

## Notice of Decision and Reasons for Decision

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Applicant:	'GA7'
Agency:	Department of Justice and Community Safety
Decision date:	17 April 2025
Exemption and provision considered:	Section 38 in conjunction with section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	'GA7' and <i>Department of Justice and Community Safety</i> (Freedom of Information) [2025] VICmr 70 (17 April 2025)

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FREEDOM OF INFORMATION – recordings of telephone calls within a prison – section 104ZZA of the *Corrections Act 1986* (Vic) – secrecy provision

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 fresh 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 and no further information is to be released.

I am satisfied the documents are exempt in full under section 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

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

My reasons for decision follow.

Penny Eastman  
**Public Access Deputy Commissioner**

17 April 2025

## Reasons for Decision

### Background to review

1. The Applicant made the following request to the Agency [detailed information about seeking access to telephone calls between the Applicant and third parties, that occurred while the Applicant was in prison].
2. The Agency did not identify any documents falling within part one of the request.
3. The Agency identified five documents in response to part two of the request and refused access in full under section 38 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.
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. During the review, the Agency elected to make a fresh decision on the Applicant's request.
8. The Agency's fresh decision letter states:

The [Agency's] original decision detailed that no documents were identified for part one of your request, and five documents were identified corresponding to part two.

However, as part of the OVIC review process it has been established that a relevant document does exist for part one (document 1 in the schedule). This document was identified as part of original searches for documents but was not assessed for release. The recording captures an unanswered phone call and a generic voicemail for the number dialled. For clarity, neither party to the attempted call is recorded as speaking.

Documents 2-6 (inclusive) correspond to part two of your request. Each of these calls were answered and capture the conversation that occurred.

9. The Agency refused access to the six documents in full under section 38 in conjunction with section 104ZZA of the Corrections Act.
10. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
11. I have examined a copy of the documents subject to review.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered relevant communications and submissions received from the parties.

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.

## Review of exemption

### *Section 38 – Documents to which secrecy provisions of enactments apply*

16. For more information about section 38 see the FOI Guidelines.<sup>1</sup>
17. Section 38 exempts documents where information in those documents is protected by a secrecy provision.
18. A document is exempt under section 38 if three requirements are met:
  - (a) there is an enactment that is in force; and
  - (b) the enactment applies specifically to information contained in the document; and
  - (c) the enactment prohibits specific persons from disclosing the specified information.

#### *Is there an enactment in force?*

19. An enactment is defined broadly in section 5. It means an Act or instrument made under an Act, including rules, regulations, local laws, or by-laws.
20. Section 104ZZA of the Corrections Act is an enactment in force.

#### *Does the enactment refer specifically to the information in the documents?*

21. For section 38 to apply to a document, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
22. 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, 104ZZ or 104ZZAA

Penalty: 120 penalty units.

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<sup>1</sup> <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-38/>.

23. 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.
24. Each document contains a recording of telephone conversation between the Applicant and another person.
25. Each document starts with the voice of an Agency officer regarding the terms of the call.
26. Document 6 also includes part of a recording of a telephone conversation between two other people.
27. The conversations recorded also refer to other people.
28. Therefore, I am satisfied the recordings of the voices of other people, and references to other people, is information that falls within the definition of 'personal and confidential information' as defined in section 104ZX(a) and 104ZX(c) of the Corrections Act.

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

29. The secrecy provision must prohibit a person from disclosing the specified information.
30. 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.
31. 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.
32. 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'.
33. As such, the Agency is a 'relevant person' for the purposes of section 104ZZA of the Corrections Act.

*Are there any exceptions to the secrecy provision?*

34. Sections 104ZY and 104ZZ of the Corrections Act set out exceptions to the prohibition on relevant persons disclosing 'personal or confidential information'.

35. Having reviewed these exceptions, there is no information before me to suggest an exception applies to authorise disclosure of the documents to the Applicant in this instance. While the relevant information concerns the Applicant, the other people identified in the documents have not provided authorisation for the Agency to disclose the information to the Applicant.
36. Accordingly, I am satisfied section 104ZZA of the Corrections Act prohibits Agency officers from disclosing the documents, and I am satisfied the documents contain information that is exempt from release under section 38.

***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. Deciding whether it is ‘practicable’ to delete exempt or irrelevant information requires an agency or Minister to consider:
- (a) the effort involved in making the deletions from a resources point of view;<sup>2</sup> and
  - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.<sup>3</sup>
39. VCAT has held that deletion is not practicable where:
- (a) it would effectively reduce the document ‘to something which was meaningless, misleading or unintelligible’;<sup>4</sup>
  - (b) what remains would be ‘devoid of context’;<sup>5</sup>
  - (c) it would lead to unnecessary speculation as to what was missing<sup>6</sup> or lead the reader to draw erroneous conclusions.<sup>7</sup>
40. The Agency’s fresh decision letter states:
- I have decided it would not be practicable to edit the recordings to remove the exempt information as it is intertwined with information that is not exempt. It would not be feasible to distinguish the exempt information from the other, and for an edited recording to retain any meaning.

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<sup>2</sup> *Mickelborough v Victoria Police* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967, [82].

<sup>3</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.

<sup>4</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [47].

<sup>5</sup> *Kotsiras v Department of Premier and Cabinet* [2003] VCAT 472, [31]; *Noonan v Victoria Police* [2006] VCAT 1918, [28].

<sup>6</sup> *Thwaites v Department of Human Services* (Victorian Civil and Administrative Tribunal, Nedovic PM, 15 December 1998) [26].

<sup>7</sup> *Koch v Swinburne University* [2004] VCAT 1513, [35].

41. I have carefully considered if the documents can be released to the Applicant in part, with exempt information deleted, being the voice of other people and references to other people.
42. In my view, it would not be practicable to edit the documents to only release the Applicant's voice. This is because the recordings are of conversations between the Applicant and another person, often in the form of a question and answer, and therefore, releasing only the questions would render the documents devoid of meaning.

### Conclusion

43. On the information before me, I am satisfied certain information in the documents is exempt from release under section 38 in conjunction with 104ZZA of the Corrections Act. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

### Timeframe to seek a review of my decision

44. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>8</sup>
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
46. 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.
47. The Agency is required to notify the Information Commissioner in writing as soon as practicable if the Applicant applies to VCAT for a review of my decision.<sup>10</sup>

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<sup>8</sup> Section 50(1)(b).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 50(3FA).