

Notice of Decision and Reasons for Decision

Applicant:	'FK7'
Agency:	Department of Justice and Community Safety
Decision date:	7 December 2023
Section and provision considered:	Sections 33(1) and 38 in conjunction with section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	'FK7' and Department of Justice and Community Safety (Freedom of Information) [2023] VICmr 101 (7 December 2023)

FREEDOM OF INFORMATION – Ministerial briefing – death of prisoner – secrecy provision – section 104ZZA – *Corrections Act 1986* (Vic) – information that identifies a prisoner

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to a document requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have determined some information in the document is exempt under a different exemption in the FOI Act. I am satisfied that certain information is exempt from release under section 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**). With respect to the information that I have determined is not exempt under section 38, I am satisfied it is exempt from release under section 33(1).

Given the Agency granted access to the document in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the documents with exempt information deleted.

A marked-up copy of the document subject to review has been provided to the Agency with my decision.

My reasons for decision follow.

Please refer to the end of my decision for information about further review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

Shantelle Ryan
Acting Public Access Deputy Commissioner
7 December 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified their request and sought access to:

Any ministerial briefing document sent to [a Minister] between [specified dates], where such a document contains the key word [prison name] in the title of the briefing document. Where attachments are appended to a briefing within the scope of the request, I consent to receiving the briefing document as well as a list of the titles of the attachments (rather than the entire contents of the attachments).
2. The Agency identified five documents falling within the terms of the Applicant's request and granted access to the documents in part under sections 32(1), 33(1) and 38 in conjunction with Section 104ZZA of the Corrections Act. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access in part to the documents.
4. In their application, the Applicant advised they only seek review of the information the Agency exempted from release under section 38 in Document 1. Accordingly, this review will only consider exemptions in relation to Document 1.
5. I have examined a copy of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
9. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.
10. 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

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

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

11. 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.

12. 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) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
- (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications).

Is there an enactment in force?

13. The Agency applied section 38 in conjunction with section 104ZZA of the Corrections Act, which I am satisfied is an enactment in force.

Does the enactment apply specifically to the kind of information in the document?

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

15. 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 disclosure is authorised under section 104ZY or 104ZZ.

Penalty: 120 penalty units.

16. The term ‘personal or confidential information’ is defined in section 104ZX of the Corrections Act and includes the following, which I consider are relevant in this matter:

- (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.
- 17. The document concerns a death in custody. I have carefully reviewed the exempted information and I am satisfied it is information that identifies a prisoner by their name, 'CRN' and other information about their incarceration, medical history and death.
- 18. As such, I am satisfied this information falls within the definition of 'personal and confidential information' as defined in section 104ZX of the Corrections Act.

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

- 19. Section 104ZZA of the Corrections Act operates to protect the privacy of individuals who are identified in documents generated in connection with the management and administration of the corrections system. The section imposes strict confidentiality requirements on Agency officers, among others, which apply in all but certain limited circumstances.
- 20. Section 104ZZA of the Corrections Act prohibits 'a person who is or has been a relevant person' from disclosing 'personal or confidential information' unless authorised.
- 21. The phrase 'relevant person' means a person specified in an item of Schedule 5 of the Corrections Act and includes '[a] person employed in the Department under Part 3 of the Public Administration Act 2004'.
- 22. As such, the Agency is a 'relevant person' for the purposes of section 104ZZA of the Corrections Act.
- 23. Sections 104ZY and 104ZZ of the Corrections Act set out exceptions to the prohibition on relevant persons disclosing 'personal or confidential information'.
- 24. Relevantly, section 104ZY(2)(n) provides that:
 - (2) A relevant person may also use or disclose personal or confidential information in the following circumstances—
 - ...
 - (n) if the information is already in the public domain;
- 25. I am satisfied that certain information relating to the death of the prisoner to whom the document relates is in the public domain. As such, I am satisfied an exception applies which permits the disclosure of certain information in the document. With respect to information that is not in the public domain, I am satisfied the exception to the prohibition does not apply.
- 26. Accordingly, I am satisfied section 104ZZA of the Corrections Act prohibits Agency officers from disclosing some of the information to which the Agency refused access, and I am satisfied the information is exempt from release under section 38.

Section 33(1) – Documents affecting personal privacy of third parties

27. With respect to the information to which the exception to the prohibition does not apply as detailed above, I have considered whether section 33(1) applies to that information.
28. 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 (a **third party**);² and
 - (b) such disclosure would be ‘unreasonable’.

Does the document contain personal affairs information of individuals other than the Applicant?

29. 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 this may be reasonably determined.³
30. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person.⁴
31. As stated above, I am satisfied the exempted information identifies a prisoner by their name, ‘CRN’ and other information about their incarceration, medical history and death.

Would disclosure of the personal affairs information be unreasonable?

32. 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.
33. In *Victoria Police v Marke*,⁵ the Victorian Court of Appeal held there is ‘no absolute bar to providing access to documents which relate to the personal affairs of others’. Further, the exemption under section 33(1) ‘arises only in cases of unreasonable disclosure’ and ‘[w]hat amounts to an unreasonable disclosure of someone’s personal affairs will necessarily vary from case to case’.⁶ The Court further held, ‘[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual’s privacy can be invaded by a lesser or greater degree’.⁷
34. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
- (a) the nature of the personal affairs information;

² Sections 33(1) and 33(2).

³ Section 33(9).

⁴ *O’Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

⁵ [2008] VSCA 218 at [76].

⁶ *Ibid.*

⁷ *Ibid* at [79].

- (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of disclosure of information, if released;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.⁸
35. I note that certain details relating to the death of the third party have been publicly reported. However, on balance of the above factors, I am satisfied it would be unreasonable to release the personal affairs information in the circumstances of this matter for the following reasons:
- (a) The personal affairs information in the document is sensitive and personal in nature as it relates to the death of a prisoner in custody.
 - (b) Given the sensitivity of the information, I consider it is reasonably likely the deceased's next of kin would object to release of the information under the FOI Act given the nature and context of the relevant information.
 - (c) As there are no restrictions on an applicant's use of documents when disclosed under the FOI Act, I am satisfied it is reasonably likely that the information in the document, if released in this case, would be more widely disseminated. Given the sensitive nature of the personal affairs information in the document, I am not satisfied the public interest would be served by such wider disclosure.
 - (d) There is a public interest in disclosure of information concerning deaths in custodial facilities, as it relates to the operation of a prison and its response to a critical event. However, I do not consider this public interest outweighs the public interest in privacy for the deceased and their family.
 - (e) The potential impact of further information being disclosed about the deceased person would be significant and distressing for the deceased's family. However, I do not consider it would be reasonably likely to endanger the life or physical safety of any person.
36. On balance of the above factors, I am satisfied it would be unreasonable to disclose the relevant information in the document and therefore the information is exempt under section 33(1).

⁸ Section 33(2A).

Section 25 – Deletion of exempt or irrelevant information

37. 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.
38. 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
39. Given the Agency granted access to the document in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted.

Conclusion

40. On the information before me, I am satisfied that certain information is exempt from release under section 38 in conjunction with section 104ZZA of the Corrections Act. However, where I am satisfied information is not exempt from release under section 38, I am satisfied it is exempt from release under section 33(1).
41. I consider it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25 of the FOI Act.
42. A marked-up copy of the document has been provided to the Agency with my decision.

Timeframe to seek a review of my decision

43. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
46. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted via admin@vcat.vic.gov.au or by 1300 018 228.

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], [155].

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

¹² Section 52(5).

¹³ Section 52(9).

47. 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

48. 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).