

## Notice of Decision and Reasons for Decision

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Applicant:	'DS2'
Agency:	Department of Justice and Community Safety
Decision Date:	30 September 2021
Exemptions considered:	Sections 30(1) and 38 in conjunction with section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	'DS2' and Department of Justice and Community Safety (Freedom of Information) [2021] VICmr 291 (30 September 2021)

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FREEDOM OF INFORMATION – prison documents – prisoner medical file – medical records – secrecy provision – *Corrections Act 1986* (Vic) – ‘personal and confidential information’

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 differs from the Agency’s decision.

While I am satisfied certain information in the documents is exempt under sections 30(1) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**), I have granted access to additional information where I am satisfied it is not exempt.

As I am satisfied 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.

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

30 September 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to psychiatric reports, findings and documents concerning the Applicant while serving a prison sentence.
2. The Agency identified 260 pages of documents falling within the terms of the Applicant's request and granted access to the documents in part, relying on the exemptions under sections 30(1), 33(1) and 38 in conjunction with section 104ZZA of the Corrections Act.
3. The Agency's decision letter sets out the reasons for its decision.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
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.

### Review of exemptions

#### ***Section 38 – Documents to which secrecy provisions apply***

10. 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.

11. Therefore, for a document to be exempt under section 38, three conditions must be satisfied:

- (a) there must be an enactment in force;
- (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
- (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications).

12. The Agency's decision letter states:

Section 104ZZA of the *Corrections Act 1986* (Corrections Act) prohibits the disclosure of confidential information and the personal information of offenders, prisoners and any other third parties. Section 104ZX defines personal or confidential information.

In this case, the following material fits the definition of personal or confidential information:

- the names of staff, their titles and signatures is information that identifies a person
- references to other individuals

The Corrections Act prohibits this information from disclosure. Therefore, it is exempt under section 38 of the FOI Act.

*Is there an enactment in force?*

13. I am satisfied the Corrections Act is an enactment in force for the purposes of section 38 of the FOI Act.

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

14. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

15. The Agency applied section 38 of the FOI Act in conjunction with 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 disclose is authorised under sections 104ZY or 104ZZ.

Penalty: 120 penalty units.

16. Section 104ZZA of the Corrections Act operates to protect the personal privacy of persons who are identified in documents created in connection with the management and administration of the corrections system, including prisoners. The provision is also 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.

17. Section 104ZX of the Corrections Act defines 'relevant person' as a person specified in Schedule 5 of that 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.

18. The term 'personal and confidential information' is defined in section 104ZX of the Corrections Act and includes the following, which I consider is 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.

...

19. The information in the documents the Agency considers is 'personal or confidential information' under section 104ZX of the Corrections Act is described in paragraph 12 above. Having carefully reviewed the documents, I am satisfied most of the relevant information exempted by the Agency identifies persons other than the Applicant or information to which the identity of a person can be reasonably determined. Such information includes:
- (a) names of prison staff and medical professionals;
  - (b) position titles;
  - (c) relationship descriptors;
  - (d) telephone numbers;
  - (e) signatures;
  - (f) email addresses; and
  - (g) information about the health and circumstances of third parties.
20. However, I have decided a small amount of information in the documents is not information that identifies persons, as described in the definition of 'personal and confidential information', as set out above. Details of my decision are set out in the Schedule of Documents in **Annexure 1**.
21. Accordingly, I am satisfied most of the information deleted by the Agency falls within the definition of 'personal or confidential information' under section 104ZX of the Corrections Act and is information to which the secrecy provision under section 104ZZA of the Corrections Act applies. However, in limited instances I am satisfied the information exempted from release by the Agency is not of a kind that falls within the definition of 'personal and confidential' information.

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

22. Section 104ZZA of the Corrections Act prohibits the use or disclosure of the type of information to which it applies. It is an offence to disclose information in contravention of that prohibition.
23. However, section 104ZZA is subject to exceptions in sections 104ZY and 104ZZ of the Corrections Act, which permit the release of 'personal or confidential information' in certain circumstances.
24. I am satisfied the exceptions do not apply in this instance.
25. 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.

26. Accordingly, on the information before me, 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.
27. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 38.

**Section 30(1) – Internal working documents**

28. Section 30(1) has three requirements:
- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
  - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
  - (c) disclosure of the matter would be contrary to the public interest.
29. The exemption does not apply to purely factual material in a document.<sup>1</sup>

*Were the documents prepared by an officer of the Agency or a Minister?*

30. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of an agency’s staff and any person employed by, or on behalf of an agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.
31. I am satisfied the documents were prepared by Agency officers.

