

Notice of Decision and Reasons for Decision

Applicant:	'EP8'
Agency:	Department of Justice and Community Safety
Decision date:	22 June 2022
Exemption considered:	Section 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:	'EP8' and <i>Department of Justice and Community Safety</i> (Freedom of Information) [2022] VICmr 171 (22 June 2022)

FREEDOM OF INFORMATION – prison records – prisoner telephone records – secrecy provision – personal or confidential information – *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 document subject to review is exempt in full under section 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
22 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to prison telephone records between named individuals for the period [year] and [year].
2. The Agency identified one document falling within the terms of the Applicant's request, totalling five pages, and refused access to the document in full under section 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**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 a copy of the document 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 exemption

Section 38 – Documents to which secrecy provisions apply

10. A document is exempt from release 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).

Is there an enactment in force?

11. 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 document?

12. For a document to be exempt from release under section 38, the relevant enactment must be formulated with such precision that it specifies the actual information in the document sought to be withheld.
13. As indicated above, the Agency relies on section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
14. Section 104ZZA 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.

15. The definition of 'relevant person' in section 104ZX of the Corrections Act 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.

...

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

- (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 the person; or
- (ii) from which any person's identity, address or location can reasonably be determined;

...

17. The Agency applied the secrecy provision to the names and contact information of third parties.
18. I am satisfied this information 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.

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

19. Having reviewed the circumstances in which disclosure is authorised under sections 104ZY and 104ZZA of the Corrections Act, I am satisfied the Agency is prohibited from disclosing the information exempted by the Agency.
20. Disclosure of information in breach of section 104ZZA of the Corrections Act attracts a financial penalty, which highlights the legislature's intention that such information should remain confidential.

Conclusion on the application of section 38

21. In relation to section 38 of the FOI Act, I am satisfied:
 - (a) section 104ZZA of the Corrections Act is an enactment in force;
 - (b) the document contains information that falls within the definition of ‘personal or confidential information’ in sections 104ZX(a) and 104ZX(c) of the Corrections Act; and
 - (c) section 104ZZA of the Corrections Act prohibits Agency officers from disclosing the personal and confidential information in the document.
22. 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. However, I am satisfied the exceptions do not apply to the relevant information in this instance.
23. I note the information in the Applicant’s request and the sensitive circumstances in which they have requested the information. However, as described above, there is no discretion in the application of these provisions of the Corrections Act, and therefore the application of section 38.
24. Accordingly, on the information before me, I am satisfied the document is exempt in full under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Section 25 – Deletion of exempt or irrelevant information

25. 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.
26. 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
27. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete the exempt information, because doing so would render the document meaningless.

Conclusion

28. I am satisfied the document is exempt in full under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
29. As I am satisfied the document cannot be edited to delete exempt information the document is refused in full.

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] and [155].

Review rights

30. If the Applicant 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
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
32. 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.
33. 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.⁵

When this decision takes effect

34. My decision does not take effect until the relevant review period (stated above) expires.
35. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

³ Section 50(1)(b).

⁴ Section 52(5).

⁵ Sections 50(3F) and (3FA).