

Notice of Decision and Reasons for Decision

Applicant:	'AX1'
Agency:	Department of Justice and Community Safety
Decision date:	19 December 2019
Exemptions considered:	Sections 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:	'AX1' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2019] VICmr 209 (19 December 2019)

FREEDOM OF INFORMATION – pathology report – prisoner urine sample – urinalysis test report – 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 differs from the Agency's decision in that I have decided to release further information in the documents, and an additional document identified by the Agency during the review.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
19 December 2019

Reasons for Decision

Background to review

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

... my urine sample that was conducted at [named] Prison on [date], that urine resulted with a positive screening to the medication [drug]. I have request to the FOI to get my urine screening results. I requested to see the specific drug or medications and the level of that screening...

I would still like to request another result of the urine sample on the [date] which was conducted at [named] Prison in [location]. I would like all the readings, all the information about that urine screening...

Also on the [date] and the [date], I had more urine screening taken, can I please get the information for these screening too please, on the [date] my urine screening was taken at [named] prison, I would like the levels of the drug or medication it was positive for and levels. On the [date] I also went another drug screening, that screening resulted in a adulterated result, I would like to request for the results of the urine screen on the [date], I would like all the information of the screening, most importantly the substance that was used to adulterate the urine...

2. In its decision, the Agency identified eight documents falling within the terms of the Applicant's request. It decided to grant access to all 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. During the review, the Agency informed OVIC staff an additional document (Document 9) had been identified as relevant to the terms of the Applicant's request.
5. I have been briefed by OVIC staff who inspected the parts of the documents claimed to be exempt under section 31(1),¹ including the additional document identified by the Agency.
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) the Agency's submission, dated 17 December 2019.
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.

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.

Review of exemptions

9. The Agency relies on the exemptions under sections 31(1)(a), 31(1)(d) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986 (Vic) (Corrections Act)*, to refuse access to parts of the documents.
10. The Agency's decision letter sets out the reasons for its decision.

Section 38 – Documents to which secrecy provisions apply

11. 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).
12. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
13. 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.

14. Section 104ZX of the Corrections Act defines 'relevant person' as a person specified in an item of Schedule 5.
15. 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?

16. 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?

17. The documents comprise six pathology reports and three urinalysis test reports recording results of urine specimens collected from the Applicant while in prison.

18. The information exempted in the documents is the creatinine levels, adulterant check results, types of drugs tested for and general statements relating to the results.
19. The Agency submits urea results were erroneously released to the Applicant, and should have been exempted.
20. Section 29A in Part 6 of the Corrections Act (Management and administration of prisons) provides for regular drug testing of prisoners.
21. Regular drug testing is a measure employed to maintain good order and proper administration of prisons in accordance with its statutory obligations under the Corrections Act.²
22. In this case, I consider details about creatinine levels, adulterant check results, urea results and types of drugs tested for in a pathology report is information that concerns the management of prisons and the security systems and measures in, or in relation to a prison. Therefore, I am satisfied the enactment applies specifically to this kind of information in the documents.

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

23. 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.
24. 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.
25. Accordingly, I am satisfied certain information in the documents is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

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

26. 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.
27. ‘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.³
28. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
29. ‘Proper administration of the law’ includes the manner in which the law is administered, including regulatory, monitoring and compliance activities.⁴
30. The Supreme Court of Victoria in *Knight v Corrections Victoria*⁵ 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 *Goussis v Secretary to the Department of Justice and Regulation (Review and Regulation)* [2017] VCAT 1847 at [36].

³ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁴ *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.

⁵ [2010] VSC 338 at [73].

31. As stated above, the documents comprise six pathology reports and three urinalysis test reports recording the results of urine specimens collected from the Applicant.
32. The information exempted in the documents is the creatinine levels, adulterant check results, types of drugs tested for, and general statements relating to the results (the **information**).
33. The Agency submits urea results were erroneously released to the Applicant, and should have been exempted.
34. The Agency contends disclosure of the information and urea results 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.⁶
38. 'Prejudice' means to hinder, impair or undermine, and includes actual prejudice as well as impending prejudice.⁷
39. I have considered the Agency's decision letter, which states disclosure of the information is reasonably likely to be used by prisoners to manipulate drug test results.
40. In *Goussis v Secretary to the Department of Justice and Regulation*,⁸ 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. In the current circumstances, I am satisfied disclosure of certain information in the documents 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.
42. Accordingly, I am satisfied certain information in the documents is exempt under section 31(1)(a).

⁶ *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.

⁷ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁸ (Review and Regulation) [2017] VCAT 1847 at [40]-[43].

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

43. As I am satisfied the information is exempt under sections 38 and 31(1)(a), it is not necessary for me to consider this additional exemption relied on by the Agency.

Deletion of exempt or irrelevant information

44. 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.
45. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁹ 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 25.¹⁰
46. I have considered the effect of deleting exempt and irrelevant information in the Documents. I am satisfied it is practicable to delete such information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

47. My decision differs from the Agency’s decision in that I have decided to release further information in Documents 7 and 8, and information contained in an additional document (Document 9) identified by the Agency during the review.
48. Otherwise, I am satisfied certain information in the documents is exempt under sections 31(1)(a) and 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
49. As I am satisfied it is practicable to delete exempt and irrelevant information in the documents in accordance with section 25, I have decided to grant access to the documents in part.
50. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

51. 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.¹¹
52. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
53. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
54. 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.