*Do the documents contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

32. For the requirements of section 30(1) to be met, the document must contain matter in the nature of opinion, advice or recommendation prepared by an officer of an agency, or consultation or deliberation between officers.
33. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.<sup>2</sup>
34. Section 30(3) provides purely factual information is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant material deleted, where it is practicable to do so.
35. The Agency applied section 30(1) to information in the documents that records the professional opinions and observations of various medical professionals working within the correctional system.

*Were the documents made in the course of, or for the purpose of, the deliberative processes involved in the functions of the Agency?*

36. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>3</sup>

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>3</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

37. In *Re Waterford and Department of Treasury (No.2)*,<sup>4</sup> the Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

38. I am satisfied the information was communicated in in the course of, or for the purpose of, the deliberative processes involved in the functions of the Agency, which in this instance, is providing care and treatment for the Applicant whilst incarcerated.

*Would disclosure of the information be contrary to the public interest?*

39. In determining if disclosure would be contrary to the public interest, I must consider all relevant factors remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have given weight to the following factors:<sup>5</sup>

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency’s functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

40. The Agency, in its decision, advised that release of this information would be contrary to the public interest as it would inhibit medical staff and clinicians from freely expressing their opinions and observations about a prisoner’s presentation to ensure the ongoing management of a prisoner’s health and well-being.

41. I acknowledge the Applicant’s personal interest in obtaining all information that concerns them in the documents. Further, I appreciate redactions made to documents can create a sense of disappointment and frustration to an applicant, regardless of whether only a small amount of material is withheld, and an applicant may simply wish for a complete copy of a document without any redactions to any pages.

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<sup>4</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

<sup>5</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

42. In addition to the Applicant's personal interest in the documents, I consider there is a broader public interest that favours release of official information to promote transparency and accountability to improve the quality of reporting.
43. Although these factors weigh in favour of release, I consider there are also several factors weighing against disclosure. Having carefully examined the documents and the context in which they were created, I am satisfied it would be contrary to the public interest to release the exempted information for the following reasons:
- (a) Generally speaking, I consider medical information is sensitive in nature. In this case, the deliberative material in the documents was recorded when the Applicant was serving a prison term. I consider the prison environment and the purpose for which the information was recorded increases its sensitivity.
  - (b) I accept release may give prisoners (or former prisoners) additional insight into the processes of medical staff and Agency officers who are responsible for monitoring individuals within the Corrections system. The wide disclosure of the type of information exempted by the Agency may influence the future behaviour of prisoners towards staff, who rely on open and candid interactions to accurately assess the health and well-being of prisoners in particular circumstances.
  - (c) The document records the opinions, advice and subjective comments of Agency officers based on their observations at the relevant time. Their preliminary information and views could be misunderstood as amounting to conclusive advice, which may not accurately reflect an actual clinical diagnosis or final understanding by the Agency of matters involving the Applicant.
  - (d) Generally, I do not accept that, as a result of the disclosure of the information in response to the Applicant's request, medical staff employed by the Agency would be deterred from discharging their professional and ethical obligations to provide their opinions and subjective comments in the future, or from recording detailed opinions or advice in relation to the health and well-being of prisoners in their care. However, I consider the routine disclosure of such information would result in a diminution in the degree of candour adopted by Agency medical staff. Further, should such information be broadly disseminated, it is likely Agency staff will feel constrained in the way in which they raise issues and communicate concerns regarding prisoners. This could have serious adverse consequences in relation to the general management of prisoner health and well-being.
  - (e) While the public interest in transparency is a consideration to which I have given weight, I am mindful of the overall purpose of the documents in providing Agency officers, who are responsible for monitoring the physical and mental health of prisoners, access to detailed relevant information to support them in effectively performing their role.
44. Accordingly, I am satisfied the documents are exempt under section 30(1). However, I have decided a small amount of information in Document 3 is not exempt and is to be released to the Applicant.
45. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1).

### **Section 33(1) – Information affecting an individual’s personal privacy**

46. 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’.
47. Information relating to a person’s ‘personal affairs’ includes 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>7</sup>
48. I am satisfied most of the information the Agency exempted under section 33(1) is exempt from release under section 38.
49. However, I have determined a small amount of information is not exempt under section 38 on the basis it is not ‘confidential and personal’ information under section 104ZX of the Corrections Act, as I am satisfied it is not capable of identifying a third party.
50. In light of this, it is not necessary for me to consider the application of section 33(1) to the documents.
51. However, I have decided a small amount of information in Document 3 is not exempt and is to be released to the Applicant.
52. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

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

53. 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.
54. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>8</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>9</sup>
55. I have considered the effect of deleting exempt and irrelevant information from the documents. I am satisfied it is practicable to delete the exempt and irrelevant information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

56. On the information before me, I am satisfied certain information in the documents is exempt under sections 30(1) and 38. However, I have decided a small amount of information in Document 3 is not exempt and is to be released to the Applicant.

