

Notice of Decision and Reasons for Decision

Applicant:	'FH3'
Agency:	Department of Justice and Community Safety
Decision date:	26 July 2023
Exemptions and provisions considered:	Sections 25, 31(1)(a), 31(1)(d), 33(1) 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:	'FH3' and Department of Justice and Community Safety (Freedom of Information) [2023] VICmr 74 (26 July 2023)

FREEDOM OF INFORMATION – Zoom recordings of prison visits – video files – third parties – minors – personal or confidential information – secrecy provision – *Corrections Act 1986* (Vic) – operation of section 104ZY(2)(b) – editing – not practicable to delete exempt or irrelevant 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.

I consider information in the documents which depicts the images and audio of individuals other than the Applicant, being video recordings of prison visits held via Zoom, is exempt from release under section 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

I am not satisfied the documents are exempt in full under sections 31(1)(a) or 31(1)(d) of the FOI Act, although I consider certain information is exempt under these sections.

I have determined it is not practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, as the work involved in editing the documents would be substantial and unreasonable, especially when I consider the volume of redactions required would essentially render the documents meaningless. As such, access is refused in full.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

26 July 2023

Reasons for Decision

Background to review

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

Copies of the recordings of Zoom video visits between myself and my children held by Corrections Victoria.
2. In their request, the Applicant identified 77 specific Zoom video visits by date, time and visitor name occurring between [date range].
3. The Agency identified 45 documents falling within the terms of the Applicant's request and refused access to all 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 advised in its decision letter that access was refused as the documents '... contain images of third parties and information regarding the security and management of prisons'.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. In their review application, the Applicant raised concerns about the adequacy of the Agency's document searches; noting all 77 documents listed in their FOI request were not located. In accordance with section 61B(3), these concerns were dealt with by this review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review, including about the Applicant concerns about the adequacy of the Agency's search.
8. I have considered all communications and submissions received from the parties throughout this review.
9. In relation to the Applicant's concerns about the Agency's document search, OVIC staff made further enquiries and the Agency provided an explanation as to why certain documents were not located. This explanation, along with further information about the documents not located, was shared with the Applicant. In consultation with the Applicant, it was agreed OVIC would proceed with the review of the exemptions applied to the documents that were located and not make further enquiries or take further action under this review in relation to those documents not located.
10. As such, I have proceeded with my review of the 45 documents located. I have been briefed on the content of these documents and have viewed a sample of the documents subject to review.
11. I note these documents are similar in format and content in that they depict the conversations and interactions during a visit between the Applicant and one or more of their children conducted over Zoom, which occurred while the Applicant was incarcerated. The recordings are in colour and include sound. Beyond the Applicant and their children, other third party individuals can also be heard and are visible in parts of the documents.

12. The Applicant has advised they seek access to the documents to demonstrate they maintained regular and positive contact with their children in support of future legal proceedings involving custody once they are released. In their detailed submissions, the Applicant raised whether other content beyond that showing their engagement with their children could be edited out of the documents which I have further carefully considered.
13. On [date], the Agency was provided with my preliminary view that I was not convinced the documents were clearly exempt in full under the FOI Act. I provided the Agency with an opportunity to respond, including about the practicality of editing the documents in accordance with section 25. I have carefully considered the Agency's response.
14. 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.
15. 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.
16. 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 to be 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 my decision.

Review of exemptions

Section 38 – Documents to which a secrecy provision applies

17. A document is exempt from release under section 38 if the following three requirements are met:
 - (a) there is an enactment in force;
 - (b) the enactment applies specifically to the kind of information in a document; and
 - (c) the enactment prohibits persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
18. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Is there an enactment in force?

19. As stated above, the Agency refused access to the documents under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

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

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

21. 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 Zoom visit recordings?

22. '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 documents 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.

...

(i) information concerning the management of prisons;

(j) information concerning—

i. security systems and security measures in, or in relation to, a prison;

...

23. The Agency submits the following fits within the definition of 'personal and confidential information':

- the names, voices, images and other possible identifying information of third parties including prisoner's family
- information that concerns the security and management of prisons.

24. The documents include images and audio of the Applicant and third party individuals, including adults and children in their home environment, as well as prison staff and their movements within the prison immediately prior to, on occasion during and following the conclusion of each visit.

25. I note the Applicant has expressed the below view about the definition of information in section 104ZX:

This definition states that "information includes photographs, fingerprints samples and the results of tests". It does not include video footage or recordings of Zoom video visits in this definition. This definition therefore limits the definition of personal and confidential information accordingly.

26. While this definition does not specifically reference video footage or recordings of Zoom calls, it does not explicitly exclude it. I note the Correction Act predates the existence of such technology which now results in the creation of documents such to the FOI Act and other legislation. As such, I take a modern interpretation of what information can include in this context.

