

Notice of Decision and Reasons for Decision

Applicant:	'AT2'
Agency:	Department of Justice and Community Safety
Decision date:	22 November 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:	'AT2' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2019] VICmr 174 (22 November 2019)

FREEDOM OF INFORMATION – secrecy provision – CCTV footage – body-worn camera footage – personal or confidential information – secrecy provision – prison records – security and management of prisons

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 is the same as the Agency's decision in that I have decided to refuse access to the document in full.

I am satisfied the document is exempt in full under section 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
22 November 2019

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency for access to documents in relation to an incident that occurred when the Applicant was detained in custody.
2. As a result of the incident, the Applicant's legal representative submits the Applicant received medical attention.
3. The FOI request sought access to the following documents:
 1. [Applicant's] individual Management File;
 2. [Applicant's] medical file;
 3. Any documents pertaining to the Incident, including but not limited to:
 - 3.1. documents pertaining to any complaint made by [the Applicant];
 - 3.2. incident reports;
 - 3.3. statements made by any officer, employee or contractor of the Department or [correctional facility];
 - 3.4. notes taken by any officer, employee or contractor of the Department or [correctional facility];
 - 3.5. investigation reports;
 - 3.6. photographs; and
 - 3.7. CCTV footage.
 4. Documents pertaining to [the Applicant's] medical treatment following the Incident;
 5. Documents pertaining to [the Applicant's] transfer to [correctional facility]; and
 6. All CCTV footage that features [the Applicant] at [correctional facility] between the period of [time frame] on [specific date].
4. Following consultation with the Agency on 23 May 2019, the Applicant amended their initial request to:

...parts of [the Applicant's] Individual Management file and medical file that are applicable to the period [they were] at [correctional facility] for [their] current term of imprisonment. ...other request for specific documents relating to the incident on [date] remains the same.
5. In its decision, the Agency identified 122 pages of documents and CCTV footage falling within the terms of the Applicant's request. The Agency grant access to 24 pages in full, 97 pages in part and refused access to the CCTV footage in full.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access in full to the CCTV footage, which also contained body worn camera footage (the **footage**) only.
7. The Applicant, through their legal representative, advised the Applicant seeks access to the footage to explore possible civil law remedies as a result of the alleged incident and does not seek 'to distribute the CCTV footage or publish it for a 'wider audience'.
8. Section 63D provides documents exempted under section 31(1) may only be inspected at an agency's premises. As such I am not entitled to take possession of the footage, but have been briefed by OVIC staff who viewed the footage subject to review on 11 September 2019.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

10. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated 26 September 2019 and information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 22 October 2019.
11. 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

12. The Agency relied on the exemptions in sections 31(1)(a), 31(1)(d), 33(1) and 38 under the FOI Act along with section 104ZZA of the *Corrections Act 1986 (Vic)* (**Corrections Act**) to refuse access to the footage. The Agency's decision letter sets out the reasons for its decision.

Section 38

13. 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.

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

14. The Agency relies on section 38 in conjunction with section 104ZZA of the Corrections Act to refuse access to the footage in full. The Agency submitted these secrecy provisions apply to:
 - (a) the images, identifiable personal markings and names of staff, other prisoners and third parties; and
 - (b) images of security systems and security measures in prison, including the information that concerns the security and management of prisons.

15. Section 104ZZA of the Corrections Act 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.

16. The term 'personal and confidential information' is defined in section 104ZX of the Corrections Act, which relevantly provides:

personal or confidential information includes the following –

(a) information relating to the personal affairs of a person who is or has been an offender or a prisoner;

...

(c) information –

(i) that identifies any 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;

...

(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;

...

17. The words 'relevant person' in section 104ZX are defined in Schedule 5 to include:

...

(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.

18. 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. The provision is also 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 certain limited circumstances.

19. 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 disclosing the information to which it applies.

20. From my briefing by OVIC staff on the content of the footage, I am satisfied it contains information that falls within the definition of 'personal or confidential information' in section 104ZX(a), (c), (i) and (j) of the Corrections Act, and is information to which the secrecy provision applies.
21. Further, I am satisfied the content of the footage, if released, would reveal information about the operation of security measures, protocols and plans followed by prison staff in dealing with emergencies resulting from incidents.
22. Section 104ZZA of the Corrections Act clearly prohibits the use or disclosure of the type of information to which it applies. It is an offence to disclose information in contravention of that prohibition.
23. Conversely, the secrecy provision in section 104ZZA is subject to exceptions in sections 104ZY and 104ZZ of the Corrections Act, which permit the release of personal or confidential information in certain circumstances.
24. I note the submission of the Applicant's representative in relation to this point, that:

...in the circumstances, disclosure is permissible because the footage is being provided to an Australian lawyer for the purpose of obtaining legal advice or representation in relation to the administration or operation of Corrections legislation...

25. Section 104ZY(2)(m) provides:

104ZY Authorisation to use or disclose information

...

- (2) A relevant person may also use or disclose personal or confidential information in the following circumstances—

...

- (m) if the use or disclosure is to an Australian lawyer for the purpose of obtaining legal advice or representation in relation to the administration or operation of Corrections legislation;

...

26. I have considered the Applicant's submission in relation to the exception in section 104ZY(2)(m). However, I do not accept the Applicant's submission as I am of the view this exception applies in the context of an Australian lawyer engaged by the Agency for the purpose of obtaining legal advice in relation to the administration or operation of Corrections Act only. I do not interpret the provision to extend to the use or disclosure to a legal representative of a person seeking access to a document under the FOI Act.
27. I acknowledge the Applicant's purpose for seeking access to the footage, as submitted by [their] legal representative in their submission dated 26 September 2019. However, the secrecy exemption under section 38 of the FOI Act does not provide for any public interest or other considerations in determining whether this exemption applies.
28. Accordingly, on the information before me, I am satisfied the footage is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

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

29. I note the Applicant's representative made detailed submissions in relation to the Agency's application of additional exemptions under sections 31(1)(a), 31(1)(d) and 33(1). However, in light of

my decision that the document is exempt in full under section 38, it is not necessary for me to consider these additional exemptions.

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'¹ and the effectiveness of the deletions. Where deletions would render a document meaningless they are not 'practicable' and release of an edited copy of the document is not required under section 25.²
32. I acknowledge the Applicant is agreeable to receiving a redacted copy of the footage. Having considered the effect of deleting exempt information from the footage, I am satisfied it would not be practicable to delete or edit exempt information from the footage as do so would render the footage meaningless. Accordingly, I am satisfied there is no obligation to provide an edited copy of the footage in accordance with section 25.

Conclusion

33. On the information available, I am satisfied the footage is exempt in full under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Review rights

34. 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
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
37. 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.
38. 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

39. 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.

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).

⁶ Sections 50(3F) and (3FA).