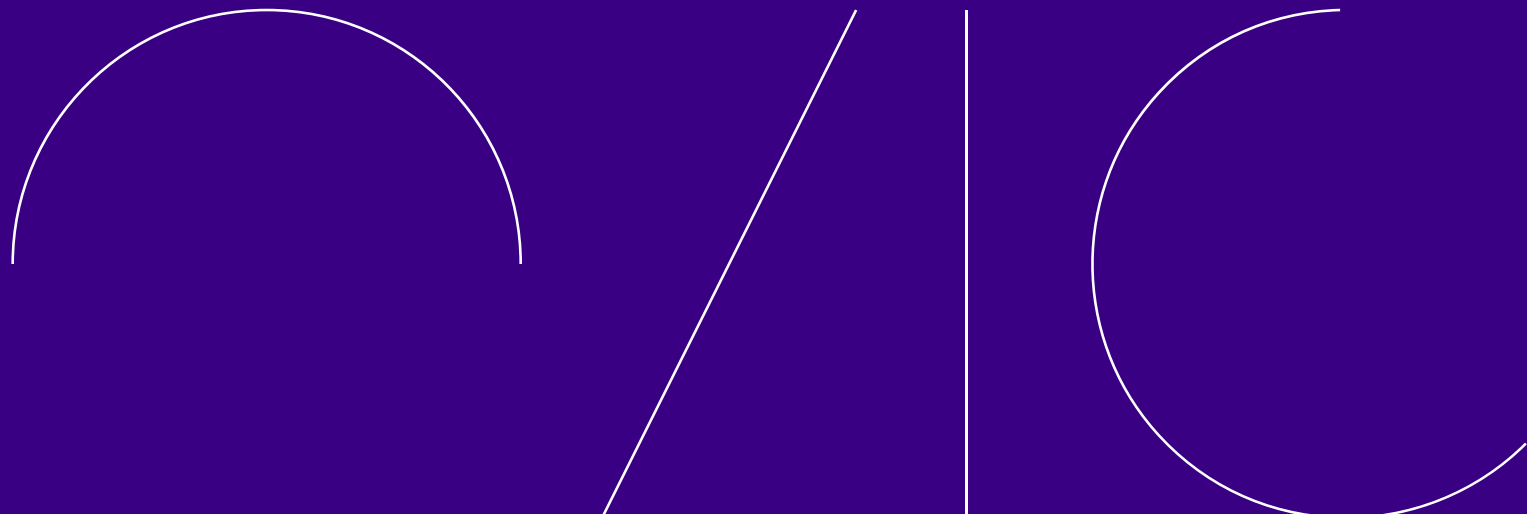


Section 38

When does a provision fall within section 38?



We acknowledge the Wurundjeri people of the Kulin Nation as the Traditional Owners of the land from which we are presenting today

We pay our respects to their Elders, past and present, and Aboriginal Elders of other communities who may be with us today

Agenda

1. Elements of section 38
 - Case examples
 - Exceptions
 - Section 125 of the *Local Government Act 2020*
2. Practical tips
3. Q&A

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

Elements of section 38

1. There is an enactment in force
2. The enactment 'applies specifically to information of a kind' contained in the document
3. Persons referred to in the enactment are prohibited from disclosing that information

*Department of Justice v Western Suburbs
Legal Service Inc [2009] VSC 68*

1. Enactment in force

Section 5 FOI Act:

Enactment means an Act or an instrument (including rules, regulations, local laws or by-laws) made under an Act

Examples:

- Corrections Act 1986
- Melbourne University Standing Resolutions (was not specific enough)

Repealed or amended enactments?

It is the secrecy provision in force at the time the FOI decision is made that is relevant.

Commonwealth enactments?

Sometimes Commonwealth legislation prevents the disclosure of information.

These cannot be provisions under section 38

However, where a Commonwealth Act prohibits the disclosure of information, it cannot be released under Victorian FOI Laws.

