

Notice of Decision and Reasons for Decision

Applicant:	'BS1'
Agency:	Department of Justice and Community Safety
Decision date:	24 June 2020
Exemption and provisions considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 104ZZA and 104ZX of the <i>Corrections Act 1986</i> (Vic)
Citation:	'BS1' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2020] VICmr 173 (24 June 2020)

FREEDOM OF INFORMATION – prisoner – prison staff – prison incidents – prison visitors – prison visitor ban – 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.

I am satisfied the documents are exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

As I am satisfied it is practicable to delete the exempt information from Documents 4, 6, 8, 11, 12 in accordance with section 25, I have determined to grant access to these documents in part.

However, as I am not satisfied it is practicable to do so in relation to Documents 1-3, 5, 7 and 9, I have determined to refuse access to these documents in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

24 June 2020

Reasons for Decision

Background to review

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

Requested documents relate to interferences with my rights caused by a decision by prison authorities (at [named] Correctional Centre) to ban my advisor [named individual] from visiting me for [period of] months; and to ban my advisor [named individual] from visiting me for [period of] months due to an alleged incident claimed to have occurred at [named Correctional Centre] in [Month Year].
2. In its decision, the Agency identified 12 documents, comprising 18 pages, falling within the terms of the Applicant's request. The Agency released one document in full and five documents in part, and refused access to six documents in full.
3. The Agency relied on the exemptions under sections 31(1)(a), 31(1)(d), 33(1) and 38 of the FOI Act in conjunction with sections 104ZZA and 104ZX of the *Corrections Act 1986* (Vic) (**Corrections Act**) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Review

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

Submissions

7. With respect to the application of section 38, the Agency advised it relies on section 38 where section 33(1) is also relied upon, as section 104ZX of the *Corrections Act* prohibits the disclosure of personal or confidential information.
8. The Agency further submits:
 - (a) it withdraws its reliance on section 31(1)(d);
 - (b) it relies on section 31(1)(a) in relation to any material to which it previously relied on section 31(1)(d); and
 - (c) it relies on section 31(1)(a) in relation to any material to which it also relies on section 38:

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.

- to release the information contrary to section 104ZZA of the Corrections Act would prejudice the administration of the Corrections Act; and
- information concerning security arrangements in prisons and the management of prisons is exempt under both sections 31(1)(a) and 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

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

Section 38 – Documents to which secrecy provisions apply

10. 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. Therefore, for a document to be exempt under section 38, three conditions must be satisfied:

- there must be an enactment in force;
- that applies specifically to the kind of information contained in the document; and
- 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).

Is there an enactment in force?

11. The Agency applied section 38 in conjunction with section 104ZZA of the Corrections Act to exempt Documents 1-3, 5, 7 and 9 in full and Documents 4, 6, 8, 11 and 12 in part.

12. 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?

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

12. 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.

13. 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, including prisons.

14. The provision is also directed towards maintaining the confidentiality of methods and procedures used in the management of prisons and prisoners across Victoria. The section imposes strict confidentiality requirements on Agency officers, among others, that apply in all but certain limited circumstances.

15. 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.

16. The term 'personal and confidential information' is defined in section 104ZX of the Corrections Act and includes the following, which I consider to be relevant in the context of 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;

...

17. The documents in this matter are internal correspondence and memoranda concerning the response and management of an incident involving the Applicant's attendance at a prison.

18. The Agency submits the following information in the documents falls within the meaning of 'personal or confidential information' in accordance with section 104ZZA of the Corrections Act:

(a) Information that identifies persons, including:

(i) names, signatures, telephone numbers and position titles of prison staff; and

(ii) names, addresses, telephone numbers and other personal information of individuals other than Applicant.

(b) Information that concerns the security and management of prisons, contained in:

(i) the details of [specified number of] incidents provided for the reasons for banning [specified number of] visitors to a prison; and

- (ii) Information that concerns the protocols and plans followed by prison staff in relation to visitors to a prison and the effectiveness of the methods used to maintain the security and good order of prisons.
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 information' for the purpose of section 104ZZA of the Corrections Act.
 20. In addition, I consider information that details incidents and reasons for a decision to ban a visitor from attending a prison, as well as information concerning the protocols to be followed by prison staff in relation to prison visitors, is information that concerns the management of prisons and the security systems and measures in a prison. Therefore, I am satisfied the requirements under sections 104ZX(i) and (j) are met in relation to information of this nature.
 21. Accordingly, I am satisfied the information exempted by the Agency 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?

22. Section 104ZZA of the Corrections Act 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. 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.
24. I am satisfied the exceptions do not apply in this instance.
25. 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 the prohibition applies; and
 - (c) section 104ZZA clearly prohibits specified 'relevant persons' from disclosing the 'personal or confidential information' to which it applies.
26. Accordingly, on the information before me, I am satisfied the relevant documents are exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Deletion of exempt or irrelevant information

27. 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.
28. 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

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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.³

29. I have considered whether it would be practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25.
30. While I am satisfied it is practicable to delete the exempt information from Documents 4, 6, 8 and 11-12, I am not satisfied it is practicable to do so in relation to Documents 1-3, 5, 7 and 9, as this would involve substantial effort and the documents would not retain meaning.

Sections 31(1)(a) and 33(1)

31. In light of my decision in relation to the documents being exempt under section 38 in conjunction with section 104ZZA of the Corrections Act, I do not consider it is necessary to consider the additional exemptions relied on by the Agency under sections 31(1)(a) and 33(1).

Conclusion

32. On the information before me, I am satisfied the documents are exempt under section 38 in conjunction with section 104ZZA of the Corrections Act.
33. As I am satisfied it is practicable to delete the exempt information from Documents 4, 6, 8, 11, 12 in accordance with section 25, I have determined to grant access to these documents in part.
34. However, as I am not satisfied it is practicable to do so in relation to Documents 1-3, 5, 7 and 9, I have determined to refuse access to these documents in full.

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 periods, set out above, expire.
41. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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).