

Notice of Decision and Reasons for Decision

Applicant: AB3
Agency: Department of Justice and Community Safety
(formerly Department of Justice and Regulation)
Decision Date: 22 March 2019
Exemptions considered: Sections 23(2), 38 and 31(1)(a)

FREEDOM OF INFORMATION – Communications between a corrections facility and the Applicant – prison records – Corrections staff – secrecy provision

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 differs from the Agency's decision in that I have decided to release additional information in the document.

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

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

22 March 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to documents relating to:

... communications, including letters forms, request and complaints, etc that are between [a Victorian Corrections facility] and [the Applicant] ... from [a specified date] until the current date of processing this request, including all response and notes in relation to these communications.
2. In its decision, the Agency identified 143 pages falling within the terms of the Applicant's request. It decided to:
 - (a) release 18 pages outside of the FOI Act;
 - (b) release 29 pages in full; and
 - (c) release 96 pages in part.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review and been briefed by OVIC staff who inspected the documents claimed to be exempt under section 31(1)(a).¹
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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 19 March 2019.
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.

Form of access

8. Section 23(1) provides a finite list of the form of access by which an applicant may be granted access to a document and includes 'provision...of a copy of the document'.²
9. Section 23(2) states that, where an applicant has requested access to information in a particular form, access must be granted in that form, subject to some limited exceptions.

¹ Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

² Section 23(1)(b).

10. The FOI Act is silent as to whether a copy of a document includes an electronic copy and whether electronic copies can be provided on CD, DVD or in some other electronic format. Given the date the FOI Act came into existence, this is not surprising, as electronic copies of documents and the method for accessing electronic documents would not have been as extensive as today.
 11. When read in conjunction with each other, sections 23(1) and 23(2) appear to suggest an applicant is entitled to request and receive a copy of material in an electronic format, unless an exception in section 23(3) applies. I consider this interpretation is consistent with the object of the FOI Act under section 3(1), which includes 'to extend as far as possible the right of the community to access to information in the possession of the Government of Victoria', and section 3(2) which provides:
 - (2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.
 12. Further, section 35 of the *Interpretation of Legislation Act 1984* (Vic), provides:

In the interpretation of a provision of an Act or subordinate instrument—

 - (a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object.
 13. Section 23(3)(a) states if the form of access requested by an applicant would 'interfere unreasonably with the operations of the agency', access in the requested form may be refused and provided in another form.
 14. The Agency is responsible for overseeing the good order, management and security of prisons and correctional facilities under the *Corrections Act 1986* (Vic) (**Corrections Act**). To assist with its statutory obligations, 'Commissioner's Requirements' have been published that set out high level requirements regarding operational and security matters within prisons.
 15. Section 2.1.2 of the 'Commissioner's Requirements' note that both CDs and DVDs 'carry an inherent risk to the good order and security of each prison'. Therefore, there are only a limited number of agencies that can send CDs and DVDs into the prison environment, including legal representatives, Victoria Police and 'other agencies that, from time to time, may be authorised by the prison General Manager'.
 16. An agency wishing to send documents released under FOI on a CD or DVD to a prisoner would likely need to apply to the General Manager for authorisation in each instance to allow this information to be received by a prisoner directly.
 17. Further, the 'Commissioner's Requirements' require an agency to label CDs and DVDs in a particular manner, including using an approved Corrections Victoria security seal. Any information on the CD or DVD must be burned to the CD or DVD in a closed session format and the CD or DVD may only be kept with a prisoner for as long as necessary.
 18. CDs and DVDs sent to prison facilities are subject to screening by technical specialists. Release of information under FOI on a CD or DVD to each applicant, who is a prisoner, would likely place a significant impost on the limited number of technical specialists based at each location.
 19. In light of the above security requirements, I consider the release of documents on a CD or DVD under FOI into the prison environment would interfere unreasonably with the operations of the Agency.
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20. Therefore, in the circumstances of this matter, I have determined the Agency was entitled to refuse to provide access to the documents in electronic form in accordance with section 23(3) and may disclose the documents to the Applicant in hard copy.

