

Notice of Decision and Reasons for Decision

Applicant:	'A17'
Agency:	Department of Justice and Community Safety
Decision Date:	16 August 2019
Provisions considered:	Section 38 in conjunction with section 104ZZA of the Corrections Act 1986 (Vic)
Citation:	'A17' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2019] VICmr 79 (16 August 2019)

FREEDOM OF INFORMATION – Corrections Victoria – case notes – personal and confidential information – information identifying a third party – exception to prohibition on disclosure

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 document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
16 August 2019

Reasons for Decision

Background to review

1. The Applicant made an FOI request to the Agency for the following documents:

... tapes / video's and such, on [the Applicant, date of birth], of [residential address]. Attending the appointment with [Agency staff] at [specified date and time] at Corrections Victoria [specified community correctional service].
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to:
 - (a) release a two-page document in part (the **Document**); and
 - (b) refuse access to CCTV footage in full.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. On 17 July 2019, the Agency informed OVIC staff that no footage exists of the Applicant's supervision appointment with the Agency officer.
5. On 13 August 2019, OVIC staff relayed this information to the Applicant, who accepted the requested CCTV footage does not exist. The Applicant also agreed to exclude from review information on the second page of the Document.
6. Accordingly, this review relates to the four deletions on page 1 of the Document.
7. I have examined a copy of the Document subject to review. It is a two page document containing cases notes recorded by an Agency officer. I note the Agency released the majority of information in the Document to the Applicant.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated 14 August 2019 and information provided with the Applicant's review application; and
 - (c) communications between OVIC staff and the Applicant.
10. 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

11. The Agency relied on the exemptions under sections 33(1) and 38 to refuse access to parts of the Document. The Agency's decision letter sets out the reasons for its decision.

Section 38

12. 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).
13. 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

14. 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.

15. 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.
16. 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 information from which the identity of a third party (or third parties) could be reasonably ascertained.
17. 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.
18. Section 104ZZA of the Corrections Act clearly prohibits the use or disclosure of this type of information and it is an offence under that Act to disclose information in contravention of that prohibition.
19. On 14 August 2018, the Applicant made a submission claiming an exception applied under section 104ZY(2)(a)(ii) of the Corrections Act to the above prohibition where the disclosure of the information was necessary to lessen or prevent a threat to the life, health, safety or welfare of a person. The Applicant also provided an explanation advising why the exception applied in this case.
20. Having reviewed the information exempted by the Agency in the Document and considered the Applicant's submission, I do not consider release of the information would be necessary to lessen or prevent a threat to the life, health, safety or welfare of any individuals as contemplated by section 104ZY(2)(a)(ii) of the Corrections Act.

21. Nor am I satisfied the other exceptions set out in sections 104ZY or 104ZZ of the Corrections Act apply in the circumstances of this matter.
22. Accordingly, I have determined information in the Document that identifies a third party (or third parties) is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Section 33(1)

23. Having determined the Document is exempt in part under section 38 in conjunction with section 104ZZA of the Corrections Act, it is not necessary for me to consider the application of section 33(1) to the same information.

Deletion of exempt or irrelevant information

24. 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.
25. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹ 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 25.²
26. I have considered the effect of deleting irrelevant information on page 2 of the Document and exempt information on page 1 of the Document. In my view, it is practicable to delete this information as to do so would not require substantial time and effort, and the edited Document would retain meaning.

Conclusion

27. My decision on the Applicant's request is the same as the Agency's decision in that I have decided to release the Document in part, being satisfied information in the Document that identifies a third party (or third parties) is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Review rights

28. 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.³
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵

¹ *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 at [82].

² *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].

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

⁴ Section 52(5).

⁵ Section 52(9).

31. 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.
32. 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.⁶

When this decision takes effect

33. 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.

⁶ Sections 50(3F) and (3FA).