

Notice of Decision and Reasons for Decision

Applicant:	'AN5'
Agency:	Department of Justice and Community Safety
Decision date:	26 September 2019
Provision and exemptions considered:	Sections 27(2)(b), 31(1)(a), 31(1)(d)
Citation:	'AN5' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2019] VICmr 122 (26 September 2019)

FREEDOM OF INFORMATION – neither confirm nor deny the existence of documents – disclosure would prejudice investigation or prejudice enforcement or administration of the law

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.

I am satisfied, in accordance with section 27(2)(b), confirming or denying the existence of any documents that may fall within the scope of the Applicant's request would disclose information that would otherwise be exempt under sections 31(1)(a) and 31(1)(d).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

26 September 2019

Reasons for Decision

Background to review

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

All of the DOJ and CS [Department of Justice and Community Safety] summaries of my sentencing comments as recorded across all of its systems.
2. Following consultation with the Agency, the Applicant clarified their request to be for:

Summaries of my sentencing comments as recorded on:

 - e-Justice
 - PIMS [Prisoner Information Management System]
 - Centurion¹
3. In its decision of 23 August 2019, the Agency advised the Applicant that sentencing comments, also known as sentencing remarks, are not recorded in PIMS or e-Justice. The Agency also confirmed a full and complete copy of sentencing remarks relevant to the Applicant are publicly available and could be obtained through the Australasian Legal Information Institute (AustLII) website or directly via the relevant Magistrates' Court.
4. The Agency neither confirmed nor denied the existence of any sentencing comments recorded in the prison intelligence database, Centurion, in accordance with section 27(2)(b), as any decision would reveal information which, in and of itself, would be exempt information.
5. The Agency claimed any documents that may fall within the terms of the Applicant's request, if they existed, would be exempt under sections 31(1)(a) and 31(1)(d).

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. In their review application, the Applicant stated they believe information withheld is false or misleading and they seek access so they can request an amendment under the FOI Act to any relevant records.
8. In submitting this review, the Applicant provided information regarding previous similar FOI requests submitted seeking summaries made by Agency staff regarding sentencing comments relevant to the Applicant's case and details of subsequent attempts to have amendments made to Agency records.
9. In this current review, I am focused solely on the Agency's decision of 23 August 2019 and I have considered all communications and correspondence received from the parties in relation to this specific matter.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. The Agency's reliance on section 27(2)(b) obviates the need for the Agency to provide me with a copy of any documents, if any exist, that would fall within the terms of the Applicant's request.
12. 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

¹ Centurion is a database of prison related security information that enables the secure collection and sharing of intelligence information within and between Victorian prisons.

only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

13. The Agency relied on section 27(2)(b) to neither confirm nor deny the existence of any documents relevant to the Applicant's request for summaries of sentencing comments as recorded on Centurion, which if any existed, the Agency further determined would be exempt under sections 31(1)(a) and 31(1)(d).

Section 27(2)(b)

14. Section 27(2)(b) provides:

(2) In notice under subsection (1), an agency or Minister –

...

(b) if the decision relates to a request for access to a document that is an exempt document under section 28, 29A, 31 or 31A or that, if it existed, would be an exempt document under section 28, 29A, 31 or 31A, may state the decision in terms which neither confirm nor deny the existence of any document.

15. Section 27(2)(b) requires me to consider whether, should any documents requested by the Applicant exist, they would be exempt under sections 31(1)(a) and 31(1)(d) and whether information as to the existence or non-existence of any such documents would disclose what would otherwise be exempt information under section 31(1)(a) and 31(1)(d).

Application of sections 31(1)(a) and 31(1)(d)

16. Sections 31(1)(a) and 31(1)(d) provide:

31 Law enforcement documents

(1) 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;

...

(d) Disclosure 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.

17. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.²

18. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³

19. The phrase 'in a particular instance', does not require a single specific investigation and can encompass specific, identified aspects of law, administration of law or the investigation of breaches or potential breaches of law.⁴

² *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.

³ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

20. In its decision letter, the Agency stated:

Under section 31(1)(a), the [Agency] will not disclose information if it would be likely to improperly affect an investigation, or the administration or enforcement of a particular law.

