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## Notice of Decision and Reasons for Decision

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Applicant:	'D14'
Agency:	Department of Justice and Community Safety
Decision date:	29 June 2021
Exemptions and provision considered:	Sections 31(1)(a), 31(1)(d) and 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:	'D14' and Department of Justice and Community Safety ( <i>Freedom of Information</i> ) [2021] VICmr 203 (29 June 2021)

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FREEDOM OF INFORMATION – prison documents – prison management – CCTV footage – prisoner – strip search – prison staff – secrecy provision – personal and confidential information – prejudice the proper administration or enforcement of the law

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision is the same as the Agency's decision in that I have determined not to release additional information in the documents to the Applicant.

I am satisfied information in Documents 1 to 5 is exempt under section 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

The Agency disclosed an edited copy of Documents 1-4 with exempt and irrelevant information deleted in accordance with section 25. I am satisfied it remains practicable to provide edited copies of these documents to the Applicant. However, I am satisfied Document 5 is exempt 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

29 June 2021

## Reasons for Decision

### Background to review

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

#### Request 1

I request full access to, and a copy of, all information and documents associated with:

- (a) The decision making process which lead to my being directed to submit to a strip-search as part of a conditional policy requirement for a section 40 visit with a lawyer;
- (b) Records of any communications in relation to my objections to the strip searching, including emails, and diary and daybook entries between:
  - Prison Officer [name];
  - Prison Officer [name];
  - Acting Prison Governor [name]; and
  - Prison Supervisor [name].

#### Request 2

I request full access to, and a copy of, all information and documents associated with the CCTV footage of my movements in the [Unit name] in relation to the period of time from:

- my entry into the foyer area of [Unit name] on [date] at around [time]; and
  - my being ushered into the strip-search room by [named Prison Officer] and [named Prison Officer]; and
  - the door of the strip-search room being closed after the Officers and I entered the room; and
  - a third Officer entering and exiting the room; and
  - my exiting of the room fully dressed and in handcuffs.
2. The Agency identified five pages of documents falling within the terms of the Applicant's 'Request 1' to which it refused access to certain information under sections 33(1) and 38 in conjunction with section 104ZZA of the Corrections Act.
  3. In relation to the requested CCTV footage in 'Request 2', the Agency stated in its decision letter:

Due to COVID-19 (Coronavirus) requirements we are currently operating under a restricted capacity and are unable to obtain and assess any CCTV footage. The footage you have requested has been retained and you will be able to make another application at a later date once we have returned to our normal operations.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
  5. During the review, the Applicant raised concerns about the Agency's inability to access the CCTV footage due to remote working arrangements during the COVID-19 pandemic. OVIC made inquiries with the Agency regarding this issue.
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### ***Agency's fresh decision***

6. On [date], the Agency made a fresh decision on the Applicant's request in accordance with section 49M.
7. The Agency's fresh decision on 'Request 1' remained the same. In relation to 'Request 2', the Agency identified and assessed [specified number of] minutes of CCTV footage to which it refused access in full under sections 31(1)(a), 31(1)(d), 33(1) and 38 in conjunction with section 104ZZA of the Corrections Act.
8. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all relevant communications between OVIC and the parties, as well as submissions received from the parties.
11. I have examined a copy of Documents 1 to 4, which include internal correspondence and notes and viewed Document 5, which is CCTV footage (the **Documents**).
12. 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.
13. 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 – Documents to which a secrecy provision applies***

14. The Agency relies on section 38 in conjunction with section 104ZZA of the Corrections Act to exempt from release Documents 1 to 4 in part, and Document 5 in full.
  15. 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.
  16. Therefore, 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
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- (c) the enactment must prohibit persons referred to in the enactment from disclosing that specific kind of information (either absolutely or subject to an exception or qualification).

*Is there an enactment in force?*

- 17. I am satisfied the Corrections Act is an enactment in force for the purposes of section 38.
- 18. Accordingly, I am satisfied the first condition for the application of section 38 is met.

*Does the enactment apply specifically to the kind of information in the Documents?*

- 19. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
- 20. Part 9E of the Corrections Act concerns 'Disclosure of information' under the Act.
- 21. 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.

- 22. 'Relevant person' is a person specified in Schedule 5 of the Corrections 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.

