

# GUIDE TO SECTION 30

## Internal working documents

### Elements of the exemption

Section 30 exempts from disclosure internal working documents; or in other words, documents that contain the deliberative processes of agencies.

- > The document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
- > Such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- > Disclosure of the matter would be contrary to the public interest.

### Opinion, advice or recommendation?

In *Halliday v Office of Fair Trading*, the Administrative Appeals Tribunal held that 'opinion, advice or recommendation' conveys a meaning of matters in the nature of a 'personal view', 'an opinion recommended or offered' or 'a presentation worthy of acceptance'.

The opinion, advice or recommendation needs to have been generated by an officer of the agency. The Victorian Civil and Administrative Tribunal (**VCAT**) has previously recognised that section 30(1) applies to a third party consultant employed by an agency (*Koch v Swinburne University* [2004] VCAT 1513).

VCAT has also determined that is sufficient if the opinion, advice or recommendation comes from an officer of another agency under the FOI Act (*Dalla-Riva v Department of Treasury and Finance* [2005] VCAT 2083).

### Consultation or deliberation?

A document may still fall within this exemption if it discloses consultation or deliberation between officers of an agency.

Section 30(1) can apply in instances where the consultation or deliberation occurs between officers of different agencies, so long as the consultation or deliberation relates to the deliberative processes of one of those agencies.

***Brog v Department of Premier and Cabinet*** [1989] 3 VAR 201

In *Brog*, the Applicant applied to the Department of Premier and Cabinet for, amongst other things, a draft document. One of the documents was a report provided by The University of Melbourne to the Department of Premier and Cabinet. The report contained the opinions and recommendations of an evaluation group employed by The University of Melbourne. Whilst the individual members of the evaluation group were not consultants to the Department of Premier and Cabinet, the VCAT determined that it was sufficient if consultation or deliberation occurs between officers, even if those officers are officers of some other agency or indeed other agencies.

## When does section 30(1) not apply?

If the document does not contain matter in the nature of opinion, advice or recommendation, nor consultation or deliberation, then there is no need to consider the remaining requirements of section 30(1).

Section 30(1) does not apply to –

- > Any document that can be purchased under section 8(1) of the FOI Act (see section 30(2));
- > Purely factual information (see section 30(3));
- > Records of final decisions, orders or rulings given in the exercise of an adjudicative function (see section 30(4));
- > Documents more than 10 years old (see section 30(6)).

### Tip

It is important to determine when information is purely factual in nature. If a document contains factual information that is intertwined with advice, opinion or recommendation, or consultation or deliberation, then it is not purely factual.

## Deliberative processes of an agency

The Administrative Appeals Tribunal held, in *Re Waterford and Department of Treasury* (No. 2) [1984] 1 AAR 1; 5 ALD 588, that –

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

### Consider

What are the functions of your agency?

Was the opinion, advice, recommendation, consultation or deliberation provided in the course of, or for the purpose of, one of your agency’s functions?

## The public interest

The final element of section 30(1) requires an agency to consider whether the disclosure of the opinion, advice, recommendation or consultation or deliberation, is contrary to the public interest.

Factors to consider include –

- > The right of every person to obtain access to documents under the FOI Act;
- > The degree of sensitivity of the issues involved in the deliberations; the more sensitive or contentious the issues involved in the communication, the more likely it is that the communication should not be disclosed;
- > The likelihood that disclosure would be likely to lead to confusion and ill-informed debate in the public;
- > The state of the policy development process when the document was created;

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- > The likelihood that disclosure would inhibit the independence of officers;
  - > The likelihood that disclosure would create mischief one way or another. This may include circumstances where disclosure of the information may mislead or misinform the public; or where disclosure would undermine any processes of the agency.
  - > The significance of the document; and
  - > The nature of the information and the nature of the document.

In order to make out this exemption, an agency must weigh the competing interests – on the one hand the right of access provided by the FOI Act, and on the other, the public interest in protecting the deliberative

processes of government. An agency must demonstrate that, after such a balancing of the competing interests, disclosure would be contrary to the public interest.

There is a general principle that disclosure of documents containing preliminary information, advice and deliberation may lead to speculation in the public domain and would be likely to lead to confusion. In these cases, the information is more likely to be exempt.

Information that is of a controversial subject matter or matter that forms the basis of ongoing public discussion is more likely to be exempt than information that is of a largely innocuous and uncontentious nature, and that does not reveal any sensitive information about the agency's policy position, or refers to information that appears in the public arena.

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## Further Information

### Visit our website, call or email us:

- > [www.foicommissioner.vic.gov.au](http://www.foicommissioner.vic.gov.au)
- > 1300 842 364 (1300 VIC FOI)
- > [enquiries@foicommissioner.vic.gov.au](mailto:enquiries@foicommissioner.vic.gov.au)

### Other related fact sheets include:

- > The FOI access process
- > Writing FOI access decisions

*Disclaimer: This fact sheet does not constitute legal advice and should not be used as a substitute for applying the provisions of the Freedom of Information Act 1982, or any other legal requirement, to individual cases.*