

Notice of Decision and Reasons for Decision

Applicant:	'CK5'
Agency:	Victoria Police
Decision date:	9 December 2020
Exemption and provision considered:	Section 38 in conjunction with section 115(6) of the <i>Coroners Act 2008</i> (Vic)
Citation:	'CK5' and <i>Victoria Police (Freedom of Information)</i> [2020] VICmr 343 (9 December 2020)

FREEDOM OF INFORMATION – Coroners Court of Victoria documents – documents relating to a death – inquiry – inquest – secrecy provision – prohibition on disclosure

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

Notice of Decision

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

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the documents are exempt under section 38 of the FOI Act in conjunction with section 115(6) of the *Coroners Act 2008* (Vic) (**Coroners Act**).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

9 December 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to a report on the death of their relative.
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request and refused access to the documents in full under section 38 in conjunction with section 115(6) of the Coroners Act.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
8. I note parliament's intention the FOI Act must be interpreted so as to further the object of the FOI Act and any discretions conferred by the FOI Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemption

Section 38

9. The Agency relied on section 38 in conjunction with section 115(6) of the Coroners Act to refuse access to the documents.
10. Section 38 provides:

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.

11. A document will be exempt under section 38 if three conditions are satisfied:
 - (a) there must be an enactment in force;
 - (b) the enactment must apply specifically to the kind of information contained in the documents; and

- (c) the enactment must prohibit persons referred to in the enactment from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

Is there an enactment in force?

12. Section 115(6) of the Coroners Act provides:

A document relating to the investigation of a death or a fire that is held by a coroner must not be released by a coroner except as permitted under this Act or any other law.

...

13. I am satisfied the Coroners Act is an enactment in force.

Does the enactment apply specifically to the kind of information in the documents?

14. For section 38 to apply, an enactment must be formulated with such precision that it specifies the nature and quality of information that is protected and does not merely describe the information by reference to its context.¹
15. In this case, while section 115(6) captures documents based on them being held by the Coroners Court, it also requires the information relate to 'the investigation of a death or fire' by a coroner. Consequently, section 115(6) describes the protected information with sufficient specificity.
16. In addition, the secrecy provision must also capture the actual information sought to be withheld.
17. In this case, the documents subject to review are a *Police Report of Death for the Coroner (Form 83)* and *Statement of identification*.
18. In its decision, the Agency states the documents were sent to the Coroners Court following the death of the Applicant's relative and remain in the possession of the Coroner, whilst copies are held by the Agency. A Coroners Court inquiry is now closed, and no inquest was held.
19. I am satisfied the documents relate to the investigation of a death by a coroner. Accordingly, I am satisfied the enactment applies specifically to the kind of information in the requested documents.

Does the enactment prohibit persons referred to in the enactment from disclosing the specific kind of information referred to in the enactment, either absolutely or subject to exceptions or qualifications?

20. In *Secretary to the Department of Justice v Western Suburbs Legal Service Inc*,² the Victorian Supreme Court held the enactment is not required to prohibit disclosure of the information by:
- (a) a person in possession of the document;
 - (b) the person to whom the document was provided; or
 - (c) the person to whom the document was addressed.
21. Rather, all that is required is for the enactment to prohibit a person, or persons, (either generally, specifically or as otherwise defined) from disclosing the specific type of information referred to in the enactment, namely:

In this case the text of s 38 is plain. In order for a document to be exempt, the relevant enactment must prohibit "persons referred to in the enactment" from disclosing the relevant information. Section 38

¹ *Simons v Department of Justice* [2006] VCAT 2053.

² [2009] VSC 68 at [21].

does not provide that the enactment must prohibit the person in possession of the document or the person to whom the document was provided or the person to whom the document was addressed from disclosing the relevant information: it only provides that the enactment must prohibit persons referred to in the enactment from such disclosures. Had the Parliament wished to provide that enactments of the kind referred to in s 38 of the FOI Act had to prohibit the person in possession of the document from making any disclosure then it could have so provided. There is no basis for departing from the language and plain meaning of s 38. This construction also has the benefit of providing that a document will be exempt if a non-disclosure or secrecy provision applies to its contents rather than on the more random basis of whether or not the document is or has fallen into the hands of an individual who may or may not be a person to whom such a provision applies.

