of enabling a legal practitioner to represent a client in legal proceedings. Of course, a communication prepared for the purpose of enabling a legal practitioner to *represent* a client in a legal proceeding will almost inevitably also have the purpose of enabling the legal practitioner to *advise* the client on how to conduct the proceeding. However, it was once thought that a document communicated by a third party (such as a forensic accountant or other expert) to a client for the purpose of enabling a legal practitioner to advise the client could only attract legal professional privilege (as opposed to client legal privilege)[43] if it could be brought within the scope of litigation privilege, and that this was a key distinction that rendered the litigation privilege aspect of legal professional privilege substantially broader in scope than the advice privilege aspect. But since the judgment of the Full Court of the Federal Court in *Pratt Holdings Pty Ltd v Commissioner of Taxation*,[44] it has become widely accepted that documents

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40 *Balabel v Air India* [1988] Ch 317 at 330; *General Manager, WorkCover Authority of New South Wales v Law Society of New South Wales* (2006) 65 NSWLR 502 at 521 [77]-[78]; *Re Southland Coal Pty Ltd* (2006) 59 ACSR 87 at 91 [14(d)].

41 *Re Southland Coal Pty Ltd* (2006) 59 ACSR 87 at 91-2 [14(e)].

42 *AWB Ltd v Cole* (2006) 152 FCR 382 at 417 [133]; *Re Southland Coal Pty Ltd* (2006) 59 ACSR 87 at 91-2 [14(e)].

43 Section 118(c) of the Evidence Act expressly provides that client legal privilege attaches to 'the contents of a confidential document (whether delivered or not) prepared by the client, lawyer *or another person* … for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.'

44 (2004) 136 FCR 357.

prepared by a third party for the purpose of enabling a client to obtain legal advice may attract both legal professional privilege and client legal privilege notwithstanding that they were not brought into existence for the purpose of conducting litigation.[45] Thus while the distinction between advice privilege and litigation privilege persists in relation to both legal professional privilege and client legal privilege, the distinction has little practical significance. As a general rule, a confidential document that was prepared for the dominant purpose of enabling a client to obtain legal advice (whether in relation to litigation or otherwise) will attract both legal professional privilege and client legal privilege.

41. Of course, both legal professional privilege and client legal privilege are capable of being waived. If privilege has been waived in a document, it will no longer attract the protection of s 32 of the FoI Act. Generally speaking, where a client acts in a manner that is inconsistent with the maintenance of legal professional privilege in a communication, it will be held to have waived privilege in that communication. This is so regardless of whether the client had the subjective intention of waiving privilege.[46] Insofar as client legal privilege is concerned, the question of waiver is governed by s 122 of the Evidence Act. Where the substance of legal advice is disclosed by a client to a third party, privilege in that advice will generally be held to have been waived if the following two criteria are satisfied:

    41.1 First, there has been sufficient physical disclosure of the communication or document to warrant loss of privilege. This is essentially a quantitative test, which looks to whether the 'substance', 'effect', 'content' or 'gist' of the advice has been disclosed.[47]

    41.2 Second, that 'the physical act of disclosure' was undertaken 'consciously and intentionally.' This inquiry looks to 'the intention of the person claiming privilege and in particular on that person's intention in relation to the alleged "disclosure"'. However, it does not involve 'a consideration of whether the

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45 See, for example, *Spotless Group Ltd v Premier Building & Consulting Pty Ltd* (2006) 16 VR 1; *Danne v Hendtlass (sitting as Coroner)* [2012] VSC 454.

46 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Goldberg v Ng* (1995) 185 CLR 83; *Mann v Carnell* (1999) 201 CLR 1.

