

Notice of Decision and Reasons for Decision

Applicant:	'BJ4'
Agency:	Department of Justice and Community Safety
Decision Date:	27 March 2020
Exemptions and provisions considered:	Sections 30(1), 31(1)(a) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	'BJ4' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2020] VICmr 91 (27 March 2020)

FREEDOM OF INFORMATION – Corrections Victoria – prison records – Post Sentence Authority – offender records – offender reports – incident report – audit report – law enforcement documents – documents to which secrecy provisions apply

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.

I am satisfied the documents are exempt under sections 30(1) and 31(1)(a) and section 38 in conjunction with section 104ZZA of the Corrections Act.

As I am not satisfied it is practicable to delete exempt information in the Reports, I have determined to refuse access to the documents in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

27 March 2020

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 amended the initial request.
2. The amended request was for access to the following documents:
 - (1) All quarterly reports dated from the [date] to current date.
 - (2) Any documents/ incident reports, including photos in relation to the confiscation of my phone in [month and year].
3. In its decision, the Agency identified four documents falling within the terms of the Applicant's request. It decided to grant access to one page in full and refuse access to the remaining pages of the documents.
4. The Agency relied on the exemptions in sections 30(1), 31(1)(a), 31(1)(d), 33(1) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**) to refuse access to the Reports. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant advised during the review they do not seek access to the 'quarterly report' documents.
7. Accordingly, the Applicant seeks review of the decision by the Agency to exempt the 'audit report', 'incident report' and 'special report-supervision order' (the **Reports**).
8. I have been briefed by OVIC staff, who inspected the Reports claimed to be exempt under section 31(1).¹
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (b) the Applicant's submission dated [date] and information provided with their review application.
11. 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

Section 30(1) – Internal working documents

12. 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.

13. The exemption does not apply to purely factual material in a document.²

14. In its decision letter, the Agency stated:

I have determined that it would be contrary to the public interest to disclose material in the reports as staff and clinicians need to be able to express freely opinions about gains made or limitations encountered while monitoring and supervising offenders on detention orders. The release of such information is likely to inhibit Corrections staff from freely expressing opinions in similar reports to the PSA in the future. This would be contrary to the public interest as it would render such reports from Corrections staff ineffective. This would undermine the role of both corrections staff and the PSA in monitoring and supervising offenders to maximise community safety.

15. 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.

Do the Reports disclose matter in the nature of opinion, advice or recommendation prepared by agency officers?

16. The Agency exempted information in parts of the Reports under section 30(1) where it determined the opinions and recommendations were made by Agency officers and clinicians to the Post Sentence Authority (PSA).

17. I am satisfied certain information in the Reports discloses opinions and recommendations made by Agency officers and clinicians and those clinicians are Agency officers for the purpose of the FOI Act.

Were the Reports made in the course of, or for the purpose of, the deliberative processes involved in the functions of the agency?

18. In *Re Waterford and Department of Treasury (No. 2)*,³ the Commonwealth Administrative Appeals Tribunal held:

... “deliberative process” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ... its thinking processes – the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

² Section 30(3).

³ [1981] 1 AAR 1.

19. I am satisfied the opinions and recommendations recorded in the Reports were provided in the course of, and for the purpose of, the Agency's deliberative processes involved in the management of offenders on supervision orders, which is an important function of the Agency.

Would disclosure of the Reports be contrary to the public interest?

20. In determining if disclosure would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
21. Determining whether disclosure of the documents would be contrary to the public interest requires a 'process of the weighing against each other conflicting merits and demerits'.⁴
22. In deciding whether disclosure of the documents would be contrary to the public interest, I have given weight to the following relevant factors:⁵
- (a) the right of every person to gain access to documents under the FOI Act;
 - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the agency would not otherwise be able to explain upon disclosure of the documents;
 - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the agency at the conclusion of a decision or process; and
 - (g) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
23. In my view, the Reports subject to this review are similar to the material considered in *Debono v Department of Justice - FOI Officer*⁶ (**Debono decision**), in which 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).
24. In the Debono decision, the applicant had been released from prison and held concerns regarding his parole from prison. He sought access to two written assessments prepared by prison clinicians while he was serving a prison sentence. Following the provision of sworn evidence by a clinician employed by the Agency (formerly the Department of Justice), VCAT determined the written assessments were exempt under section 30(1).

⁴ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

⁶ [2008] VCAT 1791 (per Judge Macnamara, VCAT Deputy President).

