

Notice of Decision and Reasons for Decision

Applicant:	'BP1'
Agency:	Department of Justice and Community Safety
Decision date:	27 May 2020
Exemptions and provisions considered:	Sections 30(1), 33(1), and section 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:	'BP1' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2020] VICmr 144 (27 May 2020)

FREEDOM OF INFORMATION – prison documents – Justice Health – death in correctional facility – action plan – prison and incident management – draft documents – factual information – deliberative process – release not contrary to public interest – 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 decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information in the documents.

I am satisfied certain information in the documents is exempt under sections 33(1) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic). However, I am not satisfied the documents are exempt under section 30(1).

As I am satisfied it is practicable to delete exempt and irrelevant information in the documents in accordance with section 25, I have determined to grant access to the documents in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
27 May 2020

Reasons for Decision

Background to review

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

I request access under the Freedom of Information Act 1982 to any:

- Report;
- Findings;
- Conclusions; or
- Recommendations

of any:

- Investigation;
- Analysis; or
- Review

created by or for

- the Department of Justice and Community Safety;
- Corrections Victoria;
- Justice Health; or
- Correct Care Australasia

in relation to the cause or circumstances of the death of at [named correctional facility]

2. The Agency identified seven documents falling within the terms of the Applicant's request and refused access to the documents in full and in part under sections 30(1), 33(1), and section 38 in conjunction with section 104ZZA of the *Corrections Act 1986 (Vic)* (**Corrections Act**).

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Applicant advised they do not seek the names of individuals in the documents. Accordingly, this information is 'irrelevant information' for the purpose of my review.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review. However, I note neither the Applicant nor the Agency made a submission.
7. 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 review request.
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

Section 30(1)

9. 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.
10. Section 30(3) provides the exemption does not apply to purely factual material in a document.
11. The Agency exempted the following information in the documents under section 30(1):
- (a) four draft versions of the 'Action Plan Updates';
 - (b) the first draft version of the Justice Health 'Action Item paper';
 - (c) information in the nature of opinion, advice or recommendations in the most recent 'Action Plan Updates'; and
 - (d) information in the nature of opinion, advice or recommendation in the 'final draft' of the Justice Health 'Action Item paper'.
12. The Agency determined the above information is exempt under section 30(1) for the following reasons:

The earlier versions of the [correctional facility] Action Plan Updates and the first draft of the Justice Health Action Item paper contain information that was subsequently amended or updated in later drafts.

Disclosure of these documents would be contrary to the public interest as it would only serve to create confusion for those who read the documents and could lead to individuals drawing incorrect inferences based on out of date information.

Furthermore, as partial access has been provided to the most recent versions of these two documents, I do not believe release of the earlier versions would serve to promote any further public interest.

The most recent [correctional facility] Action Plan Update and final draft of the Justice Health Action Item paper both contain information that was prepared by officers in response to matters arising out of the death

Disclosure of this information would be contrary to the public interest as it may lead to officers being more guarded in providing this kind of information in future, thereby limiting the usefulness of such advice being provided and inhibiting Corrections Victoria from undertaking thorough reviews of actions following incidents in prisons.

Do the documents 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?

13. Having reviewed the documents, a significant amount of information in the documents is factual. For example, dates of events, descriptions of certain processes or arrangements or actions taken.
14. However, given the stage in the development of the particular draft documents, I accept they broadly contain information in the nature of opinion, advice and recommendations prepared by Agency officers for the purposes of section 30(1).

Were the documents 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?

15. I am satisfied the documents were prepared as part of the Agency's deliberative processes in responding to the death of a person at a prison.

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

16. In deciding if disclosure of a document 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.
17. In deciding whether the disclosure of information exempted by the Agency under section 30(1) would be contrary to the public interest, I have given weight to the following factors:
- (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 or a decision or status of policy development or a process being undertaken at the time the documents were prepared.
 - (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 its 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.
 - (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.

Draft documents

18. The documents comprise:
- (a) four drafts and the final version of a '[correctional facility] Action Plan Updates'; and
 - (b) one draft and one final version of a 'Justice Health Action Item' paper.
19. The Agency determined the draft documents are exempt under section 30(1) as they contain information that was subsequently amended or updated.
20. Having reviewed each of the draft documents, on balance, I do not consider disclosure of these documents would be contrary to the public interest, for the following reasons:
- (a) Draft documents are not exempt as a class of documents.