47 See, for example, *QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [116]-[126] and the cases referred to therein.

person disclosing intended to waive client legal privilege which would otherwise be able to be asserted.'[48]

42. In accordance with s 122(5) of the Evidence Act, some conscious and voluntary disclosures of legal advice will not give rise to any waiver of privilege. For example, waiver is unlikely to occur where legal advice is shared between officers of a corporation or corporate group,[49] where it is uploaded to a confidential database maintained by a State police force[50] or where it is shared between an insured party and an insurer conducting litigation in the insured's name.[51] Similarly, legal professional privilege will not be waived where a communication is disclosed by a client or legal practitioner in circumstances where 'the person entitled to the privilege and the person to whom the content of the document is made known have such a commonality of interest in relation to the subject matter of the privilege that sharing of the content is consistent, rather than inconsistent, with an ongoing intention to preserve confidentiality and privilege.'[52]

43. Unlike many of the other provisions of Pt IV of the FoI Act, s 32 does not contemplate any 'balancing exercise' under which factors weighing in favour of disclosure are weighed against factors that favour confidentiality. Rather, s 32 reflects the 'all or nothing' nature of legal professional privilege and client legal privilege – at common law and under the Evidence Act, if information is privileged, then (subject to the question of waiver) it remains so regardless of any public interest that might be served by making it available to the public (or to a particular member of the public). However, the rigid operation of s 32 can be ameliorated by the 'public interest override' contained in s 50(4) of the FoI Act.[53]

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48 *QUBE Logistics (Vic) Pty Ltd v Wimmera Container Line Pty Ltd* [2013] VSC 695 at [94].
49 *Seven Network Ltd v News Ltd* [2005] FCA 864 at [56].
50 *Nadere v State of New South Wales* [2015] NSWDC 336 at [12].
51 *Spotless Group Ltd v Premier Building & Consulting Pty Ltd* (2006) 16 VR 1 at 14 [34] (Chernov JA).
52 *Marshall v Prescott* [2013] NSWCA 152, [57] (citations omitted).
53 The public interest override is discussed at Part D below.

C-8 DOCUMENTS CONTAINING PERSONAL INFORMATION: SECTION 33

44. Section 33(1) of the FoI Act provides that:

> 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).

45. The broad terms of s 33(1) are supplemented by a number of procedural and substantive provisions. Importantly, s 33(2A) provides that:

> 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.

46. Further, s 33(9) provides that:

> ***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;

47. Determining whether a document is an exempt document under s 33(1) requires the application of a three-stage process, under which the decision maker must ask itself the following questions:

47.1 First, does the document contain 'information relating to the personal affairs of any person'?

47.2 Second, would granting access to the document involve any 'disclosure' of that information?

47.3 Finally, would that disclosure be 'unreasonable'?

48. Leaving aside for a moment the terms of s 33(9), the expression 'information relating to the personal affairs of any person' is a broad one that extends to any information

that is in some sense 'personal' to a natural person.[54] At its narrowest, it encompasses 'affairs relating to family and marital relationships, health or ill-health, relationships with and emotional ties with other real people.'[55] It may also encompass certain business transactions, at least where they take place in the course of a closely held family business.[56] Where information relates to a person's employment, the nature of the information will determine whether it has a personal character. In this regard, 'matters related to the pursuit of a vocation and "personal affairs" are not necessarily mutually exclusive categories.'[57] Thus while information that concerns only anodyne employment-related matters, such as a person's job description, would generally not be considered 'personal', information that is primarily relevant to a person's employment may nevertheless be 'personal' if it is 'information concerning his or her state of health, the nature or condition of any marital or other relationship, domestic responsibilities or financial obligations'.[58] Information about a person's interpersonal relationships with his or her co-workers ordinarily falls squarely within the field of employment-related information that is also 'personal' in nature.[59] Thus information concerning allegations of workplace bullying or similar conduct will almost inevitably be 'personal'.[60]

49. However, the scope of the expression 'information relating to the personal affairs of any person' is expanded significantly by the definition contained in s 33(9). In this regard, it is important to note that s 33(9) was introduced in response to the decision of the Tribunal in the 'Frankston Hospital case', in which the Tribunal decided that a list of the nurses who were on duty at a hospital on a particular date did not contain information relating to the nurses' personal affairs, and ordered that access to the list be granted to a convicted multiple murderer.[61] Section 33(9) reflects an assessment by

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54 For the purposes of the FoI Act, a corporation or body politic does not itself have 'personal affairs': *The News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64 at 72-3 (Bowen CJ and Fisher J), 79 (St John J).

