

Notice of Decision and Reasons for Decision

Applicant:	'AX2'
Agency:	Department of Justice and Community Safety
Decision Date:	19 December 2019
Provision and exemption considered:	Sections 25A(5), 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:	'AX2' and <i>Department of Justice and Community Safety (Freedom of Information)</i> [2019] VICmr 210 (19 December 2019)

FREEDOM OF INFORMATION – prison incident – CCTV footage – incident statements – refusal to process request on grounds documents would be exempt – 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 is the same as the Agency's decision.

I am satisfied the requirements of section 25A(5) are met and I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(5).

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:

CCTV footage and statements from [location] Correctional Centre in regard to incident on [date].

[Description of incident involving the Applicant relating to] [location] Corrections Officers in [location] at the [location] Correctional Centre on [date].
2. The Agency relied on section 25A(5) to refuse to grant access to the documents in accordance with the Applicant's request.
3. The Agency determined any documents falling within the terms of the Applicant's request would be exempt from release under one or more exemptions under the FOI Act. Accordingly, the Agency refused to grant access to documents in accordance with section 25A(5).
4. The reasons for the Agency's decision are set out in its decision letter dated 31 October 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, dated 31 October 2019;
 - (b) information provided with the Applicant's review application; and
 - (c) all communications between OVIC and the Agency and the Applicant.
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 of section 25A(5) to refuse to grant access to documents

9. The power under 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 requested documents are exempt.
 - (c) Third, it must be apparent from:

- (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
- (ii) the request, or through consultation with the applicant, they 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 essential quality or character of the documents, as described in the Applicant's request, are CCTV footage and statements in relation to an incident involving the Applicant, which occurred in a prison.

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

11. In refusing access to documents under section 25A(5), the Agency submitted any documents relevant to the request would be exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986 (Vic)* (**Corrections Act**).

Section 38 – Documents to which secrecy provisions of enactments apply

12. 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, the relevant enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Application of the secrecy provision

13. In its decision letter, the Agency stated the CCTV footage and any statements concerning the incident would by their nature be prohibited from disclosure as they are subject to a secrecy provision in the Corrections Act and, therefore, would be exempt under section 38. The Agency submitted the secrecy provision applies to:
- (a) information concerning the investigation of a contravention or possible contravention of the law; and
 - (b) such information is currently being investigated by Victoria Police.

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

14. 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.

15. 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;

...

16. 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.

17. Section 104ZZA of the Corrections Act operates to protect the personal privacy of individuals who are identified in documents created in connection with the management and administration of the Corrections system. The provision 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, that apply in all but limited circumstances.

18. 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.

19. Based on the information before me, I am satisfied information concerning the investigation of a contravention or possible contravention of the law, which is currently being investigated by Victoria Police, 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.
20. Further, I am satisfied the CCTV footage and incident statements, if released, would reveal information about security measures, protocols and plans followed by prison staff in dealing with incidents and emergencies.
21. 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 the prohibition.
22. While section 104ZZA of the Corrections Act is subject to exceptions in sections 104ZY and 104ZZ of the Corrections Act, I am satisfied none of these provisions apply in this case.
23. I acknowledge the Applicant's purpose for seeking access to the footage. 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.
24. Accordingly, on the information before me, I am satisfied the CCTV footage and incident statements are exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Deletion of exempt or irrelevant information

25. 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.
26. 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
27. Having considered the nature of the documents sought, I am satisfied it would not be practicable to provide the Applicant with an edited copy of the documents with exempt information deleted, as to do so would render the documents meaningless.

Conclusion

28. On the information before me, I am satisfied the requirements of section 25A(5) are met and I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request under section 25A(5) on grounds:
 - (a) the CCTV footage and incident statements would be exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act; and

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].

- (b) while the Applicant has not indicated whether they would agree to receive an edited copy of the documents, in any case I am satisfied it would not be practicable to provide the Applicant with an edited copy of any documents in accordance with section 25.

Review rights

29. 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
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
32. 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.
33. 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

34. 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).