

Notice of Decision and Reasons for Decision

Applicant:	'EK3'
Agency:	Department of Families, Fairness and Housing
Decision date:	10 March 2022
Exemptions considered:	Sections 30(1), 31(1)(a), 33(1), 35(1)(b), 38
Citation:	'EK3' and Department of Families, Fairness and Housing (Freedom of Information) [2022] VICmr 37 (10 March 2022)

FREEDOM OF INFORMATION – death in prison – inquiries into a death – coronial inquest – section 104ZZA of the *Corrections Act 1986* (Vic) – consultation between agency officers

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

I am satisfied the exemptions under sections 30(1), 31(1)(a), 33(1) and 38 apply to information in the documents. I am not satisfied information is exempt under section 35(1)(b), however, this has not changed the overall decision to deny access to the documents in full.

As I am not satisfied it is practicable to provide the Applicant with edited copies of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the documents is refused in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

10 March 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to [documents concerning the death of a third party in a custodial facility].
2. The Agency refused to grant access to documents in accordance with the Applicant's request under section 25A(5). In doing so, the Agency was not required to identify any documents relevant to the request on grounds all documents to which the request relates, should any exist, would be exempt under sections 31(1)(a) and 33(1).
3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. On [date], I determined the requirements of section 25A(5) were not met, and required the Agency to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.
5. In accordance with my decision, the Agency proceeded to search for and identify all relevant documents. In its decision, the Agency located 12 documents falling within the terms of the Applicant's request, to which it refused access in full under sections 30(1), 31(1)(a), 35(1)(b) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).
6. The Agency's decision letter sets out the reasons for its decision.

Review application

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
8. I have examined copies of the documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
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.

Complaint concerning the Agency's document search

13. Alongside their review application, the Applicant raised concerns regarding the Agency's decision that certain documents it located did not fall within the scope of their FOI request.
14. In accordance with section 61B(3), OVIC determined [these concerns could be dealt with by] this review.
15. OVIC made inquiries with the Agency about its document search.

16. On the information before me, I am satisfied the Agency undertook a thorough and diligent document search.

Review of exemptions

Section 38 – documents to which secrecy provisions of enactments apply

17. Section 38 provides 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’.
18. For section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
19. The Agency relies on section 38 in conjunction with section 104ZZA of the Corrections Act to exempt ‘personal affairs of a person who is or has been an offender or prisoner’, and ‘information concerning the management of prisons’. The Agency only exempted Document 5 under section 38.
20. Section 104ZZA of the Corrections Act provides:

A person who is or has been a relevant person must not use or disclose personal or confidential information unless that use or disclosure is authorised under section 104ZY or 104ZZ.

Penalty: 120 penalty units.

21. Section 104XZ defines ‘personal or confidential information’, and relevantly includes:
- (a) information relating to the personal affairs of a person who is or has been an offender or a prisoner;
 - ...
 - (i) information concerning the management of prisons;

22. The phrase ‘relevant person’ is set out in Schedule 5, which includes:

4. Department of Health and Human Services

...

(2) A person employed in the Department of Health and Human Services under Part 3 of the Public Administration Act 2004.

23. In summary, section 104ZZA of the Corrections Act operates to protect the personal privacy of individuals who are identified in documents generated in connection with the management and administration of the corrections system. It is also directed toward maintaining the confidentiality of methods and procedures used in the management of prisons. The section imposes strict confidentiality requirements on Agency officers, among others, which apply in all but certain limited circumstances.
24. From my review of Document 5, I am satisfied certain information is exempt under section 38 for the following reasons:
- (a) I am satisfied the Corrections Act is an Act in force for the purposes of section 38.
 - (b) Section 104ZZA of the Corrections Act is formulated with sufficient precision to identify information in relation to which a prohibition on disclosure applies. In this matter, this would include information that would identify a prisoner or information concerning the management of prisons.