27. On the information before me, I am satisfied the documents contain ‘personal or confidential information’ falling within the broad categories of information described under sections 104ZX(a), 104ZX(c)(i) and (ii), 104ZX(i) and 104ZX(j)(i) of the Corrections Act and in the most part this is information to which the prohibition on disclosure under section 104ZZA of the Corrections Act applies.

28. Accordingly, I am satisfied the second condition for the application of section 38 is met.

Does the enactment prohibit persons from disclosing that information in the documents?

29. Part 9E of the Corrections Act concerns ‘Disclosure of information’.

30. 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.

31. 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*’.

32. 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. I consider this can extend to the prison’s management of an individual prisoner. The section imposes strict confidentiality requirements on Agency officers and others and prohibits them from disclosing ‘personal or confidential information’, subject to limited exceptions as detailed in sections 104ZY and 104ZZ of the Corrections Act.

33. Relevantly in this case, 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’.

34. I note the Applicant’s views on sections 104ZY(2)(b), 104ZY(2)(c) and 104ZY(2)(n) being relevant in this case. These exceptions provided, a relevant person may also use or disclose personal or confidential information in the following circumstances—

(b) with the authorisation, or at the request, of the person to whom the information relates;

(c) if the use or disclosure is authorised by the Minister;

...

(n) if the information is already in the public domain;

35. Having further carefully considered the operation of section 104ZZA of the Corrections Act and the exceptions under section 104ZY(2), in this case I am not satisfied that the relevant Minister has authorised disclosure, therefore 104ZY(2)(c) is not applicable. While information about the Applicant’s children and the arrangements in place for visitation between them and the Applicant via Zoom may be in the public domain through court order documents, the documents under review being Zoom recordings of these visits are not in the public domain. Rather they are stored securely by the Agency in line with its document management

requirements and copies are securely stored by OVIC for the duration of the review only. As such, I find section 104XY(2)(n) is not applicable.

36. In relation to 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.² As such, I consider 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 specific content in the documents where it captures the Applicant only and whether the broader prison environment is not visible. I put this to the Agency in my preliminary view and on reconsideration it agreed in theory with this interpretation.
37. I note the Applicant considers the exemption under 104ZY(2)(b) should extend further to them being able to provide authorisation as their parent for the audio and visuals of minors captured in the documents being released. In support of this, the Applicant highlights the requirements detailed in section 33 of the FOI Act in relation to consultation with third parties and notification process around minors before disclosing their personal affairs information. While the type of information captured under section 33(1) is similar to some of the definitions of 'confidential and personal information' under the Corrections Act, there is no requirement to consult with or notify third parties before applying section 38. For completeness, I do not consider the Applicant can provide consent on behalf of their children in this case; noting the applicant is not currently their primary carer.
38. Where the 'personal or confidential information' in the documents falls under sections 104ZX(c)(i) and (ii), 104ZX(i) and 104ZX(j)(i) of the Corrections Act and/or this information is intertwined with personal affairs information solely of the Applicant, I am satisfied the exception under section 104ZY(2)(b) is not intended to extend to enable disclosure in these circumstances. Therefore, I am not satisfied the exception under section 104ZY(2)(b) of the Corrections Act extends to content in the documents which goes beyond the discreet images and audio showing the Applicant only as described above at paragraph 31.
39. Accordingly, I am satisfied the third condition for the application of section 38 is met in part in relation to the documents.

Conclusion in relation to section 38

40. In summary, to all information in the documents which does not solely depict the Applicant, 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;

² *Frugniet 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.

- (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' as defined under sections 104ZX(c)(i) and (ii), 104ZX(i) and 104ZX(j)(i) of the Corrections Act that the Agency exempted from release under section 38.

41. On the information before me, I am satisfied the content in the documents requested by the Applicant, which does not solely depict them alone, is exempt from release under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Sections 31(1)(a) and 31(1)(d) - Disclosure of documents that would prejudice the enforcement or proper administration of the law or would disclose methods for preventing, detecting, investigating breaches of the law

- 42. The Agency also relies on sections 31(1)(a) and 31(1)(d) to refuse access to the documents.
- 43. Section 31(1)(a) provides a document is exempt if its disclosure under the FOI Act 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.
- 44. Section 31(1)(d) provides a document is exempt if its disclosure would, or would be reasonably likely to, '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'.
- 45. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.³
- 46. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴
- 47. '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.⁵
- 48. 'Proper administration of the law' includes the manner in which the law is administered, including regulatory, monitoring and compliance activities.⁶

³ *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.

⁴ *Ibid*, *Bergman* at [66] referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

⁵ *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].

⁶ *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.

49. The exemptions in section 31(1) do not apply to widespread and well known law enforcement or investigation methods and procedures.⁷

50. In *Knight v Corrections Victoria*, the Supreme Court of Victoria considered section 31(1):⁸

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.

