

Notice of Decision and Reasons for Decision

Applicant:	'EO7'
Agency:	Department of Justice and Community Safety
Decision date:	10 June 2022
Exemptions considered:	Sections 29B and 14(1)(a)
Citation:	'EO7' and Department of Justice and Community Safety (Freedom of Information) [2022] VICmr 161 (14 June 2022)

FREEDOM OF INFORMATION – court documents – prisoner records – pre-sentence report– documents not subject to FOI Act – access subject to fee – document available for purchase

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. Accordingly, I have determined to refuse access to the documents in full.

I am satisfied the documents is exempt under section 29B. I am also satisfied one of the documents identified by the Agency is not a document to which the FOI Act applies under section 14(1)(a).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

10 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

On the [date] at [time] [I] was assessed by [Government Agency] [name of Agency] for my suitability pertaining to my plea, related to matters before [location] Magistrates' Court that were heard on [date] via WebEx. It is the purpose of this application that I obtain access to this [description of] assessment in its entirety via FOI Act.

2. The Agency identified two documents (with attachments) falling within the terms of the Applicant's request and refused access to the documents in full, relying on section 38 in conjunction with section 104ZZA of the Corrections Act. The Agency's decision letter sets out the reasons for its decision.

Review application

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. During the review, the Agency removed the exemption in section 38 from all documents and replaced the exemption with sections 29B and 14(1)(a) of the FOI Act.
6. OVIC staff accepted the Agency's removal of exemption and will now review each document subject to the Agency's revised application of exemption 29B and 14(1)(a).
7. OVIC staff advised the Applicant of the change in exemptions applied by the Agency and provide an initial view that that section 29B applies to the documents subject to review, and if a formal decision was to be made, OVIC's decision would be the same as the Agency's decision to refuse access to the documents in full.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. The Applicant did not provide a response to the initial view, as such OVIC proceeded with a formal decision.
10. I have considered all communications and submissions received from the parties.
11. 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.
12. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the 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 exemptions

Section 14 – Documents not subject to the FOI Act

13. During the review, the Agency claimed document 6 is not subject to the FOI Act under section 14(1)(a).

14. Section 14 provides:

14 Part not to apply to certain documents

- (1) 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
- ...

15. Therefore, a document is not subject to access under the FOI Act if it is of a kind referred to in the various categories set out in section 14.¹

16. The Victorian Civil and Administrative Tribunal (**VCAT**) has held:

The intention of this provision 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.²

17. The *Victoria Police (Fees and Charges) Regulations 2014* (Vic) prescribe a search fee is to be charged to conduct a search of relevant records concerning the existence of a person's criminal history.³

18. Accordingly, I am satisfied a document requested by the Applicant is accessible to them for a fee or charge and is not a document to which the FOI Act applies by virtue of section 14(1)(b).

19. I am satisfied a copy of the Applicant's criminal record is available for purchase from Victoria Police.

Section 29B – Documents of Court Services Victoria

20. During the review, the Agency clarified the documents to which it referred in its submission are exempt under section 29B, which provides:

29B Documents of Court Services Victoria

A document is an exempt document if it is a document of Court Services Victoria that relates to the exercise of a judicial or quasi-judicial function of a court or VCAT.

21. For section 29B to apply, I must be satisfied the document:

- (a) is a document of Court Services Victoria (**CSV**); and
- (b) relates to the exercise of a judicial or quasi-judicial function of a court or tribunal.

22. CSV provides, or arranges for the provision of, the administrative services and facilities necessary to support the performance of the judicial, quasi-judicial and administrative functions of Victorian Courts and tribunals (including VCAT).

23. In deciding if a document is exempt under section 29B, I have had regard to case law about how the broadly equivalent section 5 in the *Freedom of Information Act 1982* (Cth) (**Commonwealth FOI Act**) is

¹ *Rizza v Boroondarra CC* [2000] VCAT 2062 at [17] and [19].

² *Smeaton v Transport Accident Commission* [2017] VCAT 1486 at [42].

³ *Victoria Police (Fees and Charges) Regulations 2014* (Vic) Regulation 6 in Schedule 3.

interpreted. These cases indicate judicial or quasi-judicial information should be broadly interpreted as compared to administrative information, which should be narrowly interpreted.

24. In *Bienstein v Family Court of Australia*,⁴ the Federal Court held documents, that would normally be described as 'administrative' and did not affect a judicial determination directly, were nonetheless 'judicial documents' as they are closely related to judicial independence. The Court considered documents that affect judicial independence should not be subject to the Commonwealth FOI Act.
25. This approach was broadened by the High Court of Australia in *Kline v Official Secretary to the Governor General*.⁵ The Court narrowed administrative documents to documents that relate to logistical support, such as travel and accommodation arrangements. The Court found any documents 'preparatory to the exercise of substantive power or to the performance of a substantive function' should not be subject to release under the Commonwealth FOI Act.
26. The documents exempt from release by the Agency under section 29B include Magistrates' Court documents that the Court requested to decide either to make a community corrections order or release the offender on adjournment with or without recording a conviction.
27. Having regard to the abovementioned caselaw, I am satisfied the documents exempted from release by the Agency under section 29B relate to judicial independence and do not merely relate to the logistical support or administrative processes of the Courts.

[Types of reports] reports

28. The Agency also determined a [type of report] report prepared by [other third party] is exempt from release under section 29B.
29. Documents 2 and 9 were provided to the Court in accordance with section 330(b) of the *[Victorian government Act] Act 2014* which states that the function of [other third party] is to provide [type of assessment] assessment services to courts. In relation to the Applicant, this [type of report] report was prepared for the exercise of a judicial or quasi-judicial function of the Magistrates Court.
30. The [type of report] report was written in response to the Applicant's Court proceedings, in response to a specific referral question for the purpose of the Court and the assessment and determination of the Applicant's criminal sentencing.
31. Considering the nature of these documents, I am satisfied they relate to the exercise of a judicial function of the Magistrates Court.
32. Accordingly, I am satisfied the [type of report] report and documents prepared at the request of the Magistrates' Court is exempt under section 29B.

Conclusion

33. On the information before me, I am satisfied the documents are exempt under section 29B. I am also satisfied document 6 identified by the Agency is not a document to which the FOI Act applies under section 14(1)(b).
34. Accordingly, my decision is the same as the Agency's, in that I have decided to refuse access to the documents in full.

Review rights

⁴ (2008) 251 ALR 453.

⁵ [2013] HCA 52.

35. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁶
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
38. 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.
39. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.⁹

When this decision takes effect

40. My decision does not take effect until the Agency's 14 day review period expires.
41. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).