- (c) The Corrections Act prohibits disclosure of such information and unauthorised disclosure is an offence subject to a penalty.
25. I am satisfied the document contains information relating to the personal affairs of a person who is or has been a prisoner, and that identifies persons in the context of documents created by Corrections, which falls within the definition of 'personal or confidential information' in section 104ZX of the Corrections Act and is information to which the secrecy provision applies.
26. I am also satisfied the document contains information concerning the management of a prison, specifically in relation to a program at the prison, which falls within the definition of 'personal or confidential information' in section 104ZX of the Corrections Act and is information to which the secrecy provision applies.
27. The secrecy provision contained in section 104ZZA of the Corrections Act is also subject to exceptions outlined in sections 104ZY and 104ZZ, which permit the release of personal or confidential information in certain circumstances. However, I do not consider that any of the exceptions in sections 104ZY or 104ZZ of the Corrections Act apply in the circumstances. This includes the exception at section 104ZY(2)(b) for disclosure with the authorisation, or at the request of, the person to whom the information relates. In this case, the applicant is not the person to whom the information relates.
28. Accordingly, I am satisfied section 38 applies to Document 5.
29. The Schedule of Documents in **Annexure 1** sets out my decision on section 38.

Section 30(1) – Internal working documents

30. Section 30(1) has three requirements:
- (a) 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
 - (b) 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
 - (c) disclosure of the matter would be contrary to the public interest.
31. The exemption does not apply to purely factual material in a document.¹

Do the documents 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?

32. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
33. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.²
34. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant information deleted, where it is practicable to do so.

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

35. I am satisfied the documents contain matter in the nature of opinion and consultation between agency officers.

Were the documents 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?

36. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³
37. In *Re Waterford and Department of Treasury (No.2)*,⁴ the former Victorian Administrative Appeals Tribunal held:

... "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.

38. The documents were made in the course of the deliberative processes of the Agency with respect to its response to the death of a third party at a prison [contextual information redacted].

Would disclosure of the documents be contrary to the public interest?

39. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
40. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:⁵
- (a) The public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.

I note the Applicant's submission that details of the death of the third party have been publicly reported. In *O'Sullivan v Department of Education, Employment and Training*,⁶ the Victorian Civil and Administrative Tribunal (VCAT) observed that while an incident has been the subject of an article in a newspaper or on television, this does not mean that disclosure of information about the incident is necessarily in the public interest under the FOI Act.

Nevertheless, I am satisfied there is significant public interest in deaths in custodial facilities, the investigation of such incidents and the identification of their causes. In particular, I note the Royal Commission into Aboriginal Deaths in Custody.⁷ I also note the death of the third party is the subject to an ongoing Coronial investigation. An important function of the Coroners Court is to independently investigate deaths, prevent similar deaths in future and to promote the administration of justice, in accordance with its statutory functions under the *Coroners Act 2008* (Vic). Therefore, the function the Applicant is seeking via their FOI request, namely, to inform the public on matters concerning and connected with the death of the third party, will be carried out by the Coroners Court.

The FOI Act promotes government transparency and accountability, which is an important function where information sought under FOI Act is a matter of public interest and requires

³ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

⁶ (unreported, VCAT, Megay SM, 1 November 2002).

⁷ See <<http://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.

greater public scrutiny, such as deaths in custodial facilities. However, this must be considered in light of other factors set out below.

- (b) The degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents.

In determining whether disclosure would be contrary to the public interest, regard must be given to the nature of the information and the document,⁸ and that the more sensitive or contentious the issues involved in the communication, the more likely it is that the communication should not be disclosed.⁹

The documents concern the death of a third party, but also broader matters concerning a program in the prison. In terms of the management of the prison and persons within its care, this is a significant and sensitive matter.

As noted below with respect to section 33(1), the information in the documents concerning the death of a third party is highly sensitive and personal information. In most instances, I consider this information is exempt under sections 33(1) and 31(1)(a).

Other information in the documents that concerns a program within the prison may be considered less sensitive. However, it is sensitive so far as it relates to the death of the third party, the management of the prison and persons within the prison's care, including [persons involved in the prison program].

- (c) The stage or a decision or status of policy development or a process being undertaken at the time the communications were made.

