



Office of the Victorian
Information Commissioner

t 1300 00 6842
e enquiries@ovic.vic.gov.au
w ovic.vic.gov.au

PO Box 24274
Melbourne Victoria 3001

Notice of Decision and Reasons for Decision

Applicant:	'AY7'
Agency:	Department of Justice and Community Safety
Decision Date:	27 December 2019
Exemptions considered:	Sections 25A(5) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 104ZZA of <i>Corrections Act 1986</i> (Vic)
Citation:	'AY7' and <i>Department of Justice and Community Safety (Freedom of Information)</i> [2019] VICmr 219 (27 December 2019)

FREEDOM OF INFORMATION – refusal to process on grounds all documents would be exempt – CCTV footage – secrecy provision – prison records – security management 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.

I am satisfied the requirement for the application of section 25A(5) are met. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's FOI request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

27 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to CCTV footage of an incident that occurred in a prison. The Applicant states they appear in the footage.
2. The Agency relies on section 25A(5) to refuse to grant access to documents in accordance with the Applicant's request. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request, without having identified any relevant documents if it is apparent from the nature of the request all documents would be exempt under the FOI Act, and where it is not possible to release an edited copy with exempt material deleted, or it is clear the applicant does not seek an edited copy of the documents.
3. In refusing access to the requested documents under section 25A(5), the Agency relied on the exemptions under sections 31(1)(a), 31(1)(d), 33(1), and 38 in conjunction with sections 104ZZA and 104ZX of the *Corrections Act 1986* (Vic) (**Corrections Act**).
4. The reasons for the Agency's decision are set out in its decision letter dated 21 November 2019.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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; and
 - (b) the Agency's submission dated 16 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.

Review

9. The power in section 25A(5) is carefully circumscribed. A decision maker must be satisfied of the following three elements, which operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all the documents sought in the request would be exempt.
 - (c) Third, it must be apparent from:
 - (i) the nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document; or

- (ii) the request, or through consultation with the applicant, that the person would not wish to have access to an edited copy of the document.¹

What is the essential character of the documents requested?

10. The Agency submits the incident at the prison involved two prisoners, neither of whom are the Applicant.
11. Accordingly, I am satisfied the essential quality or character of the documents, as described in the Applicant's request, is CCTV footage of the incident.

Would the documents requested, as described by the Applicant, be exempt?

12. In refusing access to the requested documents under section 25A(5), the Agency relies on sections 31(1)(a), 31(1)(d), 33(1), and 38 in conjunction with sections 104ZZA and 104ZX of the *Corrections Act 1986* (Vic) (**Corrections Act**) to exempt the document from release.

Section 38 – Documents to which a secrecy provision applies

13. Section 38 provides:

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.

14. For a document to be exempt under section 38, three conditions must be satisfied:

- (a) there must be an enactment in force;
- (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
- (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications).

Is there an enactment in force?

15. The Agency relies on section 38 of the FOI Act in conjunction with sections 104ZZA and 104ZX of the *Corrections Act* to refuse access to the CCTV footage sought.
16. I am satisfied the *Corrections Act* is an enactment in force for the purposes of section 38 of the FOI Act.

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

17. The Agency submits:

Section 104ZZA of the *Corrections Act* prohibits the disclosure of confidential information. CCTV of a prisoner assault and staff response is confidential information under section 104ZX of the *Corrections Act* as follows:

- (g) information concerning the investigation of a contravention of the law by (ii) a prisoner;

¹ *Knight v Corrections Victoria* [2010] VSC 338.

(h) information concerning procedures to be followed in a prison in the event of an emergency.

18. 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.

19. Section 104ZX of the Corrections Act defines 'relevant person' as a person specified in an item of Schedule 5 of that Act and 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.

20. The term 'personal and confidential information' is defined in section 104ZX of the Corrections Act and includes the following, which I consider relevant in this matter:

- (a) information relating to the personal affairs of a person who is or has been an offender or a prisoner;
- ...
- (g) information concerning the investigation of a contravention or possible contravention of the law by-
 - ...
 - (ii) a prisoner
- (h) information concerning procedures or plans to be adopted or followed in a prison in the event of an emergency;
- (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;
- ...

21. In its decision, the Agency states the following would be classified as 'personal or confidential information' in accordance with section 104ZX of the Corrections Act:

- (a) the images of other prisoners; and
- (b) information concerning the management of prisons or the security measures in a prison, being information about the use of CCTV cameras in a maximum security prison.

22. Section 104ZZA of the Corrections Act operates to protect the personal privacy of persons who are identified in documents created in connection with the management and administration of the corrections system, including prisoners. 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.

23. I am satisfied CCTV footage of an incident within a maximum security prison, if released, would contain information that falls within the definition of 'personal or confidential information' in section 104ZX(a), (a), (g) - (j) of the Corrections Act, and is information to which the secrecy provision applies.
24. 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.

Does the enactment prohibit persons from disclosing the CCTV footage?

25. 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.
26. However, 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.
27. I am satisfied the exceptions do not apply in this instance.
28. In summary, 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.
29. Accordingly, on the information before me, I am satisfied the footage would be exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Is there scope to provide an edited copy of the documents requested?

30. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency 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'² and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable', and release of an edited copy of a document is not required under section 25.³
32. Having considered the nature of the requested documents, I am satisfied deleting all exempt information from the documents would render them meaningless given the document is CCTV footage and the footage sought by the Applicant would be exempt. Therefore, I am satisfied it would not be practicable to provide an edited copy of the requested document in accordance with section 25.

² *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].

³ *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].

Conclusion

33. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:
- (a) The essential quality or character of the documents, as described in the Applicant's request, would be CCTV footage taken within a prison.
 - (b) Given the nature of the requested document, I am satisfied any relevant footage, should it exist, would be exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
 - (c) I am satisfied it is not practicable to provide an edited copy of the footage, with exempt material deleted in accordance with section 25, as to do so would render it meaningless.
34. Accordingly, on the information before me, I am satisfied the footage would be exempt under section 25A(5).

Applications of sections 31(1)(a), 31(1)(d) and 33(1)

35. I note the Agency determined the footage would also be exempt under sections 31(1)(a), 31(1)(d) and 33(1). However, in light of my decision that the footage is exempt in full under section 38, it is not necessary for me to consider those additional exemptions.

Review rights

36. 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.⁴
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
39. 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.
40. 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

41. 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.

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).