- (b) The disclosure of draft documents can provide transparency as to an agency's decision making and consultative processes and can be an important tool in understanding how government agencies carry out and fulfil their statutory functions.
- (c) Rather than being subject to significant or substantial change, the draft documents have only been subject to minor amendments and, in most cases, additional information was included in the documents rather than removed.
- (d) Disclosure of the draft documents does not reveal significant or substantive information that differs from the final versions.
- (e) Members of the public are capable of understanding amendments and updates made to such documents over time as an agency works towards finalising a final document. As such, I do not accept disclosure of the documents 'create confusion' or 'could lead to individuals drawing incorrect inferences based on out of date information'.
- (f) Finally, I am not persuaded disclosure of such documents would 'lead to Agency officers being more guarded in providing this kind of information in future, thereby limiting the usefulness of such advice being provided and inhibiting Corrections Victoria from undertaking thorough reviews of actions following incidents in prisons'. In circumstances involving the death of a person in prison, or other serious incident, it is foreseeable Agency officers or other prison staff would be required to provide information to a law enforcement agency, the Coroners Court of Victoria and/or any internal Agency review of prison processes and procedures to avoid a similar event.

Other information

21. The Agency exempted certain information in the final versions of the documents under section 30(1). I understand the Agency exempted sensitive information, information that is more akin to opinion, or related to ongoing action being undertaken by the Agency in response to a serious incident.
22. In my view, members of the public are capable of understanding that reports are created at a particular point in time where actions may not have been completed. I also consider there is a public interest in disclosure of such information so members of the public can hold agencies to account for the completion of such tasks.
23. I note the documents contain sensitive information, and I have considered the Agency's submission regarding the importance of conducting a thorough review following a serious incident in a prison. However, having reviewed the information exempted by the Agency, I do not accept disclosure would impair the ability of the Agency to undertake such reviews in the future.
24. The documents describe the incident and subsequent actions taken by the Agency. In my view, the documents merely describe action taken by the Agency in accordance with its obligations under the Corrections Act to ensure the management and security of prisons.
25. As stated above at paragraph 20(f), I do not accept disclosure of the documents would result in Agency officers being 'more guarded' in providing information to a review or investigation into a serious incident in a prison. Rather, Agency officers would be required to disclose any relevant information concerning a fatal incident in a prison, for example, as part of a criminal investigation, coronial inquiry or internal Agency review.
26. Accordingly, I am not satisfied the documents are exempt under section 30(1).
27. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1).

Section 33(1)

28. Section 33(1) provides a document is exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).
29. Section 33(1) does not apply to an applicant's own personal affairs information.
30. The Applicant does not seek the names of persons referred to in the documents. However, as the section 33(1) also encompasses information from which a person's identity is ascertainable, I have considered this exemption.
31. Given the sensitivity of this matter and the particular circumstances of the incident, I have taken a broad view of the types of information in the documents that could identify third parties.
32. On balance, it would be unreasonable to release information from which the identity of third parties is identifiable for the following reasons:
 - (a) The personal affairs information in the documents is sensitive in nature.
 - (b) It is reasonably likely the relevant third parties would object to release of the information under the FOI Act.
 - (c) The nature of disclosure under the FOI Act means, once a document is disclosed, an applicant is free to use or further disseminate the document as they chose. Given the sensitive nature of the personal affairs information in the documents, I am not satisfied the public interest would be served by disclosure of the documents under the FOI Act.
33. Accordingly, I am satisfied certain personal affairs information in the documents is exempt under section 33(1).
34. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Section 38

35. Section 38 provides a document is exempt if there is in force an enactment applying specifically to information of a kind contained in the document that prohibits persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.
36. In order 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.
37. The Agency relies on section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act in relation to the names of prison staff and their titles, as it is information that identifies a person; and the name of a prisoner and a related third party.
38. As with 'personal affairs information' in the context of section 33(1), while the Applicant does not seek the names of individuals, as section 104ZZA of the Corrections Act captures information from which a person's identity, address or location can be reasonably determined, I have considered this exemption further below.
39. Section 104ZZA of the Corrections Act provides it is an offence:

... to use or disclose personal or confidential information unless authorised by 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. 'Personal or confidential information' includes:

(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 the person; or

(ii) from which any person's identity, address or location can reasonably be determined;

41. Section 104ZY of the Corrections Act sets out exceptions to section 104ZZA.

42. I am satisfied certain information in the documents is exempt under section 38 of the FOI Act for the following reasons:

(a) I am satisfied the Corrections Act is an Act in force for the purposes of section 38.

(b) The Corrections Act is formulated with sufficient precision to identify the information sought to be withheld, being information that would identify a prisoner.

(c) The Corrections Act prohibits disclosure of such information and unauthorised disclosure is an offence subject to a penalty.

(d) The exceptions in section 104ZY of the Corrections Act do not apply in this matter.

43. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 38.

Deletion of exempt or irrelevant information

44. 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.

45. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹ 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 25.²

46. I have considered the effect of deleting exempt and irrelevant information from the documents in accordance with section 25. I am satisfied it is practicable to delete such information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

¹ *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].

