

## Notice of Decision and Reasons for Decision

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Applicant:	'FI2'
Agency:	Victoria Police
Decision date:	9 August 2023
Exemptions and provision considered:	Sections 33(1) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 115(6) of the <i>Coroners Act 2008</i> (Vic)
Citation:	'FI2' and Victoria Police (Freedom of Information) [2023] VICmr 82 (9 August 2023)

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FREEDOM OF INFORMATION – death of a child – parent applicant – next of kin – police inquiries – police documents – Coroners Court of Victoria – coronial investigation – documents held by Coroner – secrecy provision – prohibition on disclosure – *Coroners Act 2008* (Vic)

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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release a small amount of additional information in Document 5.

With the exception of this information, I am satisfied the other information to which the Agency refused access under section 33(1) and section 38 of the FOI Act in conjunction with section 115(6) of the *Coroners Act 2008* (Vic) (**Coroners Act**) is exempt from release and is to remain deleted in accordance with section 25.

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

My reasons for decision follow.

Joanne Kummrow  
**Public Access Deputy Commissioner**

9 August 2023

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the 'police report and other documentation / notes' related to the death of their [child] and the attendance by police officers at their [child's] apartment.
2. The Applicant provided the Agency with information in support of being the deceased person's next of kin. The Agency identified nine documents falling within the terms of the Applicant's request. It released five documents in part under sections 33(1) and refused access to four documents in full under section 38 in conjunction with section 115(6) of the Coroners Act.
3. The Agency's decision letter sets out the reasons for its decision and provided the Applicant with a list of the documents located.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties. In particular, I have reviewed and taken into account all information provided by the Applicant acknowledging [their] relationship as the [parent] of the deceased and [their] concern to ensure that her [child's] death was properly investigated.
8. During the review, in response to queries from my staff, the Agency confirmed the Applicant was treated as a next of kin for the purposes of their FOI request and I accept the Applicant is a next of kin for the purposes of the FOI Act.
9. I understand the Applicant has raised questions about the actions taken by Victoria Police, Ambulance Victoria and the Coroner's Court in relation to their [child's] death. While appreciating the sensitivity of the situation, I consider these questions are beyond the scope of my review of the Agency's FOI decision. I note my staff provided the Applicant with advice on other avenues they may wish to pursue to obtain information they seek.
10. 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.

## Review of exemptions

### ***Section 38 – Documents to which secrecy provisions of enactments apply***

11. As stated above, the Agency relies on section 38 in conjunction with section 115(6) of the Coroners Act to refuse access to four documents.
12. 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.

13. A document will be exempt under section 38 of the FOI Act if three conditions are satisfied:
  - (a) there must be an enactment in force;
  - (b) the enactment must apply specifically to the kind of information in the document; 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?*

14. 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.

...

15. I am satisfied the Coroners Act is an enactment in force for the purpose of section 38.

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

16. 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.<sup>1</sup>
17. While section 115(6) of the Coroners Act captures documents based on them being held by the Coroners Court, it also requires that the information relates to ‘the investigation of a death or fire’ by the Coroner.
18. In addition, the secrecy provision under an enactment must also capture the actual information sought to be withheld by the Agency.
19. The Agency refused access under section 38 to Documents 6 to 9 being:

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<sup>1</sup> *Simons v Department of Justice* [2006] VCAT 2053.

- (a) a Coroner's determination letter; and
  - (b) photographs, a Police Report of Death for Coroner (or Form 83) and statement of identification and transfer papers which were provided to the Coroner by the Agency as part of the Coroner's inquiry or investigation into the death.
20. I am satisfied these documents relate to the investigation of a death by the Coroner and are documents held by and remaining in the possession of the Coroner, whilst copies are held by the Agency.
21. Accordingly, I am satisfied the enactment applies specifically to the kind of information in Document 6 to 9.

*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?*

22. In *Secretary to the Department of Justice v Western Suburbs Legal Service Inc*,<sup>2</sup> the Victorian Supreme Court held an enactment is not required to prohibit disclosure of information in a document 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.
23. 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 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.

24. Section 115(6) of the Coroners Act applies to coroners specifically and prohibits a coroner from releasing documents relating to the investigation of a death, unless otherwise permitted under the Coroners Act or another law.

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<sup>2</sup> [2009] VSC 68 at [21].

25. Accordingly, I am satisfied the enactment prohibits persons referred to in the enactment from disclosing the specific kind of information in the documents. As such, I am also satisfied this requirement of section 38 is satisfied.

*Do any exceptions or qualifications apply to the prohibition on disclosure?*

26. Sections 115(1) and 115(2) of the Coroners Act set out circumstances in which a coroner can release a document provided to the Coroners Court:

**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.

...