⁹ *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].

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

55. 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.¹⁴

When this decision takes effect

56. 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.

¹⁴ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	PIMS Urinalysis Test Report (Collected: [date])	1	Release in part Sections 31(1)(a), 31(1)(d), 38	Release in part Sections 31(1)(a), 38, 25 Information exempted by the Agency is to remain deleted.	<p>Section 31(1)(a): I am satisfied disclosure of the types of drugs tested for by the Agency in prisons would be reasonably likely to prejudice the proper administration of section 29A of the Corrections Act.</p> <p>Section 38: I am satisfied section 38 of the FOI Act applies in conjunction with section 104ZZA of the Corrections Act.</p> <p>Section 25: I am satisfied it is practicable to delete exempt information in the documents in accordance with section 25 and the deletions made by the Agency.</p>
2.	[Date]	Pathology Report (Collected: [date])	1	Release in part Sections 31(1)(a), 31(1)(d), 38	Release in part Sections 31(1)(a), 38, 25 I note the urea results were inadvertently disclosed by the Agency. This information is exempt and is to be deleted.	<p>Section 31(1)(a): I am satisfied disclosure of the creatinine level, urea result, adulterant check result, types of drugs tested for and general statement regarding the results would be reasonably likely to prejudice the proper administration of section 29A of the Corrections Act.</p> <p>Section 38: I am satisfied section 38 of the FOI Act applies in conjunction with section 104ZZA of the Corrections Act.</p> <p>Section 25: I am satisfied it is practicable to delete exempt information in the documents in accordance with section 25 and the</p>

Annexure 1 – Schedule of Documents

						deletions made by the Agency.
3.	[Date]	PIMS Urinalysis Test Report (Collected: [date])	1	Release in part Sections 31(1)(a), 31(1)(d), 38	Release in part Sections 31(1)(a), 38, 25 Information exempted by the Agency is to remain deleted.	See comments for Document 1.
4.	[Date]	Pathology Report (Collected: [date])	1	Release in part Sections 31(1)(a), 31(1)(d), 38	Release in part Sections 31(1)(a), 38, 25 I note the urea results were inadvertently disclosed by the Agency. This information is exempt and is to be deleted.	See comments for Document 2.
5.	[Date]	Pathology Report (Second Sample Verification - Collected: [date])	1	Release in part Sections 31(1)(a), 31(1)(d), 38	Release in part Sections 31(1)(a), 38, 25 I note the urea results were inadvertently disclosed by the Agency. This information is exempt and is to be deleted.	See comments for Document 2.
6.	[Date]	PIMS Urinalysis Test Report (Collected: [date])	1	Release in part Sections 31(1)(a),	Release in part Sections 31(1)(a), 38, 25	See comments for Document 1.

Annexure 1 – Schedule of Documents

				31(1)(d), 38	Information exempted by the Agency is to remain deleted.	
7.	[Date]	Pathology Report (Collected: [date])	1	Release in part Sections 31(1)(a), 31(1)(d), 38	Release in part Sections 31(1)(a), 38, 25 The following information is not exempt and is to be released : <ul style="list-style-type: none"> • adulterant check result; and • the final paragraph. 	Section 31(1)(a): I am satisfied disclosure of the creatinine level, urea result, and types of drugs tested for would be reasonably likely to prejudice the proper administration of section 29A of the Corrections Act. Section 38: I am satisfied section 38 of the FOI Act applies in conjunction with section 104ZZA of the Corrections Act. Section 25: I agree with the deletions made by the Agency with respect to the creatinine level, urea result and types of drugs tested for. I am not satisfied the adulterant check result or the general statement is exempt under sections 31(1)(a) or 38. Accordingly, this information is to be released. I note the Agency provided its agreement to release this information to the Applicant.
8.	[Date]	Pathology Report (Second Sample Verification – Collected: [date])	1	Release in part Sections 31(1)(a), 31(1)(d), 38	Release in part Sections 31(1)(a), 38, 25 The following information is not exempt and is to be released : <ul style="list-style-type: none"> • adulterant check 	See comments for Document 7.

Annexure 1 – Schedule of Documents

					<p>result; and</p> <ul style="list-style-type: none"> the final paragraph. 	
9.	[Date]	<p>Pathology Report (Second Sample Verification – Collected: [date])</p>	1	N/A	<p>Release in part Sections 31(1)(a), 38, 25</p> <p>The following information is exempt and is to be deleted:</p> <ul style="list-style-type: none"> Line 4: the creatinine level; Lines 5 and 6: the results; and the final paragraph <p>The following information is irrelevant and is to be deleted:</p> <ul style="list-style-type: none"> the word preceding ‘Laboratory’; the phone number of the laboratory; and the Pathologist’s identifier 	<p>Note: During the review, the Agency identified this additional document which is relevant to the terms of the Applicant’s request.</p> <p>Sections 31(1)(a) and 38: See comments for Document 2.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.</p>