22. Section 115(6) of the Coroners Act specifically applies to coroners and prohibits a coroner from releasing documents relating to the investigation of a death, unless otherwise permitted under the Coroners Act or another law.
23. Accordingly, I am satisfied the enactment prohibits persons referred to in the enactment from disclosing the specific kind of information in the documents subject to review.
24. As such, this limb is satisfied.

Do any exceptions or qualifications apply?

25. Sections 115(1) and 115(2) of the Coroners Act set out the circumstances to which documents before the Coroners Court can be released by a coroner, as follows:

Section 115 Access to documents

- (1) Unless otherwise ordered by the coroner, the principal registrar must—
 - (a) provide the senior next of kin of a deceased person written notice, in accordance with the rules, specifying—
 - (i) that reports have been given to a coroner as a result of a medical examination performed on the deceased; and
 - (ii) that the senior next of kin may request copies of those reports; and
 - (iii) the manner in which the senior next of kin may request copies of those reports; and
 - (b) if an inquest is to be held, provide an interested party with a copy of the coronial brief.
- (2) A coroner may also release a document to—
 - (a) an interested party if the coroner is satisfied that the party has a sufficient interest in the document;
 - (b) a statutory body if the coroner is satisfied that the release of the document is required to allow the statutory body to exercise a statutory function;
 - (c) a police officer for law enforcement purposes;
 - (d) a person who is conducting research if the coroner is satisfied that the research has been approved by an appropriate human research ethics committee;
 - (e) any person if the coroner is satisfied that the release is in the public interest;
 - (f) a person specified in the rules as being a person to whom documents may be released.

- (3) A coroner may impose conditions on the release of any document under subsection (1) or (2).
- (4) A person to whom a document has been released under this section must comply with any condition placed on that release.

Penalty: 60 penalty units.

...

26. Sections 115(1) and (2) of the Coroners Act provide the coroner with discretion to grant access to documents that would otherwise be prohibited under section 115(6) of the Coroners Act. Unlike the FOI Act, to which release of documents is on an unconditional and unrestricted basis, release of documents by the coroner can be granted subject to conditions, for which it is an offence if a person does not comply with any conditions imposed.
27. In my view, as access to documents in accordance with sections 115(1) and (2) of the Coroners Act is at the coroner's discretion, I am not satisfied these sections are impacted by the FOI Act such that it provides for disclosure of the documents in accordance with the FOI Act.
28. While I acknowledge the Applicant's personal interest in obtaining access to the requested documents held by the Coroners Court, I am satisfied no relevant exceptions apply to the operation of section 115(6) in the circumstances.

Decision on section 38

29. In summary:
 - (a) I am satisfied the Coroners Act is an enactment in force for the purposes of section 38;
 - (b) the documents subject to review contain the specific information described in section 115(6) of the Coroners Act to which there is a prohibition against disclosure; and
 - (c) there are no relevant exceptions that apply in this instance.
30. I acknowledge the Applicant's genuine interest in obtaining access to the documents and note they received documentation from the Coroners Court. However, I am satisfied the documents are exempt from release under the FOI Act in accordance with section 38 of the FOI Act in conjunction with section 115(6) of the Coroners Act.

Deletion of exempt or irrelevant information

31. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information from a document and the applicant agrees to receiving such a copy.
32. I have considered the effect of deleting exempt information from the documents. In light of the operation of section 38 of the FOI Act in conjunction with section 115(6) of the Coroners Act, I am satisfied it is not practicable for the Agency to delete the exempt information as to do so would render the documents meaningless. Accordingly, the requested documents are exempt in full.

Conclusion

33. On the information before me, I am satisfied the documents are exempt under section 38 of the FOI Act in conjunction with section 115(6) of the Coroners Act.

34. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

Review rights

35. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.³
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
37. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
38. The Agency is required to notify the Information Commissioner in writing as soon as practicable if it becomes aware the Applicant has applied to VCAT for a review of my decision.⁵
39. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

³ Section 50(1)(b).

⁴ Section 52(5).

⁵ Sections 50(3FA).