55 *The News Corporation Ltd v National Companies and Securities Commission* (1984) 1 FCR 64 at 79 (St John J); *Department of Social Security v Dyrenfurth* (1988) 15 ALD 232 at 237.

56 *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at 69.

57 *Bleicher v Australian Capital Territory Health Authority* (1990) 24 FCR 497 at 503.

58 *Department of Social Security v Dyrenfurth* (1988) 15 ALD 232 at 237.

59 *Re Toomer and Department of Primary Industries and Energy* (1990) 20 ALD 275 at 284. Generally speaking, a person's opinions about another person can be said to be sufficiently 'personal' to fall within the scope of s 33(1): *Richardson v Business Licensing Authority* [2003] VCAT 1053 at [25].

60 See, for example, *Davis v Victoria Police* [2008] VCAT 1343.

61 The second reading speech accompanying the introduction of the *Freedom of Information (Amendment) Bill 1999*, which introduced the current definition, made specific reference to the Frankston Hospital case and to the obligation of government to 'always and strenuously … protect its officers and employees from

the legislature that even seemingly banal information about a person – such as where they work and when they might be expected to be at work – has the capacity to interfere greatly with their privacy (and to affect their personal safety). In light of the broad definition in s 33(9), 'information relating to the personal affairs of any person' extends to a range of matters, including any visual depiction of a person (such as a video recording of a person riding a train)[62] and any distinctive thing that would identify a person (such as their handwriting).[63] The result of the extended definition of 'information relating to the personal affairs of any person' is that a range of anodyne information may be considered 'personal' for the purposes of s 33(1). However, this does not mean that such information will always be immune from disclosure under s 33(1). Rather, the question whether personal information should be disclosed is subject to the overarching question of 'reasonableness' discussed at paragraphs 51 to 52 below.

50. The word 'disclosure' in s 33(1) bears its ordinary legal meaning. Thus a 'disclosure' of information occurs when information not previously known to the applicant (or to some other person to whom the applicant subsequently discloses a document) is revealed to them as a result of the granting of access to a document.[64] A document may therefore not be exempt under s 33(1) if it contains personal information that is already in the possession of the applicant (assuming the applicant does not intend to further disclose the information) or that is a matter of public knowledge.

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unwarranted invasion of privacy and threat of harm': see Parliamentary Debates (Hansard), Victoria, *Legislative Assembly*, 6 May 1999 at 815-6.

62 See *Wilner v Department of Economic Development, Jobs, Transport and Resources* [2015] VCAT 669.

63 See *Sloan v Secretary to the Department of Justice and Community Safety* [2019] VCAT 586.

64 In *Nasr v New South Wales* (2007) 170 A Crim R 78 at 106, Campbell JA (with whom Beazley and Hodgson JJA agreed) surveyed the authorities on the meaning of the word 'disclosure' and concluded that:

> The essence of disclosure of information is making known to a person information that the person to whom the disclosure is made did not previously know: *R v Skeen & Freeman* (1859) Bell 97 ; 169 ER 1182 ("uncovering … discovering … revealing … imparting of what was secret … [or] telling that which had been concealed"); *Foster v Federal Commissioner of Taxation* (1951) 82 CLR 606 at 614–5 (" … a statement of fact by way of disclosure so as to reveal or make apparent that which (so far as the "discloser" knows) was previously unknown to the person to whom the statement was made"); *R v Gidlow* [1983] 2 Qd R 557 at 559 ("telling that which has been kept concealed"); *Dun & Bradstreet (Australia) Pty Ltd v Lyle* (1977) 15 SASR 297 at 299; *A-G v Associated Newspapers Ltd* [1994] 2 AC 238 at 248 ("to open up to the knowledge of others"); *Real Estate Opportunities Ltd v Aberdeen Asset Managers Jersey Ltd* [2007] EWCA Civ 197 at [78] ("the revelation of information for the first time"). In my view, the provision by the keeper of the records of Waverley court of the records of the conviction would be a disclosure of information relating to a spent conviction only if the solicitor at the Crown Solicitors Office to whom that record was provided did not already know the information that was contained in it.