27. Sections 115(1) and 115(2) of the Coroners Act provide a coroner with discretion to grant access to documents that would otherwise be prohibited under section 115(6). Unlike the FOI Act, to which release of a document is on an unconditional and unrestricted basis, release of a document by a coroner can be granted subject to conditions, for which it is an offence for a person to breach a condition imposed.
28. In my view, as access to documents in accordance with sections 115(1) and 115(2) of the Coroners Act is at a 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.
29. I note again that OVIC staff have encouraged the Applicant to contact the Coroners Court to request access to Documents 6 to 9 to which, for the purposes of the FOI Act, I am satisfied

section 38 and section 115(6) of the Coroners Act apply. While I acknowledge the Applicant is not satisfied with the response received and their strong personal interest in obtaining full access to the documents, I am satisfied no relevant exception applies to the prohibition on disclosure under the Coroners Act to permit me to release the documents under the FOI Act.

30. In summary:

- (a) I am satisfied the Coroners Act is an enactment in force for the purposes of section 38;
- (b) on the information before me, Documents 6 to 9 contain the specific information described in section 115(6) of the Coroners Act which prohibits disclosure; and
- (c) there are no relevant exceptions under the Coroners Act that apply in this instance.

31. Accordingly, I am satisfied Documents 6 to 9 are exempt from release under section 38 of the FOI Act in conjunction with section 115(6) of the Coroners Act.

32. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 38.

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

33. 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**);<sup>3</sup> and
- (b) such disclosure would be ‘unreasonable’.

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

34. 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 such information may be reasonably determined.<sup>4</sup>

35. A third party’s opinion or observations about another person’s conduct can constitute information in relation to the personal affairs of a third party.<sup>5</sup>

36. The Victorian Civil and Administrative Tribunal (**VCAT**) has interpreted the scope of ‘personal affairs information’ broadly to include matters relating to health, private behaviour, home life or personal or family relationships of individuals.<sup>6</sup>

37. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person.<sup>7</sup> As the nature of disclosure under the FOI Act

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<sup>3</sup> Sections 33(1) and 33(2).

<sup>4</sup> Section 33(9).

<sup>5</sup> *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

<sup>6</sup> *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

<sup>7</sup> *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].

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.

38. Even where an applicant knows the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.<sup>8</sup>
39. Similarly, even where an applicant may be a next of kin, it may still be unreasonable to release information relating to a third party under the FOI Act.
40. I am satisfied the information deleted by the Agency in Documents 1 to 5 comprises 'personal affairs information' of third parties for the purposes of section 33. This includes names, addresses, contact information, observations, identification numbers and a signature.

*Would disclosure of personal affairs information be unreasonable?*

41. 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.
42. In *Victoria Police v Marke*,<sup>9</sup> 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'.<sup>10</sup> The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.<sup>11</sup>
43. 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

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<sup>8</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

<sup>9</sup> [2008] VSCA 218 at [76].

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid* at [79].

- (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>12</sup>
44. In making my decision, I find the majority of the information relates to the Agency's attendance at the Applicant's [child's] apartment and actions taken in relation to [their] death. Further, the majority of relevant information in Documents 1 to 5 was released by the Agency to the Applicant, including the names and/or ID numbers of the Agency officers involved in attending their [child's] home and investigating [the] death.
45. In Document 5, the Verification of Death Form, the Agency refused access to a signature and employee number, which belongs to an Ambulance Victoria officer. I consider this information was recorded in the course of the officer performing their professional duties. There is no information before me regarding this officer's view of the release of their personal affairs information. Generally, unless I am aware of the existence of special circumstances, I do not consider it is unreasonable to release the name or employee number where it relates solely to a government employee carrying out their professional role and this relates to the subject matters of the FOI request. As such, in relation to Document 5 only, I have determined it would not be unreasonable to release the employee number and I find this content is not exempt from release under section 33(1).
46. The remaining information in the documents predominately constitutes the personal affairs information of other persons who are not Agency or emergency services staff. I am satisfied disclosure of this third party personal affairs information would be unreasonable for the following reasons:
- (a) information provided to police concerning law enforcement or investigative matters such as attending the scene of a death are inherently sensitive;
  - (b) for that reason, members of the public have an expectation their information will be kept confidential and used only by the Agency for the purposes for which it was provided;
  - (c) while the Agency determined not to consult with the relevant third parties, I consider the relevant individuals would be reasonably likely to object to the disclosure of their personal affairs information under the FOI Act given the nature and context of the relevant information;
  - (d) the ability for the Agency to maintain the confidentiality of persons from whom it receives information in relation to its policing duties is essential to its ability to carry out its law enforcement functions; and
  - (e) I note the Applicant's purpose for seeking access to all information in the documents following the loss of their [child] in tragic circumstances. However, for the reasons described above, I consider the public interest weighs against disclosure given the circumstances of this matter.
47. Accordingly, I have determined the remaining information identified by the Agency is exempt from release under section 33(1).

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<sup>12</sup> Section 33(2A).



48. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

### **Section 25 – Deletion of exempt or irrelevant information**

49. 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.
50. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>13</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’ and release of the document is not required under section 25.<sup>14</sup>
51. I have considered the information the Agency deleted as irrelevant information. I agree it falls outside the scope of the Applicant’s request as it relates to police matters, attendances and information on people other than those specified in the request.
52. I have considered the effect of deleting exempt and irrelevant information from the documents. In relation to Documents 1 to 5, I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted. However, 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 to delete the exempt information from Document 6 to 9 as to do so would render the documents meaningless. Accordingly, these documents are exempt in full.
53. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 25.

### **Conclusion**

54. On the information before me, I have decided to release a small amount of additional information in Document 5 where I am not satisfied it is not exempt from release under section 33(1).
55. With the exception of this information, I am satisfied the other information to which the Agency refused access under section 33(1) and section 38 of the FOI Act in conjunction with section 115(6) of the *Coroners Act 2008* (Vic) (**Coroners Act**) is exempt from release and is to remain deleted in accordance with section 25.
56. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

57. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>15</sup>

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<sup>13</sup> *Mickelborough v Victoria Police* (General) [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier* (General) [2012] VCAT 967 at [82].

<sup>14</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division* (Review and Regulation) [2013] VCAT 1267 at [140] and [155].

<sup>15</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

58. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>16</sup>
59. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>17</sup>
60. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
61. 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.<sup>18</sup>

***Third party review rights***

62. As I have determined to release the personal affairs information of a third party in Document 5, if practicable, I am required to notify that person of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>19</sup>
63. I am satisfied it is practicable to notify the relevant third party of their review rights and confirm they will be notified of my decision either on the date of my decision or as soon as practical thereafter.

***When this decision takes effect***

64. My decision does not take effect until the third party's 60 day review period expires.
65. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>16</sup> Section 52(5).

<sup>17</sup> Section 52(9).

<sup>18</sup> Sections 50(3F) and 50(3FA).

<sup>19</sup> Sections 49P(5), 50(3), and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Handwritten notes made by police officer (1)	3	Released in part Section 33(1)	<p><b>Release in part</b> Sections 33(1), 25</p> <p>No further information is to be released.</p> <p>The document is to be released with exempt and irrelevant information deleted in accordance with section 25.</p>	<p><b>Section 33(1):</b> I am satisfied the information to which the Agency refused access under section 33(1) is the personal affairs information of a third party and its disclosure would be unreasonable for the reasons described in the Notice of Decision above.</p> <p><b>Section 25:</b> A police officer's diary or 'day book' will generally record various incidents at which the officer attends over the course of their shift. In this case, I am satisfied the information identified by the Agency as irrelevant information does not relate to the Applicant's [child] and falls outside the terms of their request.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant and exempt</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						information deleted in accordance with section 25.
2.	[Date]	Death of recorded person	1	Released in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>No further information is to be released.</p> <p>The document is to be released with exempt information deleted in accordance with section 25.</p>	<p>Section 33(1): See comment for Document 1.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>
3.	[Date]	Electronic Patrol Duty Return Form (ePDR)	11	Released in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>No further information is to be released.</p> <p>The document is to be released with exempt and irrelevant information deleted in accordance with section 25.</p>	<p>Section 33(1): See comment for Document 1.</p> <p>Section 25: See comment for Document 1.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	[Date]	Handwritten notes made by police officer (2)	3	Released in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>No further information is to be released.</p> <p>The document is to be released with exempt and irrelevant information deleted in accordance with section 25.</p>	<p>Section 33(1): See comment for Document 1.</p> <p>Section 25: See comment for Document 1.</p>
5.	[Date]	Verification of Death Form completed by Ambulance Victoria	1	Released in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The following additional information is to be released:</p> <ul style="list-style-type: none"> <li>the Ambulance Victoria Employee No. at the bottom right of the page.</li> </ul> <p>The document is to be released with the remaining exempt information deleted in accordance with section 25.</p>	<p>Section 33(1): I have decided to release a small amount of additional information in Document 5 where I am not satisfied it is exempt from release under section 33(1) for the reasons described in the Notice of Decision above.</p> <p>Section 25: See comment for Document 2.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
6.	[Date]	Coroner's determination letter	2	Refused in full Section 38	Refuse in full Section 38	<p><b>Section 38:</b> I am satisfied the document is exempt from release under section 38 for the reasons described in the Notice of Decision above.</p> <p><b>Section 25:</b> I am not satisfied it is practicable to edit the document to delete exempt information as to do so would render the document meaningless.</p>
7.	[Date]	Photographs	55	Refused in full Section 38	Refuse in full Section 38	<p><b>Section 38:</b> See comment for Document 6.</p> <p><b>Section 25:</b> See comment for Document 6.</p>
8.	[Date]	Police report of death prepared for Coroner	5	Refused in full Section 38	Refuse in full Section 38	<p><b>Section 38:</b> See comment for Document 6.</p> <p><b>Section 25:</b> See comment for Document 6.</p>
9.	[Date]	Statement of ID and Transfer papers	2	Refused in full Section 38	Refuse in full Section 38	<p><b>Section 38:</b> See comment for Document 6.</p> <p><b>Section 25:</b> See comment for Document 6.</p>