

Notice of Decision and Reasons for Decision

Applicant: AC6
Agency: Department of Justice and Community Safety
(formerly Department of Justice & Regulation)
Decision Date: 26 April 2019
Exemptions considered: Sections 30(1), 31(1)(a), 38

FREEDOM OF INFORMATION – prisoner records – forensic mental health services – psychological intervention report – internal working documents – law enforcement documents – documents to which secrecy provisions apply – section 104ZZA *Corrections Act 1986*

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 in that I have decided not to release any further information to the Applicant.

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

26 April 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to copies of reports and assessments as a result of seeing a named psychologist.
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to grant access to the documents in part.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant is seeking a review of the decision that parts of the 'psychological intervention report' (the **Report**) are exempt from release. The Report is an 18 page document.
5. I have examined copies of the documents subject to review and been briefed by OVIC staff who inspected the sections of the document the Agency decided is exempt from release under section 31(1)(a).¹
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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application and subsequent communications with this Office;
 - (c) the Agency's submission dated 21 January 2019 and further information provided on 11 April 2019.
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.

Review of exemptions

9. The Agency relied on the exemptions in sections 30(1), 33(1), 31(1)(a) and 38 to refuse access to parts of the Report. The Agency's decision letter sets out the reasons for its decision.

Section 30(1)

10. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and

¹ Section 63C(3) requires documents claimed to be exempt under section 31(1) to be inspected at the Agency's premises and I am not entitled to possess or to make copies of the documents.

- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
11. The exemption does not apply to purely factual material in a document.²
 12. I must also be satisfied releasing this information is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.³
 13. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances of the particular matter, remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
 14. The Agency applied section 30(1) to parts of the Report that disclose the opinions and observations of a clinician who assessed the Applicant.
 15. The Agency advised it would be contrary to the public interest to release this information because clinical staff need to be able to express their opinions about a prisoner and their behaviour to ensure the proper management of their health. The release of such information is likely to inhibit clinical staff from freely expressing such opinions, and would provide insights to prisoners into the methodologies used by clinicians.
 16. I note the Agency also advised, in relation to the data in the report, that it is used in the interpretive process. The Agency referred to *Re Crawley and Centrelink*⁴ as a precedent for refusing access to raw psychometric data. I have decided I do not have sufficient information before me to determine whether this information should properly be considered 'purely factual' for the purposes of the FOI Act. Therefore, I have not made a decision about whether or not this information is exempt from release under section 30(1).
 17. I also note the decision cited by the Agency relies on a provision of the Commonwealth *Freedom of Information Act 1982* that refers to an exemption for documents that would or would reasonably be expected to 'prejudice the effectiveness of procedures or methods for the conduct of tests or audits by an agency'. This fits more naturally within the Victorian FOI Act under section 31(1)(a). I have therefore further considered whether the document is exempt under that section below.
 18. The term 'officer of an Agency' is defined in section 5(1). It includes a member of the agency, a member of the agency's staff, and any person employed by or for the agency, whether that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply or not.
 19. I am satisfied the opinions and recommendations in the document were provided in the course of, and for the purpose of, the Applicant's participation in the relevant offender rehabilitation program.
 20. In my view, the document subject to this review is similar to that considered in *Debono v Department of Justice - FOI Officer*⁵ (**Debono**). In that decision, the Victorian Civil and Administrative Tribunal (VCAT) affirmed a clinical assessment of participation in a prevention of violence program is exempt from disclosure under section 30(1).
 21. In *Debono*, the applicant (who had been released from prison) sought access to two written assessments prepared by clinicians during a prison sentence he was serving. The applicant in *Debono*

² Section 30(3).

³ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 485, adopted in *Department of Premier and Cabinet v Halls* [1999] VSCA 117 at [30].

⁴ [2006] AATA 572 (30 June 2006).

⁵ [2008] VCAT 1791 (per Judge Macnamara, Deputy President).

sought access to the written assessments in relation to concerns he held around his parole from prison. Following the provision of evidence by a clinician employed by the (former) Department of Justice, VCAT held in *Debono* that section 30(1) applied to the written assessments. A copy of the *Debono* decision is to be provided to the Applicant with these reasons for decision.

22. While the document in this instance is not exactly the same as those subject to that matter, I consider they are similar. Accordingly, similar considerations apply when deciding whether its release would be contrary to the public interest.