- 23. 'Personal or confidential information' is defined in section 104ZX of the Corrections Act and includes the following, which I consider are relevant to the Documents:

- (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.

...

- (i) information concerning the management of prisons;
- (j) information concerning—
  - (i) security systems and security measures in, or in relation to, a prison;

...

24. In summary, section 104ZZA of the Corrections Act operates to protect the confidentiality and personal privacy of individuals who are identified in documents created in connection with prisoners, prison staff and prisons, including the management and security of prisons in Victoria.

#### The Documents

25. As discussed above, the Documents comprise:
- (a) internal correspondence and notes concerning a strip search of the Applicant (the **Internal prison documents**); and
  - (b) CCTV footage of the Applicant's movements when escorted by prison officers within the prison on the day of the strip search (the **prison CCTV footage**).
26. The Agency submits the following information in the Documents falls within the meaning of 'personal or confidential information' for the purpose of the prohibition on disclosure under section 104ZZA of the Corrections Act:
- (a) Information that identifies persons, including
    - (i) the names of Agency officers, position titles and signatures; and
    - (ii) images of Agency officers captured by CCTV cameras located in the prison, which record Agency officers escorting the Applicant within the prison.
27. I accept the Agency's submission in relation to 'personal or confidential information' in the Documents. Specifically, in relation to:
- (a) the internal prison documents, I am satisfied they contain 'personal or confidential information' under subsections 104ZX(a), (c)(ii) and (i) of the Corrections Act; and
  - (b) the prison CCTV footage, I am satisfied it contains 'personal or confidential information' under subsections 104ZX(a), (c)(ii), (i) and (j)(i) of the Corrections Act.
28. On the information before me, I am satisfied the information exempted by the Agency in the Documents falls within the definition of 'personal or confidential information' under section 104ZX of the Corrections Act and is information to which the prohibition on disclosure under section 104ZZA of the Corrections Act applies.
29. Accordingly, I am satisfied the second condition for the application of section 38 is met.

#### *Does the enactment prohibit persons from disclosing information in the Documents?*

30. Section 104ZZA of the Corrections Act imposes strict confidentiality requirements on 'relevant persons' and prohibits them from disclosing 'personal or confidential information' under that Act.
31. However, the prohibition on disclosure is subject to exceptions that permit release of 'personal or confidential information' in certain limited circumstances.
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32. In this case, I have considered each of the exceptions under section 104ZY. Relevantly, section 104ZY(2)(b) provides, a 'relevant person' may use or disclose 'personal or confidential information' 'with the authorisation, or at the request, of the person to whom the information relates'.

*Internal prison documents*

33. In relation to the internal prison documents, the information exempted from release by the Agency exclusively relates to third parties. As such, I do not need to further consider section 104ZY(2)(b) of the Corrections Act as it does not apply

*Prison CCTV footage*

34. I have considered the Agency's further submission setting out its views in relation to 'personal or confidential information' in the Documents and the operation of the exception of section 104ZY(2)(b) of the Corrections Act which it submits does not apply.
35. Having carefully considered the operation of section 104ZZA of the Corrections Act and the exception under section 104ZY(2)(b), I consider the Applicant's FOI request seeking access to documents containing 'personal or confidential information' represents their implied consent to the disclosure of information relating to them in the documents.<sup>1</sup>
36. As such, I have considered whether the exception under section 104ZY(2)(b) of the Corrections Act applies to remove the prohibition on disclosure under section 104ZZA of the Corrections Act in relation to the Documents.
37. Where the 'personal or confidential information' falls under sections 104ZX(a), (c)(ii), (i) and (j)(i) of the Corrections Act I am not satisfied the exception under section 104ZY(2)(b) extends to the 'personal or confidential information' in the Documents.
38. Therefore, in relation to the prison CCTV footage I am not satisfied the exception under section 104ZY(2)(b) extends to images of the Applicant in the footage. The purpose and content of the footage, which was captured by CCTV security cameras in the prison, directly concerns the management of the prison and forms a key part of its security system and security measures under section 104ZX(i) and (j)(i) of the Corrections Act. As such, I am satisfied the exceptions, including under section 104ZY(2)(b) of the Corrections Act, do not apply.
39. Accordingly, I am satisfied the third condition for the application of section 38 is met in relation to both the internal documents and the CCTV footage.