51. Finally, the question whether any disclosure of personal information involved in granting access to a document would be 'unreasonable' must be determined by having regard to 'any matter that may relevantly, logically, probatively bear upon whether disclosure of a document "would involve the unreasonable disclosure of information relating to the personal affairs of any person".'[65] The factors to which the Tribunal may have regard in addressing the question of unreasonableness include:

    51.1 The purpose for which access to the document is sought by the applicant.

    51.2 The extent to which the document might assist the applicant to pursue that purpose.

    51.3 The likely extent of any further disclosure or publication by the applicant of the document or of any personal information contained in it.

    51.4 The sensitivity of the personal information contained in the document.

    51.5 Whether the personal information contained in the document was obtained by compulsion and whether it was obtained in confidence.

    51.6 The extent to which any part of the personal information contained in the document is already known to the applicant.

    51.7 Any view expressed by the person to whom the personal information relates as to whether it should be disclosed.

    51.8 Any public interest, beyond the obvious public interest in maintaining privacy in personal information, that would be undermined if access to the document were granted.[66]

52. In determining the likely extent of any further disclosure of a document or the information contained in it, it is relevant to have regard to the fact that once access to a document has been granted under the FoI Act, the person to whom access has been granted is free to disclose the document to the world at large. However, it should not

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65 *Marke v Victoria Police* (2008) 23 VR 223 at 245 [98] (Pagone AJA).

66 Some of these considerations are adverted to in the judgment of Maxwell P in *Marke v Victoria Police* (2008) 23 VR 223 at 229 [19]. See also *Page v Metropolitan Transit Authority* (1988) 2 VAR 243.

be assumed that a person who has obtained a document pursuant to the FoI Act will inevitably go on to publish it widely.[67]

C-9 BUSINESS INFORMATION: SECTION 34

53. Section 34(1) of the FoI Act provides that:

> 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.

54. Section 34(2) goes on to set out a range of matters that a decision maker *may* (not must) take into account in deciding whether a document is an exempt document under s 34(1)(b):

> 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.

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67 *Marke v Victoria Police* (2008) 23 VR 223 at 231 [28] (Maxwell P), 241 [79] (Weinberg JA), 246 [99] (Pagone JA).

55. Sections 34(1)(a) and (b) must be read disjunctively.[68] Thus 'trade secrets' are a particular type of information – they are not merely an example of matters the disclosure of which might unreasonably disadvantage a business. It follows that if a document contains a trade secret, it is an exempt document and there is no need for the decision maker to consider whether disclosing the document would unreasonably expose a business to disadvantage (even though, as a practical matter, it is difficult to conceive of a 'trade secret' that would not also fall within the scope of s 34(1)(b)).[69] In the context of s 34(1), a trade secret is simply 'a device or technique used in a particular trade or … occupation and giving an advantage not generally known.'[70] Thus in *Lansing Linde Ltd v Kerr*, Staughton LJ stated that:

> [A] trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.
>
> That is my preferred view of the meaning of trade secret in this context. It can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods which they buy.[71]

56. Things like the secret recipes for *Kentucky Fried Chicken* and *Coca-Cola* are archetypal trade secrets. However, lower level matters of business strategy may also constitute trade secrets.