51. I have carefully considered the Applicant's detailed submissions. I note their concerns about the broad definition adopted by the Agency of 'administration of the law' and how they see this as running counter to "...the object and purpose of the FOI Act in providing a fair and transparent system for accessing documents held by agencies such as Corrections Victoria and the [Agency]."

52. I have further considered their view that the section 31(1)(a) has been incorrectly applied as they consider these recordings "... are not being retained for or involved in the purposes of investigations of a breach of the law. There has been no suggestions or allegation at any stage of any breach or evasion of the law arising from the Zoom video visits I have had with my children requiring investigation".

53. However, I consider the broad purpose of the documents being created is to ensure those involved in the calls do not engage in behaviour in breach, or potential breach, of the law and this further links to important monitoring functions that help ensure the successful management of the prison. I broadly accept the Agency's position that disclosure of certain content would prejudice the proper administration of the Corrections Act in relation to 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. In making this assessment, I am not suggesting there is any information before me that indicates the documents under review contain information of concern in relation to the Applicant's engagement with their children during these visits.

54. The Applicant considers the recordings were all taken in "...a private, office space ... used solely for the purposes of professional and personal visits" and release would not disclose information about secure areas of the prison not usually accessible to public scrutiny. They consider with the exception of content that may show the verification process of confirming the identity of third parties responsible for facilitating the visits, it cannot be argued that disclosure would have any impact on the good management and security of the prison as contemplated by section 31(1).

55. While I acknowledge the Applicant has stressed their request is focused on seeking access to their interactions with their children as contained in the documents, I consider this content is intertwined on occasion with other content that would broadly be consider exempt from release under section 31(1) in the circumstances. For example, I am satisfied certain content

⁷ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

⁸ *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 Lapidus 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].

in the documents reveals information about the prison environment, like the location of cameras installed for security and safety purposes to maintain good order and security within the prison system, and the management and movement of prisoners in the facility. The latter includes content in relation to the processes involved in facilitating prison visits via Zoom as previously raised by the Applicant, depicts certain areas of the prison I consider would not usually accessible to the public as well as the general locations such visits are conducted in. However, I am not satisfied all content in the documents reveal information contemplated by sections 31(1)(a) or (d).

56. The FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI. Therefore, I accept disclosure of the documents to the Applicant means they would be free to use or further disseminate them as they please. While I am not questioning the Applicant's reason for seeking access or suggesting they intend to further disseminate the documents beyond their stated purpose, I must consider released under the FOI Act could result in documents, which include content from within prison and external content involving minors, being disseminated and subsequently accessed by prisoners, offenders and/or the general public.
57. If such footage depicting imagery from within a prison were to be routinely disclosed under the FOI Act, given the unrestricted nature of release under the Act, I consider it could 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)

58. Accordingly, I am satisfied disclosure of certain content in 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.
59. While I do not agree with the Agency that the documents are exempt in full under sections 31(1)(a) and 31(1)(d), I am satisfied certain information is exempt from release under these sections.

Section 25 – Deletion of exempt or irrelevant information from the video recordings

60. 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.
61. 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

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].

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].

62. I note again the Applicant has advised that their request is for content showing their interactions and conversations with their children that occurred during prison visits. I have carefully considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information removed or edited in accordance with section 25. In doing this, I sought a further submission from the Agency about the practicality of editing the documents. The Agency provided details of technical limitations and on the estimated time and resources involved in attempting to edit the documents.
63. I am satisfied it would not be practicable to prepare edited copies of the documents in the circumstances. I consider the substantial investment of time and resources required to attempt to edit the documents is unreasonable as due to the intertwined nature of the content and the volume of redactions required even if all exempt and irrelevant information could be edited from each document, the remaining content would not retain sufficient meaning and it would not serve the Applicant's legitimate purpose.

Conclusion

64. On the information before me, I am satisfied information in the recordings depicting individuals other than the Applicant is exempt from release under section 38 in conjunction with section 104ZZA of the Corrections Act.
65. Certain content in the documents is also broadly exempt from release under section 31(1); however, I am not satisfied either 31(1)(a) or 31(1)(d) apply in full.
66. I have considered the effect of deleting exempt and irrelevant information from the documents in accordance with section 25. In my view, it is not practicable for the Agency to do this, because of the extensive resources required to complete this editing, and because I consider deleting the exempt and irrelevant information would effectively render the documents meaningless or not assist in meeting the aims of the Applicant.
67. As such, access to the documents under the FOI Act is refused in full.
68. The Applicant may wish to pursue seeking access to relevant documents in the future for court purposes under subpoena.

Review rights

69. 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.¹¹
70. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
71. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³

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

¹² Section 52(5).

¹³ Section 52(9).

72. 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.
73. 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

When this decision takes effect

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

¹⁴ Sections 50(3F) and 50(3FA).