*Conclusion in relation to section 38*

40. In summary, 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;

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<sup>1</sup> *Frugtniet v Legal Services Board (Review and Regulation)* [2014] VCAT 1299 at [96]; *Gullquist v Victorian Legal Services Commissioner (Review and Regulation)* [2017] VCAT 764 at [80] and [83]; *Victorian Legal Services Commissioner v Grahame (No 2) (Review and Regulation)* [2019] VCAT 1878.

- (b) section 104ZZA of the Corrections Act, in conjunction with section 104ZX, identifies with precision the type of information to which it the prohibition applies;
  - (c) section 104ZZA of the Corrections Act prohibits specified 'relevant persons' from disclosing the 'personal or confidential information' to which it applies in the Documents; and
  - (d) I am satisfied none of the exceptions under section 104ZY of the Corrections Act apply to the information the Agency exempted from release under section 38, in this instance.
41. Having reviewed the Documents and on the information before me, I am satisfied the information the Agency exempted from release, is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
42. My decision in relation to section 38 is set out in the Schedule of Documents in **Annexure 1**.
43. Given my decision in relation to the application of section 38, it is not necessary for me to also consider the application of the additional exemptions relied on by the Agency.

### ***Section 25 – Deletion of exempt or irrelevant information***

44. 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.
45. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>2</sup> 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.<sup>3</sup>
46. I have considered the information the Agency deleted from the Documents as irrelevant. I agree it falls outside the terms of the Applicant's request.
47. I have also 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.
48. As the Agency provided the Applicant with a copy of Documents 1 to 4 with exempt and irrelevant information deleted in accordance with section 25, I am satisfied it remains practicable to provide the Applicant with an edited copy of these documents.
49. In relation to Document 5, given the nature of the document and the application of the exemption to the contents of the document, I am satisfied it is not practicable to provide the Applicant with an edited copy with exempt and irrelevant information deleted in accordance with section 25.

### **Conclusion**

50. On the information before me, I am satisfied information in Documents 1 to 5 is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act.

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<sup>2</sup> *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].

<sup>3</sup> *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].

51. The Agency disclosed an edited copy of Documents 1 to 4 with exempt and irrelevant information deleted in accordance with section 25. I am satisfied it remains practicable to provide edited copies of these documents to the Applicant.
52. I am satisfied Document 5 is exempt in full as it is not practicable to provide the Applicant with an edited copy of the document.
53. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

#### **Review rights**

54. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>4</sup>
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>5</sup>
56. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
57. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application is made to VCAT for a review of my decision.<sup>6</sup>

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<sup>4</sup> Section 50(1)(b).

<sup>5</sup> Section 52(5).

<sup>6</sup> Sections 50(3F) and (3FA).

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Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Strip Search Register	1	Released in part Sections 25, 33(1), 38	<b>Release in part</b> Sections 38, 25  The document is to be released with exempt information identified by the Agency deleted in accordance with section 25.	<b>Section 38:</b> For the reasons set out in the Notice of Decision above, I am satisfied information exempted by the Agency under section 38 of the FOI Act is 'personal or confidential information', as defined in section 104ZX of the Corrections Act. Accordingly, I am satisfied this information is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.  <b>Section 25:</b> 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.
2.	[date]	Movement Register	1	Released in part Section 25	<b>Release in part</b> Sections 38, 25	See comments for Document 1.
3.	[date]	Local Plan File Notes	1	Released in part Sections 25, 33(1), 38	<b>Release in part</b> Sections 38, 25	See comments for Document 1.
4.	[date]	Email: Professional Visit	2	Released in part Sections 25, 33(1), 38	<b>Release in part</b> Sections 38, 25	See comments for Document 1.
5.	[date]	CCTV Footage	N/A	Refused in full Sections 31(1)(a), 31(1)(d), 33(1), 38	<b>Refuse in full</b> Section 38	<b>Section 38:</b> See comments for Document 1.  <b>Section 25:</b> I am satisfied it is not practicable to provide the Applicant with

**Annexure 1 – Schedule of Documents**

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						an edited copy of the document as it is exempt in full.