23. In the *Debono* decision, VCAT noted:

So far as Mr Debono and those who are concerned to ensure the observance of his human rights are concerned, there is a strong public interest in transparency. ... It seems to be contrary to fundamental concepts of fairness or as the common law would have it, contrary to natural justice to have a person's legitimate interest in seeking parole affected by what the person might regard as a secret denunciation from a clinician. On the other hand there is a very strong public interest and in my view a public interest which predominates over the one just described in ensuring that clinicians have the opportunity to give reports of this type in a frank and candid manner without the potential for intimidation.

Mr Debono and any other prisoner or former prisoner in his situation was or would be imprisoned for a serious offence of violence, the very program for which Mr Debono was being assessed supposed that he had a propensity for violence which needed to be treated. Ms Hadley said that psychologists in an institution such as Marngoneet operated in close physical proximity to the prisoners whom they assessed. This is in contrast to people such as the members and officers of the Adult Parole Board. This proximity would I suppose be essential to the proper discharge of the psychologists' duties. ... If there were full transparency in these reports I believe the willingness of clinicians to give candid reports would be impaired and the public interest in having proper assessments of prisoners would thereby be sacrificed. Generally in claims for exemption under Section 30(1) I have favoured the view that transparency and accountability would be likely to enhance the quality of reports forming part of internal working documents rather than to prejudice that quality. The special circumstances attending prisons and particularly prisoners incarcerated for offences of violence renders the situation here different from the one which exists generally across Government administration. I also accept that release may give prisoners additional insights into clinicians' methods which they could employ to subvert the effectiveness of assessments.⁶

24. In relation to the parts of the document the Agency determined are exempt under section 30(1), I am of the opinion disclosure of the opinions and recommendations in the document is likely to inhibit clinicians from freely expressing their opinions and recommendations in similar written assessments in the future. As held in *Debono*, I consider disclosure of such information could provide insights into psychological methodologies used by clinicians that prisoners could employ to subvert the effectiveness of such assessments.

25. In these circumstances, the public interest weighs in favour of maintaining the integrity of the Agency's processes relating to such programs, offered to prisoners while incarcerated. Therefore, I am satisfied the clinician's opinions and recommendations are exempt and should remain deleted under section 30(1).

Section 31(1)(a)

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

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

⁶ Ibid at [19-20].

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;

27. 'Reasonably likely' means that there is a real chance of an event occurring; it is not fanciful or remote.⁷ 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁸ '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.⁹
28. The Agency advised that information is exempt from the document under section 31(1)(a) on the basis that:
- (a) disclosure could undermine the effectiveness of offender rehabilitation programs, and therefore undermine the administration of the *Corrections Act 1986* (Vic) (**Corrections Act**);
 - (b) there is a real possibility that the reports could be misinterpreted; misinterpretation could lead to confusion or mischievous uses of the documents;
 - (c) there are concerns offenders would discuss the contents of the reports with the intent of undermining the assessment process.
29. I note the views of the Supreme Court of Victoria in *Knight v Corrections Victoria*, which provides:
- 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, [72] including one where it upheld a decision to refuse access to a prisoner to information about himself. The tribunal has also applied s 31(1)(a) to uphold a decision to refuse to give access to information relating to the considerations of the Parole Board.¹⁰
30. The Agency relied on the second limb in section 31(1)(a), concerning the 'proper administration of the law in a particular instance', in this case, claiming that disclosure would be likely to prejudice the proper administration of a prison.
31. As set out above, the information removed from the Report includes the opinions and recommendations of a clinician about the Applicant. It also contains data gathered by the clinician and their assessment of that data under various models for psychological assessment.
32. I have considered the reasoning of the Agency as well as the Applicant's view that the release of the report to him, in full, will assist him to obtain certain government benefits.
33. I have decided the clinical information the Agency removed from the document, particularly where it reveals the methodology undertaken by the clinician, is exempt under section 31(1)(a) for the following reasons:
- (a) the document contains highly technical detail that, if disclosed, would reveal the assessment methods undertaken by the clinician;

⁷ *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.