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

<sup>7</sup> Section 33(9).

<sup>8</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>9</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140] and [155].



57. I am satisfied it is practicable for the Agency to edit the documents to delete exempt and irrelevant information in accordance with section 25.
58. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

59. 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>10</sup>
60. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
61. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
62. 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.
63. 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>13</sup>

### **Third party review rights**

64. As I have determined to release information the Agency determined to be the personal affairs information of third parties in the documents, if practicable, I am required to notify those individuals of their right to seek review by VCAT within 60 days from the date they are given notice of my decision.<sup>14</sup>
65. In the circumstances, I have decided notifying the relevant third parties of their review rights is not practicable as I am of the view the information to be released is not capable of identifying the third parties, and in some instances, is the Applicant's own personal affairs information.

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

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

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<sup>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).

<sup>14</sup> Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Multiple	Compilation of medical records	100	<p><b>Released in part</b></p> <p>Sections 30(1), 33(1), 38</p>	<p><b>Release in part</b></p> <p>Sections 30(1), 33(1), 38, 25</p> <p>The information exempted by the Agency is to remain deleted except for the following information, which is not exempt under section 38 and is to be released:</p> <ul style="list-style-type: none"> <li>the telephone number of the psychiatric triage service on page 7 (page 6 of 178 of the medical file);</li> <li>the fourth redaction made by the Agency on page 33 (page 32 of 178 of the medical file); and</li> <li>the second last redaction made by the Agency on page</li> </ul>	<p><b>Section 38:</b> I accept most of the redacted information is ‘personal or confidential information’ within the meaning of section 104ZX of the Corrections Act. Accordingly, I am satisfied this information is exempt under section 38.</p> <p>However, I have determined to release certain information where I am not satisfied it falls within the definition of ‘personal or confidential information’ under section 104ZX of the Corrections Act.</p> <p>I am also satisfied this information is not ‘personal affairs information’ for the purposes of section 33(1).</p> <p>Where I have determined information is exempt under section 38, it is not necessary for me to consider the application of section 33(1) to the same information.</p> <p><b>Section 30(1):</b> I am satisfied it would be contrary to the public interest to release the deliberations of the Agency in the circumstances, as I accept Agency officers need to be able to freely record their professional opinions and observations concerning prisoners and discuss appropriate methods for dealing with potential risks without concern such information will be disclosed under the FOI Act and possibly disseminated widely.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
					53 (page 54 of 178 of the medical file).	<b>Section 25:</b> In regards to page 1, the Agency relies on sections 33(1) and 38 to exempt from release the name of an Agency officer who printed out this document for the purposes of processing the Applicant’s FOI request. Accordingly, I am satisfied this is ‘irrelevant information’ and is to be deleted in accordance with section 25 of the FOI Act and it is practicable to provide the Applicant with an edited copy of the document.
2.	Multiple	Compilation of medical records	79	<b>Released in part</b>  Sections 30(1), 33(1), 38	<b>Release in part</b>  Sections 30(1), 33(1), 38, 25  The information exempted by the Agency is to remain deleted except for the following information, which is not exempt under section 38 and is to be released:  <ul style="list-style-type: none"> <li>the third redaction made by the Agency on page 36 (page 135 of 178 of the medical file); and</li> </ul>	See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> <li>the first redaction made by the Agency on page 54 (page 152 of 178 of the medical file).</li> </ul>	
3.	Multiple	Forensicare File	81	Released in part  Sections 30(1), 33(1), 38	<p>Release in part</p> <p>Sections 30(1), 33(1), 38, 25</p> <p>The information exempted by the Agency is to remain deleted except for the following information, which is not exempt under section 30 and is to be released:</p> <ul style="list-style-type: none"> <li>the information exempted by the Agency on page 19.</li> </ul>	<p><b>Section 38:</b> See comments for Document 1. However, I am satisfied all information is exempt from release under section 38, and no further information is to be released.</p> <p><b>Section 30(1):</b> I am not satisfied the information exempted by the Agency on page 19 is exempt from release under section 30(1) for the following reasons:</p> <p>(a) similar information was released to the Applicant in Documents 1 and 2; and</p> <p>(b) disclosure of this information to the Applicant is unlikely to inhibit Agency officers from recording similar information in official documents in the future.</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of the document in accordance with section 25.</p>