The communications were made at a time when the Agency was seeking access to information from another public sector agency for its consideration. Having considered the matters set out in the communications, I consider the documents record the early consultation between agencies, and internal deliberation on serious and sensitive matters, before the Agency had determined its course of action.

- (d) Whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations.

Disclosure of documents may be contrary to the public interest where it would have an adverse effect on the integrity or effectiveness of decision-making, investigative, or other processes.¹⁰

In highly sensitive and serious matters such as this matter, I consider there is a public interest in agencies being able to undertake a thorough and considered approach in its information gathering and consultation with external agencies, and its internal deliberation. In my view, disclosure of information in the documents could inhibit agency officers from recording their communications or sharing information with external agencies on highly sensitive issues, out of concern it may later be released under FOI. Having considered the nature of the information recorded in the documents and the circumstances of this particular matter, inhibiting the open flow of communications on such matters as this would have adverse impacts on prison programs and the welfare of [persons] living in prisons.

⁸ *Friends of Mallacoota Inc v Department of Planning and Community Development* [2011] VCAT 1889 at [51].

⁹ *Ibid*, citing *Howard v the Treasurer of the Commonwealth* (1985) 3 AAR 169 at 177-8.

¹⁰ *Ibid*, citing *Roy Morgan Research Centre Pty Ltd v State Revenue Office* (unreported, VCAT, Coghlan DP, 17 June 1999); *Conyers v Monash University* [2005] VCAT 2509 at [38]; *Sportsbet Pty Ltd v Department of Justice* [2010] VCAT 8 at [65].

- (e) Whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents.

As noted above, the communications between agencies occurred at a time when it was attempting to gather information about what had occurred and determining its next steps. In my opinion, these communications occurred at an early point in time in the information gathering process and would not provide a complete explanation of what occurred following the death of the third party.

- (f) The impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process.

Document 7 contains drafts of an inquiry intended to be sent to an external agency. In highly sensitive and serious matters such as this, agency officers should be able to carefully draft and collaborate on correspondence in a thorough and fulsome way.

However, where a draft is similar to the final version sent, disclosing the draft would not misrepresent the final position of the Agency as it does not reveal significant or substantive information that differs from the final version.

- (g) The right of every person to gain access to documents under the FOI Act.

As noted above, the object of the FOI Act is to extend, as far as possible, the right of the community to access information in possession of the government. As a [profession of the Applicant], the Applicant is exercising their right to access to information to inform the community of an issue which the Applicant reasonably considers to be a matter of public interest.

41. Having considered these factors, I am satisfied it would be contrary to the public interest to disclose certain information in the documents.
42. My decision on the application of section 30(1) to the documents is outlined in the Schedule of Documents in **Annexure 1**.

Section 31(1)(a) – Disclosure of documents that would prejudice the enforcement or proper administration of the law

43. Section 31(1)(a) provides:

31 Law enforcement documents

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;

44. 'Reasonably likely' means that there is a real chance of an event occurring; it is not fanciful or remote.¹¹
45. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.¹²

¹¹ *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

¹² *Ibid*, Bergman at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

46. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.¹³
47. The Agency's decision letter states:
- In this instance, as a coronial inquest into the death... is in progress, it is considered that the release of the requested documents would be reasonably likely to prejudice the proper administration of the law.
48. I accept the Agency's submission that the death is subject to an ongoing Coronial investigation. In the circumstances of this particular matter, I consider disclosure of information specifically concerning the facts and circumstances of the death of the third party would be reasonably likely to undermine or hinder the coroner's investigation into the death. I also note a significant amount of this information is also exempt under section 33(1), which will be addressed below.
49. Of the remaining information, I consider the documents concern broader issues concerning a program within the prison. In my view, disclosure of this information would not be reasonably likely to prejudice the Coronial Inquest, nor the administration of the law more generally.
50. My decision on the application of section 31(1)(a) is outlined in the Schedule of Documents in **Annexure 1**.

Section 33(1) – Documents affecting personal privacy of third parties

51. A document is exempt under section 33(1) if two conditions are satisfied:
- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (a **third party**);¹⁴ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of individuals other than the Applicant?

52. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.¹⁵
53. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.¹⁶
54. Given the sensitivity of this matter and the particular and unusual circumstances of the death, I have concluded that the types of information in the documents that could identify third parties are broad. As such, I am satisfied the documents include information that explicitly identifies third parties, such as names, addresses, locations and contact details. However, I also consider that information that concerns third parties but that does not expressly deal with their names, addresses, locations or contact details still amounts to personal affairs information in the particular circumstances of this matter.

¹³ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

¹⁴ Sections 33(1) and (2).

¹⁵ Section 33(9).

¹⁶ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

Would disclosure of the personal affairs information be unreasonable?

55. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
56. In *Victoria Police v Marke*,¹⁷ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.¹⁸ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33, is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.¹⁹
57. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
- (a) the nature of the personal affairs information;
 - (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of disclosure of information, if released;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.²⁰
58. I note the Applicant's submission that details of the death have been publicly reported. However, on balance of the above factors, I am satisfied it would be unreasonable to release the personal affairs information in the documents in the circumstances of this matter for the following reasons:
- (a) The personal affairs information in the documents is sensitive and personal in nature as it relates to a death of a third party within a prison.
 - (b) The information was collected during a significant and sensitive matter.
 - (c) It is reasonably likely the relevant third parties would object to release of the information under the FOI Act.
 - (d) I am satisfied it is reasonably likely that the information in the documents, if released in this case, would be more widely disseminated. Given the sensitive nature of the personal affairs information in the documents, I am not satisfied the public interest would be served by such wider disclosure.

¹⁷ [2008] VSCA 218 at [76].

¹⁸ *Ibid.*

¹⁹ *Ibid* at [79].

²⁰ Section 33(2A).

- (e) There is a public interest in disclosure of information concerning deaths in custodial facilities, as it relates to the operation of a prison and its response to a critical event. However, I do not consider this public interest outweighs the public interest in privacy for the deceased and their family.
- (f) The potential impact of further information being disclosed on the person concerned would be significant and distressing. As described above, I consider that the particular circumstances of this matter mean that much of the information will amount to personal affairs information, even if it does not expressly identify third parties.
- (g) Disclosure of the personal affairs information of agency officers will not serve the public interest in understanding the circumstances of the death or the decisions and actions taken by agencies in response.

59. Accordingly, I am satisfied information in the documents is exempt under section 33(1).

60. My decision in relation to section 33(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 35(1)(b) – Information obtained in confidence

61. A document is exempt under section 35(1)(b) if two conditions are satisfied:

- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
- (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Was the information obtained in confidence?

62. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.²¹

63. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.²²

64. The document claimed exempt under section 35(1)(b) is a letter sent from another public sector agency.

65. The agency's decision states, 'the relevant agency was consulted in relation to the material and objected to the release on the basis that the material was communicated in confidence'.

66. Having considered the nature of the information and the view of the agency who authored the document, I am satisfied the information was communicated in confidence.

Would disclosure of the information be contrary to the public interest?

67. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.

68. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same type of information in the future. I note the

²¹ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

²² *XYZ v Victoria Police* [2010] VCAT 255 at [265].

exemption will not be made out if an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.²³

69. I am not satisfied disclosure of the information in this document would impair the Agency's ability to obtain similar information of this nature in the future. In my view, there is a professional obligation on the external agency to do so, given the agency's connection with the matter to which the FOI request relates.
70. Accordingly, I am not satisfied Document 5 is exempt under section 35(1)(b).
71. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

72. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
73. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²⁴ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.²⁵
74. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request because it does not concern the death of a third party, to which the Applicant's request relates.
75. I am not satisfied it is practicable to edit the documents to delete exempt and irrelevant information in accordance with section 25, as the documents would be rendered meaningless or are otherwise exempt in full.

Conclusion

76. On the information before me, I am satisfied the exemptions under sections 30(1), 31(1)(a), 33(1) and 38 apply to information in the documents. I am not satisfied information is exempt under section 35(1)(b).
77. As I am not satisfied it is practicable to provide the Applicant with edited copies of documents with irrelevant and exempt information deleted in accordance with section 25, access is refused in full.

