



Office of the Victorian
Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'CM3'
Agency:	Department of Justice and Community Safety
Decision date:	4 January 2021
Exemptions and provision considered:	Section 31(1)(a), and 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:	'CM3' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2021] VICmr 2 (4 January 2021)

FREEDOM OF INFORMATION – prisoner records – incident reports – search register – emails – memorandums – proper administration of a prison

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 31(1)(a), and section 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

During the review, the Agency determined certain information in Document 2 is not exempt, and I am satisfied this information should be released by the Agency to the Applicant.

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

4 January 2021

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency seeking access to the documents relating to the Applicant while serving a prison sentence:

All documents in relation to incidents in prison during [date range]...
2. In its decision, the Agency identified 25 documents, totalling 76 pages, falling within the terms of the Applicant's request. The Agency granted access to 23 documents in part and refused access to two documents in full.
3. The Agency relied on the exemptions in sections 31(1)(a), 31(1)(d), 33(1), and section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act. 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. In discussion with OVIC staff, the Agency agreed additional information in Document 2 is not exempt and should be released. As this information is no longer in dispute, it is to be provided by the Agency to the Applicant as a priority upon receipt of this decision.
6. I have examined copies of the documents subject to review.
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.
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.
10. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost

Review of exemptions

Section 38 – Secrecy provision

11. 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'.
12. In order for section 38 to apply to an enactment (or a provision in legislation), the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Corrections Act

13. Section 104ZZA of the Corrections Act provides:

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 section 104ZY or 104ZZ.

Penalty: 120 penalty units.

14. The phrase 'personal and confidential information' is defined in section 104ZX of the Corrections Act:

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;
- (b) information relating to the classification of a prisoner under this Act;
- (c) information –
 - (i) that identifies a 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;
- (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;
- ...
- (g) information concerning the investigation of a contravention or possible contravention of the law by–
 - (i) an offender; or
 - (ii) a prisoner; or
- ...
- (i) information concerning the management of prisons;
- ...
- (j) information concerning –
 - (i) security systems and security measures in, or in relation to, a prison;
- ...

15. The phrase 'relevant person' is set out in Schedule 5, 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. In summary, section 104ZZA of the Corrections Act protects the personal privacy of individuals identified in documents generated in relation to a prisoner and the management of prisons. It is also directed towards maintaining the confidentiality of methods and procedures used in the management and security of prisoners and prisons. The section imposes strict confidentiality requirements on Agency officers and others, subject to limited exceptions.

17. 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 of the Corrections Act identifies, with precision, the type of information to which the section applies; and
 - (c) section 104ZZA of the Corrections Act prohibits specified 'relevant persons' from disclosing the information to which it applies.
18. The documents subject to review relate to incidents involving the Applicant while they were serving a prison sentence. The documents include, incident and investigation reports, corrections officer reports, prisoner questionnaires, seizure register, internal memorandums and emails.
19. The Agency determined the following information is exempt under section 38:
- (a) the names and identification numbers of prisoners other than the Applicant;
 - (b) information relating to other prisoners other than the Applicant;
 - (c) names, initials and signatures of corrections officers;
 - (d) information relating to security measures taken in response to an incident or incidents in a prison;
 - (e) information provided by corrections officers in relation to the investigation of a contravention or possible contravention of the law; and
 - (f) information concerning the management of a prison.
20. On the information before me, I am satisfied information in the documents falls within the definition of 'personal or confidential information' in section 104ZX of the Corrections Act.
21. Conversely, the secrecy provision in section 104ZZA is subject to exceptions in sections 104ZY and 104ZZ of the Corrections Act. Sections 104ZY(1)(b)(i)(A) and 104ZY(2)(a)(i) permit the release of personal or confidential information in certain limited circumstances. However, having reviewed the documents subject to review, I am satisfied no exceptions to the prohibition on disclosure apply in this instance.
22. Accordingly, I am satisfied information that falls within the definition of 'personal and confidential information' in the documents is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Section 31(1)(a)

23. Section 31(1)(a) provides a document is exempt if its disclosure under the FOI Act would, or would be reasonably likely to, prejudice the investigation of a breach, or possible breach, of the law in a particular instance, or the enforcement or proper administration of the law in a particular instance.
24. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.¹ 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.²

¹ *Bergman v Department of Justice Freedom of Information Officer (General)* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

² *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

25. I note the views of the Supreme Court of Victoria expressed in *Knight v Corrections Victoria*:

It is clear from the terms of s 31(1) that its provisions, and especially s 31(1)(a), are capable of applying to documents concerning the administration and management of prisons generally and concerning individual prisoners specifically. The Tribunal has so decided on a number of occasions, [72] including one where it upheld a decision to refuse access to a prisoner to information about himself. The tribunal has also applied s 31(1)(a) to uphold a decision to refuse to give access to information relating to the considerations of the Parole Board.³

26. The Agency relies on the second limb of section 31(1)(a) and submits release of the document would be likely to prejudice the proper administration of a prison under the Corrections Act in a particular instance.

