

## Notice of Decision and Reasons for Decision

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Applicant:	'FF1'
Agency:	Department of Justice and Community Safety
Decision date:	31 May 2023
Exemption and provisions considered:	Section 25A(5) in conjunction with section 38 of the <i>Freedom of Information Act 1982</i> (Vic) and section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	'FF1' and Department of Justice and Community Safety (Freedom of Information) [2023] VICmr 54 (31 May 2023)

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FREEDOM OF INFORMATION – Corrections Victoria – person on parole – bail conditions – mobile phone images – refusal to process request on grounds that all documents would be exempt – investigation of a possible contravention of the law – secrecy provision – offender management – *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 requirements of the application of section 25A(5) are met. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with section 25A(5).

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

31 May 2023

## Reasons for Decision

### Background to review

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

... all Images and Video files analysed by Corrections Victoria & [named correctional centre] from my personal phone...
2. The Agency, without having caused the processing of the Applicant's request, refused access to documents under section 25A(5) on the basis that the documents, should any exist, would be exempt under section 38 of the FOI Act 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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. 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'.<sup>1</sup> 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 the application of section 25A(5)

9. Section 25A(5) provides:
  - (5) The agency or Minister may refuse to grant access to the documents in accordance with the request without having identified any or all documents to which the request relates and without specifying, in respect of each document, the provision or provisions under this Act under which that document is claimed to be an exempt document if –
    - (a) it is apparent from the nature of the document as described in the request that all documents to which the request is expressed to relate are exemption documents; and

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

- (b) either–
  - (i) it is apparent from the nature of the documents as so described that no obligation would arise under section 25 in relation to any of those documents to grant access to an edited copy of the document; or
  - (ii) it is apparent from the request, or as a result of consultation by the agency or Minister with the person making the request, that the person would not wish to have access to an edited copy of the document.

10. The power to refuse access to a request under section 25A(5) is carefully circumscribed. In *Knight v Corrections Victoria*,<sup>2</sup> the Supreme Court of Victoria held section 25A(5) will apply to an FOI request only when each of the following three elements are met:

- (a) First, the exempt nature of the requested document must be objectively apparent from the face of the request, namely the terms of the request as described by the applicant. The ‘nature’ of a document refers to its inherent or essential quality or character.
- (b) Second, it must be apparent each requested document is exempt from release under the FOI Act.
- (c) Third, it must be apparent from:
  - i. the nature of the document, as described in the request, that no obligation would arise for the agency to grant access to an edited copy of the document in accordance with section 25; or
  - ii. the request itself, or through consultation with the applicant, that they would not wish to have access to an edited copy of the document.

***What is the essential quality or character of the requested document?***

11. The terms of the Applicant’s request are specific, requesting access to ‘all Images and Video files analysed by Corrections Victoria...’.

12. The Agency submissions provide:

...Any images or videos from the Applicant’s device as specified in the request that are in our possession would have been taken by the Department following and pursuant to an Audit Request issued as part of [the Applicant’s] parole...in circumstances where it was suspected that the Applicant had breached [their] parole. As a result, in our view any images and video files analysed would have the essential quality of being information concerning the contravention or possible contravention of the law by an offender.

13. Having considered the Applicant’s FOI request and their submissions, I consider the essential character of the requested documents, should any exist, would be the images and or videos obtained from the Applicant’s mobile telephone and examined by the Agency for the purposes of determining whether a breach or possible breach of the Applicant’s parole conditions had occurred.

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<sup>2</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

14. Accordingly, I am satisfied that the essential quality or character of the requested documents is objectively apparent from the terms of the Applicant's request. Therefore, I turn now to consideration of the second element of section 25A(5).

***Would all documents requested, as described by the Applicant in their request, be exempt?***

15. The Applicant's submissions state:

[redacted]

16. Before refusing access to a document under an exemption in the FOI Act, an agency must first conduct a thorough and diligent search for all relevant documents. However, in refusing access to documents under section 25A(5), as in this case, an agency is not required to do so and can refuse to grant access to the documents requested without having identified any or all documents to which the request relates.
17. This means my review of the Agency's decision is based on a hypothetical consideration of the documents requested, should any exist, and whether or not such documents would be exempt from release under the FOI Act.
18. In refusing to grant access to the documents requested under section 25A(5), the Agency relies on section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

*Section 38 – Documents to which a secrecy provision of an enactment apply*

19. A document is an exempt document under section 38 of the FOI Act if:
- (a) there is an enactment in force;
  - (b) the enactment applies specifically to the kind of information in the requested document/s; and
  - (c) the enactment prohibits persons, referred to in the enactment, from disclosing the specific kinds of information whether absolute or subject to exemptions or qualifications.
20. The Agency's submissions provide:

Our decision under s25A(5) was made in conjunction with s38 of the FOI Act, with the secrecy provision being section 104ZZA of the Corrections Act 1986 (Vic). That section prohibits release of 'personal or confidential information', defined in section 104ZX of that Act to include information concerning the contravention or possible contravention of the law by an offender. Offender is further defined in s3 of that Act to refer to anyone subject to a correctional order, which in this case includes the parole which the Applicant was subject to.

*Is there an enactment in force?*

21. The FOI Act defines 'enactment' as 'an Act or instrument (including rules, regulations, local laws or by-laws) made under an Act'.<sup>3</sup>

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<sup>3</sup> Section 5.

