

Notice of Decision and Reasons for Decision

Applicant:	'EC5'
Agency:	Department of Justice and Community Safety
Decision date:	30 June 2022
Exemption considered:	Section 38 in conjunction with section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	'EC5' and <i>Department of Justice and Community Safety</i> (Freedom of Information) [2022] VICmr 49 (30 June 2022)

FREEDOM OF INFORMATION – Corrections Victoria – prison record – audio recording of telephone call made from prison – law enforcement document – document to which secrecy provisions apply – section 104ZZA of the *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.

My decision on the Applicant's request is the same as the Agency's decision in that I am satisfied the document subject to review is exempt under section 38 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 in accordance with section 25, access to the document is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
30 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to transcripts of two telephone calls the Applicant made on specified dates.
2. The Agency identified two documents, being audio recordings, falling within the terms of the Applicant's request and refused access in full under section 38 in conjunction with section 104ZZA of the Corrections Act. The Agency also advised the Applicant that it does not hold transcriptions of the telephone calls. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the first recorded telephone call only.
4. I have examined a copy of the document 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 exemption

Section 38 – Documents to which a secrecy provision applies

9. 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'.
10. For section 38 to apply, the relevant enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
11. The Agency refused access to the document under section 38 in conjunction with section 104ZZA of the Corrections Act.
12. 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.
13. The term 'personal or confidential information' is defined in section 104ZX of the Corrections Act and includes the following, which I consider are relevant in 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.
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14. The phrase ‘relevant person’ is set out in Schedule 5, and includes ‘[a] person employed in the Department under Part 3 of the Public Administration Act 2004’.
15. In summary, section 104ZZA of the Corrections Act operates to protect the personal privacy of individuals who are identified in documents generated in connection with the management and administration of the corrections system. The section imposes strict confidentiality requirements on Agency officers, among others, which apply in all but certain limited circumstances.
16. 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 applies; and
 - (c) section 104ZZA clearly prohibits specified ‘relevant persons’ from disclosing the information to which it applies.
17. The document is an audio recording of a telephone call between the Applicant and a third party.
18. In its decision letter, the Agency states the following information fits within the definition of ‘personal or confidential information’, and is exempt from release:
 - (a) voice recordings of third parties;
 - (b) the name and other identifying information of third parties; and
 - (c) references to other prisoners.
19. I am satisfied the document contains information that identifies third parties, such as their voice and discussion about other third parties.
20. Sections 104ZY and 104ZZ of the Corrections Act set out exceptions to the prohibition on relevant persons disclosing personal or confidential information. Having reviewed these exceptions, I consider there is no information before me to suggest any of the exceptions authorise disclosure of the documents to the Applicant in this instance.
21. Accordingly, I am satisfied section 104ZZA of the Corrections Act prohibits employees of the Agency from disclosing the personal information contained in the document. Therefore, I am satisfied section 38 of the FOI Act applies to the document.

Section 25 – Deletion of exempt or irrelevant information

22. 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.

23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹ 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 25.²
24. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable to provide the Applicant with an edited copy of the document, to release parts of the document that contains the Applicant's voice only and where the information only concerns the Applicant. This is because most of the recording of the Applicant contains discussion of other third parties, and the remaining information is minimal and would be meaningless in isolation.

Conclusion

25. On the information before me, I am satisfied the document is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act.
26. As I am satisfied 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, access is refused in full.

Review rights

27. 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.³
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
30. 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.
31. 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.⁶

¹ *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].

² *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] at [155].

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

⁴ Section 52(5).

⁵ Section 52(9).

⁶ Sections 50(3F) and 50(3FA).