'Administration of the law' under this section includes the administration of a prison under the *Corrections Act 1986* (the Corrections Act) and the Corrections Regulations 2009

Under section 31(1)(d), the [Agency] will not disclose information if it is about methods and procedures used to prevent, detect, investigate or deal with illegal activities, and its disclosure would harm the effectiveness of those methods and procedures.

The purpose of the Corrections Act is to provide for the establishment, management and security of prisons and the welfare of prisoners. In order to carry out these functions prison authorities must be able to obtain and store information that could affect the management and good order of the prison.

This type of information - if it existed – [and was] disclosed would prejudice the proper administration of the Corrections Act because it would affect what and how information was recorded about prisoners thus making information gathering ineffective with the ultimate effect of compromising the good order and security of the prison.

21. The Agency also provided submissions in support of the above reasoning and highlighted previous decisions of the Victorian Civil and Administrative Tribunal (**VCAT**) which affirmed that prison intelligence information, as located in systems such as Centurion, is exempt from disclosure. Of particular relevance is the decision of *Knight v Department of Justice*⁵ (**Knight decision**) which concerns an access request for prison intelligence information held on 'Protel', which was the predecessor of Centurion.
22. The Agency advised the descriptions of Protel provided in evidence in the Knight decision are directly transferrable to its current iteration, which is known as Centurion. As such, I am satisfied, as held in the Knight decision, Centurion is a restricted database used by authorised Agency officers to 'gather and assess intelligence and information about the activities of prisoners' and that 'the sources of prison intelligence include prisoners, prison visitors, prison officer and other staff, members of the police force, other Australian prisons, and members of the public'.⁶ I understand information held in Centurion (as it was in Protel) is 'used to make informed decisions about [prison] security and management ... and that this information is critical to the effective and safe management of Victorian prisons'.⁷
23. In the Knight decision, Judge Davis agreed with the decision of Deputy President Galvin in *Elsing v Department of Justice*⁸ that the protection of information held in the Protel system is in the public interest and that disclosure of prison intelligence information could '...result in a decrease in the flow of information...received, which would in turn adversely impact safety and security.'⁹
24. Further, of direct relevance to this review which is required to consider the nature of Centurion, in the Knight decision it was determined that the exemptions under section 31(1)(a) and 31(1)(b) applied to Protel documents in full as disclosure would:

... prejudice the administration of the prison... disclose the methodology used by intelligence staff to collect information, which would allow prisoners to exploit that knowledge and conceal unlawful activities...and significantly affect the nature, quality and amount of information collected which would

⁴ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁵ [2011] VCAT 1276.

⁶ *Knight v Department of Justice* [2011] VCAT 1276 at [6].

⁷ *Knight v Department of Justice* [2011] VCAT 1276 at [27].

⁸ [1998] VCAT 1249.

⁹ *Knight v Department of Justice* [2011] VCAT 1276 at [27].

adversely impact the capacity of the [Agency] to anticipate, prevent and respond to breaches of the law".¹⁰

25. I am constrained in providing more detailed reasons for decision as to why the exemptions under sections 31(1)(a) and 31(1)(d) may or may not apply to any documents, should any exist, as to do so would disclose what would otherwise be exempt information under those exemptions.
26. Having considered the relevant factors, I am satisfied disclosure of any information as to the existence or non-existence of any documents falling within the scope of the Applicant's request, would disclose of information that would be exempt under section 31(1)(a) and 31(1)(d).
27. Putting this another way, I am satisfied that, should any documents exist, they would be exempt from release under sections 31(1)(a) and/or 31(1)(d). In reaching this conclusion, I reiterate that I am neither confirming nor denying the existence of any documents that would fall the terms of the Applicant's request.

Conclusion

28. On the information available, I am satisfied, in accordance with section 27(2)(b), confirming or denying the existence of any documents that may fall within the scope of the Applicant's request, would disclose of information that would otherwise be exempt under sections 31(1)(a) and 31(1)(d).

Review rights

29. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.¹¹
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
32. 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 (international callers dial +61 3 8685 1462).
33. 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

34. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁰ Ibid, *Knight* [2011] at [17-19].

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

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).