2. The enactment ‘applies specifically to information of a kind’ contained in the document

This is often the most difficult part of assessing section 38 provisions

Indicators of when an enactment applies specifically

- The enactment is formulated with such precision it refers with particularity to the information
- The enactment is concerned with the specific nature and quality of the relevant information contained in the document.
- It focuses on the information in the document
- The provision applies to the document's contents, as opposed to only applying based on who is in possession of the document

Indicators of when an enactment does **not** apply specifically

- It is too general in its application
- Makes a blanket reference to 'information'
- Is formulated in such general terms it would encompass the information without expressly referring to it
- Concerned with context
- Identifies information only as information obtained in pursuance of the Act in which the provision is found
- Focuses on document, or its status, source or destination
- Identifies the 'kind' of information only by reference to the capacity of the person who is in possession of it
- Prohibits disclosure only on the basis of who has possession

Corrections Act 1986

91 Disclosure of information

1. Except for the extent necessary to perform official duties, an officer must not disclose to any person except
 - a. A court; or
 - b. The Minister; or
 - c. The Secretary; or
 - d. With the authority of the Minister, Secretary or a Regional Manager; or
 - e. The Ombudsman or Ombudsman's officers

Information gained because of the officer's position as an officer or contained in a record, return or report prepared by the officer under this Act.

* Provision has been repealed

VCAT said No

“It is not sufficient for this purpose for an enactment to prohibit disclosure of information identified only by reference to the capacity of the person who has received the information or where the information is identified as having been obtained by a public servant in the course of his or her duty”

Judge S Davis, Vice President
Simons v Department of Justice [2006] VCAT 2053

Business Licensing Authority Act 1988

18 Secrecy

- (1) This section applies to every person who is or has been a member of the Authority, the Registrar, a Deputy Registrar, a member of the other staff assisting the Authority, a person whose services are used by the Authority under section 7(2) or a person engaged under section 8
- (2) A person to whom this section applies must not, either directly or indirectly, make a record of, or disclose or communicate to any person, any information concerning the affairs of any person acquired by reason of the office or employment under or for the purposes of this Act or a business licensing Act

VCAT said Yes

“In my opinion, although it is arguable that the section lacks the necessary particularity in order to attract the operation of section 38, on balance it does have that effect. I interpret its intent as being one that protects from disclosure information, namely that which concerns the “affairs of any person.” I accept that the words “affairs of any person” are fairly wide as is the class of person upon whom the duty is imposed. However I think that it does have the necessary particularity.”

Judge Higgins, Vice President
Richardson v Business Licensing Authority [2003]
VCAT 1053

Ombudsman Act 1973

20 Person obtaining information shall not disclose or take advantage of it

- (1) A person who obtains or receives information in the course of an investigation under this Act
 - a) Shall not disclose that information except
 - i. For the purposes of the investigation and of any report or recommendation to be made thereon under this Act; or
 - ii. For the purposes of any proceedings in relation to an offence against section 19 of the Evidence Act 1958; and
 - b) Shall not take advantage of any knowledge gained from that information to benefit himself or any other person
- (2) A person who in contravention of this section discloses information or takes advantage of knowledge gained from information shall be guilty of an offence against this Act

The Courts said...

Yes

“The issue then is whether “information received or obtained by the Ombudsman under this Act or “information obtained or received in the course of the investigation” under the Ombudsman Act is “information of a kind” to which the Ombudsman Act applies specifically.

The question may be posed: does the Ombudsman Act apply to some, and if so what, “kind of information?” I consider the answer is; yes, information obtained or received during the course of an investigation under the Ombudsman Act.”

Hassett J
Deasey v Geshke (unreported, Vic County
Court, Hassett J, 1 November 1984)

...and No

“The kind or class of information, that which is obtained or received in the course of investigation, fails to meet this requirement.”

Member Curtain
Horesh v Ombudsman {1986} 1 VAR 149

“Section 20 of the Ombudsman Act 1973, when it speaks of information obtained or received “in the course of an investigation under this Act” is, in my view, a provision which falls on the same side of the line as the lastmentioned cases and lacks the necessary degree of specificity.”

Member Smith
Lapidos v Ombudsman (No 1) (1987) 2 VAR 82

Ombudsman Act 1973 – amended

20 Person obtaining information shall not disclose or take advantage of it

- (1) A person (other than the complainant) who obtains or receives information in the course or as a result of the exercise of the functions of the Ombudsman under this Act
 - a) Shall not disclose that information except
 - i. For the purposes of the exercise of the functions of the Ombudsman and of any report or recommendation to be made under this Act; or
 - ii. For the purposes of any proceedings in relation to an offence against this Act or section 19 of the Evidence Act 1958; or
 - iii. For the purposes of any communication authorised under section 20A of this Act; and
 - b) Shall not take advantage of any knowledge gained from that information to benefit himself or any other person
- (2) A person who in contravention of this section discloses information or takes advantage of knowledge gained from information shall be guilty of an offence against this Act

VCAT said No

“I agree with and adopt the analysis of Senior Member Preuss in Woodford outlined above. I consider that the effect of section 20 of the Ombudsman Act is to prohibit all persons (other than the complainant) from disclosing information that it obtained or received pursuant to the Act. The section makes blanket reference to “information” in such a manner as to suggest that it applies to any and all information obtained in connection with the functions exercised under the Ombudsman Act.

