

Notice of Decision and Reasons for Decision

Applicant:	'FA3'
Agency:	Department of Justice and Community Safety
Decision date:	3 March 2023
Exemptions considered:	Sections 31(1)(a), 31(1)(d) and 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:	'FA3' and Department of Justice and Community Safety (Freedom of Information) [2023] VICmr 12 (3 March 2023)

FREEDOM OF INFORMATION – Corrections Victoria – correctional centre – prison – CCTV footage – body worn camera footage – incident involving a prisoner – alleged assault – prison management – prison officers – not practicable to delete exempt and irrelevant information – prejudice the proper administration or enforcement of the law – secrecy provision – *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.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the documents, being closed-circuit television (**CCTV**) and body-worn camera footage, are exempt from release under sections 31(1)(a), 31(1)(d) and 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 documents with irrelevant and exempt information deleted in accordance with section 25, access is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
3 March 2023

Reasons for Decision

Background to review

1. The Applicant, a prisoner at [named prison], made a request to the Agency seeking access to the following documents:

Any and all "Surveillance Footage" of an incident that occurred on [date] at approximately [time] at [named prison] in [location].

2. The Applicant provided further details of the location of the incident and the prison officers involved to assist in locating the requested documents.
3. The Agency identified five documents, being CCTV footage and body-worn camera footage captured inside the correctional centre (**footage**), falling within the terms of the Applicant's request to which the Agency denied access in full under sections 31(1)(a), 31(1)(d) and 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
4. The Agency's decision letter sets out the reasons for its decision.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access in full to the prison footage.
6. OVIC staff have briefed me on the content of the footage subject to review. It comprises five video files taken from different locations and angles within the prison and includes body worn camera and CCTV footage. The Applicant and multiple third parties are visible in the footage that depicts activities prior to and after an incident in [location] which resulted in the Applicant being restrained, handcuffed and escorted from [location] by prison officers. For the Applicant's understanding, there is no other information captured relevant to their specific request terms.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. In their review application, the Applicant submits they seek access to the footage for their own records as they allege they were assaulted within the prison by prison officers who were there to protect them. The Applicant advises:

I do not believe such disclosure would effect an investigation or administration of a particular law, as there is no investigation currently in place... its disclosure would not harm any effectiveness of any methods of procedures [nor] and undermine any security aspects of the management of named prison].

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.

Review of exemptions

Section 38 – Documents to which a secrecy provision applies

11. As stated above, the Agency refused access to the footage under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
12. 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'.
13. For section 38 to apply, the relevant enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
14. Therefore, for a document to be exempt from release under section 38, three conditions must be satisfied:
 - (a) there must be an enactment in force;
 - (b) that applies specifically to the kind of information contained 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 an exception or qualification).

Is there an enactment in force?

15. I am satisfied the Corrections Act is an enactment in force for the purposes of section 38.
16. Accordingly, I am satisfied the first condition for the application of section 38 is met.

Does the enactment apply specifically to the kind of information in the prison footage?

17. Part 9E of the Corrections Act concerns 'Disclosure of information' under the Act.
18. Section 104ZZA of the Corrections Act 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.

19. 'Personal or confidential information' is defined in section 104ZX of the Corrections Act and includes the following categories of information, which I consider are relevant to the footage subject to review:
 - (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.

...

- (g) information concerning the investigation of a contravention of possible contravention of the by –
 - (i) an offender; or
 - (ii) a prisoner; or
 - (iii) an officer within the meaning of Part 5 or Part 9;
 - (iv) a person authorize under section 9A to exercise a function or power; or
 - (v) a person working with, or in contact with, offenders or prisoners; or
 - (vi) a person engaged in the administration of this Act;
- (h) information concerning procedures or plans adopted or following in a prison in event of an emergency;
- (i) information concerning the management of prisons;
- (j) information concerning—
 - i. security systems and security measures in, or in relation to, a prison;

...

- 20. 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*'.
- 21. In summary, section 104ZZA of the Corrections Act operates to protect the confidentiality and personal privacy of individuals who are identified in documents created in connection with prisoners, prison staff and prisons, including the management and security of prisons in Victoria.
- 22. In its decision letter, the Agency identified the following material as fitting the definition of 'personal or confidential information' under section 104ZZA of the Corrections Act:
 - (a) CCTV footage in a prison is information that concerns the security and management of a prison; and
 - (b) details about how information is recorded and stored is information that concerns the security and management of a prison.
- 23. The footage includes images of the Applicant as well as other prisoners and prison staff and their movements prior to and following the incident in the exercise yard.
- 24. On the information before me, I am satisfied the footage contains 'personal or confidential information' within the categories of information under sections 104ZX(a), 104ZX(c)(ii), 104ZX(i) and 104ZX(j)(i) of the Corrections Act and is information to which the prohibition on disclosure under section 104ZZA of the Corrections Act applies.
- 25. Accordingly, I am satisfied the second condition for the application of section 38 is met.

