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Notice of Decision and Reasons for Decision

Applicant:	'AC7'
Agency:	Department of Justice and Community Safety (formerly Department of Justice and Regulation)
Decision Date:	3 May 2019
Exemptions considered:	Sections 30(1), 31(1)(a), 33(1), 38
Citation:	*'AC7' and Department of Justice and Community Safety* (Freedom of Information) [2019] VICmr 25 (3 May 2019)

FREEDOM OF INFORMATION – prisoner – clinical assessment in prison – Specialised Offender Assessment and Treatment Service (SOATS) – internal working documents– law enforcement documents – documents to which secrecy provisions apply – section 104ZZA *Corrections Act*

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 in accordance with the Applicant's Freedom of Information (**FOI**) request.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided to refuse access to the documents in full.

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

3 May 2019

Reasons for Decision

Background to review

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

> …all information in relation to a cognitive assessment that I had undergone whilst in custody at [named correctional facility] approximately on or around [named date].
>
> The person who conducted the cognitive assessment is [details of named clinician].

2. The assessment was completed as part of the Applicant's management in prison in the Specialised Offender Assessment and Treatment Service (**SOATS**).

3. In its decision, the Agency identified a document falling within the terms of the Applicant's request. It decided to refuse access to the document in full.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.

5. I have been briefed by OVIC staff who inspected the document claimed to be exempt under section 31(1).[1]

6. The document is an eight page cognitive assessment completed as part of the Applicant's treatment and rehabilitation in prison. The report is a professional interpretation of the results of a proprietary standardised test completed by the Applicant.

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;

   (b) information provided with the Applicant's review application and during the review; and

   (c) the Agency's submission dated 25 February 2019; and

   (d) further information provided by the Agency during the course of the review.

9. The Applicant did not make a submission relating to the review.

10. 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.

[1] Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

Review of exemptions

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

Section 38

12. Section 38 provides in relation to 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.

13. 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.

Corrections Act

14. Section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) 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.

15. The term '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;
>
> (b) information relating to the classification of a prisoner under this Act;
>
> (c) information –
>
> (i) that identifies a 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;
>
> (d) information given to the Adult Parole Board that is not disclosed in a decision of the Board or in any reasons given by the Board for a decision of the Board;
>
> …
>
> (j) information concerning—
>
> …
>
> (ii) security measures taken to protect the community from offenders;

16. The phrase 'relevant person' is set out in Schedule 5, 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

17. In summary, section 104ZZA operates to protect the personal privacy of individuals who are identified in documents generated in connection with the management and administration of the corrections system. It is also directed toward maintaining the confidentiality of methods and procedures used in the management of offenders and prisoners. The section imposes strict confidentiality requirements on Agency officers, among others, which apply in all but certain limited circumstances.

18. I am satisfied that 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 identifies, with precision, the type of information to which it applies; and

    (c) section 104ZZA clearly prohibits specified persons from disclosing the information to which it applies.

19. The Agency applied the secrecy provision to the name of the clinician preparing the report and their title.

20. I am satisfied the deleted information in the document falls within the definition of 'personal or confidential information' in section 104ZX of the Corrections Act, and is information to which the secrecy provision applies.

21. The secrecy provision contained in section 104ZZA is also subject to exceptions outlined in sections 104ZY and 104ZZ, which permit the release of personal or confidential information in certain circumstances. However, I do not consider that any of the exceptions in sections 104ZY of 104ZZ of the Corrections Act apply in the circumstances.

22. Accordingly, I am satisfied section 38 applies to the document.

23. For completeness, I will also discuss the operation of sections 31(1)(a) and 30(1) to the report.

Section 31(1)(a)

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

> **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;

25. The expression 'reasonably likely' was considered by the Supreme Court of Victoria in *Department of Agriculture and Rural Affairs v Binnie*, which held:

> The expression "reasonably likely" is substantially idiomatic, its meaning not necessarily unlocked by close dissection. In its ordinary use, it speaks of a chance of an event occurring or not occurring which is real – not fanciful or remote. It does not refer to a chance which is more likely than not to occur, that is, one which is "odds on" or between nil and certainty it should be placed. A chance which in common parlance is described as reasonable is one that is "fair", "sufficient" or "worth noting".[2]

[2] *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836 at [10].