Review rights

78. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁶
79. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁷

²³ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

²⁴ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

²⁵ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

²⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁷ Section 52(5).

80. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁸
81. 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.
82. 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.²⁹

Third party review rights

83. Although I have determined Document 5 is not exempt under section 35(1)(b), I am satisfied it is nevertheless exempt under sections 31(1)(a), 33(1) and 38. Accordingly, it is not practicable to notify the relevant third party of their right to seek review by VCAT of my decision.

When this decision takes effect

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

²⁸ Section 52(9).

²⁹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Email thread	4	<p>Refused in full</p> <p>Sections 30(1), 31(1)(a), 33(1), 25</p>	<p>Refuse in full</p> <p>Sections 30(1), 33(1), 25</p>	<p>Section 30(1): I am satisfied the document discloses matter in the nature of consultation. I am satisfied disclosure would be contrary to the public interest for the reasons provided in the Notice of Decision, above.</p> <p>Section 31(1)(a): This document does not contain specific information concerning the death of a third party. Rather, it concerns broader matters in relation to [people] in prisons. In my view, disclosure of this information would not, or would not be reasonably likely to prejudice the proper administration of the law. Accordingly, I am not satisfied the document is exempt under section 31(1)(a).</p> <p>Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information that the Agency exempted under section 33(1) for the reasons given above.</p> <p>Section 25: I am satisfied the emails dated [date] fall outside of the</p>

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						<p>terms of the Applicant's request as it does not concern the subject matter of the Applicant's FOI request. These emails are to remain deleted as it is irrelevant information.</p> <p>I am not satisfied it is practicable to edit the document to delete exempt and irrelevant information in accordance with section 25 as it would render this document meaningless. Accordingly, access is refused in full.</p>
2.	[date]	Email thread	1	<p>Refused in full</p> <p>Sections 31(1)(a), 33(1)</p>	<p>Refuse in full</p> <p>Sections 33(1), 25</p>	<p>Section 31(1)(a): The document does not contain any substantive information about the death. Rather, the emails were sent for administrative purposes. I am not satisfied disclosure would be reasonably likely to prejudice the Coronial Inquest. Accordingly, I am not satisfied disclosure would, or would be reasonably likely to prejudice the proper administration of the law and is not exempt under section 31(1)(a).</p>

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						<p>Section 33(1): See comments for Document 1.</p> <p>Section 25: I am not satisfied it would be practicable to edit this document to delete exempt information in accordance with section 25, as the remaining information would not assist the Applicant with their intended purpose for seeking access to the documents and is effectively meaningless without context of the other documents subject to review.</p>
3.	[date]	Letter, Attachment to Document 2	1	<p>Refused in full</p> <p>Section 31(1)(a)</p>	<p>Refuse in full</p> <p>Sections 30(1)</p>	<p>Section 31(1)(a): This document concerns broader matters in relation to children in prisons. In my view, disclosure of this information will not be reasonably likely to prejudice the proper administration of the law. Accordingly, I am not satisfied the document is exempt under section 31(1)(a).</p> <p>Section 30(1): The Agency did not apply section 30(1) to this document. However, I consider it is a relevant provision to consider as the document contains matter in</p>

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						<p>the nature of opinion and consultation. I am satisfied disclosure would be contrary to the public interest for the reasons outlined in the Notice of Decision, above. Accordingly, the document is exempt under section 30(1).</p> <p>Section 25: I am satisfied it is not practicable to edit this document to delete exempt information as it would render the document meaningless. Access is refused in full.</p>
4.	[date]	Email thread	2	<p>Refused in full</p> <p>Sections 31(1)(a), 33(1)</p>	<p>Refuse in full</p> <p>Sections 33(1)</p>	<p>Section 31(1)(a): See comments for Document 2.</p> <p>Section 33(1): See comments for Document 1.</p> <p>Section 25: See comments for Document 2.</p>
5.	[date]	Attachment to Document 4 – Letter	4	<p>Refused in full</p> <p>Sections 31(1)(a), 35(1)(b), 38</p>	<p>Refuse in full</p> <p>Sections 31(1)(a), 33(1), 38</p>	<p>Section 31(1)(a): This document concerns broader matters [relating to the prison.]. In my view, disclosure of this information will not be reasonably likely to</p>

