



Secrecy and Confidentiality in a Time of Openness

Legal Division

14 February 2019

Introduction

Discussion: who has come across s 38?





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.



Intention of section 38





Two purposes in secrecy provisions

Ensure that public servants do not inappropriately divulge information that they have access to.

Ensure that particular sensitive information in government is protected.



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Section 534, Children Youth and Families Act 2005

(1) A person must not publish or cause to be published ... a report of a proceeding in the Court ... that contains any particulars likely to lead to the identification of ... a child or other party to the proceeding or a witness in the proceeding; ...

Section 26A, Ombudsman Act 1973

(1) A person who is, or was, an Ombudsman officer must not, directly or indirectly, provide or disclose any information acquired by the person by reason of, or in the course of, the performance of the duties and functions of the Ombudsman, or the exercise of the powers of the Ombudsman, under this Act or any other Act ...



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Elements of s 38: the legal test

- 1. There is an enactment in force.
- 2. The enactment 'applies specifically to information of a kind' contained in the document.
- 3. There is a prohibition on persons referred to in the enactment from disclosing the information.



Department of Justice v Western Suburbs Legal Service Inc [2009] VSC 68.



1. There is an enactment in force.

'Enactment' is defined in section 5(1) of the FOI Act:

Enactment means an Act or an instrument (including rules, regulations, local laws or by-laws) made under an Act.

Includes:

- Regulations: Public Service (Unauthorised Disclosure) Regulations 1987
- Instruments made under an Act: Teaching Service Order No 140

Does not include:

- Commonwealth Act secrecy provisions
- Policy or guidelines

Enactment in force

It is the secrecy provision in force at the time the decision is made (not at the date the request was made) which is relevant.





2. The enactment 'applies specifically to information of a kind' contained in the document

An enactment 'applies specifically' to information when:

- it is formulated with precision and refers to information with particularity
- it is concerned with the specific nature and quality of information

An enactment generally does not 'apply specifically' to information when:

- it only applies because of the position of the person that received or possesses it
- it only applies because of the enactment that it was received through
- it only applies because of the type of "bucket" the information is contained in, for example "information in minutes" or "cabinet documents"

Look beyond the subsection to other subsections and the division.



Taxation Administration Act 1997

Section 91 - Prohibition on certain disclosures of information by tax officers

- (1) A person who is or was a tax officer must not disclose any information obtained under or in relation to the administration or execution of a taxation law, except as permitted by this Part.
- (2) For the purposes of the Freedom of Information Act 1982, information referred to in subsection (1) is information of a kind to which section 38 of that Act applies.

Section 93 - Permitted disclosures of a general nature

The Commissioner may disclose information obtained under or in relation to the administration of a taxation law unless that information will or is likely to identify a particular taxpayer.



Local Government Act 1989

Section 77 - Confidential Information

- (1) A person who is, or has been, a Councillor or a member of a special committee, must not disclose information that the person knows, or should reasonably know, is confidential information.
- (1A) ... (1B) ... (1C)
- (2) For the purposes of this section, information is confidential information if—
 - (a) the information was provided to the Council or a special committee in relation to a matter considered by the Council or special committee at a meeting closed to members of the public and the Council or special committee has not passed a resolution that the information is not confidential; or
 - (b) the information has been designated as confidential information by a resolution of the Council or a special committee which specifies the relevant ground or grounds applying under section 89(2) and the Council or special committee has not passed a resolution that the information is not confidential; or
 - (c) the information has been designated in writing as confidential information by the Chief Executive Officer specifying the relevant ground or grounds applying under section 89(2) and the Council has not passed a resolution that the information is not confidential.



Section 534, Children Youth and Families Act 2005

(1) A person must not publish or cause to be published ... a report of a proceeding in the Court ... that contains any particulars likely to lead to the identification of ... a child or other party to the proceeding or a witness in the proceeding; ...

Section 26A, Ombudsman Act 1973

(1) A person who is, or was, an Ombudsman officer must not, directly or indirectly, provide or disclose any information acquired by the person by reason of, or in the course of, the performance of the duties and functions of the Ombudsman, or the exercise of the powers of the Ombudsman, under this Act or any other Act ...



The fine line



The distinction can be fine —
In *Birrell v DPC* the Tribunal gave the example that "information relating to public health" was specific enough but information "prepared for the Ministry of health" would not be.