25. While the Reports are not the same as those the subject of the Debono decision, I consider they are sufficiently similar in nature. Accordingly, I have taken into consideration VCAT's findings in the Debono decision in determining whether disclosure of the Reports would be contrary to the public interest:

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.⁷

26. In relation to the parts of the Reports the Agency determined are exempt under section 30(1), I am satisfied disclosure of the opinions and recommendations in the Reports is likely to inhibit Agency officers and clinicians from freely expressing their opinions and recommendations in similar reports in the future. Further, I consider disclosure of such information could provide insights into psychological methodologies used by clinicians that offenders could employ to subvert the effectiveness of such reports. I also accept the Agency's submission that disclosure of the opinions and recommendations in the Reports would be reasonably likely to undermine the role of both Agency officers and the PSA in monitoring and supervising offenders in the public interest of promoting community safety.
27. In these circumstances, I am satisfied the public interest weighs in favour of maintaining the integrity of the Agency's processes relating to the management of offenders on supervision orders. Therefore, I am satisfied the opinions and recommendations of Agency officers and clinicians in the Reports are exempt under section 30(1).

Section 31(1)(a) – Law enforcement documents

28. Section 31(1)(a) provides a document is an exempt document if its disclosure under the FOI Act would, or would be reasonably likely to, 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.

⁷ Ibid at [19]-[20].

29. '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.⁸
30. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
31. 'Proper administration of the law' includes the manner in which the law is administered, including regulatory, monitoring and compliance activities.⁹
32. In *Knight v Corrections Victoria*,¹⁰ the Supreme Court of Victoria held:

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.

33. In its decision letter, the Agency stated:

'Administration of the law' under this section includes the administration of a prison under the Corrections Act 1986 (Corrections Act) and the Corrections Regulations 2019.

The purpose of the Corrections Act is to provide for the establishment, management and security of corrections facilities and the welfare of offenders. In order to carry out these functions, corrections staff must be able to obtain and store information that, if disclosed, could affect the management and good order of the prison.

Material exempted includes information concerning the security of corrections facilities and the management of offenders especially in relation to incidents concerning the contravention or possible contravention of the law by offenders, descriptions of offences and classification within the corrections system.

If this type of information were disclosed it would prejudice the proper administration of the Corrections Act because it would affect what and how information was recorded about offenders thus making information gathering ineffective with the ultimate effect of compromising the good order and security of the correctional facility.

Reports to the PSA are also exempt under section 31(1)(a) as they have been provided to the PSA for the deliberations of the PSA to assist with the management of you as an offender on a court order.

The PSA is an independent statutory body established under the *Serious Offenders Act 2018*. The Board of the PSA has jurisdiction over offenders subject to detention or supervision orders under the post sentence scheme. This forms an important public function in making independent and appropriate decisions in relation to offenders on detention and supervision orders.

If Corrections staff and the PSA consider that the offender concerned might obtain reports, officers would be reluctant to report fully and state their frank opinions and recommendations and the PSA would hesitate to seek and obtain them. This would undermine the role of Corrections staff and the PSA and prejudice the administration of the post sentence scheme and the law on which it is based.

⁸ *Cichello v Department of Justice* (Review and Regulation) [2014] VCAT 340 at [24].

⁹ *Cichello v Department of Justice* [2014] VCAT 340 at [23]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] VicRp 72; [1991] 2 VR 322.

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].

34. 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 the Corrections Act because it would affect what and how information was recorded about offenders. The Agency also claimed that disclosure would be likely to prejudice the administration of the post sentence scheme established under the *Serious Offenders Act 2018* (Vic) (**Serious Offenders Act**).
35. I am constrained from describing the material to which the Agency refused access in the Reports in any detail, as to do so would reveal the very information that gives rise to the exemption. However, as set out above, the Reports include the opinions and recommendations of Agency officers and clinicians about the Applicant. The Reports also contain information gathered and assessed by the Agency.
36. I accept the investigation of contraventions or possible contraventions of the law when incidents arise is a measure employed to maintain good order and proper administration of corrections residential facilities in accordance with Corrections Victoria’s statutory obligations under the Corrections Act, and the administration of investigations within a corrections facility is a ‘particular instance’ for the purpose of section 31(1)(a).
37. I also accept that the collection of information about offenders is a measure employed to assist with the proper administration of the post sentence scheme under the Serious Offenders Act, and the administration of information gathering and reporting within a corrections facility is a ‘particular instance’ for the purpose of section 31(1)(a).
38. Therefore, it is necessary for me to consider whether granting access to the information would, or would be reasonably likely to, prejudice the Agency’s proper administration of its investigations, information gathering and reporting within a corrections facility.
39. The phrase ‘reasonably likely’ means there is a real chance of an event occurring and it is not fanciful or remote.¹¹
40. ‘Prejudice’ means to hinder, impair or undermine, and includes actual prejudice as well as impending prejudice.¹²
41. In the circumstances, I am satisfied disclosure of the Reports would be reasonably likely to prejudice the proper administration of the Corrections Act and the proper administration of the post sentence scheme under the Serious Offenders Act for the following reasons:
- (a) the Reports contain highly technical detail that, if disclosed, would reveal the assessment methods undertaken by the Agency;
 - (b) the disclosure of that information could mean that the assessment process could be manipulated to achieve certain outcomes;
 - (c) 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;¹³ and
 - (d) 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 and subvert the effectiveness of similar reports given to the PSA.