² *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].

Conclusion

47. On the information before me, I am satisfied certain information in the documents is exempt under section 33 and section 38 in conjunction with section 104ZZA of the Corrections Act. However, I am not satisfied the documents are exempt under section 30(1).
48. As I am satisfied it is practicable to delete exempt and irrelevant information in the documents in accordance with section 25, I have determined to grant access to the documents in part.
49. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

50. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.³
51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
53. 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.
54. 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.⁶

When this decision takes effect

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

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

⁴ Section 52(5).

⁵ Section 52(9).

⁶ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	[month] [year] (on or after [date] [month])	[Correctional facility's] Action Plan Update (earlier version)	2	Refused in full Sections 30(1), 33(1), 38	Release in part Sections 33(1), 25 The document is to be released with the following exempt and irrelevant information deleted: <ul style="list-style-type: none"> the date and name that appears in the 'event' heading; and all other names that appear in the document. 	Section 30(1): I am not satisfied the document is exempt under section 30(1) for the reasons set out in the Notice of Decision above. Section 33(1): The date and name that appears in the event heading is exempt under section 33(1) for the reasons set out in the Notice of Decision above. Section 38: I am satisfied parts of the report are also exempt under section 38 for the reasons set out in the Notice of Decision above. Section 25: All other personal names are irrelevant to terms of the Applicant's review and I am satisfied it is practicable to delete this irrelevant information in accordance with section 25.
2	[month] [year] (on or after [date] [month])	[Correctional facility's] Action Plan Update (earlier version)	2	Refused in full Sections 30(1), 33(1), 38	Release in part Sections 33(1), 25 The document is to be released with the following exempt and	Section 30(1): See comments for Document 1 above. Section 33(1): See comments for Document 1 above.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					irrelevant information deleted: <ul style="list-style-type: none"> the date and name that appears in the 'event' heading; and all other names that appear in the document. 	<p>Section 38: See comments for Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>
3	[month] [year]	[Correctional facility's] Action Plan Update (earlier version)	3	<p>Refused in full</p> <p>Sections 30(1), 33(1), 38</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with the following exempt and irrelevant information deleted:</p> <ul style="list-style-type: none"> the date and name that appears in the 'event' heading; and all other names that appear in the document. 	<p>Section 30(1): See comments for Document 1 above.</p> <p>Section 33(1): See comments for Document 1 above.</p> <p>Section 38: See comments for Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>
4	[month] [year]	[Correctional facility's] Action Plan Update (earlier version)	4	<p>Refused in full</p> <p>Sections 30(1), 33(1), 38</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with the following exempt and irrelevant information deleted:</p>	<p>Section 30(1): See comments for Document 1 above.</p> <p>Section 33(1): See comments for Document 1 above.</p> <p>Section 38: See comments for</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> the date and name that appears in the 'event' heading; and all other names that appear in the document. 	<p>Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>
5	[month] [year]	[Correctional facility's] Action Plan Update	4	<p>Released in part</p> <p>Sections 30(1), 33(1), 38</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with the following exempt and irrelevant information deleted:</p> <ul style="list-style-type: none"> the date and name that appears in the 'event' heading; and all other names that appear in the document. 	<p>Section 30(1): See comments for Document 1 above.</p> <p>Section 33(1): See comments for Document 1 above.</p> <p>Section 38: See comments for Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>
6	[date] [month][year]	Justice Health Action Item (earlier draft)	8	<p>Refused in full</p> <p>Sections 30(1), 33(1), 38</p>	<p>Release in part</p> <p>Sections 33(1), 38, 25</p> <p>The document is to be released with the following exempt and irrelevant information deleted:</p> <ul style="list-style-type: none"> the information the Agency 	<p>Section 30(1): See comments for Document 1 above.</p> <p>Section 33(1): My decision is the same as the Agency's decision in relation to the application of section 33(1) to Document 7.</p> <p>Section 38: See comments for</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>determined was exempt under section 33(1) in Document 7; and</p> <ul style="list-style-type: none"> all other names in the document. 	<p>Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>
7	[date] [month][year]	Justice Health Action Item	8	<p>Released in part</p> <p>Sections 30(1), 33(1), 38</p>	<p>Release in part</p> <p>Sections 33(1), 38, 25</p> <p>The document is to be released with the following exempt and irrelevant information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> information the Agency exempted under section 33(1) in Document 7; and all other personal names in the document. 	<p>Section 30(1): See comments for Document 1 above.</p> <p>Section 33(1): My decision is the same as the Agency's decision in relation to section 33(1).</p> <p>Section 38: See comments for Document 1 above.</p> <p>Section 25: See comments for Document 1 above.</p>