3. There is a prohibition on persons referred to in the enactment from disclosing the information.

Generally easy to determine. Nevertheless, some traps are:

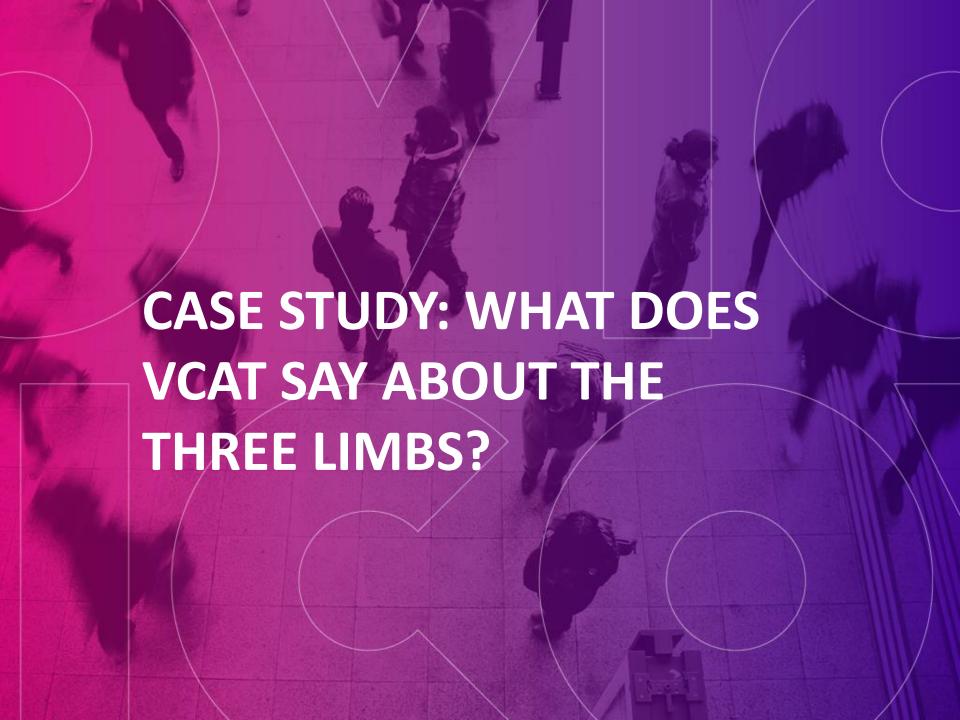
- It is not a positive prohibition but a right to "everything but"
 Barnes v Commissioner for Corporate Affairs
- The prohibition is not mandatory: McCullloch v Melbourne
- The secrecy provision does not apply to the FOI applicant.
 - Gullquist v Victorian Legal Services Commissioner (Review and Regulation) [2017] VCAT 764 (2 June 2017)
 - Ambikapathy v VLA VCAT 1999



You cannot rely on s 38 to protect information that the secrecy provision would not protect:

- Gullquist v Victorian Legal Services Commissioner (Review and Regulation) [2017] VCAT 764 (2 June 2017) -
- Ambikapathy v VLA Vcat 1999 and





Case study: Frugtniet v Legal Services Board





First provision: confidentiality

- (2) A person to whom this section applies must not, directly or indirectly, make a record of, disclose or communicate to any person any information relating to the affairs of any person or law practice acquired in the performance of functions under this Act, unless—
- (a) it is necessary to do so for the purpose of, or in connection with, the performance of a function under this Act; or
- (b) the person to whom the information relates gives written consent to the making of the record, disclosure or communication.

Penalty: 120 penalty units.

Amongst others, this provision applies to a person to whom the LSB has delegated functions.



Second provision: investigations and prosecution

- (1) An investigator must
- not disclose information acquired in the course of an investigation under this Division except—
- (a) as is necessary for the purpose of conducting the investigation and making the report of the investigation; or
- (b) as is permitted by subsection (2); or
- (c) with the consent of the person to whom the information relates.

Penalty: 60 penalty units.

This is subject to exceptions which allow disclosure to the police, LSB, LSC, or a court or Tribunal, etc, for law enforcement purposes (s 7.2.9(2)).



Third provision: confidentiality

(1) A relevant person must not disclose to any other person, whether directly or indirectly, any personal information obtained by reason of being a relevant person.

Penalty: 60 penalty units.