27. The Agency's decision letter states:

The purpose of the Corrections Act 1986 (the Corrections Act) is to provide for the establishment, management and security of prisons and the welfare of prisoners. In order to carry out these functions prison authorities must be able to obtain and store information that could affect the management and good order of the prison.

If this type of information were disclosed, it would prejudice the proper administration of the Corrections Act because it would affect what and how information was recorded about prisoners this making information gathering ineffective with the ultimate effect of comprising good order and security of the prison.

Disclosure of the methods of obtaining and storing information would prejudice the proper administration of the Corrections Act as it would impact how and what information was recorded about prisoners. This would render information gathering ineffective, this compromising the good order and security of the prison. Some information set out in file notes are exempt from disclosure under the Act for these reasons.

There is also information in one of the incident reports from a prison officer showing a prison roster information including watch and location position. This information is exempt because it relates to the management of the prison and proper prison security. If this type of information was disclosed, it would enable prisoners to exploit that knowledge and to conceal any planned unlawful harmful activity.

28. I acknowledge the Applicant's genuine interest in receiving access in full to the requested documents.

29. However, having reviewed the documents in this matter, I accept the Agency's submission that granting access to the information exempted by the Agency would prejudice the proper administration of the Corrections Act in relation to the recording and investigation of incidents in the prison and processes designed to ensure the security and good order of the prison. I am satisfied this is a 'particular instance' in which the administration of the law may be prejudiced.

30. While there is no specific evidence before me to suggest granting access to the documents in full would enable the Applicant to identify methods that would compromise the good order of a prison, I accept concerns raised by the Agency that such an outcome could reasonably occur if such information were disclosed and became known.

31. In the context of disclosure under the FOI Act, which involves the unrestricted and unconditional release of a document, I accept disclosure of a document in full means the Applicant is free to use or further disseminate the document as they please, which could reasonably involve a document being disseminated within the prison or accessed by prisoners, offenders and/or the general public.

³ *Knight v Corrections Victoria* [2010] VSC 338 at [73] (Bell J) which references at [74] *Lomax v Department of Justice* [1999] VCAT 2125; *Re Mallinder and Office of Corrections* (1988) 2 VAR 566, 580; *Re Lapidos and Office of Corrections (No 4)* (1990) 4 VAR 283, 307-308 and *Simons v Department of Justice* [2006] VCAT 20553 at [35]-[40]; and at [73] *Debono v Department of Justice* [2008] VCAT 1791 at [9]-[11] and [19]-[21].

32. In particular, I accept the Agency's submission disclosure of information regarding corrections officer locations and watch positions within the prison would be reasonably likely to prejudice the effectiveness of methods used to assist in managing and maintaining the security and good order of the prison.
33. Accordingly, I am satisfied disclosure of the documents would be reasonably likely to prejudice the proper administration of the law, in this case, the administration of the Corrections Act in regard to the management and security of a prison and prisoners. Therefore, I am satisfied the documents are exempt under section 31(1)(a).

Application of sections 31(1)(d) and 33(1)

34. As I have determined the documents are exempt under sections 31(1)(a) and 38, it is not necessary for me to consider the application of sections 31(1)(d) and 33(1) to the same information.

Deletion of exempt or irrelevant information

35. 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.
36. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
37. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. In my view, it is practicable to do so as deleting the relevant information would not require substantial time and effort and the edited documents would retain meaning. However, where the deletion of exempt information from a document would render it devoid of meaning, I have determined to refuse access to the document in full.

Conclusion

38. On the information before me, I am satisfied the documents are exempt under section 31(1)(a), and section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
39. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, I have determined to grant access to the document in part. However, where the deletion of exempt information from a document would render it devoid of meaning, I have determined to refuse access to the document in full.
40. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

41. 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.⁶

⁴ *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].

⁵ *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].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
44. 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.
45. 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.⁹

