

Notice of Decision and Reasons for Decision

Applicant: AA5
Agency: Department of Justice and Community Safety
(formerly Department of Justice and Regulation)
Decision Date: 8 March 2019
Exemptions considered: Sections 30(1), 33(1) and 38

FREEDOM OF INFORMATION – prison medical file – Corrections Act 1986 – section 104ZZA – personal and confidential information – relevant person – secrecy provision – contrary to the public interest – opinions advice and observations

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

8 March 2019

Reasons for Decision

Background to review

1. The Applicant, in consultation with the Agency, made a request for access to the following documents:

...Medical file(s), psych file(s) and any other document(s)...
2. In its decision, the Agency identified two documents, comprising 179 pages, falling within the terms of the Applicant's request. It decided to grant access to the documents 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.
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 31 January 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.

Review of exemptions

The Agency relied on the exemptions in sections 30(1), 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

8. 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.

9. 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.
10. The Agency relies on section 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) to exempt information in the documents.

Corrections Act

11. Section 104ZZA of the 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 or 104ZZ.

Penalty: 120 penalty units.

12. The term 'personal or confidential information' is defined in section 104ZX of the Corrections Act, which relevantly provides:

personal or confidential information includes the following –

(a) information relating to the personal affairs of a person who is or has been an offender or a prisoner;

...

(c) information –

(i) that identifies a 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;

13. A 'relevant person' is set out in Schedule 5, which includes in part:

(2) A person employed in the Department under Part 3 of the Public Administration Act 2004

(3) A person who provides services or advice (whether paid or unpaid) to or on behalf of the Department

14. In summary, section 104ZZA operates to protect the personal privacy of individuals who are identified in documents generated in connection with the management and administration of the corrections system. The section imposes strict confidentiality requirements on a 'relevant person', which includes Agency officers, among others, which apply in all but limited circumstances.

15. The Agency applied the secrecy exemption in section 38 to exempt:

(a) the names, contact details and other identifying information of medical staff;

(b) the names of Corrections Victoria staff;

(c) information relating to family members of the Applicant; and

(d) information relating to the personal affairs of other prisoners.

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 of a kind to which section 104ZZA refers.

17. Sections 104ZY and 104ZZ of the Corrections Act set out a number of exceptions to the prohibition on relevant persons disclosing personal or confidential information. Having reviewed these exceptions, I consider there is no information before me to suggest that any of the exceptions authorise disclosure of the documents to the Applicant in this instance.

18. In *Glasscott v Department of Justice and Regulation*,¹ section 104ZZA of the Corrections Act was held to be a secrecy provision for the purposes of section 38. I agree with that finding.
19. In light of the above, I am satisfied section 38 applies to all of the material exempted by the Agency.

Section 30(1)

20. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
21. The exemption does not apply to purely factual material in a document.²
22. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of the agency, a member of the agency’s staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
23. The Agency applied section 30(1) to exempt the opinions, advice and observations of health professionals, employed by the Agency, contained in the Applicant’s prisoner medical file.
24. The term ‘deliberative process’ has been interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³
25. In *Re Waterford and Department of Treasury (No. 2)*,⁴ the Commonwealth Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ... its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.
26. Having viewed the exempted information, I am satisfied the document contains information in the nature of opinion and advice relating to the medical and psychiatric treatment of the Applicant. I am further satisfied this information was produced in the course of, and for the purpose of, the Agency’s deliberative process of managing and monitoring the treatment of the Applicant whilst serving a prison term.
27. However, I must also consider whether disclosure of the information would be contrary to the public interest under section 30(1)(b). In deciding this question, it is necessary to consider all relevant facts and circumstances, remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
28. In the circumstances of this matter, I have taken the following into consideration:⁵

¹ [2018] VCAT 1491.

² Section 30(3).

³ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁴ [1981] 1 AAR 1.

- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues involved;
 - (c) whether the disclosure would be likely to inhibit frankness and candour in the making of communications;
 - (d) the likelihood disclosure of the documents would inhibit the independence of officers or the making of proper and detailed research and submissions by them; and
 - (e) the likelihood disclosure would create mischief in one way or another such as a risk of mischievous interpretation.
29. The Agency, in its decision, advised that release of this information would be contrary to the public interest as it would inhibit medical staff from freely expressing their opinions and observations about a prisoner's presentation to ensure the ongoing management of a prisoner's health and well-being.
30. The Applicant has not provided information regarding his reasons or motives for seeking access to the information, however, I acknowledge the Applicant's personal interest in obtaining all information that concerns him. Further, I appreciate redactions made to documents can create a sense of disappointment and frustration to an applicant, regardless of whether only a small amount of material is withheld, and an applicant may simply wish for a complete copy of a document without any redactions to any pages.
31. In addition to the Applicant's personal interest in the documents, I consider there is a broader public interest that favours release of official information to promote transparency and accountability to improve the quality of reporting.
32. Although these are factors weighing in favour of release, I consider there are also several factors weighing against disclosure. Having carefully examined the document, I am satisfied it would be contrary to the public interest to release the exempted information for the following reasons:
- (a) Generally speaking, I consider medical information to be sensitive in nature. In this case, the deliberative material contained in Document 2 was provided whilst the Applicant was serving a prison term. I consider the prison environment and the purpose in which the information was recorded in the document increases the sensitivity of the information.
 - (b) I accept release may give prisoners (or former prisoners in the Applicant's situation) additional insight into the processes of medical staff who are responsible for monitoring individuals within the corrections system. The wide disclosure of the type of information exempted by the Agency may influence future behaviour of prisoners towards medical staff, who rely on honest interactions to accurately assess the health and well-being of prisoners in particular circumstances.
 - (c) The document records the opinions, advice and subjective comments of Agency officers based on their observations at the relevant time. Their preliminary information and views could be misunderstood as amounting to conclusive advice, which may not accurately reflect an actual clinical diagnosis or final understanding by the Agency of matters involving the Applicant.
 - (d) I do not accept that, as a result of the disclosure of the information in response to the Applicant's request, medical staff employed by the Agency would be deterred from discharging their professional and ethical obligations to provide their opinions and subjective comments in the

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

future, or from frankly and candidly discussing the health and well-being of prisoners who are under their care. However, I do acknowledge that the routine disclosure of this type of information may eventually result in a diminution in the degree of candour adopted by medical staff of the Agency. I consider that, should this information be broadly disseminated, it is likely that Agency staff will feel constrained in the way they are able to raise issues and communicate such concerns regarding prisoners. This could have serious adverse consequence on the general management of prisoner health and well-being.

- (e) While the public interest in transparency is a consideration in which I have given weight, I am just as mindful of the overall purpose of the document in providing those individuals responsible for monitoring the physical and mental health of prisoners, access to frank and candid information to effectively perform their role. I consider releasing the document without exempting the opinion, advice and observations of medical staff would impede the provision of full and frank reporting, which in turn would lead to a lack of candour, rendering the information recorded in prisoner medical files less effective for their purpose. In the circumstances, I consider that ensuring the confidentiality of the Agency's deliberations in this matter is the stronger of the two.

33. For these reasons, I am satisfied section 30(1) applies to the information in the document.

Section 33(1)

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

Deletion of exempt or irrelevant information

35. 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.

36. 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 under section 25.⁷

37. 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.

Conclusion

38. On the information available, I am satisfied the exemptions in sections 30(1), 33(1) and 38 apply to the documents. I have decided to grant access to the documents in part.

Review rights

39. 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

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).

40. The Applicant may apply to VCAT for a review up to 60 days from the date he is given this Notice of Decision.⁹
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
42. 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.
43. 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

44. 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.

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Undated	Medical file overview	1	Released in part Sections 33(1) and 38	Release in full Deletion of irrelevant information under section 25	The Agency has applied sections 33(1) and 38 to exempt the name of an Agency officer who performed the administrative role of printing the document for the purposes of the Applicant's FOI request. I note the information, although exempted by the Agency, falls outside the scope of the Applicant's request as it not information contained on his prisoner medical file. Instead, I consider this information should be deleted as 'irrelevant information' in accordance with section 25 of the FOI Act.
2.	Undated	Medical file	178	Released in part Sections 30(1), 33(1) and 38	Release in part Sections 30(1) and 38	<p>Section 38: I accept the redacted information is personal or confidential information within the meaning of section 104ZX of the Corrections Act. It is therefore exempt under section 38.</p> <p>As I have determined the information is exempt under section 38, it is not necessary for me to consider the application of section 33(1) to the same information.</p> <p>Section 30(1): It would be contrary to the public interest to release the deliberations of the Agency in the</p>

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						<p>circumstances, as Agency staff need to be able to freely record their opinions and observations concerning prisoners and discuss appropriate methods for dealing with potential risks without concern that information will be disseminated widely.</p>