

Notice of Decision and Reasons for Decision

Applicant: AA4
Agency: Department of Justice and Community Safety
(formerly Department of Justice and Regulation)
Decision Date: 7 March 2019
Exemptions considered: Sections 33(1) and 38

FREEDOM OF INFORMATION – prison medical file – Corrections Act 1986 – section 104ZZA – personal or confidential information - 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 is the same as the Agency's decision in that I have decided to release the documents in part to the Applicant.

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

7 March 2019

Reasons for Decision

Background to review

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

...the next 150 pages from the medical file
2. In its decision, the Agency advised it had interpreted the Applicant's request to be for 'Results and Forms and Documents [pages] from your JCare file'.
3. The Agency further advised it identified 11 documents comprising 151 pages relevant to the terms of the Applicant's request. It decided to grant access to the documents in part.

Review

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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application; and
 - (c) the Agency's submission dated 22 February 2019.
8. 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

9. The Agency relied on the exemptions in sections 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

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. In order 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.

12. Section 104ZZA of the *Corrections Act 1986* (Vic) (**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 and 104ZZ.

13. A 'relevant person' is an employee of the Agency.¹

14. 'Personal or confidential information' is defined to include:²

...

(c) Information –

- (i) that identifies any person or discloses his or her address or location or a journey made by the person; or
- (ii) from which any person's identity, address or location can reasonably be determined; (emphasis added).

15. In this matter, the Agency relies on section 38 to exempt names, signatures and position titles of medical staff who were involved in the medical treatment of the Applicant whilst he was serving a prison term. The Agency also applies section 38 to exempt the names, locations, relationship descriptors and other personal identifying information relating to the Applicant's family members.

16. I am satisfied the information exempted by the Agency is information from which the identity of third parties can be reasonably determined and is therefore information that is of a kind to which section 104ZZA refers.

17. Section 104ZY of the *Corrections Act* sets out a number of exceptions to the prohibition on relevant persons disclosing personal or confidential information. For example, section 104ZY(2)(b) provides that personal or confidential information may be used or disclosed with the authorisation, or at the request, of the person to whom the information relates.

18. Having reviewed these exceptions and based on the information before me, I cannot identify any that apply in the circumstances of this matter.

19. In summary, I am satisfied that section 104ZZA of the *Corrections Act* prohibits employees of the Agency from disclosing the personal information contained in the documents. As a consequence, I am satisfied that section 38 of the *FOI Act* applies to the personal affairs information of medical staff and the Applicant's family members and exempt this information from release.

20. Further, I note the decision of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Glasscott v Department of Justice and Regulation*,³ which held section 104ZZA of the *Corrections Act* is a secrecy provision for the purposes of section 38. I agree with that finding.

21. Having determined the information is exempt under section 38, it is not necessary for me to consider the Agency's application of section 33(1) to the same information.

Deletion of exempt or irrelevant information

22. 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 information and the applicant agrees to receiving such a copy.

¹ Section 104ZX of the *Corrections Act*.

² *Ibid.*

³ [2018] VCAT 1491.

23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
24. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

25. On the information available and in light of the secrecy provisions in the Corrections Act, my decision on the Applicant's request is the same as the Agency's decision in that I have determined the information sought is exempt under section 38.
26. As it is practicable for the Agency to edit the documents to delete irrelevant and exempt information, I have determined to grant access to the documents in part.

Review rights

27. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.⁶
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
30. 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.
31. 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.⁹

When this decision takes effect

32. 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.

⁴ *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].

⁵ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

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

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	ECG Results	1	Released in part Sections 33(1) and 38	Release in part Section 38	<p>Section 38: Section 104ZZA of the Corrections Act applies to 'personal or confidential information' and the definition of that term applies to the personal and identifying information captured in the documents subject to review.</p> <p>I am also satisfied section 104ZZA prohibits Agency officers from disclosing the personal information in the documents. Therefore, I am satisfied the personal and identifying information in the document is exempt under section 38.</p> <p>Section 33(1): Having determined the information is exempt under section 38, I am not required to consider the application of section 33(1).</p>
2.	[Date]	Results	52	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
3.	[Date]	Dental Clinical Record	2	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
4.	[Date]	Inter prison transfer assessment	6	Released in part	Release in part	For the reasons provided in Document 1 above.

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Sections 33(1) and 38	Section 38	
5.	[Date]	Psychiatric Inpatient Admission Assessment	18	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
6.	[Date]	Reception Medical Assessment	6	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
7.	[Date]	Reception Psychiatric Assessment	6	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
8.	Various	Risk Reviews	29	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
9.	[Date]	Medical Imaging Diagnostic Request	6	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
10.	[Date]	Inter prison transfer assessment	6	Released in part Sections 33(1) and 38	Release in part Section 38	For the reasons provided in Document 1 above.
11.	[Date]	Psychiatric Inpatient Admission Assessment	9	Released in part	Release in part	For the reasons provided in Document 1 above.

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				Sections 33(1) and 38	Section 38	