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Incident Report Cover Sheet	2	Released in part Sections 33(1), 38	Release in part Sections 38, 25	<p>Section 38: For the reasons set out in the Notice of Decision I am satisfied information exempted by the Agency is ‘personal or confidential information’ captured by section 104ZX of the Corrections Act. Accordingly, I am satisfied the relevant ‘personal and confidential’ information in the documents is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>
2.	[date]	Incident Report	2	Released in part Sections 33(1), 38	Release in part Sections 38, 25	<p>In discussion with OVIC staff, the Agency agreed certain information in the document is not exempt. The Agency is to release this information to the Applicant as a priority upon receipt of this decision.</p> <p>Sections 38 and 25: See comments for Document 1.</p>
3.	[date]	Officer Report	2	Released in part Sections 31(1)(a), 31(1)(d), 33(1), 38	Release in part Sections 31(1)(a), 38, 25	<p>Sections 38 and 25: See comments for Document 1.</p> <p>Section 31(1)(a): For the reasons set out in the Notice of Decision, I am satisfied</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
						disclosure of information provided in the course of investigating an incident in a prison would be reasonably likely to prejudice the proper administration of the law, in this case, the administration of the Corrections Act in regard to the management and security of the prison and prisoner welfare. Accordingly, I am satisfied certain information in the document is exempt under section 31(1)(a).
4.	[date]	Officer Report	2	Released in part Sections 31(1)(a), 31(1)(d), 33(1), 38	Release in part Sections 31(1)(a), 38, 25	Sections 38 and 25: See comments for Document 1. Section 31(1)(a): See comments for Document 3.
5.	[date]	Officer Report	2	Released in part Sections 31(1)(a), 31(1)(d), 33(1), 38	Release in part Sections 31(1)(a), 38, 25	Sections 38 and 25: See comments for Document 1. Section 31(1)(a): See comments for Document 3.
6.	[date]	Officer Report	2	Released in part Sections 31(1)(a), 31(1)(d), 33(1), 38	Release in part Sections 31(1)(a), 38, 25	Sections 38 and 25: See comments for Document 1. Section 31(1)(a): See comments for Document 3.
7.	[date]	Officer Report	2	Released in part	Release in part	Section 38: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
				Sections 33(1), 38	Sections 38, 25	
8.	[date]	Crime Scene Log	1	Released in part Sections 33(1), 38	Release in part Sections 38, 25	Sections 38 and 25: See comments for Document 1.
9.	[date]	Prisoner Inmate Injury Questionnaire	2	Released in part Sections 33(1), 38	Release in part Sections 38, 25	Sections 38 and 25: See comments for Document 1.
10.	[date]	Authority to Separate Prisoner	1	Released in part Sections 33(1), 38	Release in part Sections 38, 25	Sections 38 and 25: See comments for Document 1.
11.	[date]	Incident Report	1	Released in part Sections 33(1), 38	Release in part Sections 38, 25	Sections 38 and 25: See comments for Document 1.
12.	[date]	Incident/Injury/Investigation Report Form	3	Released in part Sections 33(1), 38	Release in part Sections 38, 25	Sections 38 and 25: See comments for Document 1.
13.	[date]	Incident Report	1	Released in part Sections 31(1)(a),	Release in part Sections 31(1)(a),	Sections 38 and 25: See comments for Document 1.

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Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
				31(1)(d), 33(1), 38	38, 25	Section 31(1)(a): See comments for Document 3. Section 25: See comments for Document 1.
14.	[date]	Email	1	Released in part Sections 33(1), 38	Refuse in full Section 38	Section 38: See comments for Document 1. Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.
15.	[date]	Incident/Injury/Investigation Report Form	4	Released in part Sections 31(1)(a), 31(1)(d), 33(1), 38	Release in part Sections 31(1)(a), 38, 25	Section 38: See comments for Document 1. Section 31(1)(a): See comments for Document 3.
16.	Undated	Photographs	4	Released in part Sections 33(1), 38	Refuse in full Section 38	Section 38: See comments for Document 1. Section 25: See comments for Document 14.
17.	[date]	Disciplinary Process	3	Released in part Sections 31(1)(a), 31(1)(d), 33(1), 38	Release in part Sections 31(1)(a), 38, 25	Sections 38 and 25: See comments for Document 1. Section 31(1)(a): See comments for Document 3.
18.	[date]	Memorandum – [redacted - item description]	1	Released in part Sections 31(1)(a),	Release in part Sections 31(1)(a),	Sections 38 and 25: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
				31(1)(d), 33(1), 38	38, 25	Section 31(1)(a): See comments for Document 3.
19.	[date]	Memorandum - [redacted - item description]	1	Released in part Sections 33(1), 38	Release in part Sections 38, 25	Sections 38 and 25: See comments for Document 1.
20.	[date]	Memorandum - [redacted - item description]	2	Released in part Sections 33(1), 38	Refuse in full Section 38	Section 38: See comments for Document 1. Section 25: See comments for Document 14.
21.	[date]	Seizure Register	1	Released in part Sections 33(1), 38	Release in part Sections 38, 25	Sections 38 and 25: See comments for Document 1.
22.	[date]	Incident Report	1	Released in part Sections 31(1)(a), 31(1)(d), 33(1), 38	Release in part Sections 31(1)(a), 38, 25	Sections 38 and 25: See comments for Document 1. Section 31(1)(a): See comments for Document 3.
23.	[date]	Memorandum - [redacted - item description]	1	Released in part Sections 33(1), 38	Release in part Sections 38, 25	Sections 38 and 25: See comments for Document 1.
24.	[date]	Incident/Injury/Investigation Report Form	4	Released in part Sections 31(1)(a),	Release in part Sections 31(1)(a),	Sections 38 and 25: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency Decision	OVIC Decision	OVIC Comments
				31(1)(d), 33(1), 38	38, 25	Section 31(1)(a): See comments for Document 3.
25.	Various	Duplicate documents	30	Released in part Sections 31(1)(a), 31(1)(d), 33(1), 38	Release in part Sections 31(1)(a), 38, 25	The document comprises duplicate pages of Documents 4, 5, 6, 11, 13, 14, 15, 16, 17, 19, 20, 22 and 24. See comments for these documents above.