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						<p>prejudice the proper administration of the law.</p> <p>Accordingly, section 31(1)(a) does not apply to all information in this document.</p> <p>Section 33(1): See comments for Document 1.</p> <p>Section 35(1)(b): I am not satisfied section 35(1)(b) applies, for the reasons provided in the Notice of Decision, above.</p> <p>Section 38: I am satisfied the document contains information concerning a prison program, which I am satisfied is information the concerns the management of prisons. In my view, section 38 in conjunction with section 104ZZA of the Corrections Act applies to this document.</p> <p>Section 25: See comments for Document 3.</p>
6.	[date]	Email thread	2	Refused in full	Refuse in full	<p>Section 31(1)(a): I am satisfied disclosure of some of the information in this document</p>

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				Sections 31(1)(a), 33(1), 25	Sections 30(1), 31(1)(a), 33(1), 25	<p>would not be reasonably likely to prejudice the Coronial Inquest. The focus of parts of this document is not on the factual events or circumstances, rather it is for the purpose of information gathering. On balance, such information is not exempt under section 31(1)(a).</p> <p>However, where it does concern the factual circumstances or events, I am satisfied such information is exempt under section 31(1)(a).</p> <p>Section 30(1): As I am not satisfied the document is exempt in full under section 31(1)(a), I have considered the application of section 30(1). This email thread contains an email sent by the Agency to an external agency for the purpose of information gathering. I accept it contains matter in the nature of consultation, to which disclosure would be contrary to the public interest for the reasons provided in the Notice of Decision, above.</p> <p>Section 33(1): This document contains highly sensitive and</p>

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						<p>personal information about the death of a third party and their family. I am satisfied it would be unreasonable to disclose this information in the circumstances and it is exempt under section 33(1).</p> <p>Section 25: I am satisfied the document contains information concerning another third party and that this information does not fall within the terms of the FOI request.</p> <p>See comments for Document 3.</p>
7.	[date]	Email thread	4	<p>Refused in full</p> <p>Sections 30(1), 31(1)(a), 33(1), 25</p>	<p>Refuse in full</p> <p>Sections 30(1), 31(1)(a), 33(1), 25</p>	<p>Section 30(1): The email thread contains drafts of queries intended to be sent to an external agency. In my view, disclosure of the draft would be contrary to the public interest because Agency officers should be able to carefully draft and collaborate on draft queries relating to serious and sensitive matters in a thorough and fulsome way. Disclosure of this draft could impact the way in which Agency officers carefully deliberate similar</p>

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						<p>matters, should they arise in the future.</p> <p>I note one of the drafts in this document is similar to the final query sent to an external agency. Nevertheless, having considered the factors in the Notice of Decision above in determining whether disclosure would be contrary to the public interest, I am satisfied disclosure of the draft would be contrary to the public interest regardless of its similarity to final query in Document 6.</p> <p>Section 31(1)(a): See comments for Document 6.</p> <p>Section 33(1): See comments for Document 1.</p> <p>Section 25: I am satisfied the document contains information concerning another third party and that this information does not fall within the terms of the FOI request. The information is to remain deleted under section 25 and it is irrelevant information.</p>

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						See comments for Document 3.
8.	[date]	Office of Professional Practice Brief Case review	2	Refused in full Sections 30(1), 31(1)(a), 33(1)	Refused in full Sections 31(1)(a), 33(1)	<p>Section 33(1): This contains a chronology of events. This document contains highly sensitive and personal information about the death of a third party. I am satisfied it would be unreasonable to disclose this information in the circumstances. Accordingly, information in the document is exempt under section 33(1).</p> <p>Section 31(1)(a): This contains sensitive and personal information about the death and a chronology of events. I am satisfied disclosure of this information would be reasonably likely to prejudice the Coronial Inquest, and therefore, the proper administration of the law. Accordingly, it is exempt under section 31(1)(a).</p> <p>In light of my decision on sections 31(1)(a) and 33(1), I have not considered section 30(1).</p>