To my mind, the language of section 20 contains no reference to the “kind” of information obtained and is materially different in this regard to the phrases which have been held to attract the exemption under section 38 of the Act.”

DP Davis

Al Hakim v Ombudsman [2001] VCAT 1972

3. There is a prohibition on persons referred to in the enactment disclosing the information

Prohibition

Provision must prohibit a person from disclosing the specified information

Persons referred to in the enactment

Enactment must prohibit a person or persons (either generally, specifically, or otherwise defined) from disclosing the information

Not required to prohibit disclosure by the person in possession of the document; the person to whom the document was provided or the person to whom the document was addressed – *Department of Justice v Western Suburbs Legal Service Inc* [2009] VSC 68

Melbourne University

Standing Resolution 3.21

3.21 The policy on the availability to members of the Council of the audio transcript is as follows

[...]

3.21.5 the audio transcript may not be removed from the University Secretary's Office

3.21.6 the audio tapes may not be removed from the University Secretary's Office

3.21.7 no audio duplication of the tapes may be made

3.21.8 notes may be made by members for their personal use only

VCAT said No

“The tenor of the resolution is one of preferred conduct, not a mandatory ruling set in stone.”

“I was not persuaded by the argument that the fact that meetings were mostly held in camera gave rise to the necessary prohibition, nor was I persuaded that the fact that visitors at meetings might be asked to leave in order that matters could be considered in camera gave rise to some inference of prohibition.”

Megay, SM
McCulloch v University of Melbourne [2001]
VCAT 2246

4. Exceptions

Agencies should look to see if there are any exceptions to the prohibition

Consent

Many provisions will state that information can be released with the written consent of the subject of the information.

If the applicant is the subject – then the exception will apply

FOI requests are considered written consent – *Gullquist v Victorian Legal Services Commissioner* [2017] VCAT 764

‘In performance of functions under this Act’ or where ‘required or authorised by law for another purpose’

Does this include FOI?

Section 125 Local Government Act

Section 125 LGA2020 protects 'confidential information' from unauthorised disclosure

It is a section 38 provision – but its application is limited by sections 125(4) and 125(5)

Section 38 cannot be used to exempt certain kinds of confidential information

Information that cannot be exempted

- Council business information
- Security information
- Land use planning information
- Law enforcement information
- Privileged information
- Personal information
- Private commercial information

Information that can be exempted

- Confidential meeting information
- Internal arbitration information
- Councillor Conduct Panel confidential information
- Information prescribed by the regulations to be confidential information

Practical tips

Tip 1 – is release outside the Act possible?

- Is there an established access scheme allowing access outside of FOI (e.g. for certain persons)?
- Proactive and informal release needs to be managed a bit more carefully with secrecy provisions that have actual prohibition on release (compared with other FOI Act exemptions where there is always discretion to release the information)

Tip 2 – has OVIC considered this before?

Table of provisions that section 38 does not apply to

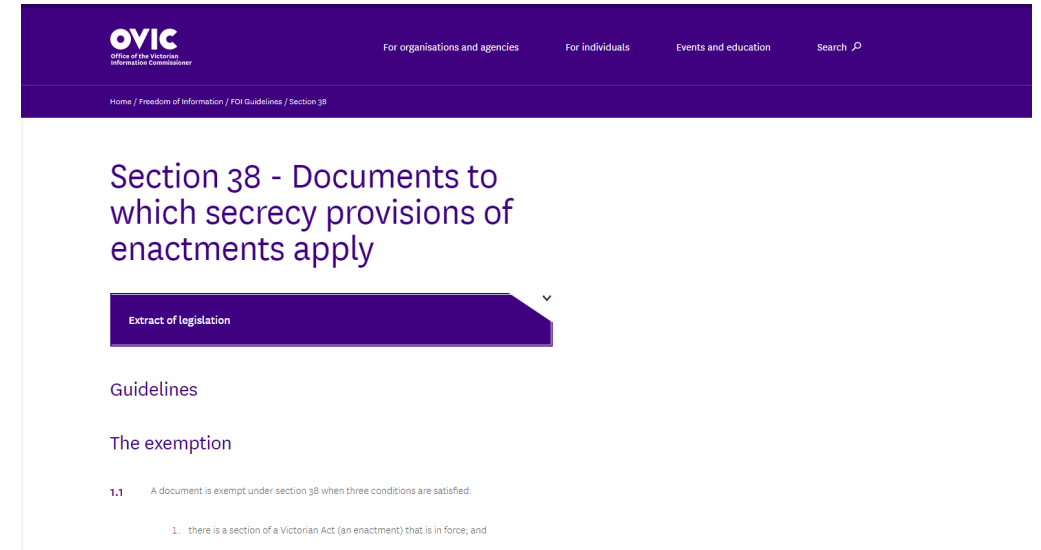
1.37 This table outlines enactments that have been interpreted to not be secrecy provisions for the purpose of the Act. Section 38 does not apply to the enactments listed in the table.

