

Notice of Decision and Reasons for Decision

Applicant:	'ER5'
Agency:	Department of Justice and Community Safety
Decision date:	5 July 2022
Exemption considered:	Sections 31(1)(a)
Citation:	'ER5' and Department of Justice and Community Safety (Freedom of Information) [2022] VICmr 187 (5 July 2022)

FREEDOM OF INFORMATION – Corrections Victoria – mail sent by prisoner to third parties – prisoner mail seized by prison staff – 'Not To Be Issued' (NTBI) mail – enforcement or proper administration of the law in a particular instance – *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 documents requested by the Applicant under the FOI Act.

I am satisfied the documents are exempt from release under section 31(1)(a).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access to documents is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

5 July 2022

Reasons for Decision

Background to review

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

...any mail that has been posted to me or sent via DX mail in prison to myself between [date range] that is being held in my prison stores property that has been deemed NTBI (not to be issued) by prison intel staff or corrections workers, held at the [location] or if I can't handle the original mail for some reason then I request to have photo copies of it to read. I want also any mail I haven't received for some reason even [if] it's not stamped NTBI, original or photocopies [are] fine. This includes mail stored that I haven't been able to read that wasn't necessarily sent to me at [location] but it still wasn't given by another prison but is stored in my property at [location] stores. I want to know who each letter is from where it was sent from and why I was not given it or allowed to read it.
2. The Agency identified 10 documents (totalling 77 pages) that meet the terms of the Applicant's request and refused access to the documents in full under sections 31(1)(a), 33(1), and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

Review application

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 a copy of the documents subject to review. In summary, the documents comprise letters written by the Applicant, who is serving a term of imprisonment, to private individuals outside the prison and to another current serving prisoner located in another prison.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. During the review, the Agency advised it no longer relies on the exemption under section 33(1) to refuse access to the documents.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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.
10. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision is the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of making my fresh decision.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

Review of exemptions

11. As stated above, the Agency relies on the exemptions under sections 31(1)(a) and 38 in conjunction with section 104ZZA of the Corrections Act to refuse access to the documents in full.
12. It is generally my preference to first consider the application of a confidentiality or secrecy provision in a relevant piece of legislation (referred to as an 'enactment' in section 38 the FOI Act) that prohibits the disclosure of information in a document before considering whether or not another exemption under the FOI Act apply.
13. In this case, the relevant enactment is the Corrections Act, specifically section 104ZZA of that Act. In summary, the Agency submits the documents contain information that 'fits the definition of 'personal or confidential information' in that they disclose information of 'offenders, prisoners and any other third parties' and 'information that concerns the security and management of a prison'.
14. Having considered the content of the documents subject to review, which comprise letters written by the Applicant who is currently serving a term of imprisonment, to third parties in the community and to another prisoner held in a separate prison, I have determined it is appropriate to first consider the exemption under section 31(1)(a) given the restrictions imposed by section 47D(1) of the Corrections Act on the receipt and sending of prisoner mail.

Legal basis for seizing prisoner mail

15. In conducting my review, I requested and received additional documents from the Agency that outline the legal basis for seizing prisoner mail.²

Corrections Act

16. The Corrections Act sets out the rights of and restrictions on the rights of prisoners.
17. Division 4A of the Corrections Act prescribes the rights of prisoners and the powers of prison staff in relation to letters and parcels sent from and received by prisoners.
18. Section 47(1) of the Corrections Act sets out the rights of prisoners and includes the right to send letters and parcels. Subsection 47(1)(m) provides for the right to send letters and parcels to and receive letters and parcels from, for example, a prisoner's lawyer, a Member of Parliament and various independent oversight agencies and office holders (ie the Victorian Ombudsman). Subsection 47(1)(n) provides, subject to section 47D, for the right for a prisoner to send and receive other letters and parcels uncensored by prison staff.
19. Section 47C of the Corrections Act provides:

An officer within the meaning of Part 5 may open, inspect and read a letter or parcel sent to, or received by, a prisoner by or from any person who is not listed or referred to in section 47(1)(m) to determine whether or not the contents of the letter or parcel may jeopardise the safety and security of the prison, the safe custody and welfare of any prisoner or the safety of the community.

² I have also had regard to a decision of the Supreme Court of Victoria which related to cases involving the seizure of prisoner mail as background to the operation of section 47D of the Corrections Act and the obligation under section 38(1) of the human rights considerations under section 38(1) of the *Charter of Human Rights and Responsibilities 2006* (Vic). See *Minogue v Dougherty* [2017] VSC 724 in which Dixon J considered whether non-delivery of a letter constituted censorship of mail or unreasonable limitation of right to privacy of correspondence or freedom of expression and declined to grant relief.