57. Insofar as s 34(1)(b) is concerned, documents recording the charge-out rates of a firm of solicitors have been held to be exempt, on the basis that such information 'could not be disclosed without causing substantial harm to the competitive position' of the firm.[72] Similarly, documents recording the amount paid by an advertising company for the exclusive right to place advertisements on public transport infrastructure have been held to be subject to s 34(1)(b), on the basis that such information could be used to the advertising company's disadvantage in future tenders.[73]

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68 *Gill v Department of Industry, Technology and Resources* [1987] VR 681 at 686.
69 See *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 122.
70 *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 119.
71 [1991] 1 WLR 251 at 260, cited with approval in *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111 at 120.
72 *Coulson v Department of Premier and Cabinet* [2018] VCAT 229 at [154].
73 *Brown v Public Transport Development Authority* [2017] VCAT 1993 at [20].

C-10 INFORMATION PROVIDED IN CONFIDENCE: SECTION 35

58. Section 35(1) of the FoI Act provides, relevantly, that:

> 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.

59. Section 35(1)(a) operates where information generated by a person that is not an agency is communicated in confidence[74] to an agency. The provision applies regardless of whether the information was communicated to the agency in the form of a document, or was communicated in some other form and recorded in a document by the agency. If this confidentiality requirement is met, the decision maker must consider whether, in a counterfactual scenario in which the information was generated by an agency, a document recording the information would be exempt under one of the other provisions of Pt IV.[75] Thus if a report of a 'think tank' is communicated in confidence to an agency, it may attract the operation of s 35(1)(a) if it contains policy recommendations of a kind that would bring a document generated by an agency within the exemption provided for in s 30(1) of the FoI Act.

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74 See paragraph 62.1 below.

75 In this regard, the term 'exempt matter' in s 35(1)(a) is defined in s 5(1) to mean 'matter the inclusion of which in a document causes the document to be an exempt document'.

60. There is authority in the Tribunal for the view that determining whether a document is exempt under s 35(1)(b) requires the application of a two-stage process. Thus in *Johnson v Cancer Council of Victoria*, President Garde J stated that:

> The [respondent] claims that Document 1 is exempt under s 35(1)(b) of the FOI Act. The exemption is made out only if the [respondent] satisfies the Tribunal that:
>
> (1) the disclosure of the document would divulge any information or matter communicated in confidence by or on behalf of a person to an agency ('the confidentiality requirement'); and
>
> (2) the disclosure of the information would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of an agency to obtain similar information in the future ('the impairment requirement').[76]

61. However, this statement of the test arguably conflates the question whether disclosure of information would be contrary to the public interest with the 'impairment requirement' and suggests that the where the impairment requirement is met, it will necessarily be contrary to the public interest for the information to be disclosed. At least in my view, a close reading of the three judgments given by the Full Court of the Supreme Court of Victoria in *Ryder v Booth* shows that the impairment requirement and the question whether disclosure of information would be contrary to the public interest are discrete issues. Thus s 35(1)(b) in fact requires the application of a *three*-stage process, pursuant to which:

61.1 First, the decision maker must determine whether the information contained in the document was provided to the agency in confidence.

61.2 Second, the decision maker must determine whether disclosing the information contained in the document would be likely to impair the agency's ability to obtain similar information in the future.

61.3 Finally, the decision maker must determine whether disclosing the information contained in the document would be contrary to the public interest.[77]

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[76] [2016] VCAT 1596 at [275].

[77] That the question whether disclosure of information would impair the respondent's ability to obtain similar information is separate from the question whether disclosure of the information would be contrary to the

62. The first two steps are matters of evidence, while the third step requires the decision maker to make a value judgment. The matters the decision maker must consider are as follows:

62.1 At stage one, the decision maker must consider whether the information contained in the document was 'treated as confidential'.[78] In determining this, both the intention of the agency and the intention of the person who communicated the information are relevant. It is not necessary to consider whether any legal obligation of confidence arose, whether there was any formal confidentiality agreement, or whether there was a 'meeting of the minds'.[79] Rather, all that is required is that *either* the agency *or* the provider of the information considered that it was communicated in confidence.[80] The decision maker must have regard to the circumstances under which the information was *communicated* to the agency, not to the circumstances under which any pre-existing record of the information came into existence.