⁸ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁹ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

¹⁰ *Knight v Corrections Victoria* [2010] VSC 338 (11 August 2010) at [73]. The decisions referred to in the footnotes in the quote are: (72) *Re Mallinder and Office of Corrections* (1988) 2 VAR 566, 580 (Judge Jones P, Galvin DP and Waker M); *Re Lapidos and Office of Corrections (No 4)* (1990) 4 VAR 283, 307-308 (Galvin DP) and *Simons v Department of Justice* [2006] VCAT 2053 at [35]-[40] (Judge Davis); *Debono v Department of Justice* [2008] VCAT 1791 at [9]-[11] and [19]-[21].

¹⁰ *Knight v Corrections Victoria* [2010] VSC 338 at [73]. The decision referred to in the footnotes in the quote are: (74) *Lomax v Department of Justice* [1999] VCAT 2125.

- (b) the document also contains data that, if disclosed, would reveal the assessment methods undertaken by the clinician;
 - (c) the disclosure of that information could mean that the assessment process could be manipulated to achieve certain outcomes;
 - (d) while the applicant is no longer in prison, release under the FOI Act is unrestricted and unconditional, such that an Applicant is free to use or further disseminate a document as they please;¹¹ and
 - (e) the disclosure of the methods by which the Agency conducts its assessments would undermine that process and in turn impair the ability of it to administer the Corrections Act.
34. Accordingly, the clinical information the Agency removed from the document is exempt under section 31(1)(a).
35. For completeness, I also consider section 31(2)(f)¹² is not applicable in these circumstances, given the Report is not a report on a law enforcement investigation. Rather, the document has been provided as part of the classification and management of a prisoner.

Section 38

36. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

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.

37. 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.
38. The Agency applied section 38 in conjunction with section 104ZZA of the Corrections Act to exempt parts of the document.

Corrections Act

39. Section 104ZZA provides:

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.

40. The phrase ‘personal and confidential information’ is defined in section 104ZX of the Corrections Act, which relevantly provides:

personal or confidential information includes the following—

- (a) information relating to the personal affairs of a person who is or has been an offender or a prisoner;

¹¹ *Marke v Victoria Police* [2008] VSCA 218.

¹² This section provides a document is not exempt under section 31(1) if it is a report on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation.

...

(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;

41. This type of information cannot be disclosed by a 'relevant person' unless they are authorised to do so.

42. The phrase 'relevant person' is set out in Schedule 5 of the Corrections Act, which includes:

...

- (2) A person employed in the Department under Part 3 of the Public Administration Act 2004
- (3) A person who provides services or advice (whether paid or unpaid) to or on behalf of the Department

43. Section 104ZZA operates to protect the personal privacy of individuals who are identified in documents granted in connection with the management and administration of the corrections system. The section imposes strict confidentiality requirements on a relevant person which apply in all but limited circumstances.

44. 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 in conjunction with section 104ZX identifies, with precision, the type of information to which it applies; and
- (c) section 104ZZA clearly prohibits specified 'relevant persons' from disclosing the information to which it applies.

45. In this case, the Agency applied the secrecy provision to:

- (a) names, position titles and the signatures of corrections staff; and
- (b) information that identifies the Applicant's family members or discloses information about them.

46. I am satisfied the information exempted by the Agency is information from which the identity of individuals other than the Applicant can be reasonably determined and is therefore of a kind to which section 104ZZA refers.

47. Sections 104ZY and 104ZZ of the Corrections Act set out exceptions to the prohibition on relevant persons disclosing personal or confidential information. Having reviewed these exceptions, I consider there is no information before me to suggest any of the exceptions authorise disclosure of the documents to the Applicant in this instance.

48. In summary, I am satisfied section 104ZZA of the Corrections Act prohibits employees of the Agency from disclosing the personal information contained in the documents. As a consequence, I am satisfied section 38 of the FOI Act applies to the names and position titles of medical staff and is, therefore, is exempt from release.

49. Having determined the information is exempt under section 38, it is not necessary for me to consider the Agency's application of section 33(1) to the same information.

Deletion of exempt or irrelevant information

50. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
51. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹⁴
52. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the document meaningless.

Conclusion

53. On the information available, I am satisfied the exemptions in sections 30(1), 31(1)(a) and 38 apply to parts of the Report. I have decided information the Agency deleted from the Report is exempt from release.

Review rights

54. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
56. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
57. 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.
58. 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.¹⁸

When this decision takes effect

59. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

¹³ *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].

¹⁴ *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].

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and (3FA).