Does the enactment prohibit persons from disclosing information in prison footage?

- 26. Section 104ZZA of the Corrections Act imposes strict confidentiality requirements on 'relevant persons' and prohibits them from disclosing 'personal or confidential information' under that Act.
- 27. However, the prohibition on disclosure is subject to exceptions that permit release of 'personal or confidential information' in certain limited circumstances.
- 28. In this case, I have considered each of the exceptions under section 104ZY of the Corrections Act. Relevantly, section 104ZY(2)(b) provides a 'relevant person' may use or disclose 'personal or

confidential information’ ‘with the authorisation, or at the request, of the person to whom the information relates’.

29. Having carefully considered the operation of section 104ZZA of the Corrections Act and the exception under section 104ZY(2)(b), I consider the Applicant’s request seeking access to documents containing ‘personal or confidential information’ represents their implied consent to the disclosure of information relating to them in the documents.¹ As such, I have considered whether the exception under section 104ZY(2)(b) of the Corrections Act operates to remove the prohibition on disclosure under section 104ZZA of the Corrections Act in relation to the footage where it captures the Applicant.
30. Where the ‘personal or confidential information’ falls under sections 104ZX(a), 104ZX(c)(ii), 104ZX(g)(ii), 104ZX(i) and 104ZX(j)(i) of the Corrections Act, I am satisfied the exception under section 104ZY(2)(b) is not intended to extend to enable disclosure of ‘personal or confidential information’ in these circumstances. Therefore, in relation to the footage, I am not satisfied the exception under section 104ZY(2)(b) of the Corrections Act extends to images of the Applicant. Rather, the primary purpose and content of the footage concerns the management of the prison and forms a key part of its security system and security measures under sections 104ZX(i) and 104ZX(j)(i) of the Corrections Act. As such, I am satisfied the exceptions, including under section 104ZY(2)(b) of the Corrections Act, do not apply.
31. Accordingly, I am satisfied the third condition for the application of section 38 is met.

Conclusion in relation to section 38

32. In summary, 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 of the Corrections Act, in conjunction with section 104ZX, identifies with precision the type of information to which it the prohibition applies;
 - (c) section 104ZZA of the Corrections Act prohibits specified ‘relevant persons’ from disclosing ‘personal or confidential information’ to which it applies in the documents subject to review; and
 - (d) I am satisfied none of the exceptions under section 104ZY of the Corrections Act apply to the ‘personal or confidential information’ the Agency exempted from release under section 38.
33. On the information before me, I am satisfied the footage requested by the Applicant is exempt from release under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Section 31(1) – Law enforcement documents

34. The Agency also relies on sections 31(1)(a) and 31(1)(d) to refuse access to the footage. For completeness, I also consider the application of these additional exemptions.

¹ *Frugtniet v Legal Services Board (Review and Regulation)* [2014] VCAT 1299 at [96]; *Gullquist v Victorian Legal Services Commissioner (Review and Regulation)* [2017] VCAT 764 at [80] and [83]; *Victorian Legal Services Commissioner v Grahame (No 2) (Review and Regulation)* [2019] VCAT 1878.

35. Subject to section 31, a document is an exempt document:
- (a) under section 31(1)(a) if its disclosure would, or would be reasonably likely to 'prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;
 - (b) under section 31(1)(d) if its disclosure would disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures.
36. The phrase 'reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.²
37. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
38. '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.⁴
39. 'Proper administration of the law' includes the manner in which the law is administered, including regulatory, monitoring and compliance activities.⁵
40. In *Knight v Corrections Victoria*, the Supreme Court of Victoria considered section 31(1):⁶
- 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.
41. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally. The Agency relies on the second limb of section 31(1)(a) and submits release of the footage would prejudice the proper administration of the Corrections Act in a particular instance.
42. In its decision letter, the Agency summarises its position regarding the application of sections 31(1)(a) and 31(1)(d) as follows:

Disclosure of the CCTV footage could undermine the security and proper administration of the law in relation to managing prisoners and maintaining good order and security within the prison system because release of CCTV footage in a prison environment can have a significance and consequence that would not occur in other environments. This has been found to adversely affect prisoner discipline, behaviour and management of prisoners and the prison generally.

