

Notice of Decision and Reasons for Decision

Applicant:	'AH8'
Agency:	Department of Justice and Community Safety
Decision Date:	30 July 2019
Exemptions considered:	Sections 31(1)(d), 33, 38
Citation	'AH8' and Department of Justice and Community Safety (Freedom of Information) [2019] VICmr 71 (30 July 2019)

FREEDOM OF INFORMATION – *Corrections Act 1986* (Vic) – correctional services – security rating assessment – Initial Security Rating Form

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 a document requested by the Applicant under the FOI Act.

During the review, the Agency proposed to release further information to the Applicant.

My decision is the same as the Agency's proposal, dated 13 June 2019, and is that the document is to be released in part to the Applicant.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 July 2019

Reasons for Decision

Background to review

1. The Applicant's legal representative made a request to the Agency on behalf of the Applicant for access to the following documents:
 1. All documentation, including incident reports, [the Applicant's] Individual Management File and medical file, relating to [the Applicant's] incarceration on [specified date], including, but not limited to:
 - a. documents outlining any interactions between [the Applicant and staff] on [specified date]; and
 - b. any statements by [staff] about the incident that occurred on this date.
 2. Any subsequent documentation after [specified date] that refers to the incident that occurred on [specified date], including internal emails or correspondence.
 3. Any photographs of [the Applicant's] injuries incurred on [specified date].
 4. Any CCTV footage or body camera footage taken of the incident on [specified date].
 5. Any documents prior to the [specified date] incident which contain risk assessment and/or security rating for [the Applicant], including any documents that contain details of any specific threats by other prisoners towards [the Applicant].
2. The Agency identified 14 documents falling within the terms of the Applicant's request. In its decision, the Agency:
 - (a) released 32 pages in full;
 - (b) released 62 pages in part; and
 - (c) refused access to the CCTV footage in full.

Review

3. The Applicant's legal representative sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
4. On 21 March 2019, the Applicant's legal representative indicated the Applicant only seeks review of the Agency's decision in relation to the Initial Security Rating Form. Accordingly, my review relates to this document only.
5. OVIC staff inspected the document, which the Agency exempted under section 31(1),¹ and I have been briefed on its contents.
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) information provided with the Applicant's review application;

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.

- (c) the Agency's submission dated 12 February 2019; and
 - (d) communications between OVIC staff, the Applicant's representative and the Agency.
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. In its original decision, the Agency relied on the exemptions in sections 31(1)(a), 31(1)(d), 33(1) and 38 to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Informal resolution and the Agency's proposal to partially release the document

10. On 13 March 2019, the Applicant's legal representative advised OVIC of the following:
- We note that the full (incomplete) form is available online. We submit that providing access to the specific form filled out for [the Applicant] would not have a detrimental effect on how prisoner information is recorded or compromise the security and management of the prison.
11. OVIC advised the Agency about this communication and invited it to respond.
12. On 7 May 2019, the Agency provided information to the Applicant outside the FOI Act in relation to the security rating level.
13. On 13 June 2019, the Agency provided OVIC with an edited copy of the Initial Security Rating Form. The Agency proposed that the document be partially released to the Applicant with certain information to remain exempt under sections 31(1)(d), 33(1) and 38.
14. Accordingly, I propose to limit my review to information in the document to which the Agency maintains the above exemptions apply.

Section 38

15. In order for a document to be exempt under section 38, three conditions must be satisfied:
- (a) there must be 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).
16. For section 38 to apply to an enactment, it must be formulated with such precision that it specifies the actual information sought to be withheld.

Application of the secrecy provision

17. The Agency applied section 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) which provides:

104ZZA Offence to use or disclose personal or confidential information unless authorised

A person who is or has been a relevant person must not use or disclose personal or confidential information unless that use or disclose is authorised under sections 104ZY or 104ZZ.

Penalty: 120 penalty units.

18. Section 104ZX of the Corrections Act defines 'personal and confidential information' to 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.
19. 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 document relates to an Agency staff member's name, position title and position code – I am satisfied this information sufficiently identifies that Agency staff member.
20. In these circumstances, I am satisfied section 104ZZA of the Corrections Act refers directly to the information identifying an Agency staff member in the document.
21. Section 104ZZA of the Corrections Act clearly prohibits the use or disclosure of this type of information and it is an offence to disclose information in contravention of that prohibition.
22. I do not consider any of the exceptions to the offence, as set out in sections 104ZY or 104ZZ of the Corrections Act, apply in the circumstances of this matter.
23. Accordingly, I have determined the information in the document that identifies the Agency staff member is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act.

Section 31(1)(d)

24. Section 31(1)(d) provides (subject to this section) a document is exempt if its disclosure would, or would be reasonably likely to, 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'.
25. The exemptions in section 31(1) do not apply to widespread and well-known methods and procedures.²
26. The Agency's decision letter stated it administers the Corrections Act and it explained:

Prisoner placement is the process of ensuring that prisoners are placed in prison locations that are appropriate to prison security and management as well as prisoners' individual welfare and rehabilitation needs. One of the factors affecting prisoner placement is the prisoner's security rating.

² XYZ v Victoria Police [2010] VCAT 255 at [177].

The proper administration of the Corrections Act would be likely to be improperly affected if the Security Rating Forms were disclosed because the information contained in these forms [could] be used to manipulate the results of these surveys thus affecting the outcome and ultimately the placement of a prisoner and thereby [compromising] the good order and security of the prison.

27. On 13 June 2019, the Agency submitted that many of the scores in the document are discretionary and, while the blank template is available online, the provision of the completed form in relation to the Applicant may expose methodology used by prison staff in the course of undertaking a security rating assessment.
28. Having reviewed the document, I accept the Agency's submission that disclosing information related to the calculation of the Applicant's security rating could have a detrimental effect on how prisoner information is recorded and how prison security ratings are calculated. Consequently, this may compromise the effectiveness of the Agency's functions under the Corrections Act relating to the maintenance of security and good management of prisons.
29. I am satisfied the release of this information would prejudice the effectiveness of the Agency's methods or procedures for preventing or dealing with matters arising out of breaches or evasions of the Corrections Act. Accordingly, this information is exempt under section 31(1)(d).

Deletion of exempt or irrelevant information

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ 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 25.⁴
32. For completeness, I have considered the effect of deleting exempt information from the document. In my view, it is practicable to delete this information, because it would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

33. Having considered the relevant exemptions, I have determined certain information in the document is exempt under sections 31(1)(d) and 38 and the document is to be released to the Applicant in the format proposed by the Agency in its email dated 13 June 2019.
34. As I have determined the relevant information in the document is exempt under sections 31(1)(d) and 38, it is not necessary for me to consider the application of section 33(1) to the same information.

³ *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 [82].

⁴ *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] and [155].

Review rights

35. 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.⁵
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
38. 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.
39. 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.⁸

When this decision takes effect

40. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).