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public interest appears from the judgments of Gray J and King J in *Ryder v Booth*. At [1985] VR 869 at 885, Gray J stated that:

> Finally, I should say that the reasons which lead to the conclusion that disclosure would not be likely to affect the supply of information to the Board also lead me to be unsatisfied that disclosure would be contrary to the public interest under s30(1)(b). In other words, I am not satisfied that the risk of adverse consequences to the Board's operations outweighs the public interest expressed by the Act in giving a person access to a document concerning him.

His Honour thus clearly considered that s 35(1)(b) posed two separate questions, each of which had to be addressed. More explicitly, King J stated at [1985] VR 869 at 885 that:

> I do not think that s35(1)(b) can be read to require proof only that the disclosure would be reasonably likely to impair the ability of the defendants to obtain similar information in the future. The reference to "public interest" is an additional requirement and means that in addition to an answer in favour of the appellants to the last-mentioned question the person or persons applying s35(1)(b) must find that such impairment is so damaging to the public as to warrant non-disclosure of the documents under consideration.

While Young CJ stated that 'it is clear that under the paragraph [35(1)(b)] we are not concerned with the public interest except in the limited sense described in the paragraph, that is to say, that the disclosure would be reasonably likely to impair the ability of the [respondent] to obtain similar information in the future', this is not consistent with the views expressed by Gray J and King J. To the extent that the view expressed by Justice Garde P in *Johnson* is inconsistent with those expressed by Gray J and King J in *Ryder v Booth*, it is the views of Gray J and King J that must prevail.

78 *Ryder v Booth* [1985] VR 869 at 883.

79 *Johnson v Cancer Council of Victoria* [2016] VCAT 1596 at [276]-[277].

80 *Thwaites v Department of Health and Community Services* (1995) 8 VAR 361 at 366; *Casey City Council v Environment Protection Authority* 2010] VCAT 453 at [19]; *Department of Health and Human Services v Herald and Weekly Times Pty Ltd* [2015] VCAT 291 at [42]; *Country Fire Authority v McGregor* [2017] VCAT 582 at [23].

62.2 At step two, the Tribunal must consider only the position of the agency. The question is whether the agency has discharged its onus[81] of demonstrating that disclosure of the information in the document would be reasonably likely to impair its ability to obtain similar information in the future to 'a degree ... going beyond a trifling or minimal impairment.'[82] Evidence from individuals who say they would be discouraged from providing information to the agency in the future may be relevant, but it is not conclusive.[83]

62.3 The final step requires the Tribunal to make a value judgment as to where the public interest lies, taking into account all relevant matters (including those referred to at Part C-2 and paragraph 51 above).

63. The effect that the disclosure of information would have on an agency's ability to obtain similar information in the future will ordinarily be the subject of evidence in the form of a witness statement made by a senior officer of the agency.

C-11 INFORMATION SUBJECT TO STATUTORY SECRECY PROVISIONS: SECTION 38

64. Section 38 of the FoI Act provides that a document is an exempt document if it is subject to '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'. A document may be subject to s 38 even if the agency in possession of the document is not bound by the enactment that prohibits disclosure of the information contained in the document.[84] For example, the obligations of secrecy imposed by the *Witness Protection Act 1991* (Vic) apply to natural persons, not to the body known as 'Victoria Police'.[85] Section 38 ensures that a person cannot circumvent the secrecy provisions contained in that Act by requesting information from Victoria Police under the FoI Act.

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81 FoI Act, s 55(2); *Ryder v Booth* [1985] VR 869 at 872 (Young CJ), 877 (Gray J), 885 (King J).

82 *Ryder v Booth* [1985] VR 869 at 880 (Gray J).

83 See *Ryder v Booth* [1985] VR 869 at 880 (Gray J).

84 *Secretary to the Department of Justice v Western Suburbs Legal Service Inc* (2009) 22 VR 66 at 74 [21]; *Knight v Corrections Victoria* [2010] VSC 338 at [83].