26. The term 'prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.[3]

27. Section 31(1)(a) may be applicable in two instances: firstly, where disclosure would prejudice an investigation; and secondly, where disclosure would prejudice the proper enforcement or proper administration of the law, which includes regulatory monitoring and compliance activities.[4]

28. 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.[5]

29. The Agency relies on the second limb in section 31(1)(a), concerning the 'proper administration of the law in a particular instance'.

30. I have considered the reasoning of the Agency, as set out in its decision letter, with respect to the exemption under section 31(1)(a). The Agency stated as follows:

> The disclosure of material in the report could undermine the effectiveness of offender rehabilitation programs, and therefore prejudice the administration of the Corrections Act. There is the real possibility of misinterpretation of the reports by a person who is not a trained practitioner and who is unfamiliar with the assessment tools used to obtain information that the report is based upon. Misinterpretation could lead to confusion and/or mischievous or misleading uses of the documents that would be contrary to the public interest. There are also concerns that offenders would discuss that content between themselves with the intent of assisting each other to undermine the assessment process.

31. It is my understanding arrangements can be made for a SOATS clinician to go through an assessment report with a prisoner, providing them with an opportunity for further comment and questions.

32. Despite the ability to view assessments reports in a controlled setting, the nature of 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.[6]

33. Therefore, given there are no restrictions on the use or further dissemination of information released under FOI, I believe it necessary to consider the relevant impact of disclosure, specifically how use of the type of information contained in the SOATS report would affect the Offender Behaviour Program, which is a program used by the Agency to assist with the management of prisons and prisoners.

34. The Agency advised information in the assessment report may provide additional insight into the methodologies of clinicians that, if provided to or obtained by prisoners in the prison system, could be used with the intent of subverting the effectiveness of the assessment process.

35. I accept the Agency's submission regarding the likely impact of disclosure of the report. I consider that such an outcome could reasonably lead to the misuse of information and this would be reasonably likely to have a detrimental effect on the Agency's proper administration of the Corrections Act.

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[3] *Sobh v Police Force of Victoria* [1994] 1 VR 41 (Nathan J) at [55].
[4] *JCL v Victoria Police* [2012] VCAT 1060 at [28].
[5] *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 (No4)* (1990) 4 VAR 283, 307-308 (Galvin DP) and *Simons v Department of Justice* [2006] VCAT 20553 at [35]-[40] (Judge Davis); and (73) *Debono v Department of Justice* [2008] VCAT 1791 at [9]-[11] and [19]-[21].
[5] *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.
[6] *Marke v Victoria Police* [2008] VSCA 218.

36. Specifically, I consider disclosure of this type of information could undermine the effectiveness of the Offender Behaviour Program, which is an integral part of the Agency's management of prisons and prisoners. I am satisfied this is a 'particular instance' in which the administration of the law may be prejudiced.

37. Further, in submissions dated 12 April 2019 the Agency stated that the report was provided to the Adult Parole Board (**Board**). There has been a general acceptance in previous decisions of the Victorian Civil and Administrative Tribunal (**VCAT**) that disclosure under the FOI Act of information provided to the Board would lead to an impediment to, or derogation from, the administration of the parole system.[7]

38. Therefore, the report is exempt under section 31(1)(a).

Section 30(1)

39. Although I consider that the documents are exempt under section 31(1)(a) for completeness, I have also considered the Agency's application of section 30(1) to the information.

40. 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;

    (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.

41. The exemption does not apply to purely factual material in a document.[8]

42. The document contains information taken from the clinician's interpretation of the Applicant's results, as well as opinions and advice about the impact of these results. The assessment was administered to assist with the classification and management of the Applicant.

