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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'CU8'
Agency:	Department of Justice and Community Safety
Decision date:	31 March 2021
Exemptions and provisions considered:	Sections 30(1) 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:	'CU8' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2021] VICmr 81 (31 March 2021)

FREEDOM OF INFORMATION – Corrections Victoria – offender management – Post Sentence Environmental Scan – documents provided to the Adult Parole Board – secrecy provision – offence to disclose personal or confidential information

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 a document requested by the Applicant under the FOI Act.

I am satisfied the document is exempt under sections 30(1) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

As I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, I have refused access to the document in full.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

31 March 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to documents detailing the reasons why the Applicant's residential property was determined as unsuitable as a place for a person to reside following their release from prison on parole (**parole applicant**).
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under sections 30(1), 33(1) and 38 in conjunction with section 104ZZA of the Corrections Act. The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications received from each party throughout the review.
6. 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.
7. I note Parliament's intention the FOI Act must be interpreted to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 38 – Information or documents to which a secrecy provisions applies

8. Section 38 provides:

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.

9. Therefore, three conditions must be satisfied for a document to be exempt under section 38:

- (a) there must be an enactment in force;
- (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in a document; and
- (c) the enactment must prohibit persons, who are referred to in the enactment, from disclosing the specific kind of information in a document (either absolutely or subject to exceptions or qualifications).

Is there an enactment in force?

10. The Agency relies on section 38 of the FOI Act in conjunction with sections 104ZZA and 104ZX of the Corrections Act to refuse access to the document.
11. 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 document?

12. For section 38 to apply, an enactment must be formulated with such precision that it specifies the actual information in a document sought to be withheld.
13. Section 104ZZA of the Corrections Act provides:

104ZZA Offence to use or disclose personal or confidential information unless authorised

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.

14. The phrase 'relevant person' is set out in Schedule 5 to the Corrections Act, 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

15. The phrase 'personal or confidential information' is defined in section 104ZX of the Corrections Act and includes:

- (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. In summary, section 104ZZA of the Corrections Act protects the personal privacy of individuals who are identified in documents generated in connection with the management and administration of prisoners, as well as the management of offenders in the community. The provision is also directed towards maintaining the confidentiality of methods and procedures used in the management of prisoners and offenders released into the community. It imposes strict confidentiality requirements on Agency officers and others, and is subject to limited exceptions only.

17. The Agency's decision letter states the document contains the following information 'personal or confidential information' for the purposes of section 104ZX of the Corrections Act:
- information given to the Adult Parole Board (APB) that is not disclosed in a decision of the APB or in any reasons given by the APB for a decision of the APB
 - the following information that identifies a person:
 - the names corrections staff
 - the names, relationships and other information about other individuals
 - relationships and other identifying information about victims
 - the opinions and recommendations made by corrections officers in the reports is information concerning the security measures taken to protect the community from offenders.
18. Having reviewed the document and following inquiries made by OVIC staff, including in regard to the provision of certain information to the Adult Parole Board (the **APB**), I am satisfied the document contains 'personal or confidential information' within the meaning of section 104ZX of the Corrections Act. Further, I am satisfied, based on the responses provided by the Agency, the document contains information given to the APB that was not subsequently disclosed in a decision of the APB or in any reasons for decision given by the APB.
19. Accordingly, I am satisfied section 104ZZA of the Corrections Act applies specifically to information in the document.

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

20. Under section 104ZZA of the Corrections Act, it is an offence for a 'relevant person' to use or disclose 'personal or confidential information' unless they are authorised to do so under sections 104ZY or 104ZZ of the Corrections Act.
21. These provisions authorise the release of 'personal or confidential information' in limited circumstances only. In this case, I have specifically considered the possible application of section 104ZY(2)(b), which authorises the disclosure of 'personal or confidential information' where the person to whom the information relates provides their consent for the information to be disclosed.
22. I accept the Applicant's FOI request constitutes their consent for the release of 'personal or confidential information' in the document that concerns them. However, such information in the document concerns both the Applicant and the parole applicant, and is so intertwined that it is not possible to separate information that concerns the Applicant only. Therefore, I am satisfied the exception under section 104ZY(2)(b) of the Corrections Act does not apply and no further exceptions under sections 104ZY or 104ZZ of the Corrections Act apply to the prohibition on disclosure under section 104ZZA.
23. Accordingly, I am satisfied section 104ZZA of the Corrections Act (or the 'enactment') applies specifically to information in the document.

