

Notice of Decision and Reasons for Decision

Applicant:	'AR3'
Agency:	Department of Justice and Community Safety
Decision Date:	11 November 2019
Exemption 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:	'AR3' and <i>Department of Justice and Community Safety (Freedom of Information)</i> [2019] VICmr 157 (11 November 2019)

FREEDOM OF INFORMATION – documents provided to Adult Parole Board – secrecy provision

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 fresh 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 am satisfied the documents subject to review are exempt in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

11 November 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant amended the initial request to Part 4 of the Applicant's Individual Management File (**IMF**).
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to 19 pages in full and 87 pages in part and refused access to 4 pages 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. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
5. On 16 September 2019, the Agency made a fresh decision under section 49M(1) to release further documents to the Applicant that were omitted from its original decision.
6. The Agency determined to release 18 pages in full, 96 pages in part and refuse access to 11 pages in full. I note the Agency erroneously released one document in full in its original decision. The Agency refused access to this document in its fresh decision. The fresh decision was made within the required 28 days under section 49M(2).
7. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
8. The Applicant advised they only seek review of the Agency's decision to refuse access to four pages provided to the Adult Parole Board (**APB**).
9. In its fresh decision letter, the Agency confirmed its decision to deny access in full to the documents provided to the APB had not changed.
10. I have been briefed by OVIC staff who inspected the documents subject of review and claimed to be exempt under section 31(1).¹
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's fresh decision on the FOI request;
 - (b) the Applicant's submission dated 13 June 2019 and information provided with the Applicant's review application;
 - (c) the Agency's submission dated 25 October 2019; and
 - (d) correspondence received from the Applicant during the review.

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.

13. The Agency described the document subject of review as one document. However, in conducting this review, I have determined it is more accurately described as three documents:
- (a) Parole Application Form, dated [specified date] (one page) (**Document 1**);
 - (b) Case Management Review Committee Parole Application Report, endorsed [on specified date] (two pages) (**Document 2**); and
 - (c) Review of Satisfactory Behaviour for Parole Application, dated [specified date] (one page) (**Document 3**).
14. 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

15. The Agency relies on the exemptions in sections 38, 31(1)(a) and 33(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 38

16. The Agency exempted the documents in full under the 'secrecy exemption' in section 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) applying these secrecy provisions to:
- (a) the names, positions and signatures of corrections staff; and
 - (b) information provided to the APB that is not disclosed in a decision of the APB.
17. 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.

18. 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.
19. 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.

20. The terms 'relevant person' and 'personal and confidential information' are defined in section 104ZX of the Corrections Act, which relevantly provides:

personal or confidential information includes the following –

...

- (b) information relating to the classification of a prisoner under this Act;

- (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;
- (d) information given to the Adult Parole Board that is not disclosed in a decision of the Board or in any reasons given by the Board for a decision of the Board;

...

21. The phrase ‘relevant person’ is set out in Schedule 5, which includes:

...

- (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

22. 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.

23. Relevantly, section 104ZZA of the Corrections Act is directed toward maintaining the confidentiality of methods and procedures used in the management of prisons and prisoners. The section imposes strict confidentiality requirements on Agency officers, among others, which apply in all but limited circumstances.

24. I am satisfied section 104ZZA of the Corrections Act is a secrecy provision to which section 38 of the FOI Act applies as:

- (a) the Corrections Act is an enactment in force;
- (b) section 104ZZA in conjunction with section 104ZX identifies, with precision, the type of information to which it applies; and
- (c) section 104ZZA clearly prohibits specified ‘relevant persons’ from the use or disclosure of the type of information to which it applies. Further, the provision includes that it is an offence for a ‘relevant person’ to disclose information in contravention of the prohibition.

25. In relation to the section 104ZX(d) of the Corrections Act, OVIC staff sought confirmation from the Agency as to whether or not the information provided to the APB was disclosed in a decision of the APB or in any reasons for decision given by the APB. The Agency confirmed neither of these events have occurred. Therefore, I am satisfied the requirements under section 104ZX(d) of the Corrections Act are met in this case.

26. Accordingly, on the information before me, I am satisfied the documents are exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act on grounds the documents contain ‘personal and confidential information’ and each of the documents were provided to the APB. Further, I do not consider any of the exceptions in section 104ZY of the Corrections Act apply in this case.

27. In making this decision, I note the Corrections Act does not provide for any discretion as to whether the documents sought can be released to the Applicant. This means that, as I am satisfied the documents are captured by section 104ZZA of the Corrections Act, they are exempt from disclosure under section 38 of the FOI Act.

Deletion of exempt or irrelevant information

28. 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.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'² 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 25.³
30. As the documents are exempt in full under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act, there is no obligation for the Agency to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25.

Sections 31(1)(a) and 33(1)

31. In light of my decision in relation to section 38, it is not necessary for me to consider the additional exemptions relied on by the Agency under sections 31(1)(a) and 33(1).

Conclusion

32. On the information available, I am satisfied the documents are exempt in full under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Review rights

33. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.⁴
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
36. 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.
37. 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.⁷

When this decision takes effect

38. 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.

² *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].

³ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
1.	[specified date]	Parole Application Form	1	Refused in full Sections 31(1)(a), 33(1) and 38	Refuse in full Section 38 in conjunction with section 104ZZA of the Corrections Act
2.	[specified date]	Case Management Review Committee Parole Application Report	2	Refused in full Sections 31(1)(a), 33(1) and 38	Refuse in full Section 38 in conjunction with section 104ZZA of the Corrections Act
3.	[specified date]	Review of Satisfactory Behaviour for Parole Application	1	Refused in full Sections 31(1)(a), 33(1) and 38	Refuse in full Section 38 in conjunction with section 104ZZA of the Corrections Act