43. The very nature of the document is sensitive and contains from the onset and throughout, the clinicians detailed observations, opinions and recommendations regarding the Applicant's results. Accordingly, I am satisfied the opinions, advice and recommendations were provided in the course of and for the purposes of, a deliberative process of the Agency, namely the Agency's assessment and supervision as part of his sentence.

44. In deciding whether disclosure of the information would be contrary to the public interest, it is necessary to balance relevant considerations, remaining mindful that the object of the FOI Act is to facilitate and promote disclosure of information.

45. The Applicant seeks the documents to help him understand the difference between conclusions drawn in this report, and previous conclusions reached by a psychiatrist as part of his criminal hearing.

[7] See *Lomax v Department of Justice* (unreported, VCAT, Davis M, 26 November 1999); *Fogarty v Office of Corrections* (1989) 3 VAR 214; *Knight v Department of Justice* [2012] VCAT 369.
[8] Section 30(3).

46. The Agency, in its decision letter, advised as follows:

> Disclosure of this information would be contrary to the public interest as clinical staff need to be able to freely express opinions and observations about a prisoner's presentation and behaviour to ensure the proper ongoing management of a prisoner's health and wellbeing. The release of such information is likely to inhibit clinical staff from freely expressing opinions in similar assessments in the future. The release of such information may also give prisoners insights into psychological methodologies used by clinicians which prisoners could employ to subvert the effectiveness of assessments.

47. I have considered the decision of *Debono v Department of Justice - FOI Officer*[9] (***Debono***), where VCAT affirmed that a clinical assessment of participation in a prevention of, in that matter, a violence program, is exempt from disclosure under section 30(1).

48. 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. I am of the view the document under review and the documents in *Debono* are somewhat analogous, as each were prepared for a deliberative function of the Agency to assess eligibility of specialised intervention programs and address re-offending.

49. I consider the nature of the written assessments the subject of the *Debono* decision are similar in nature to the document subject to this review. Given the similarity between the documents, I consider VCAT's reasoning in relation to public interest factors under section 30(1) are relevant to the document subject to this review.

50. For completeness, I set out the relevant parts of VCAT's decision in relation to public interest factors under section 30(1):

> 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.[10]

51. In relation to the document, my view is disclosure of the opinions and recommendations would be likely to inhibit clinicians from freely expressing their opinions and recommendations in similar written assessments in the future.

[9] [2008] VCAT 1791 (per Judge Macnamara, Deputy President).
[10] Ibid at [19-20].

52. While I am mindful of the Applicant's personal interest in accessing the document, I am also mindful of the overall purpose of the report in providing those individuals, who supervise sexual offenders within the community, access to frank and candid information to effectively perform their supervisory functions. I consider to routinely release the type of information contained in the document subject to review, could reasonably lead to a diminution in the degree of candour provided by clinicians, which would be reasonably likely to adversely affect the quality of information provided in written assessments.

53. Further, I agree with the Agency's submission that disclosure of such information could provide insights into psychological methodologies used by clinicians that persons subject to a Community Corrections Order under the community corrections system, could employ to subvert the effectiveness of such assessments.

54. In the circumstances, I consider the public interest in ensuring the confidentiality of the Agency's deliberations and maintaining the integrity of the Agency's processes in relation to such assessments outweighs the Applicant's personal interest in the document.

55. Accordingly, I am satisfied section 30(1) applies to the document.

Conclusion

56. For the reasons set out above, I am satisfied disclosure of the assessment report in this instance is likely to prejudice the proper administration of the Corrections Act and the management of a prison.

57. Accordingly, I am satisfied the document is exempt under sections 38, 31(1)(a) and 30(1).

58. In light of my decision on section 38, it is not necessary to consider the section 33(1) exemption relied on by the Agency.

Review rights

59. 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]

60. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.[12]

61. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.[13]

62. 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.

63. The Agency is required to notify the Information Commissioner, as soon as practicable, if either party applies to VCAT for a review of my decision.[14]

When this decision takes effect

64. 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.

[11] The Applicant in s 50(1)(b) and the Agency in s 50(3D).
[12] Section 52(5).
[13] Section 52(9).
[14] Section 50(3F) and (3FA).