20. Section 47D of the Corrections Act provides:

When letters and parcels may be stopped and censored

- (1) This section applies if the Governor reasonably believes that any letter or parcel to be sent by a prisoner to, or sent to a prisoner by, any person who is not listed in section 47(1)(m)—
 - (a) is a threat to prison security; or
 - (ab) in the case of a letter or parcel sent by a prisoner to another prisoner or a former prisoner, may be a threat to the good order, management or security of a prison or prisoner; or
 - (ac) in the case of a letter or parcel sent to a prisoner by another prisoner or a former prisoner, may be a threat to the good order, management or security of a prison or prisoner; or
 - (ad) in the case of a letter or parcel sent to a prisoner by a person who the Governor reasonably believes does not know the prisoner, may place that person at risk of exploitation or manipulation; or
 - (b) may be of a threatening or harassing nature; or
 - (c) may be being used to further an unlawful activity or purpose; or
 - (d) contains indecent, abusive, threatening or offensive written or pictorial matter, or written or pictorial matter or any other thing that may be regarded by a victim as distressing or traumatic, or an indecent, obscene or offensive article or substance; or
 - (e) contravenes or would contravene section 47H.
- (2) The Governor may—
 - (a) if the belief concerns the whole letter or parcel, stop the letter or parcel from being sent or received by the prisoner; or
 - (b) if the belief concerns only part of a letter, cause the relevant part of the letter to be censored; or
 - (c) if the belief concerns only part of a parcel, stop the relevant part of the parcel from being sent or received by the prisoner.
- (3) The Governor may, in relation to a letter to be sent by a prisoner—
 - (a) notify the prisoner of the Governor's reasonable belief concerning the letter; and
 - (b) give the prisoner an opportunity to rewrite the letter in order that the letter is not stopped or censored under subsection (2).

Deputy Commissioner's Instruction

21. Prisoner mail is also subject to a 'Deputy Commissioner's Instruction'. A copy of this document was provided to me in part by the Agency.³ I confirm I have read the Instruction concerning 'Prisoner communications' and it reflects the requirements for the receipt and sending of prisoner mail under the Corrections Act and the *Charter of Human Rights and Responsibilities 2006* (Vic).
22. The Agency advised that 'not to be issued' (**NTBI**) mail is prisoner property and all NTBI mail is held by the prison with the prisoner's belongings and is given to the prisoner, along with any of their other personal property, when they are released from prison.

Application of section 31(1)(a) – Disclosure of documents that would prejudice an investigation or the enforcement or proper administration of the law

23. 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:

³ Instruction 4.07.

- (a) investigation of a breach or possible breach of the law, or
- (b) enforcement or proper administration of the law in a particular instance.

24. Section 31(1)(a) is subject to other provisions in section 31.
25. The phrase 'reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.⁴
26. 'Prejudice' means to hinder, impair or undermine, and includes actual prejudice as well as impending prejudice.⁵
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.⁶
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 manner in which the law is administered, including regulatory, monitoring and compliance activities.⁷
30. In *Knight v Corrections Victoria*,⁸ the Supreme Court of Victoria held section 31(1)(a) can apply to documents concerning the management of prisons and specific prisoners:

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.

31. Having reviewed the documents subject to review, I accept their disclosure would also prejudice the proper administration of the Corrections Act in relation to the power of Corrections Victoria to seize prisoner mail for one or more of the grounds under section 47D(1) of the Corrections Act. I am also satisfied this is a 'particular instance' in which the administration of the law may be prejudiced.
32. 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 section 47D(1) of the Corrections Act, and the documents are exempt from release under section 31(1)(a).

Section 25 – Deletion of exempt or irrelevant information

33. 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.
34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ and the effectiveness of the deletions. Where

⁴ *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.

⁵ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

⁶ *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].

⁷ *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.

⁸ [2010] VSC 338 at [73].

⁹ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁰

35. 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. Given the basis of my decision to refuse access to the documents under section 31(1)(a), I am satisfied do to so would render the documents meaningless and the documents are exempt in full.

Conclusion

36. On the information before me, I am satisfied the documents are exempt from release under section 31(1)(a).
37. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access to documents is refused in full.
38. Given my decision in relation to section 31(a), it is not necessary for me to also consider the application of section 38.
39. My decision in relation to section 31(1)(a) is set out in the Schedule of Documents [redacted in full for published decision].

Other comments

40. In making my decision, I wish to make it clear to the Applicant that my role under the FOI Act is not to determine whether the Agency has followed proper procedures for the inspection and seizure of their mail in accordance with section 49D of the Corrections Act and the Deputy Commissioner's Instruction. Rather, my role is to determine whether or not the documents should be disclosed or are exempt from release under the FOI Act.
41. Where a prisoner wishes to make a complaint concerning prison management, they have a right to do so under section 47D(1) of the Corrections Act to the Corrections Minister, the Secretary of the Agency, the Corrections Commissioner, the Governor of the prison, an independent prison visitor, the Victorian Ombudsman, the Health Complaints Commissioner or the Victorian Human Rights Commissioner, as appropriate to the issue of complaint.

Review rights

42. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
45. 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.

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

46. 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.¹⁴

¹⁴ Sections 50(3F) and 50(3FA).