

## Notice of Decision and Reasons for Decision

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Applicant:	'FK3'
Agency:	State Revenue Office
Decision date:	24 November 2023
Sections and provisions considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 91(1) of the <i>Taxation Administration Act 1997</i> (Vic)
Citation	'FK3' and State Revenue Office (Freedom of Information) [2023] VICmr 97 (24 November 2023)

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FREEDOM OF INFORMATION – State Revenue Office – information obtained in relation to taxation law – secrecy provision – prohibition of disclosure – *Taxation Administration Act 1997* (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 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 from release under section 38 of the FOI Act in conjunction with section 91(1) of the *Taxation Administration Act 1997* (Vic) (**TA Act**).

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

My reasons for decision follow.

Please refer to page 6 for information about further review rights through the Victorian Civil and Administrative Tribunal.

Shantelle Ryan  
**Acting Public Access Deputy Commissioner**

24 November 2023

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## Reasons for Decision

### Background to review

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

All correspondence and file notes records to/from:

(a) [Name] or [their] representative in relation to the [Agency]'s notice of investigation issued on [date] by the [Agency]'s Investigation Branch – '[reference number]' from [date].

2. The Agency identified eight documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 31(1)(a), 31(1)(c), 33(1), 35(1)(b) and 38 in conjunction with section 91(1) of the TA 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 a copy 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 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.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

## Review of exemption

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

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. Therefore, for a document to be exempt under section 38, three conditions must be satisfied:

- (a) there must be an enactment in force;
- (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
- (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications)

12. The Agency applied section 38 in conjunction with section 9(1) of the TA Act to each of the documents subject to review.

*Is there an enactment in force?*

13. I am satisfied the TA Act is an enactment in force for the purposes of section 38.

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

14. 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.

15. In *Tucker v Commissioner of State Revenue*,<sup>2</sup> the Victorian Civil and Administrative Tribunal (VCAT) accepted section 91(1) of the TA Act is a secrecy provision for the purposes of section 38 of the FOI Act.

16. Section 91 of the TA Act provides:

#### **91 Prohibition on certain disclosures of information by tax officers**

- (1) A person who is or was a tax officer must not disclose any information obtained under or in relation to the administration or execution of a taxation law, except as permitted by this Part.

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<sup>2</sup> *(Review and Regulation)* [2019] VCAT 2018.

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Penalty: 100 penalty units

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- (2) For the purposes of the Freedom of Information Act, information referred to in subsection (1) is information of a kind to which section 38 of that Act applies.
17. Under section 63 of the TA Act, the Commissioner of the Agency has responsibility for general administration of the taxation laws and may do all things that are necessary or convenient to give effect to the taxation laws. The Commissioner also has the functions conferred on them by or under any other Act.
18. Section 4 of the TA Act defines 'taxation law' to comprise of the TA Act, Regulations made under the TA Act, and other specified Acts and Regulations.
19. I note if this section 91(1) of the TA Act were to be interpreted broadly it could be used by the Agency to refuse access to the majority of its documents given that the majority of its functions and powers are performed under the TA Act. The fact the provision also refers to the FOI Act clearly anticipates the Agency would be subject to the provisions of that Act, including that it exists to provide access to documents wherever possible.
20. I also note the context of the provision where the TA Act allows for disclosure of general information where it does not identify a particular taxpayer.<sup>3</sup> The TA Act therefore specifically provides for the disclosure of information relating to its functions where it does not affect the personal privacy of taxpayers. This is similar to secrecy provisions in other taxation legislation which reflects parliament's intent that government protect the taxation information of individuals, as distinct from the operational information of taxation agencies.
21. The secrecy provision in section 91(1) of the TA Act must be interpreted to protect the Agency's function as a tax collector and administrator, while at the same time allowing the Agency to disclose records as far as possible under the FOI Act in the interests of open and transparent decision making in government.
22. The documents subject to review are email correspondence sent to and from the Agency and a third party with respect to an investigation conducted under Part 9, Division 2 of the TA Act. As such, I am satisfied the information was obtained under, and in relation to, the administration and execution of the TA Act and is of the kind specified in section 9(1) of the TA Act.
23. Accordingly, I am satisfied the enactment applies specifically to the kind of information in the documents subject to review.

*Does the enactment prohibit persons from disclosing the information in the documents?*

24. As stated above, section 91(1) of the TA Act provides that a person who is or was a tax officer, must not disclose any information that is obtained under or in relation to the administration or execution of a taxation law, unless otherwise permitted under Part 9 of that Act.
25. Section 3(1) of the TA Act defines 'tax officer' as an 'authorised officer' or 'any other person engaged (whether as an officer or employee or otherwise) in the administration or execution of

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<sup>3</sup> Section 93 of the TA Act.

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a taxation law'. As such, the Agency is a 'tax officer' for the purposes of section 9(1) of the TA Act.

26. Sections 92 of the TA Act authorises the disclosure of information obtained under or in relation to the administration of taxation law in specified circumstances.
27. The Applicant submits disclosure is permitted under section 92(1)(a) and (c) of the TA Act, which provides:
  - (1) A tax officer may disclose information obtained under or in relation to the administration of a taxation law—
    - (a) with the consent of the person to whom the information relates or at the request of a person acting on behalf of that person; or
    - ...
    - (c) in connection with the administration or execution of a recognised law (including for the purpose of any legal proceedings arising out of a recognised law or a report of those proceedings); ...
28. I do not consider these exceptions apply because:
  - (a) the documents relate to a third party, being correspondence to and from the third party and the Agency;
  - (b) there is no information before me to suggest the third party to whom the documents relate has consented to disclosure and the Applicant is not acting on behalf of the third party; and
  - (c) disclosure of documents to an applicant under an FOI request does not concern the administration or execution of the FOI Act as contemplated within the meaning of section 92(1)(c).
29. Section 93 also permits disclosure of information obtained under or in relation to the administration of a taxation law unless that information will or is likely to identify a particular taxpayer. I am satisfied disclosure would identify a particular taxpayer and therefore, this exception does not apply.
30. Having considered the application of the relevant provisions in Part 9, Division 3 of the TA Act and being satisfied the three requirements of section 38 are met, I am satisfied the information requested by the Applicant under the FOI Act is exempt from release under section 38 in conjunction with section 91(1) of the TA Act.

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

31. 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.

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32. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>4</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>5</sup>
33. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information because it would render the documents meaningless.

## Conclusion

34. On the information before me, I am satisfied the documents are exempt from release under section 38 in conjunction with section 91(1) of the TA Act.
35. 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, access is refused in full.

## Timeframe to seek a review of my decision

36. 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>6</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>7</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>8</sup>
39. 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.
40. 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>9</sup>

## When this decision takes effect

41. 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.

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<sup>4</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>5</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], [155].

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

<sup>7</sup> Section 52(5).

<sup>8</sup> Section 52(9).

<sup>9</sup> Sections 50(3F) and 50(3FA).