85 Section 5(4) of the FoI Act provides that Victoria Police is a 'prescribed authority'. It is therefore an 'agency' for the purposes of the FoI Act.

D. THE 'PUBLIC INTEREST OVERRIDE'

65. Section 50(4) of the FoI Act provides that:

> On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 29A, section 31(3), section 31A, or in section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act.

66. The first thing to note about s 50(4) is that it does not apply to cabinet documents (FoI Act, s 29), documents affecting national security (FoI Act, s 29A), certain covert law enforcement documents (FoI Act, s 31(3)), documents relating to the Independent Broad-based Anti-corruption Commission (FoI Act, s 31A), or documents containing personal information (s 33). Further, because ss 30(1) and 35(1) require the Tribunal to determine whether granting access to a document would be contrary to the public interest, s 50(4) is likely to have little practical application to a document that has been held to be an exempt document under one of those provisions.[86] As such, the practical application of s 50(4) is generally limited to documents that are exempt under provisions that do not themselves call for a determination of whether the public lies in disclosing a document or in keeping it secret (such as ss 31(1), 34(1)(a) and 32). This explains why the leading authority on s 50(4)[87] concerns a document that was held to be an exempt document because it comprised a memorandum of legal advice in which legal professional privilege had not been waived, and thus was not one that required the application of any 'balancing test' to determine whether it was an exempt document.

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86 Thus in *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 at 340 [28], Phillips JA said the following:

> Can it be expected that the tribunal might first uphold the exemption under s. 30(1) (which depends upon its confirming that disclosure "would be contrary to the public interest") and then proceed to consider the public interest override, to determine whether it is of opinion that "the public interest requires that access to the document should be granted"? The two tasks seem to conflict and it was submitted that on that account s. 30(1) should be taken as excepted from the public interest override, like ss. 28, 31(3) and 33. Whether that can be achieved by construction is problematic, but perhaps the question will never arise; for where the tribunal considers the public interest so strong as to attract the public interest override, the tribunal would presumably not uphold the claim to exemption under s. 30(1) in the first place (as indeed the tribunal determined in this matter). But this possibility of true conflict between the two provisions need not be resolved on these appeals and I say no more about it.

87 *Osland v Secretary to the Department of Justice (No 2)* (2010) 241 CLR 320.

67. Regardless of any uncertainty about its sphere of operation, it is clear that s 50(4) imposes a high threshold for granting access to an exempt document. Thus in *Osland v Secretary to the Department of Justice (No 2)*, French CJ, Gummow and Bell JJ stated that:

> [T]he word "requires" which appears in s 50(4) directs the decision-maker to identify a high-threshold public interest before the power can be exercised. It is not enough that access to the documents could be justified in the public interest. The terminology of the subsection does not define a rule so much as an evaluative standard requiring restraint in the exercise of the power. It is, like many common law standards, "predicated on fact-value complexes, not on mere facts", to be applied by the decision-maker.[88]

68. The value judgment required by s 50(4) must be made in a context in which the FoI Act *ex hypothesi* displays a *prima facie* intention that the document under consideration should not be disclosed. That is, s 50(4) 'depends upon *first* a finding that a document is exempt under Pt IV and *then* an opinion that the public interest is so strong as to demand that access be granted notwithstanding the factors which justify the exemption in the first place.'[89] It follows that while expressions like 'exceptional circumstances' should not be used in relation to s 50(4) because of their capacity to improperly limit the scope of the discretion conferred on the Tribunal by the provision,[90] the discretion to grant access to an exempt document under s 50(4) clearly is not one that is to be exercised lightly.

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88 (2010) 241 CLR 320 at 330 [14].

89 *Secretary to the Department of Premier and Cabinet v Hulls* [1999] 3 VR 331 at 351 [56] (Phillips JA).

90 *Osland v Secretary to the Department of Justice (No 2)* (2010) 241 CLR 320 at 330 [14].