Legislation	Section	Title	Decision
Building Act 1993	229J	Confidentiality	<ul style="list-style-type: none">• ‘ET4’ and Victorian Building Authority [2022] VICmr 204
Commercial Passenger Vehicle Industry Act 2017	254	Definition	<ul style="list-style-type: none">• ‘DW7’ and Commercial Passenger Vehicles Victoria (Freedom of Information) [2021] VICmr 330

Tip 3 – take it step by step

Steps to applying section 38

1. Identify the enactment that may apply to the information
2. Ensure the enactment is in force
3. Specifically identify the information to be exempted
4. Determine whether the enactment specifically applies to the information under consideration and be able to explain how or why the enactment specifically applies to that information
5. Consider whether the enactment prohibits persons referred to in the enactment from disclosing the specific kind of information under consideration
6. Check to see if the enactment has any exceptions that may apply



The screenshot shows the OVIC website interface. At the top, there is a dark blue header with the OVIC logo on the left and navigation links for 'For organisations and agencies', 'For individuals', 'Events and education', and 'Search' on the right. Below the header, a breadcrumb trail reads 'Home / Freedom of Information / FOI Guidelines / Section 38'. The main content area has a title 'Section 38 - Documents to which secrecy provisions of enactments apply' in a large, bold, dark blue font. Below the title is a dark blue button labeled 'Extract of legislation' with a small downward arrow. Underneath the button are two sub-sections: 'Guidelines' and 'The exemption'. The 'The exemption' section contains a numbered list starting with '1.1 A document is exempt under section 38 when three conditions are satisfied:' followed by a sub-list item '1. there is a section of a Victorian Act (an enactment) that is in force, and'.

Tip 4 – it must meet all requirements, not just some

- Not all confidentiality provisions are secrecy provisions
- Consider the surrounding sections in the Act, not just the potential secrecy provision
- A penalty does not automatically make it a secrecy provision
- Consider exceptions, especially where it includes consent of a relevant person (e.g. the Applicant)
- Make sure your decision letter addresses all the requirements

229J Confidentiality

- (1) An authorised person must not give to any other person, whether directly or indirectly, any information gained in the exercise of powers as an authorised person under this Part.

Penalty: 60 penalty units.

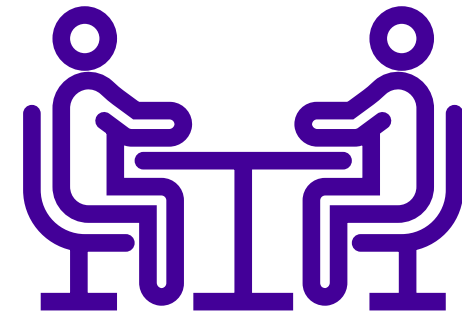
90K Authorised use or disclosure

Subject to section 90N, the Secretary or a relevant person may use or disclose relevant information—

- (d) with the consent of—
- (i) the individual to whom the information relates; or

Working with OVIC

- If you are unsure about using a secrecy provision, the OVIC Agency Information Service might be able to assist you **prior to the decision**
- A detailed decision letter to the Applicant addressing all factors set out in the OVIC Guidelines will save time and limit the further information OVIC needs to ask for
- Provide a submission addressing the potential secrecy provision, the surrounding provisions, the functions of your Agency and any relevant case law



Survey link in chat

It helps us improve and tailor content for future sessions if we get feedback!

Questions?

OVIC