² *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.

³ *Ibid*, *Bergman* at [66] referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

⁴ *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].

⁵ *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.

⁶ *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].

Disclosure of the CCTV footage could reveal how CCTV is used to prevent, detect and investigate incidents occurring within the prison. Disclosure would be reasonably likely to alert offenders to the operation of CCTV and to steps that they may take in order to avoid detection, thus prejudicing its effectiveness.

43. I accept the Agency's submission above and am satisfied the footage reveals the location and coverage of CCTV cameras installed in the prison for security and safety purposes. Further, I consider such footage is sensitive in nature given its location and purpose within a prison environment and in connection with the Agency's statutory responsibility to maintain good order and security within the prison system.
44. The FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.⁷ Therefore, I accept disclosure of the footage to the Applicant would mean they would be free to use or further disseminate it as they please, which could reasonably involve it disseminated and subsequently accessed by prisoners, offenders and/or the general public.
45. The exemptions in section 31(1)(d) do not apply to widespread and well-known methods and procedures.⁸ It is well-known that CCTV footage and body worn camera footage are used to assist in the prevention, detection, investigation and handling of matters arising out of evasions of the law within prisons. However, what is not well-known is the location, number of cameras, timing of recordings and the extent to which a CCTV camera may or may not capture footage of particular areas within a prison.
46. I acknowledge the Applicant's interest accessing the footage due to their involvement in the incident involving them in prison in circumstances where they allege they were assaulted by one or more prison officers. I appreciate this is a serious allegation about their treatment within the prison environment which should be addressed through appropriate law enforcement channels. I understand the Applicant seeks access to the footage to potentially further pursue a complaint about the alleged conduct of the prison officers involved.
47. However, based on the content of the footage, I accept the Agency's position that its disclosure 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.
48. If CCTV footage or body worn camera footage taken within a prison were to be routinely disclosed under the FOI Act, given the unrestricted nature of release under the Act, I am satisfied it would, or would be reasonably likely to, endanger the lives or physical safety of prisoners, prison officers or other persons working or visiting the prison.

Conclusion in relation to section 31(1)

49. Accordingly, I am satisfied disclosure of the documents would be reasonably likely to prejudice the proper administration of the law, in this case, the Agency's administration of the Corrections Act in regard to the management and security of the prison and prisoners.
50. I consider release of the footage would disclose pertinent information about the methods or procedures used for detecting or dealing with matters arising out of, breaches or evasions of the

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁸ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

law which would be reasonably likely to negatively impact the future effectiveness of those methods or procedures.

51. Therefore, I am satisfied information in the footage is exempt from release under sections 31(1)(a) and 31(1)(d).

Section 25 – Deletion of exempt or irrelevant information

52. I have also considered whether it is practicable to provide the Applicant with an edited copy of the footage with exempt and irrelevant information removed or edited in accordance with section 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.
53. 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 deletions would render a document meaningless, they are not ‘practicable’ and release of the document is not required under section 25.¹⁰
54. Therefore, it is necessary to consider whether it is practicable to edit the footage to remove information that is exempt from release under sections 38 and 31(1).
55. I am satisfied it would not be practicable to do so as even if all exempt information could be edited from the footage, I consider the remaining footage would not retain sufficient meaning and it would not serve the Applicant’s purpose.

Conclusion

56. On the information before me, I am satisfied information in the footage is exempt from release under sections 31(1)(a), 31(1)(d) and 38 in conjunction with section 104ZZA of the Corrections Act.
57. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the prison footage with irrelevant and exempt information deleted in accordance with section 25, access to the documents is refused in full.

Review rights

58. 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.¹¹
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
60. 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.

⁹ *Mickelburgh 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].

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 Section 50(1)(b).

¹² Section 52(5).

61. The Agency is required to notify the Information Commissioner in writing as soon as practicable after is becomes aware of any application to VCAT for a review of my decision.¹³

Other matters

62. Noting the purpose for which the Applicant seeks access to the footage, Corrections Victoria website provides details about how a person can make a complaint to Corrections Victoria.
63. If a person is not satisfied with the way in which Corrections Victoria deals with their complaint, they can make a complaint to the Victorian Ombudsman, by using the free call telephone line (enter prisoner ID then PIN *05) from 9am to 5pm weekdays. Copies of the relevant website pages providing contact details for Corrections Victoria and the Victorian Ombudsman will be supplied to the Applicant in hard copy should they wish to make a complaint arising from the incident.

¹³ Sections 50(3F) and 50(3FA).