

## Notice of Decision and Reasons for Decision

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Applicant:	'DZ3'
Agency:	Victoria Police
Decision date:	24 May 2022
Exemptions considered:	Sections 33(1), 31(1)(a)
Citation:	'DZ3' and Victoria Police (Freedom of Information) [2022] VICmr 21 (24 May 2022)

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FREEDOM OF INFORMATION – prison documents – law enforcement documents – police records – custody summary – CCTV footage – personal affairs information – unreasonable to disclose – contrary to public interest – administration of the *Corrections Act 1986* (Vic) – section 61B(3)

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 in that I am satisfied that the documents contain information that is exempt under sections 33(1) and 31(1)(a).

Where 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, access is granted in part. Where I am satisfied it is not practicable to do so, access is refused 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  
24 May 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request to:
  - I request that I have all video and audio recording of my [custody] on remand before my release;
  - all video and audio recordings of my transport arriving at [a specified police station and prison], to the cells and from the police car;
  - all video and audio recording of me in the cell;
  - all documents and registers of property and phone calls during my [custody] on remand and release;
  - all names of or status of who I was in the cell with ie convicted or accused persons, remand or release information for them.

My date of my remand [custody] roughly [date] at [specified police station and prison] I was on remand overnight and released in the morning
3. The Agency identified nine documents totalling 14 pages falling within the terms of the Applicant's request and granted access to three documents in full and refused access to six documents in part under sections 31(1)(a) and 33(1).
4. In relation to the request for CCTV footage, the decision letter states that the Victoria Police Manual, *Safe management of persons in police care or custody*, stipulates a 30 day retention period for footage where no incident has occurred. As this period had elapsed at the time the Applicant made their FOI request, the requested footage had been overwritten. As such, the Agency did not identify any CCTV footage in response to the Applicant's request.
5. The Agency's decision letter sets out the reasons for its decision.

### Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. I have examined a copy of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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
11. 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.

### **Applicant's concerns regarding missing documents**

12. Alongside their review application, the Applicant raised concerns regarding the Agency's conduct, specifically that footage of their period of incarceration had been deleted.
13. In accordance with section 61B(3), OVIC determined to address these concerns as part of this review.
14. OVIC made inquiries with the Agency regarding the Applicant's concerns.
15. Based on subsequent communications between OVIC staff and the Agency, as well as the information related to the Agency's CCTV footage retention policy, as set out in the Agency's decision letter, I am satisfied the Agency undertook a thorough and diligent search for documents using appropriate search terms of its relevant systems.
16. Further, there is no information before me to suggest the Agency conducted its document searches in a manner that would limit the discovery of relevant documents captured by the terms of the Applicant's request. It is apparent that the relevant footage was deleted in accordance with the Agency's policy. As such, I am satisfied the Applicant's concerns have been pursued to the fullest extent.

### **Review of exemptions**

#### ***Section 31(1)(a) – Disclosure of documents that would prejudice and investigation or the enforcement of proper administration of the law***

17. 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. Section 31(1)(a) is subject to other provisions in section 31.
18. The phrase 'reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>1</sup>
19. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>2</sup>
20. 'In a particular instance' does not require a single specific investigation. The phrase can encompass specific, identified aspects of the law, administration of the law or investigations of breaches or potential breaches of law.<sup>3</sup>
21. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
22. 'Proper administration of the law' includes the manner in which the law is administered, including regulatory, monitoring and compliance activities.<sup>4</sup>

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<sup>1</sup> *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.

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

<sup>3</sup> *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].

<sup>4</sup> *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.

23. In *Knight v Corrections Victoria*, in which the Supreme Court of Victoria considered section 31(1)(1), the Court states:<sup>5</sup>

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, 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.

24. The Agency relies on the second limb of section 31(1)(a) and submits release of the documents would prejudice the proper administration of the *Corrections Act 1986* (Vic) (**Corrections Act**) in a particular instance.

25. In its submission, the Agency states:

The protection classification of prisoners at the [facility] at the time of the Applicant's detention is exempt because (reasons not exhaustive):

- Disclosure would be reasonably likely to reveal Victoria Police practice on the types of protection classification prisoners that can be detained together, in close proximity or independently.
- Disclosure of the protection classification would be reasonably likely to identify a prisoner such as those in minority groups or who have vulnerable characteristics.
- Disclosure may lead to the framework used to identify protection classifications being manipulated.
- Disclosure of the protection classification may identify particular cell locations in the [facility] suited to specific classification types.
- Protection classifications go to the general overall operation, good order and safe management of the [facility] for prisoners and staff alike.