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						Section 25: See comments for Document 3.
9.	[date]	Email thread	3	<p>Refused in full</p> <p>Sections 30(1), 31(1)(a), 33(1), 25</p>	<p>Refuse in full</p> <p>Sections 30(1), 31(1)(a), 33(1), 25</p>	<p>Section 30(1): I am satisfied the document contains matter in the nature of opinion, and consultation and deliberation between Agency officers. For the reasons outlined in the Notice of Decision above, I am satisfied disclosure would be contrary to the public interest.</p> <p>Section 31(1)(a): As noted above in the reasons for decision, I am satisfied disclosure of information specifically relating to the death of a third party would be reasonably likely to prejudice the Coronal Inquest.</p> <p>Section 33(1): See comments for Document 6.</p> <p>Section 25: I am satisfied the document contains information concerning another third party and that this information does not fall within the terms of the FOI request. The information is to remain</p>

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						<p>deleted under section 25 and it is irrelevant information.</p> <p>See comments for Document 3.</p>
10.	[date]	Email thread	3	<p>Refused in full</p> <p>Sections 30(1), 31(1)(a), 33(1), 25</p>	<p>Refuse in full</p> <p>Sections 30(1), 31(1)(a), 33(1), 25</p>	<p>Section 33(1): See comments for Documents 1 and 6.</p> <p>Section 30(1): I am satisfied the document contains matter in the nature of opinion and deliberation. For the reasons outlined in the Notice of Decision, above, I am satisfied disclosure would be contrary to the public interest.</p> <p>Section 31(1)(a): As noted above in the reasons for decision, I am satisfied disclosure of information specifically relating to the death of the third party, would be reasonably likely to prejudice the Coronial Inquest.</p> <p>However, there is other information in this document that concerns broader matters in relation to a prison program. In my view, disclosure of this information will not be reasonably likely to prejudice the Coronial Inquest, or</p>

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						<p>the proper administration of the law.</p> <p>The attachments: The email thread contains two attachments. One of the attachments is Document 11, addressed below.</p> <p>The other attachment was obtained by OVIC during this review. See comments below for Document 10A.</p> <p>Section 25: See comments for Document 3.</p>
10A.	[date]	Guide for Child Protection Practitioners	8	Irrelevant Document – out of scope	Irrelevant document	<p>Section 25: This document was located by the Agency during the review, following inquiries by OVIC staff. While the Agency considers the email, to which this document is an attachment, falls within the scope of the Applicant’s request, the Agency submits this attachment does not.</p> <p>The document is a procedural guide and does not specifically concern the death to which the Applicant’s request relates. Having considered the terms of the Applicant’s</p>

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						request, it is my view this document does not fall within the scope of the request.
11.	Undated	Notes	3	Refused in full Sections 30(1), 31(1)(a), 33(1)	Refuse in full Sections 30(1), 31(1)(a), 33(1)	<p>Section 30(1): I am satisfied it would be contrary to the public interest to disclose certain parts of the Agency's deliberation of the key issues, for the reasons provided in the Notice of Decision, above.</p> <p>Section 31(1)(a): This contains a chronology of events and key issues. I am satisfied disclosure of certain information in this document would be reasonably likely to prejudice the Coronial Inquest, and would therefore, be reasonably likely to prejudice the proper administration of the law.</p> <p>Section 33(1): See comments for Document 6.</p> <p>Section 25: See comments for Document 3.</p>
12.	[date]	Email	1	Refused in full	Refuse in full Sections 30(1), 31(1)(a), 33(1)	Section 30(1): I am satisfied the document contains matter in the nature of opinion and deliberation.

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				Sections 30(1), 31(1)(a), 33(1)		<p>I am satisfied disclosure would be contrary to the public interest for the reasons outlined in the Notice of Decision, above.</p> <p>Section 31(1)(a): See comments for Document 10.</p> <p>Section 33(1): See comments for Documents 1 and 6.</p> <p>The attachments: The attachments to this email thread are Documents 10A and 11, discussed above.</p> <p>Section 25: See comments for Document 3.</p>