

Notice of Decision and Reasons for Decision

Applicant:	'AZ5'
Agency:	Department of Justice and Community Safety
Decision Date:	31 December 2019
Provisions 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:	'AZ5' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2019] VICmr 231 (31 December 2019)

FREEDOM OF INFORMATION – prison records – CCTV footage – security and management of prisons – personal or confidential information – 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 decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs to the Agency's decision. I have determined to release some of the documents in part and refuse access to certain documents in full.

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
31 December 2019

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency for access to certain documents about an alleged assault (the incident) involving the Applicant while detained in custody.

2. Following consultation with the Agency, the Applicant clarified the initial request to the following:

Documents relating to an alleged assault at the [named] Correctional Centre Medical Facility in or around [date range], after which [named person] received medical treatment for injuries sustained including a [description of injury] (the Incident).

Our client requests that the Department of Justice and Regulation provide copies of the following information or documents to the [named representative]:

1. All documentation, including incident reports, [named person]’s Individual management file and medical file, relating to the Incident, including, but not limited to:
 - a. Documents outlining any interactions between [named person] and prison medical staff or prison officers prior, during or subsequent to the Incident; and
 - b. Any statements by prison employees about the Incident.
 2. Any subsequent documentation after the Incident that refers to the incident, including internal emails or correspondence.
 3. Any photographs of [named person]’s injuries incurred on the day of the Incident.
 4. Any CCTV footage or body camera footage taken of the Incident.
 5. Any documents prior to the Incident which contain risk assessment and/or security ratings for [named person].
3. In its decision letter dated 6 June 2019, the Agency advised 90 pages were identified as falling within the terms of the Applicant’s request. The Agency granted access to seven pages in full, released 50 pages in part, and refused access to 39 pages in full and CCTV footage (the **footage**).
 4. During the review, the Agency advised it had granted access to eight pages in full, 49 pages in part, and 38 pages were refused in full. The Agency also confirmed one document had been updated since the decision (Document 1) and that an additional one page document had been located (Document 25).

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency’s decision to refuse access.
6. I have examined copies of the documents subject to review and been briefed by OVIC staff, who inspected the documents and CCTV footage claimed to be exempt under section 31(1).¹
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties, including:

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.

- (a) the Agency's decision on the FOI request;
 - (b) the information provided with the Applicant's review application and subsequent correspondence with OVIC; and
 - (c) the Agency's submission dated 10 July 2019 and correspondence with OVIC.
9. 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

10. The Agency relied on the exemptions in sections 30(1), 31(1)(a), 33(1), 35, and 38 under the FOI Act along with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) to refuse access to certain documents in part and access in full to other documents and the footage. The Agency's decision letter sets out the reasons for its decision.
11. I note Document 24 was released to the Applicant in full and is therefore not subject to this review.

Section 38

12. 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.

11. 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 that specific kind of information in the document (either absolutely or subject to exceptions or qualifications).

Application of the secrecy provision

13. The Agency relied on section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act to refuse access to certain documents and the footage in full, and refuse access to certain documents in part.
14. The Agency applied the secrecy provision to:
- (a) the names, position titles, contact numbers, signatures, and user numbers of corrections and other prison staff;
 - (b) the images, identifiable personal markings and names of prison staff, other prisoners and third parties;
 - (c) photographs and medical reports of injuries sustained by prison staff;

- (d) images of security systems and security measures in prison, including the information that concerns the security and management of prisons;
- (e) information about the measures and other operational capabilities used by the Agency to ensure the security of the prison, staff and prisoners;
- (f) information regarding the location of Applicant's family members;
- (g) information regarding staff rosters, duties, station or post allocations, and time stamps in documents; and
- (h) names of other prisoners, and names, addresses and contact numbers of third parties.

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 disclosure 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, 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;
- ...
- (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;
- ...
- (g) information concerning the investigation of a contravention of the law by –
 - (i) an offender; or
 - (ii) a prisoner; or
 - (iii) an officer within the meaning of Part 5 or Part 9; or
 - (iv) a person authorised under section 9A to exercise a function or power; or
 - (v) a person working with, or in contact with, offenders or prisoners; or
 - (vi) a person engaged in the administration of this Act;
- (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;
- ...