Summary of findings in relation to section 104ZZA of the Corrections Act

24. I am satisfied section 104ZZA of the Corrections Act is a secrecy provision to which section 38 of the FOI Act applies as:
- (a) the Corrections Act is an enactment in force;
 - (b) section 104ZZA of the Corrections Act, in conjunction with section 104ZX, identifies with precision the type of information to which the prohibition on disclosure applies; and

- (c) section 104ZZA of the Corrections Act makes it an offence for a 'relevant person' to use or disclose the type of information to which the prohibition on disclosure applies.

25. Accordingly, I am satisfied the document is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

Section 30(1) – Internal working documents

26. 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.

27. The exemption does not apply to purely factual material in a document.¹

Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer, or consultation or deliberation that has taken place between officers?

28. The document is an environmental risk assessment conducted by the Agency as to the suitability of a location for a prisoner to reside at a location in the community if granted parole.

29. I am satisfied the document contains information in the nature of opinion, advice and recommendation prepared by Agency officers.

30. The document also contains information that could be considered factual in nature. However, having reviewed this information, I am satisfied it is intertwined with the opinion, advice and recommendations in the document such that it cannot reasonably be separated. Accordingly, it is not purely factual for the purposes of section 30(3).

Was the opinion, advice or recommendation prepared by an officer, in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency?

31. I am satisfied the document was prepared for the deliberative processes involved in the functions of the Agency, namely in relation to its responsibilities for the management of offenders who reside in the community after release from prison.

Would disclosure be contrary to the public interest?

32. Determining whether disclosure of the opinion, advice and recommendations of Agency officers in the document would be contrary to the public interest requires a 'process of the weighing against each other conflicting merits and demerits'.²

33. In the circumstances of this matter, I have taken the following factors into consideration:³

¹ Section 30(3).

² *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].

³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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 document and the broader context giving rise to the creation of the document;
- (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 document 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 document 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 document; and
- (f) 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.

34. In *Simons v Department of Justice*,⁴ the Victorian Civil and Administrative Tribunal (**VCAT**) set out the public interest considerations in relation to environmental scans conducted by the Agency:

The environmental scan is but one aspect of the process of selection of appropriate accommodation, but it is inextricably linked with other considerations which may form part of the conditions of parole, including access to treatment, restrictions on movement and activities of the offender and electronic monitoring. Within the environmental scan process, fact-gathering is not done in a vacuum; judgment is exercised in determining which facts are relevant and how they are to be assessed in the light of risk factors and risk mitigation factors. Mr Delphine said that if staff undertaking environmental scans knew that their identities and reports were to be disclosed, they would be concerned about being exposed to criticism or retribution from offenders or the community for their assessments of particular properties, and would be inhibited from giving full and frank opinions in their reports.

The functions of the Board relate to the release of prisoners on parole. It is in the public interest that the parole system operate effectively.[10] Part of the effective functioning of the system is to reintegrate sex offenders into the community whilst on parole and subject to suitable supervision and monitoring, so as to reduce the likelihood of reoffending once the parole period ends. Those functions are part of the corrections system of this State. One of the functions of the Board is to determine where a serious sex offender will reside, if he or she is granted parole. This decision is highly sensitive given the public interest in both ensuring community safety and safely reintegrating an offender into the community.

35. I adopt the above reasoning of VCAT. In the context of this document, I consider its disclosure would impede the provision of clear, fullsome and comprehensive advice required to be provided by Agency officers with responsibilities for conducting assessments in relation to the management of offenders in the community following release from prison. I am satisfied the integrity and efficacy of the Agency's environmental risk assessments would be compromised if disclosed and there is a strong public interest in favour of ensuring community safety and maintaining the effectiveness of the Agency's environmental risk assessments.
36. Accordingly, I am satisfied the document is exempt under section 30(1).

⁴ [2006] VCAT 2053 at [29]-[30].

Section 33(1) – Personal affairs information of third parties

37. As I am satisfied the document is exempt under sections 30(1) and 38, it is not necessary for me to consider the additional exemption relied on by the Agency under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

38. 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.
39. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁵ and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not ‘practicable’ and release of the document is not required under section 25.⁶
40. I am not satisfied it would be practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, as to do so would render the document meaningless.

Conclusion

41. On the information before me, I am satisfied the document is exempt under sections 30(1) and 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
42. As I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, I have refused access to the document in full.

Review rights

43. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
44. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
45. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
46. 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.
47. 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.¹⁰

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).