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

27. However, having reviewed the documents in this matter, I accept the Agency's submission that granting access to the information it exempted from release 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.

28. 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 the concerns raised by the Agency that such an outcome could reasonably occur if such information were disclosed and became known, including within the prison population.

29. 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 and subsequently accessed by prisoners, offenders and/or the general public.

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<sup>5</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [73] (Bell J) which at [74] references *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].

30. In particular, I accept the Agency's submission that disclosure of information regarding cell locations 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.
31. 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 the prison and prisoners. Therefore, I am satisfied information in the documents is exempt from release under section 31(1)(a).
32. My decision in relation to section 31(1)(a) is set out in the Schedule of Documents in **Annexure 1**.

### ***Section 33(1) – Personal affairs information***

33. A document is exempt under section 33(1) if two conditions are satisfied:
  - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant (a **third party**);<sup>6</sup> and
  - (b) such disclosure would be 'unreasonable'.
34. The nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document, including a third party's personal affairs information in the document, as they choose.<sup>7</sup>

#### *Do the documents contain the 'personal affairs information' of individuals other than the Applicant?*

35. Information relating to a person's 'personal affairs' includes, but is not limited to, information that identifies any person, or discloses their address or location. It also includes any information from which such information may be reasonably determined.<sup>8</sup>
36. Personal affairs information that relates to an individual 'concerns or affects that person as an individual'.<sup>9</sup>
37. A document will disclose personal affairs information if it is directly or indirectly capable of identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.<sup>10</sup>
38. The documents subject to review list full names of individuals who were in the facility at the same time as the Applicant.
39. I am satisfied the documents contain the personal affairs information of individuals other than the Applicant.

#### *Would disclosure of the personal affairs information in the document be unreasonable in the circumstances?*

40. The concept of 'unreasonable disclosure' involves balancing the public interest in disclosure of official information with the protection of a person's right to privacy in the particular circumstances.

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<sup>6</sup> Sections 33(1) and 33(2).

<sup>7</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>8</sup> Section 33(9).

<sup>9</sup> *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

<sup>10</sup> *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

41. In *Victoria Police v Marke*,<sup>11</sup> the Victorian Court of Appeal held there is ‘no absolute bar to providing access to documents which relate to the personal affairs of others’, and the exemption under section 33(1) ‘arises only in cases of unreasonable disclosure’ and ‘[w]hat amounts to an unreasonable disclosure of someone’s personal affairs will necessarily vary from case to case’. The Court further held, ‘[t]he protections of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual’s privacy can be invaded to a lesser or greater degree’.<sup>12</sup>

42. In determining whether disclosure of personal affairs information in the document would be unreasonable in this matter, I have considered the following factors:

(a) The nature of the personal affairs information and the circumstances in which it was obtained

The relevant information was obtained by the Agency in the context of it overseeing the individuals’ interactions with the criminal justice system. In these circumstances, I consider this information is sensitive.

Information obtained by the Agency in these circumstances was done so with the expectation it will remain confidential unless required for a subsequent criminal prosecution. Having reviewed the documents, I am of the view individuals who provided the information to the Agency would not reasonably expect their personal affairs information would be disclosed under the FOI Act.

Having considered the circumstances in which the information was obtained, I am satisfied the personal affairs information in the documents is sensitive in nature.

(b) The Applicant’s interest in the information

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.<sup>13</sup>

I acknowledge the Applicant’s purpose for seeking access to these documents.

(c) Whether any public interest would be promoted by release of the information

The object of the FOI Act serves an important public purpose in that it provides for members of the community to seek to access official records held by government agencies that concern or are of importance to them subject to the application of any exception or exemption in the FOI Act necessary to protect a personal, business or public interest.

While I acknowledge the Applicant’s interest in the document is a personal interest, there is no information before me to establish wider disclosure of the documents would serve a public interest.

(d) Whether the individuals to whom the information relates object, or would be likely to object, to the disclosure of the information

In determining whether disclosure of a document would involve the unreasonable disclosure of a third party’s personal affairs information, where it is practicable to do so, an agency must notify that person an FOI request has been received seeking access to a

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<sup>11</sup> [2008] VSCA 218 at [76].