17. The 'relevant person' in section 104ZX is 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 review of documents provided to OVIC and my briefing by OVIC staff on the content of the footage and documents exempted under section 31(1), I am satisfied the documents and footage contain information that falls within the definition of 'personal or confidential information' in section 104ZX(a), (c), (g), (h), (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 and exempt information in the documents, 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 acknowledge the Applicant's purpose for seeking access to the footage, as submitted by their legal representative in their submission dated 6 August 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.
25. Accordingly, on the information before me, I am satisfied the documents are exempt in full or in part under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
26. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each document.

Sections 30(1), 31(1)(a), 33(1) and 35(1)(b)

27. Given I am satisfied the documents are exempt in full and in part under section 38, it is not necessary for me to consider additional exemptions relied on by the Agency.

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. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information in some documents that are to be released in part, because it does not require substantial time and effort, and the edited documents would retain meaning.
31. 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

32. On the information before me, I am satisfied the documents are exempt under section 38 in part and in full as set out in **Annexure 1**.

Review rights

33. 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
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

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].

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).

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.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date] (printed on [date])	PIMS Incident Report, Incident: [number] Date of Incident: [date] (version originally processed was printed on [date] – replaced with an update containing additional material)	1	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	The document was updated following the Agency's decision on 6 June 2019. The Agency is to release an updated version of the document. Section 38: I am satisfied this document is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act, which prohibits the disclosure of personal or confidential information as defined in section 104ZX(c)(i).
2.	[date]	Incident/Injury/Investigation Report Form	8	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Section 38: I am satisfied this document is exempt in part under section 38 in conjunction with section 104ZZA of the Corrections Act, noting two pages of medical reports relating to [Agency] staff are exempt in full. See reasons for Document 1.
3.	[date]	Use of Force Register	1	Released in part Sections 31(1)(a), 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain	Section 38: I am satisfied this document is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act, which prohibits the disclosure of personal or confidential information as defined in section 104ZX(c)(i), (ii) and 104ZX(j)(i).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					deleted.	
4.	[date]	Incident log	1	Released in part Sections 31(1)(a), 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Section 38: I am satisfied information exempted by the Agency is exempt in part under section 38. See comments for Document 3.
5.	[date]	Photographs	4	Refused in full Sections 33(1) and 38	Refuse in full Section 38 in conjunction with section 104ZZA of the Corrections Act	Section 38: The document contains photographs of [Agency] staff and injuries sustained. I am satisfied this document is exempt in full under section 38. See reasons for Document 1.
6.	[date]	Accident and Incident Details – database screen dumps	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	Section 38: I am satisfied this document is exempt in full under section 38 in conjunction with the secrecy provision in section 104ZZA of the Corrections Act, which prohibits the disclosure of personal or confidential information as defined in section 104ZX(c)(i), 104ZX(h) and 104ZX(i).
7.	[date]	Staff lists	2	Refused in full Sections 31(1)(a), 33(1)	Refuse in full Section 38 in conjunction with section 104ZZA of the	Section 38: See comments for Document 6.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				and 38	Corrections Act	
8.	[date]	List of possible witnesses	1	Refused in full Sections 33(1) and 38	Refuse in full Section 38 in conjunction with section 104ZZA of the Corrections Act	Section 38: I am satisfied this document is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act, which prohibits the disclosure of personal or confidential information as defined in section 104ZX(a).
9.	[date range]	Memoranda re incident x 14	15	Released in part Sections 31(1)(a), 33, 35 and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Section 38: I am satisfied this document is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act, which prohibits the disclosure of personal or confidential information as defined in section 104ZX(c)(i) and (ii), 104ZX(i) and 104ZX(j)(i).
10.	[date]	Emails re incident x 3	3	Released in part Sections 31(1)(a), 33(1), 35(1)(b) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Section 38: I am satisfied information exempted by the Agency is exempt in part under section 38. See comments for Document 9.
11.	[date]	Memorandum re incident	2	Released in part	Release in part	Section 38: I am satisfied the names of