Review of exemptions

21. The Agency relied on the exemptions under section 31(1)(a), 33(1) and 38 to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

Section 38

22. A document is exempt under section 38 if:
- (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information contained 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).
23. In order for section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Application of the secrecy provision

24. The Agency applied section 38 in conjunction with section 104ZZA of the Corrections Act that 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.

25. The term 'personal or confidential information' is defined in section 104ZX of the Corrections Act to relevantly include information that:
- (a) identifies any person or discloses his or her address or location; or
 - (b) from which any person's identity, address or location can reasonably be determined.
26. I am satisfied section 104ZZA of the Corrections Act is a secrecy provision to which section 38 applies for the following reasons:
- (a) the Corrections Act is an enactment in force for the purposes of section 38;
 - (b) section 104ZZA of the Corrections Act specifically refers to the information to which the secrecy provisions applies; this being any information that identifies or locates or from which an identity or location can be ascertained; and
 - (c) the deleted information in the documents relates to staff names, signatures, position titles, contact details and descriptors of other third parties from which these individuals' identities could be ascertained.
27. In these circumstances, I am satisfied section 104ZZA of the Corrections Act refers directly to the type of information deleted from the documents.

28. Section 104ZZA of the Corrections Act clearly prohibits the use or disclosure of the type of information to which it applies. It is an offence to disclose information in contravention of that prohibition.
29. I do not consider any of the exceptions to the offence, as set out in section 104ZY of the Corrections Act, apply in the circumstances of this matter.
30. Accordingly, I have determined the deleted information in the documents is exempt under section 38.
31. The Agency also applied section 33(1) to the same information that was deleted under section 38.

Section 33(1)

32. In light of my decision above, it is not necessary for me to consider the application of section 33(1).

Section 31(1)(a)

33. Section 31(1)(a) concerns law enforcement documents and provides:

- (1) 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;

34. ‘Reasonably likely’ means there is a real chance of an event occurring; it is not fanciful or remote.³ ‘Prejudice’ means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴ The phrase, ‘in a particular instance’ can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁵

35. In its submission, dated 19 March 2019, the Agency advised the release of the information could prejudice the proper administration of section 104ZX(i) of the Corrections Act concerning the management of prisons. This is because if the document was read out of context and disseminated widely, then it would cause overall issues in the Applicant’s management at the prison.
36. Having reviewed the deleted information, I am not satisfied the release of this information would prejudice the proper administration of the Corrections Act.
37. Accordingly, I am not satisfied this information is exempt under section 31(1)(a).

Conclusion

38. I have determined that certain information is exempt under section 38. However, certain other information is not exempt under section 31(1)(a). In the course of this Office’s preliminary enquiries, the Agency also agreed to release additional information. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

³ *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.

⁴ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁵ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

Deletion of exempt or irrelevant information

39. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
40. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 in accordance with section 25.⁷
41. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁸
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
45. 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.
46. 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.¹¹

When this decision takes effect

47. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

⁶ *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 [82].

⁷ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document	Agency's Decision	OVIC Decision	OVIC Comments
1 - 25, 27 - 69, and 71 - 73	Release in part Sections 33(1), 38	Release in part Section 38	<p>Information of a similar nature has been deleted from these 71 documents.</p> <p>Section 38: This exemption has been applied in conjunction with the secrecy provision in section 104ZZA of the Corrections Act which prohibits the disclosure of information that identifies an individual or from which an individual's identify could be determined.</p> <p>The document contains staff names, signatures, position titles, contact details and descriptors of other third parties from which these individuals' identities could be ascertained.</p> <p>I am satisfied the deleted information in the documents is exempt under section 38.</p>
26	Release in part Sections 33(1), 38	<p>Release in part Section 38</p> <p>The Agency agreed to release the information following the text 'Reason'.</p>	<p>On 19 March 2019, in the course of preliminary enquiries, the Agency agreed to release additional information in the document.</p> <p>Section 38: See comments above.</p>
70	Release in part Sections 31(1)(a), 33(1), 38	<p>Release in part Section 38</p> <p>I direct the contents of the email dated 7 November 2018 sent at 2:29pm is to be released to the Applicant. However, any names and contact details are to be deleted under section 38.</p>	<p>Section 38: See comments above.</p> <p>Section 31(1)(a): I am not satisfied the release of this information would prejudice the administration of the Corrections Act.</p>