<sup>12</sup> *Ibid* at [79].

<sup>13</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

document containing their personal affairs information and seek their view as to whether it should be disclosed.

I do not have specific information before me as to the views of the third parties named in the documents. However, I am of the view the third parties would be reasonably likely to object to the release of their personal affairs information under the FOI Act noting the nature of disclosure under the FOI Act is unconditional and unrestricted.

- (e) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>14</sup>

There is no information before me to suggest this is a relevant factor in this matter.

43. Having weighed up the above factors, on balance I am satisfied disclosure of the third parties' personal affairs information in the documents would be unreasonable in the circumstances. Accordingly, I am satisfied this information is exempt from release under section 33(1).
44. My decision on section 33(1) is set out in the Schedule of Documents in **Annexure 1**.

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

45. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
46. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>15</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>16</sup>
47. I have considered the information the Agency deleted in the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as it relates to the Agency's processing of the Applicant's FOI request rather than the subject matter of the request itself.
48. I have considered whether it is practicable to delete the irrelevant and exempt information from the documents in accordance with section 25. Where I am satisfied it is practicable to do so, access to the document is granted in part. Where it is not practicable to do so, access to the document is refused in full.
49. My decision on section 25 is set out in the Schedule of Documents in **Annexure 1**.

#### **Conclusion**

50. On the information before me, I am satisfied the exemptions in sections 31(1)(a) and 33(1) apply to some of the documents. Where it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.
51. The Schedule of Documents in **Annexure 1** sets out my decision for each document.

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<sup>14</sup> Section 33(2A).

<sup>15</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>16</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].

## **Review rights**

52. 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.<sup>17</sup>
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
55. 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.
56. 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.<sup>20</sup>

## ***When this decision takes effect***

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

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<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</sup> Sections 50(3F) and 50(3FA).



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Attendance Summary	1	Release in part Section 25	Release in part Section 25  The information redacted by the Agency is to remain deleted.	Section 25: I am satisfied the document contains information that is irrelevant to the terms of the Applicant's request. Specifically, an identification number of the individual who printed the document. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25.
2.	[date]	[Location] Prisoner Summary – [timestamp]	2	Released in part Sections 31(1)(a), 33(1), 25	Release in part Sections 31(1)(a), 33(1), 25  The information exempted from release by the Agency is to remain deleted.	Section 31(1)(a): For the reasons set out in the Notice of Decision above, I am satisfied disclosure of certain information in the document would be reasonably likely to prejudice the proper administration of the law, in this case, the administration of the Corrections Act. Accordingly, I am satisfied certain information in the document is exempt from release under section 31(1)(a).  Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in this document for the reasons outlined in the Notice of Decision above. Accordingly, I am satisfied certain information in the

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						document is exempt from release under section 33(1).  <b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.
3.		[Location] Prisoner Summary – [timestamp]	2	<b>Release in part</b> Sections 31(1)(a), 33(1), 25	<b>Release in part</b> Sections 31(1)(a), 33(1), 25  The information exempted from release by the Agency is to remain deleted.	<b>Sections 31(1)(a), 33(1) and 25:</b> See comments for Document 2.
4.		[Location]Prisoner Summary – [timestamp]	2	<b>Release in part</b> Sections 31(1)(a), 33(1), 25	<b>Release in part</b> Sections 31(1)(a), 33(1), 25  The information exempted from release by the Agency is to remain deleted.	<b>Sections 31(1)(a), 33(1) and 25:</b> See comments for Document 2.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
5.		[Location] Prisoner Summary – [timestamp]	2	Release in part Sections 31(1)(a), 33(1), 25	Release in part Sections 31(1)(a), 33(1), 25  The information exempted from release by the Agency is to remain deleted.	Sections 31(1)(a), 33(1) and 25: See comments for Document 2.
6.		[Location] Prisoner Summary – [timestamp]	2	Release in part Sections 31(1)(a), 33(1), 25	Release in part Sections 31(1)(a), 33(1), 25  The information exempted from release by the Agency is to remain deleted.	Sections 31(1)(a), 33(1) and 25: See comments for Document 2.
7.		Prisoner Information Record	1	Release in full	Not subject to review	
8.		Current Prisoner Property	1	Release in full	Not subject to review	
9.		Property Release Form	1	Release in full	Not subject to review	