

Notice of Decision and Reasons for Decision

Applicant:	'BH5'
Agency:	Department of Justice and Community Safety
Decision date:	20 March 2020
Exemption and provision 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:	'BH5' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2020] VICmr 74 (20 March 2020)

FREEDOM OF INFORMATION – law enforcement documents – Corrections Victoria – prison documents – individual management file (IMF) – security management and management of prisons and prisoners – 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 information in the documents exempted by the Agency is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

Accordingly, as already released to the Applicant by the Agency, with the exception of Documents 4, 7, 27, 29, 30 and 40, which are exempt in full, I am satisfied it is practicable for the Agency to provide the Applicant with an edited copy of the remaining documents with exempt information deleted in accordance with section 25.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

20 March 2020

Reasons for Decision

Background to review

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

All documents, case notes, incident reports, internal communication documents including emails, electronic files, memos, separation orders, written files and notations, alerts, internal reports, external reports of any kind which are about me, and or make reference to me, or make reference to me in relation to other prisoners or prisoner contained in [specific section] of my individual management file (IMF).
2. In its decision, the Agency identified 41 documents falling within the terms of the Applicant's request. It decided to grant access to 35 documents in part and refuse access to six documents in full. 16 pages were released in full outside the FOI Act.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review and been briefed by OVIC staff, who inspected documents claimed to be exempt under section 31(1).¹
5. The Applicant and Agency were invited under section 49H(2) to make a written submission in relation to the review.
6. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application and correspondence with the Applicant; and
 - (c) information provided by the Agency during this review.
7. 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

8. 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 to refuse access to certain information in the documents. The Agency's decision letter sets out the reasons for its decision.

Section 38 – Documents to which secrecy provisions apply

9. 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

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.

disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

10. Therefore, 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?

11. 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 certain information in the documents.
12. 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?

13. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
14. 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 disclose is authorised under sections 104ZY or 104ZZ.

Penalty: 120 penalty units.

15. 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 towards 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.
16. Section 104ZX of the Corrections Act defines 'relevant person' as a person specified in 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.

17. The term 'personal and confidential information' is defined in section 104ZX of the Corrections Act and includes the following, which I consider is 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 that person; or
 - (ii) from which the person's identity, address or location can reasonably be determined.
- (d) information given to the Adult Parole Board that is not disclosed in a decision of the Board or in any reasons given by the Board for a decision of the Board;

...

- (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;

...

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

- (a) Information that identifies persons, including-
 - (i) names, signatures and ID number of [Agency] staff;
 - (ii) names, addresses, phone numbers, birth dates and relationships to the Applicant; and
 - (iii) names, CRNs and locations of other prisoners.
- (b) Information that concerns the security and management of prisons, contained in-
 - (i) Victoria Police Law Enforcement Assistance Program reports;
 - (ii) parts of the Prisoner Escort Security and Risk Assessment Form; and
 - (iii) Parts of the Initial Security Rating Forms for prisoners.
- (c) Reports prepared for the Adult Parole Board that are not disclosed in a decision of the Board or in any reasons given by the Board for its decisions.

19. In relation to section 104ZX(c) of the Corrections Act, I am satisfied the identity of third parties can reasonably be identified in the documents and is, therefore, 'personal or confidential' for the purpose of section 104ZZA of the Corrections Act.

20. In relation to section 104ZX(d) of the Corrections Act, OVIC staff sought confirmation from the Agency as to whether or not the information provided to the Adult Parole Board was disclosed in a decision of the Adult Parole Board or in any reasons for decision by Adult Parole Board. The Agency confirmed neither of these events occurred. I accept the Agency's submission and I am satisfied the requirements under section 104ZX(d) of the Corrections Act is met in relation to information of this nature.
21. In addition, I consider information concerning risk assessments, prisoner escort security and information concerning the welfare of prisoners 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 requirements under sections 104ZX(i) and (j) are met in relation to information of this nature.
22. Accordingly, I am satisfied the information deleted by the Agency contains information that falls within the definition of 'personal or confidential information' under section 104ZX of the Corrections Act and is information to which the secrecy provision under section 104ZZA of the Corrections Act applies.

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

23. 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.
24. 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.
25. I am satisfied the exceptions do not apply in this instance.
26. 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.
27. Accordingly, on the information before me, I am satisfied the information deleted by the Agency 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)

28. Having determined the information deleted by the Agency in the documents is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act, it is not necessary for me to consider the additional exemptions relied on by the Agency under sections 31(1)(a), 31(1)(d) and 33(1).

Deletion of exempt or irrelevant information

29. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

30. 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 a document meaningless, they are not 'practicable', and release of the document is not required under section 25.³
31. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is practicable for the Agency to delete the exempt information from the documents as to do so would not involve substantial effort and the documents would retain meaning.

Conclusion

32. My decision on the Applicant's request is the same as the Agency's decision.
33. I am satisfied the information in the documents exempted by the Agency is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
34. Accordingly, as already released to the Applicant by the Agency, with the exception of Documents 4, 7, 27, 29, 30 and 40, which are exempt in full, I am satisfied it is practicable for the Agency to provide the Applicant with an edited copy of the remaining documents with exempt information deleted in accordance with section 25.

Review rights

35. 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
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
38. 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.
39. 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

40. 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.

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).