- (2) Subsection (1) does not apply to the disclosure of information—
- (a) to the extent that the disclosure is reasonably required to perform functions under this Act, the regulations or the legal profession rules, or under any other Act or regulations; or
- (b) to the extent that the relevant person is expressly authorised, permitted or required to disclose the information under this Act, the regulations or the legal profession rules, or under any other Act or regulations; or
- (c) with the prior consent in writing of the person to whom the information relates; or
- (d) to a court or tribunal in the course of legal proceedings; or
- (e) pursuant to an order of a court or tribunal under any Act or law; or
- (f) to the extent the disclosure is reasonably required to enable the enforcement or investigation of the criminal law or a disciplinary matter.

A 'relevant person' includes a person currently or previously employed by or acting at the direction of the LSB.



First and third limbs

'Immediately apparent first and third limbs satisfied'





The second limb & outcome

- Sufficiently specific
- Second secrecy provision satisfied the 'decider' in many cases
- No definitive findings on s 38





Refresher: the legal test

- 1. There is an enactment in force.
- 2. The enactment 'applies specifically to information of a kind' contained in the document.
- 3. There is a prohibition of persons referred to in the enactment disclosing such information.



Department of Justice v Western Suburbs Legal Service Inc [2009] VSC 68.

Is this a secrecy provision?

Corrections Act 1986 s 91 Disclosure of information

- (1) Except for the extent necessary to perform official duties, an officer must not disclose to any person except—
- a) a court; or,
- b) the Minister; or,
- c) the Secretary; or,
- d) a Regional Manager; or,
- e) with the authority of the Minister, Secretary or a Regional Manager; or,
- f) the Ombudsman or the Ombudsman's officers—

information gained because of the officer's position as an officer or contained in a record, return or report prepared by the officer under this Act.

Penalty: 5 penalty units.



No.

VCAT held this section does not 'refer with particularity' to the information sought to be withheld; Simons v Department of Justice [2006] VCAT 2053 at [58].

The second limb of the test was not met.

Insufficient for 'information of a kind':

'information gained because of the officer's position as an officer or contained in a record,
 return or report prepared by the officer under this Act.'



Is this a secrecy provision?

S 24(3) of the Sex Work Act 1994 (Vic):

(3) The register referred to in subsection (2) may only be inspected by the Director, by members or staff of the Authority or authorised police officers or authorised officers of the responsible authority.



Is this a secrecy provision?

Business Licensing Authority Act 1998 s 18 Secrecy

- (1) This section applies to every person who is or has been a member of the Authority, the Registrar, a Deputy Registrar, a member of the other staff assisting the Authority, a person whose services are used by the Authority under section 7(2) or a person engaged under section 8.
- (2) A person to whom this section applies must not, either directly or indirectly, make a record of, or disclose or communicate to any person, any information concerning the affairs of any person acquired by reason of the office or employment under or for the purposes of this Act or a business licensing Act.

Penalty: 5 penalty units.



Not in this case...but can be yes...

(2) A person must not make a record of, or disclose or communicate to any person, any information *concerning the affairs of any person* acquired by reason of the office or employment.

'concerning the affairs of any person' = information of a kind



Local Government Act 1989, Sched 3: is this a secrecy provision?

15. Disposal of ballot-papers

(3) The Chief Executive Officer must keep the parcels [of ballot-papers] safely and secretly for 3 years.

15. Ballot material and records to be secured and stored

All ballot material and records in respect of an election must be dealt with, kept and stored in accordance with the regulations.



The effects of amendments to legislation

15. Disposal of ballot-papers

(3) The Chief Executive Officer must keep the parcels [of ballot-papers] safely and secretly for 3 years.

No.

2000 – computer disc with electronic ballot material was not protected



15. Ballot material and records to be secured and stored

All ballot material and records in respect of an election must be dealt with, kept and stored in accordance with the regulations.

Yes.

2015 - electronic information on discs is protected by the same obligation to keep the information safely and secretly as previously existed in relation to ballot papers.

Tips & Tricks

- 1. Consider section 38 carefully: don't just 'slap on' section 38.
- 2. Consider the legal test carefully: what kind of information is it?
- 3. Has the legislation been amended or repealed? If so, does this apply?



OVIC List

OVIC is preparing a list with:

- Sections of Acts where VCAT has found s38 applies
- Sections of Acts where VCAT has found s38 does not apply.



Questions?





