

Notice of Decision and Reasons for Decision

Applicant:	'DL2'
Agency:	Department of Justice and Community Safety
Decision date:	4 August 2021
Exemptions considered:	Sections 31(1)(a) 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:	'DL2' and <i>Department of Justice and Community Safety</i> (Freedom of Information) [2021] VICmr 228 (4 August 2021)

FREEDOM OF INFORMATION – prison record – prisoner – substance testing – urinalysis procedures – operational procedures – security and management of prisons – *Corrections Act 1986* (Vic)

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 a document requested by the Applicant under the FOI Act.

I am satisfied the requested document is exempt under sections 31(1)(a) and 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted, access to the document is refused in full.

Accordingly, my decision on the Applicant's request is the same as the Agency's decision in that I have refused access to the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
4 August 2021

Reasons for Decision

Background to review

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

[Specified unit's] "Operation Procedures" (OPS) or their "DCIS", regarding "substance testing".
If a prisoner is caught with an unknown substance, what are the proper testing requirements?
And is a prisoner within their rights to request a secondary test of said substance?
Anything relating to these questions/information would be greatly appreciated.
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full, relying on the exemptions under sections 31(1)(a), 31(1)(d), 33(1), and 38 in conjunction with section 104ZZA of the Corrections Act. The Agency's decision letter sets out the reasons for its decision.

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.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications received from the parties.
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.
8. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and 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 secrecy provisions apply

9. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information 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).
10. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

11. 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 disclosure is authorised under section 104ZY or 104ZZ.

Penalty: 120 penalty units.

12. Section 104ZX of the Corrections Act defines 'relevant person' as a person specified in an item of Schedule 5.
13. Section 104ZX of the Corrections Act defines 'relevant person' as a person specified in Schedule 5 of that Act and includes:

...

2. The Department

...

(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.

...

14. 'Personal and confidential information' is defined in section 104ZX of the Corrections Act and relevantly includes:

...

(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;

...

15. In summary, section 104ZZA of the Corrections Act is 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.

Is there an enactment in force?

16. 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?

17. The document concerns the urinalysis operational procedure at a Victorian prison.
18. Section 29A in Part 6 of the Corrections Act (Management and administration of prisons) provides for the drug testing of prisoners.
19. I accept that regular drug testing is a measure employed by prisons to maintain good order and proper administration of a prison in accordance with statutory obligations under the Corrections Act.¹

¹ *Goussis v Secretary to the Department of Justice and Regulation (Review and Regulation)* [2017] VCAT 1847 at [36].

20. In this case, I consider the operational procedures regarding drug testing in the relevant prison is information that concerns the management of the prison and the security systems and measures in, or in relation to, the prison. Therefore, I am satisfied the enactment applies specifically to the kind of information in the document.

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

21. Having reviewed the circumstances in which disclosure of the relevant information is authorised under sections 104ZY and 104ZZ of the Corrections Act, I am satisfied the Agency is prohibited from disclosing the information in the document to the Applicant.
22. Disclosure of information in breach of section 104ZZA of the Corrections Act attracts a financial penalty, which highlights the legislatures intention that such information should remain confidential.
23. Accordingly, I am satisfied certain 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) – Disclosure of documents that would prejudice the enforcement or proper administration of the law

24. Subject to section 31, section 31(1)(a) provides a document is an exempt document 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 or prejudice the enforcement or proper administration of the law in a particular instance.
25. ‘Reasonably likely’ means there is a real chance of an event occurring and it is not fanciful or remote.²
26. ‘Prejudice’ means to hinder, impair or undermine, and includes actual prejudice as well as impending prejudice.³
27. ‘In a particular instance’ does not require a single specific investigation and can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁴
28. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
29. ‘Proper administration of the law’ includes the way a law is administered, including an agency’s regulatory, monitoring and compliance activities.⁵
30. The Supreme Court of Victoria in *Knight v Corrections Victoria*⁶ held:

It is clear from the terms of 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, including one where it upheld a decision to refuse to give access to a prisoner to information about himself.

² *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65] quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

³ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

⁴ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24]; *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [69]

⁵ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [23]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] VicRp 72; [1991] 2 VR 322.

⁶ [2010] VSC 338 at [73].

31. The Agency states the document contains operational strategies and methodologies used in the management of incidents and prisoners within a prison. The Agency considers the document, if disclosed, could be used to exploit security measures adopted to safeguard the security and welfare of prisoners. For this reason, it considers disclosure of the document would be likely to prejudice the effectiveness and operation of security measures in relation to the prisoner, and therefore, the proper administration of the Corrections Act.
32. As noted above, section 29A of the Corrections Act provides for regular drug testing of prisoners.
33. Further, I accept regular drug testing of prisoners is a measure employed to maintain good order and proper administration of prisons in accordance with Corrections Victoria's statutory obligations under the Corrections Act, and the administration of drug testing within a prison is a 'particular instance' for the purpose of section 31(1)(a).
34. Therefore, it is necessary to determine whether granting access to the relevant information would, or would be reasonably likely to, prejudice the Agency's proper administration of its drug testing program.
35. I accept the Agency's contention that the drug testing program could be exploited by disclosure of the document.
36. Accordingly, I am satisfied disclosure of the document would be reasonably likely to prejudice the efficacy of the drug testing of prisoners as part of the administration and management of prisons generally, and individual prisoners specifically.
37. Accordingly, I am satisfied the document is exempt under section 31(1)(a).

Other exemptions

38. As I am satisfied the relevant information is exempt under sections 31(1)(a) and 38, it is not necessary for me to consider the additional exemptions relied on by the Agency.

Section 25 – Deletion of exempt or irrelevant information

39. 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.
40. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸
41. I have considered the effect of deleting exempt information in the document. I am satisfied it is not practicable to delete exempt information as to do so would render the document meaningless.

Conclusion

42. I am satisfied the document is exempt under sections 31(1)(a) and 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

⁷ *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].

⁸ *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].

43. As I am satisfied it is not practicable to delete exempt information in the document in accordance with section 25, access to the document is refused in full.

Review rights

44. 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.⁹
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
47. 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.
48. 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.¹²

When this decision takes effect

49. My decision does not take effect until the Agency's 14 day review period expires.
50. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).