

## Notice of Decision and Reasons for Decision

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Applicant:	Australian Broadcasting Corporation
Agency:	Department of Justice and Community Safety
Decision date:	6 August 2020
Exemptions considered:	Sections 31(1)(a), 31(1)(b) and 31(1)(d), 33(1), 35(1)(b), 38 in conjunction with section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	<i>Australian Broadcasting Corporation and Department of Justice and Community Safety (Freedom of Information)</i> [2020] VICmr 215 (6 August 2020)

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FREEDOM OF INFORMATION – prison documents – Justice Health – death in correctional facility – brief to Minister – formal incident briefing notes

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.

I am satisfied the documents are exempt in part under sections 33(1) and 38.

As I am satisfied it is practicable to delete irrelevant and exempt information in accordance with section 25, I have determined to grant access to the documents 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

6 August 2020

## Reasons for Decision

### Background to review

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

I request access under the *Freedom of Information Act 1982* to the Ministerial Briefing and the Formal Incident Debrief notes created following the death of [description of deceased] at [location] in [month year].
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full.
3. The Agency relied on exemptions in sections 31(1)(a), (b) and (d), 33(1), 35(1)(b) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (the **Corrections Act**) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. During the review, the Applicant advised they do not seek names, addresses or locations in the documents.
6. I have examined copies of the documents subject to review.
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, including:
  - (a) the Agency's decision on the FOI request; and
  - (b) the Applicant's review application.
9. 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.
10. I also 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 31(1)(a)**

11. Section 31(1)(a) provides:

#### **31 Law enforcement documents**

Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

- (a) 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;
- 12. 'Reasonably likely' means that there is a real chance of an event occurring; it is not fanciful or remote.<sup>1</sup>
- 13. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>2</sup>
- 14. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.<sup>3</sup>
- 15. My decision in relation to section 31(1)(a) is set out in the Schedule of Documents at **Annexure 1**.

**Section 31(1)(b)**

- 16. Subject to section 31, section 31(1)(b) provides a document is exempt if its disclosure would, or would be reasonably likely to 'prejudice the fair trial of a person or the impartial adjudication of a particular case'.
- 17. Section 31(1)(b) can apply in relation to current as well as contemplated litigation.<sup>4</sup>
- 18. My decision in relation to section 31(1)(b) is set out in the Schedule of Documents at **Annexure 1**.

**Section 31(1)(d)**

- 19. Subject to section 31, 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'.
- 20. Section 31(1)(d) does not apply to widespread and well known investigative methods and procedures.<sup>5</sup>
- 21. My decision in relation to section 31(1)(d) is set out in the Schedule of Documents at **Annexure 1**.

**Section 33(1)**

- 22. 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;<sup>6</sup> and
  - (b) such disclosure would be 'unreasonable'.

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<sup>1</sup> Bergman v Department of Justice Freedom of Information Officer [2012] VCAT 363 at [65], quoting Binnie v Department of Agriculture and Rural Affairs [1989] VR 836.

<sup>2</sup> Ibid, Bergman at [66], referring to Sobh v Police Force of Victoria [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

<sup>3</sup> Cichello v Department of Justice (Review and Regulation) [2014] VCAT 340 at [24].

<sup>4</sup> Mond v Department of Justice [2005] VCAT 2817 at [42].

<sup>5</sup> XYZ v Victoria Police [2010] VCAT 255 at [177].

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

23. 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>
24. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
25. In deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.<sup>8</sup> However, I do not consider this to be a relevant factor in the circumstances.
26. The Agency did not consult with those individuals named in the documents.
27. Document 1 and a small part of Document 2 contain detailed and sensitive information relating to a third party. I am satisfied, given the specific nature of the information, that a majority of this information cannot be de-identified by the removal of all names, addresses and locations without the remaining information being capable of identifying the third party.
28. I have decided it would be unreasonable to release this information because:
  - (a) it is sensitive;
  - (b) the information was collected during a significant and sensitive event;
  - (c) the information is not available to the public;
  - (d) the person to whom the information relates is likely to object to its disclosure;
  - (e) while I understand there may be a public interest in disclosure of some of the events described in the documents as it relates to the operation of a prison and its response to a critical event, the privacy of the person to whom the information relates takes precedence in this matter; and
  - (f) in making this decision, I note release under the FOI Act is unrestricted and once disclosed may not be able to be contained.
29. My decision in relation to section 33(1) is set out in the Schedule of Documents at **Annexure 1**.

***Section 35(1)(b)***

30. A document is exempt under section 35(1)(b) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
31. The Agency did not consult with third parties in this matter in accordance with section 35(1A).

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

<sup>8</sup> Section 33(2A).

32. My decision in relation to section 35(1)(b) is set out in the Schedule of Documents at **Annexure 1**.

**Section 38**

33. Section 38 provides a document is exempt if there is in force an enactment applying specifically to information of a kind contained in the document that prohibits persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

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

35. The Agency relies on section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act to exempt the names of prison staff and their titles, as it is information that identifies a person, the name of a prisoner and a related third party.

36. Section 104ZZA of the Corrections Act provides it is an offence:

... to use or disclose personal or confidential information unless authorised by 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.

37. 'Personal or confidential information' 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;

...

(h) information concerning procedures or plans to be adopted or followed in a prison in the event of an emergency;

(i) information concerning the management of prisons;

...

38. As with 'personal affairs information' in the context of section 33(1), while the Applicant does not seek the names of individuals, section 104ZZA of the Corrections Act applies to information from which a person's identity, address or location can be reasonably determined, I have considered this exemption further below.

