

Notice of Decision and Reasons for Decision

Applicant:	'AM1'
Agency:	Department of Justice and Community Safety
Decision date:	19 September 2019
Exemptions considered:	Section 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:	'AM1' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2019] VICmr 109 (19 September 2019)

FREEDOM OF INFORMATION – Corrections Victoria – incident report – injury report – investigation report - 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 a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision regarding the application of the exemption under section 38, in that I have decided to release the document subject to review in part.

I have also decided to release additional information on page two of the document, given the Agency no longer relies on the application of sections 31(1)(a) and 31(1)(d) with respect to the document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

19 September 2019

Reasons for Decision

Background to review

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

My medical records from [date] to [date] when I was a prisoner at [named prison].

All information regarding the injuries I sustained at [named prison], and in particular photographs of those injuries.
2. In its decision, the Agency identified 156 pages of documents falling within the terms of the Applicant's request. It decided to release 81 pages in full and 90 pages 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. The Applicant in their review application indicated they seek review of the Agency's decision in relation to the document titled 'Schedule 1.19(1) Incident/Injury/Investigation Report Form' (**Report**). Accordingly, this review relates to the Agency's decision to grant access to the Report in part only.
5. I have examined a copy of the Report, which is a five page document comprising four sections detailing the incident, a medical report, the prison manager's review and an investigation summary. I note the Agency released the majority of the information in the Report to the Applicant.
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; and
 - (c) all other communications between the Applicant, the Agency and OVIC staff.
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 under sections 31(1)(a), 31(1)(d), 33(1) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) to refuse access to the Report in part. The Agency's decision letter sets out the reasons for its decision.
10. During the review, the Agency advised that it no longer relies on the exemptions under section 31(1)(a) and 31(1)(d) with respect to the Report. Accordingly, this review relates to the information exempted by the Agency under sections 33(1) and 38 only.

Section 38

11. 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).
12. 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

13. As stated above, 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 disclose is authorised under sections 104ZY or 104ZZ.

Penalty: 120 penalty units.

14. Section 104ZX of the Corrections Act defines ‘personal or 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.
15. The term ‘relevant person’ is also defined in section 104ZX of the Corrections Act to include an employee of the Agency.
16. Section 104ZZA of the Corrections Act 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. It is also directed toward maintaining the confidentiality of methods and procedures used in the management of prisons and prisoners under the Corrections Act. The section imposes strict confidentiality requirements on Agency officers, among others, which apply in all but certain limited circumstances.
17. 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 of the FOI Act;
 - (b) section 104ZZA of the Corrections Act in conjunction with section 104ZX identifies, with precision, the type of information to which it applies; and
 - (c) section 104ZZA of the Corrections Act clearly prohibits specified ‘relevant persons’ from disclosing the information to which it applies.

18. The Agency applied the secrecy provision to personal information relating to third parties, such as names, titles, signatures and other information that may identify a third party.
19. Having reviewed the Report, I am satisfied the information exempted by the Agency falls within the definition of 'personal or confidential information' in section 104ZZA of the Corrections Act, and is information to which the secrecy provision applies.
20. 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.
21. The secrecy provision in section 104ZZA is subject to the exceptions outlined in sections 104ZY and 104ZZ of the Corrections Act. However, I am not satisfied the exceptions set out in the Corrections Act apply in the circumstances of this matter.
22. Accordingly, I have determined information in the Report 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 Report 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 information the Agency deleted from part of page 5 of the Report as irrelevant. I agree it falls outside the scope of the Applicant's request because this information relates to a statement recorded in error by the Agency.
27. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

28. My decision on the Applicant's request is the same as the Agency's decision with respect to the application of section 38, in that I have decided to release the Report in part, being satisfied information in the Report 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.

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].

29. Given the Agency no longer relies on the exemptions under sections 31(1)(a) and 31(1)(d) with respect to the Report, I have determined information on page two of the Report that concerns whether photographs were taken and CCTV footage being available can be released to the Applicant.
30. As it is practicable to delete irrelevant and exempt information in the Report, I have determined to grant access to the document in part.

Review rights

31. 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
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
34. 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.
35. 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

36. 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.

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

⁴ Section 52(5).

⁵ Section 52(9).

⁶ Sections 50(3F) and (3FA).