22. I am satisfied the Corrections Act is an enactment in force for the purposes of section 38, meeting the first condition.

*Does the enactment apply specifically to the information requested by the Applicant?*

23. Part 9E of the Corrections Act contains provisions (sections 104ZX through to 104ZZB) that concern the Agency's use and disclosure of 'personal or confidential information'.
24. The term 'personal or confidential information' is defined in section 104ZX of the Corrections Act and relevantly includes the following categories of information:

...

(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;

...

(e) concerning the investigation of a contravention or possible contravention of the law by—

- (i) an offender; or
- (ii) a prisoner; or
- (iii) an officer within the meaning of Part 5 or Part 9; or
- (iv) a person authorised 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;

25. The term 'offender' is defined in section 3(1) of the Corrections Act and:

... means a person of whatever age who is the subject of a correctional order;

26. The term 'investigation' is not defined in the Corrections Act; however, the Macquarie Dictionary provides the following definition:

1. an investigation, as into a matter. 2. the act of inquiring, or seeking information by questioning; interrogation.<sup>4</sup>

*Does the enactment (the Corrections Act) prohibit the disclosure of the information?*

27. 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.

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<sup>4</sup> The Macquarie Dictionary Online at <https://www.macquariedictionary.com.au/>.

28. 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*' (**Agency officers**).
29. In summary, section 104ZZA of the Corrections Act protects the personal privacy of individuals identified in documents relating to a prisoner or offender. It is also directed towards maintaining the confidentiality of methods and procedures used in the management and security of offenders subject to the control and management of the Agency. The section imposes strict confidentiality requirements on Agency officers and others, subject to limited exceptions.
30. The unauthorised disclosure of information is an offence subject to penalties under the Corrections Act. The monetary penalties associated with these confidentiality provisions highlights Parliament's intention for this information to be protected and not disclosed.
31. I am satisfied section 104ZZA of the Corrections Act prohibits the Agency's disclosure of information concerning an investigation of a contravention or possible contravention of the law by an offender.
32. I am also satisfied the requested documents, should any exist, would contain the images of third parties, which I consider is information that identifies a person or is information from which a person's identify could reasonably be determined.
33. Accordingly, I am satisfied:
  - (a) the Corrections Act is an enactment in force for the purpose of section 38 of the FOI Act;
  - (b) the requested documents, should any exist, would constitute 'personal or confidential information', being information concerning the Agency's investigation of a contravention or possible contravention of the law by an offender and information that identifies a person or from which their identify could reasonably be determined; and
  - (c) the Agency's disclosure of such documents, should any exist, is prohibited under section 104ZZA of the Corrections Act.

*Would a relevant exception or authorisation to disclose the information apply?*

34. The secrecy provision in section 104ZZA of the Corrections Act is subject to exceptions in sections 104ZY and 104ZZ, which authorise the release of personal or confidential information in limited circumstances.
35. For example, section 104ZY(2)(b) provides for the release of 'personal or confidential information' by a relevant person with the authorisation of the person to whom the information relates. Section 104ZY(1)(A) allows for the disclosure of 'personal or confidential information' by a relevant person or law enforcement officer where it is necessary for the detection, investigation, prosecution or preventions of contraventions of the law.
36. The Applicant's submissions state:

[redacted]
37. While I accept the requested documents may have personal significance to the Applicant, I am not satisfied the documents, should any exist, would constitute the personal information of the Applicant such that it would fall under the exception in section 104ZY(2)(b) of the

Corrections Act. Nor do I consider there is any further evidence before me to suggest that any other exception applies to authorise disclosure to the Applicant.

***Would there be scope to provide the Applicant with an edited copy of the requested documents?***

38. Under section 25, an agency must 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.
39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>5</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>6</sup>
40. I have considered whether it would be practicable to provide the Applicant with an edited copy of one or more of the requested documents, should any exist.
41. Given the nature of the requested documents and their likely content as discussed above, I am satisfied it would not be practicable to grant access to an edited copy of one or more of the documents as the deletion of exempt information would remove the substance of information requested by the Applicant and would render the documents devoid of substantive meaning.
42. Accordingly, I am satisfied no obligation would arise under section 25 to provide the Applicant with an edited copy of one or more of the documents.

**Conclusion**

43. On the information before me, I am satisfied the three requirements for the application of section 25A(5) are met as:
  - (a) the essential quality or character of the documents, as described in the Applicant's request, would be images and videos obtained from the Applicant's phone and analysed by the Agency;
  - (b) given the nature of the requested documents and the purpose for which they would be obtained by the Agency, should any exist, I am satisfied any relevant documents would constitute 'personal and confidential information' and would be exempt from release under section 38 in conjunction with section 104ZZA of the Corrections Act; and
  - (c) it would not be practicable to delete the exempt information in the documents in accordance with section 25 as to do so would render the requested documents meaningless.
44. Accordingly, I have determined to refuse to grant access to documents in accordance with the Applicant's request under section 25A(5).

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<sup>5</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>6</sup> *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

45. 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>7</sup>
46. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
47. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
48. 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.
49. 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>10</sup>

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<sup>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

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

<sup>10</sup> Sections 50(3F) and (3FA).