39. Section 104ZY of the Corrections Act sets out exceptions to section 104ZZA.

40. From my review of the documents, I am satisfied certain information is exempt under section 38 for the following reasons:

(a) I am satisfied the Corrections Act is an Act in force for the purposes of section 38.

- (b) The Corrections Act is formulated with sufficient precision to identify information in relation to which a prohibition on disclosure applies. Namely, information that would identify a prisoner or information concerning the management of prisons.
- (c) The Corrections Act prohibits disclosure of such information and unauthorised disclosure is an offence subject to a penalty.
- (d) The exceptions in section 104ZY of the Corrections Act do not apply in this matter.

41. My decision in relation to section 38 is set out in the Schedule of Documents at **Annexure 1**.

#### ***Deletion of exempt or irrelevant information***

- 42. 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.
- 43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>9</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>10</sup>
- 44. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted from the documents in accordance with section 25.
- 45. On balance, I am satisfied it is practicable to delete the irrelevant and exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.
- 46. I acknowledge my decision to exempt certain information and other information is irrelevant, as it is not sought by the Applicant, means only a small amount of information in the documents will be released in accordance with section 25. Often in such circumstances, it may be determined a heavily edited document would not retain meaning and the document will be exempted in full. However, in this case I have decided to grant access to the documents in part as I am satisfied they retain meaning and to do so is in the interests of transparency and the proper application of the FOI Act.

#### ***Conclusion***

- 47. On the information before me, I am satisfied the documents are exempt in part under sections 33(1) and 38.
- 48. As I am satisfied it is practicable to delete irrelevant and exempt information in accordance with section 25, I have determined to grant access to the documents in part.
- 49. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

#### ***Review rights***

- 50. 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>11</sup>

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<sup>9</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>10</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].

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

51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
53. 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.
54. 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>14</sup>
55. My decision does not take effect until the Agency's 14 day review period expires.

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<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Brief to Minister for Corrections	6	<p><b>Refused in full</b></p> <p>Sections 31(1)(a), 31(1)(b), 31(1)(d), 33(1), 38</p>	<p><b>Release in part</b></p> <p>Sections 33(1), 38, 25</p> <p>The document is to be released with irrelevant information and information exempted under sections 33(1) and 38 deleted in accordance with section 25.</p>	<p><b>Section 33(1):</b> The document contains detailed and sensitive information relating to a third party. I am satisfied, given the specific nature of the information, the majority of this information cannot be de-identified by the deletion of certain names, addresses or locations without being capable of identifying the third party. Accordingly, I am satisfied the following information is exempt under section 33(1):</p> <ul style="list-style-type: none"> <li>• the subject line and point 1 on page 1 under the sub-heading 'Recommendation';</li> <li>• the header on all subsequent pages;</li> <li>• points 1 to 16 on pages 2 to 3, including all headings;</li> <li>• points 20 to 25, including all headings;</li> <li>• points 33 to 48, including all headings; and</li> <li>• point 50.</li> </ul> <p><b>Section 38:</b> I am satisfied the name in the document is exempt under section 38.</p> <p>I am also satisfied point 19 amounts to</p>



Annexure 1 – Schedule of Documents

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						<p>information concerning the management of prisons and this point is exempt under section 38 for the reasons set out in the Notice of Decision above.</p> <p><b>Sections 31(1)(a), 31(1)(b), 31(1)(d), 33(1), 38:</b> When the above exempt information is deleted from the document, I am not satisfied the remainder of information in the document is exempt as this information does not meet the requirements of these exemptions.</p> <p><b>Section 25:</b> The Applicant does not seek the names, addresses and locations in the document. I consider this extends to signatures and am satisfied such information is therefore irrelevant.</p>
2.	[date]	Formal incident debrief notes	5	<p><b>Refused in full</b></p> <p>Sections 31(1)(a), 31(1)(b), 31(1)(d), 33(1), 35(1)(b), 38</p>	<p><b>Release in part</b></p> <p>Sections 33(1), 38, 25</p> <p>The document is to be released with irrelevant information and information exempted under sections 33(1) and 38 deleted in accordance with section 25.</p>	<p><b>Section 33(1):</b> The document contains detailed sensitive personal affairs information similar to Document 1. I am satisfied it would be unreasonable to release this information and the following is exempt under section 33(1):</p> <ul style="list-style-type: none"> <li>the information that appears alongside 'event' on page 1; and</li> <li>the information on page 2, under the sub-heading 'incident' beginning with</li> </ul>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						<p>'In summary...' and ending with '...program'.</p> <p><b>Section 38:</b> I am satisfied the name in the document is exempt under section 38. However, I am satisfied the fifth dot point on page 4 discloses information regarding the management of prisons and is exempt under section 38 for the reasons set out in the Notice of Decision above.</p> <p><b>Sections 31(1)(a), 31(1)(b), 31(1)(d), 33(1):</b> See comments in Document 1 above.</p> <p>Rather than describing procedures, this document describes and reviews parts of the Agency's response to an event. I do not consider the disclosure of this information would prejudice the investigation or breach of the law, the particular incident, any person involved, or would affect the effectiveness of the Agency's response to such events.</p> <p><b>Section 35(1)(b):</b> I consider the debriefing following such events is critical and it relies on an open and fulsome exchange of views by those involved. However, I am not satisfied disclosure of the information in this document would impair the Agency's ability to obtain similar information of this nature in the future where there is a</p>

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						<p>professional obligation to do so and such events will likely subject to external investigation and inquiry.</p> <p><b>Section 25:</b> The Applicant does not seek the names, addresses and locations in the document. I consider this extends to signatures and am satisfied such information is therefore irrelevant and is to be deleted in accordance with section 25.</p>