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Sections 33(1) and 38	Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Agency staff are exempt under section 38. See comments for Document 1.
12.	[date]	Investigation Report	29	Refused in full Sections 30, 31(1)(a), 33(1), 35(1)(b) and 38	Refuse in full Section 38 in conjunction with section 104ZZA of the Corrections Act	Section 38: I am satisfied this document is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act, which prohibits the disclosure of personal or confidential information as defined in section 104ZX(g).
13.	[dates]	Encounters – medical file	3	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Section 38: I am satisfied this document is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act, which prohibits the disclosure of personal or confidential information, as defined in section 104ZX(c)(i) and 104ZX(c)(ii).
14.	[date]	CCTV footage	CD	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	Section 38: I am satisfied this document is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act, which prohibits the disclosure of personal or confidential information as defined in

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						section 104ZX(c)(i), 104ZX(c)(ii), 104ZX(h), 104ZX(i) and 104ZX(j)(i).
15.	[date]	Authority to Separate a Prisoner x 2	2	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Section 38: I am satisfied information exempted by the Agency is exempt in part under section 38. See comments for Document 13.
16.	[date range]	e:notes – [facility] File Note Management Recording System	3	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Section 38: I am satisfied information exempted by the Agency is exempt in part under section 38. See comments for Document 1.
17.	[date range]	Local Plan File Notes	4	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain	Section 38: I am satisfied the information exempted by the Agency is exempt in part under section 38. See comments for Document 13.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					deleted.	
18.	[date]	PIMS Sentence Management Unit 2 Sheet B – Sentence Management Panel	4	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted, except for the name on pages 2-3 under the heading 'Panel Discussion', which is a reference to the Applicant.	Section 38: I am satisfied the names of prison staff are exempt under section 38 in conjunction with section 104ZZA of the Corrections Act Further, the Agency confirmed the first name deleted on pages 2-3 under the heading 'Panel Discussion' is a typographical error and reference is to the Applicant. As such, the first name on those pages is to be released. See comments for Document 13.
19.	[date]	Authority to Exchange Information	1	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the Corrections Act Information exempted by the Agency is to remain deleted.	Section 38: I am satisfied the names of prison staff are exempt under section 38. See comments for Document 13.
20.	[date]	PIMS Sentence Management Unit 2 Sheet B – Case Management Review Committee	3	Released in part Sections 33(1) and 38	Release in part Section 38 in conjunction with section 104ZZA of the	Section 38: I am satisfied information exempted by the Agency is exempt in part under section 38. See comments for Document 13.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>Corrections Act</p> <p>Information exempted by the Agency is to remain deleted.</p>	
21.	[date]	Cell Sharing Risk Assessment	1	<p>Released in part</p> <p>Sections 33(1) and 38</p>	<p>Release in part</p> <p>Section 38 in conjunction with section 104ZZA of the Corrections Act</p> <p>Information exempted by the Agency is to remain deleted.</p>	<p>Section 38: I am satisfied information exempted by the Agency is exempt in part under section 38. See comments for Document 1.</p>
22.	[date]	Adult Parole Board Meeting decisions	1	<p>Released in part</p> <p>Sections 33(1) and 38</p>	<p>Release in part</p> <p>Section 38 in conjunction with section 104ZZA of the Corrections Act</p> <p>Information exempted by the Agency is to remain deleted.</p>	<p>Section 38: I am satisfied information exempted by the Agency is exempt in part under section 38. See comments for Document 1.</p>
23.	[date]	PIMS Sentence Management Unit 2 Sheet B – Sentence Management Panel	3	<p>Released in part</p> <p>Sections 33(1) and 38</p>	<p>Release in part</p> <p>Section 38 in conjunction with section 104ZZA of the</p>	<p>Section 38: I am satisfied the names of prison staff are exempt under section 38. See comments for Document 1.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>Corrections Act</p> <p>Information exempted by the Agency is to remain deleted.</p>	
24.	[date]	Photographs x 3	3	Released in full	Not subject of review	
25.	[date]	PIMS Incident Report	1	Released in part Sections 33(1) and 38	<p>Release in part</p> <p>Section 38 in conjunction with section 104ZZA of the Corrections Act</p> <p>The document is to be released with the name of the reporting officer deleted.</p>	<p>This document was identified by the Agency during the review and was not included in the Agency's decision of 6 June 2019.</p> <p>Section 38: I am satisfied the name of the reporting officer is exempt under section 38 and is to be deleted in accordance with section 25. See comments for Document 1.</p>