

Notice of Decision and Reasons for Decision

Applicant:	'AK6'
Agency:	Department of Justice and Community Safety
Decision Date:	5 September 2019
Exemptions considered:	Section 31(1)(a) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	'AK6' and Department of Justice and Community Safety (Freedom of Information) [2019] VICmr 96 (5 September 2019)

FREEDOM OF INFORMATION – pathology report – prisoner urine sample – secrecy provision – law enforcement documents

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 refuse access to parts of the documents.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

5 September 2019

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency for access to the following documents:

The pathology reports for [Applicant's] urine samples taken on [date], specifically the adulterant checks and creatinine levels.

2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to grant access to those 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 been briefed by OVIC staff who inspected the parts of the documents claimed to be exempt under section 31(1).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;
 - (c) the Agency's submission dated 15 August 2019; and
 - (d) the Applicant's submission dated 30 August 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

8. The Agency relied on the exemptions under sections 31(1)(d), 33(1) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**), to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.
9. In its submissions, the Agency submitted section 31(1)(a) would also be applicable to parts of the documents.
10. The Applicant was invited to provide submissions with respect to the applicability of section 31(1)(a) to the documents.

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.

11. Having considered the relevant exemptions, and for the reasons set out below, I have determined the documents are exempt in part under sections 38 and 31(1)(a).

Section 38 – Documents to which secrecy provisions apply

12. A document is exempt under section 38 if:
- (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information 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, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
14. The Agency applied section 38 of the FOI Act in conjunction with section 104ZZA of the 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 disclosure is authorised under section 104ZY or 104ZZ.

Penalty: 120 penalty units.

15. Section 104ZX of the Corrections Act defines ‘relevant person’ to mean a person specified in an item of Schedule 5.
16. Section 104ZX of the Corrections Act defines ‘personal or confidential’:

personal or confidential information includes the following—

- (i) information concerning the management of prisons;
- (j) information concerning—
 - (i) security systems and security measures in, or in relation to, a prison; or
 - (ii) security measures taken to protect the community from offenders;

...

Is there an enactment in force?

17. I am satisfied the Corrections Act is an enactment in force for the purposes of section 38.

Does the enactment apply specifically to the kind of information in the documents?

18. The documents comprise of two pathology reports recording the results of a urine specimen collected from the Applicant.
19. The information exempted in the documents is the creatinine levels, urea results and types of drugs tested for.

20. Section 29A in Part 6 – Management and administration of prisons of the Corrections Act provides for the regular drug testing of prisoners.
21. I am satisfied regular drug testing of prisoners is a measure employed to maintain good order and proper administration of prisons in accordance with its statutory obligations under the Corrections Act.
22. I accept details about creatinine levels, urea results and types of drugs tested for in a pathology report is information concerning the management of prisons and the security systems and measures in, or in relation to a prison.
23. I am satisfied the enactment applies specifically to the kind of information in the documents.

Does the enactment prohibit persons from disclosing the information in the document?

24. Having reviewed the circumstances in which disclosure is authorised under sections 104ZY and 104ZZ of the Corrections Act, I am satisfied the Agency is prohibited from disclosing the information in the documents to the Applicant.
25. Disclosure of information in breach of section 104ZZA of the Corrections Act attracts a financial penalty, which highlights the legislatures intention that such information should remain confidential.
26. Accordingly, I am satisfied disclosure of the creatinine levels, urea results and types of drugs tested for is exempt under section 38 of the FOI Act.

Section 31(1)(a) – Law enforcement documents

27. Section 31(1)(a) provides a document is an exempt document if its disclosure under the FOI Act would, or would be reasonably likely to 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.
28. ‘In a particular instance’ does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.²
29. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
30. ‘Proper administration of the law’ includes the manner in which the law is administered, including regulatory, monitoring and compliance activities.³
31. The Supreme Court of Victoria in *Knight v Corrections Victoria*⁴ held:

It is clear from the terms of 31(1) that its provisions, and especially s31(1)(a), are capable of applying to documents concerning the administration and management of prisons generally and concerning individual prisoners specifically. The Tribunal has so decided on a number of occasions, including one where it upheld a decision to refuse to give access to a prisoner to information about himself.

² *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

³ *Cichello v Department of Justice* [2014] VCAT 340 at [23]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] VicRp 72; [1991] 2 VR 322.

⁴ [2010] VSC 338 at [73].

32. The documents comprise two pathology reports that record the results of a urine specimen collected from the Applicant.
33. The information exempted in the documents is the creatinine levels, urea results and types of drugs tested for (the **information**).
34. The Agency contends disclosure of the information would prejudice the proper administration of section 29A of the Corrections Act, which provides for regular drug testing of prisoners.
35. I accept regular drug testing of prisoners is a measure employed to maintain good order and proper administration of prisons in accordance with Corrections Victoria's statutory obligations under the Corrections Act, and the administration of drug testing within a prison is a 'particular instance' for the purpose of section 31(1)(a).
36. Therefore, it is necessary for me to consider whether granting the Applicant access to the information would, or would be reasonably likely to, prejudice the Agency's proper administration of its drug testing program.
37. The phrase 'reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.⁵
38. 'Prejudice' means to hinder, impair or undermine, and includes actual prejudice as well as impending prejudice.⁶
39. I have considered the Agency's decision letter, which states disclosure of the information is reasonably likely to be used by offenders and prisoners to manipulate drug test results.
40. In *Goussis v Secretary to the Department of Justice and Regulation*,⁷ the Victorian Civil and Administrative Tribunal (**VCAT**) accepted:
 - (a) The testing of urinary creatinine levels is relevant to ensuring that the sample has not been adulterated or unduly influenced towards a false result.
 - (b) Low creatinine level results indicate that a prisoner has drunk large amounts of water, and that doing so will influence the result.
 - (c) Knowing the exact result – how much over the threshold the result was – would potentially help a prisoner to know how much more water to drink next time.
 - (d) The information is potentially useful to other prisoners.
41. The Applicant submits 'the threshold level of creatinine which indicates a dilute urine sample, and is indicative of an adulterated sample is available in the public domain'. The Applicant attached the following documents, which state the accepted threshold of 1.76 – 1.8mmol/L:
 - (a) Australian Health Practitioner Regulation Agency 'Drug and Alcohol Screening Protocol – Registrant Information', updated February 2019.

⁵ *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.

⁶ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁷ (*Review and Regulation*) [2017] VCAT 1847 at [40]-[43].

- (b) Drug and Alcohol Service South Australia, 'Urine Drug Screening: its use in determining patient progress', November 2016.
 - (c) Medical Council of New South Wales, 'Participant procedure: drug screening', published 11 April 2018.
 - (d) Government of Western Australia, 'Drug Testing Frequently Asked Questions', last updated 26 October 2015.
42. I consider the accepted threshold, as outlined above, is distinguishable from the creatinine results of a specific individual.
43. In the current circumstances, I am satisfied disclosure of the information would be reasonably likely to prejudice the efficacy of the drug testing of prisoners as part of the administration and management of prisons generally, and individual prisoners specifically.
44. Accordingly, I am satisfied the information is exempt under section 31(1)(a).

Conclusion

45. On the information available, I am satisfied information in the documents that was exempted by the Agency is exempt under sections 31(1)(a) and 38 and partial access is to be granted to the document in accordance with section 25.

Review rights

46. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
47. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
49. 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.
50. 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

51. 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.

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).