¹¹ *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.

¹² *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

¹³ *Marke v Victoria Police* [2008] VSCA 218.

42. Accordingly, the Reports are exempt under section 31(1)(a).
43. For completeness, I also consider section 31(2)(f)¹⁴ is not applicable in these circumstances, given the Reports are not reports on a law enforcement investigation. Rather, the Reports have been provided as part of the management of an offender and an investigation into a possible breach of the law by an offender.
44. Having determined the information in the Reports is exempt under section 31(1)(a), it is not necessary for me to consider the Agency's application of section 31(1)(d) to the same information.

Section 38 – Documents to which secrecy provisions apply

45. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information in the document; and
 - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
46. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
47. The Agency applied section 38 in conjunction with section 104ZZA of the Corrections Act to exempt the Reports in full.

Corrections Act

48. Section 104ZZA of the 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.

49. Section 104ZX of the Corrections Act defines 'personal and confidential information':

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;
- ...
- (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;
 - ...
- (da) information given to the Post Sentence Authority that is not disclosed in a decision of the Authority or in any reasons given by the Authority for a decision of the Authority;
- ...

¹⁴This 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.

- (g) information concerning the investigation of a contravention or possible contravention of the law by –
 - (i) an offender;
 - ...

50. A 'relevant person' cannot disclose this type of information unless they are authorised to do so.

51. Section 104ZX of the Corrections Act defines 'relevant person' as a person specified in an item of Schedule 5 and 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

52. 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.

Is there an enactment in force?

53. I am satisfied the Corrections Act is an enactment in force for the purposes of section 38.

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

54. The Agency exempted the following information under section 38 of the FOI Act as it determined it falls within the definition of 'personal and confidential information' in section 104ZX of the Corrections Act:

- (a) names, position titles and the signatures of Corrections staff;
- (b) information and images that identify third parties or disclose information about them;
- (c) information provided to the PSA that has not been disclosed in a decision of the PSA or in any reasons given by it for a decision made; and
- (d) information about an investigation undertaken by the Agency concerning a possible contravention of the law by the Applicant.

55. I am satisfied certain information in the Reports consists of information from which the identity of individuals, other than the Applicant, can be reasonably determined. I am also satisfied the Reports were created as part of an investigation concerning a possible breach of the law by the Applicant and certain information in the Reports was provided to the PSA.

56. 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 and on the information before me, I am satisfied no exceptions authorise disclosure of the documents to the Applicant in this instance. Also, there is no information to suggest any of the information in the Reports was disclosed in a decision of the PSA or in any reasons given for a decision made by the PSA.

57. Therefore, I am satisfied the enactment applies specifically to this kind of information in the documents.

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

58. Having reviewed the circumstances in which disclosure of 'personal and confidential information' is authorised under sections 104ZY and 104ZZ of the Corrections Act, I am satisfied the Agency is prohibited from disclosing the information in the Reports to the Applicant.
59. Disclosure of information in breach of section 104ZZA of the Corrections Act attracts a financial penalty, which highlights Parliament's intention that such information should remain confidential.
60. Accordingly, I am satisfied certain information in the Reports is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
61. 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

62. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
63. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ 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 25.¹⁶
64. I have considered the effect of deleting exempt information from the Reports in accordance with section 25. I am not satisfied it is practicable to delete the exempt information as to do so would render the Reports meaningless.

Conclusion

65. On the information before me, I am satisfied the Reports are exempt under sections 30(1) and 31(1)(a) and section 38 in conjunction with section 104ZZA of the Corrections Act.
66. As I am not satisfied it is practicable to delete exempt information in the Reports, I have determined to refuse access to the Reports in full.

Review rights

67. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁷
68. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
69. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹

¹⁵ *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].

¹⁶ *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].

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

70. 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.
71. 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.²⁰

When this decision takes effect

72. 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.

²⁰ Sections 50(3F) and (3FA).