

Notice of Decision and Reasons for Decision

Applicant:	'DO1'
Agency:	Department of Justice and Community Safety
Decision date:	26 August 2021
Exemption considered:	Section 30(1)
Citation:	'DO1' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2021] VICmr 254 (26 August 2021)

FREEDOM OF INFORMATION – Corrections Victoria – prisons – correctional facilities – prisoner health and welfare – COVID-19 pandemic – protective quarantine arrangements – discussion paper – draft document – disclosure not contrary to the public interest

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.

My decision on the Applicant's request differs from the Agency's decision.

I am not satisfied the document is exempt from release under section 30(1). Accordingly, access to the document is granted in full.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

26 August 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of its request to:
 - The final 'Review into prisoner quarantine arrangements' Report; and
 - The four key drafts of that Report as identified in your correspondence, those being:
 - o Version one, dated [date]],
 - o Version two, (document 3, dated [date])
 - o Version three, (document 14, dated [date]), and
 - o Version four, (document 16, dated [date]).
3. The Agency identified five documents falling within the terms of the Applicant's request and granted access to the documents in part, relying on section 30(1) to refuse access to certain parts of one document dated [date] (the **Document**).

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the Document in full.
5. During the review, the Applicant advised they do not seek review of the Agency's decision to exempt certain parts of the Document under section 30(1).
6. I have examined a copy of the Document.
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, noting the Agency declined to make a submission in relation to the review.
9. 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.
10. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 30(1) – Internal working documents

11. 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.

12. 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 Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

13. The Document is a discussion paper about protective quarantine arrangements for prisoners, which was prepared by Agency officers.

14. Having reviewed the content of the Document, for the purpose of section 30(1), I accept it discloses opinion, advice and recommendations prepared by Agency officers.

Was the document 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 Document was prepared as part of the Agency's deliberative process in undertaking its functions under the *Corrections Act 1986* (Vic) in relation to the management of prisons and prisoners, namely the provision of protective quarantine arrangements for prisoners in response to the COVID-19 pandemic.

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

16. In determining if disclosure of the Document would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

17. In this case, I have given weight to the following factors:²

- (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;

¹ Section 30(3).

² *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (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.

18. In its decision letter, the Agency provided the following reasons for exempting from release certain parts of the Document under section 30(1):

This exemption has been applied to a small amount of material in the first working draft, referred to as a discussion paper in the documents.

The exempt material is a number of discussion points and options for consideration which were prepared as part of the deliberative processes for the review of prisoner quarantine arrangements in Victorian prisons. The discussion points contain the internal thought processes of the department on the prisons roadmap to COVID Normal.

It would be contrary to the public interest to disclose this material as it has the potential to create unnecessary or ill-informed speculation on options considered but ultimately not adopted.

19. In its request for review of the Agency's decision, the Applicant submits:

A. Draft documents or documents showing the Government changing positions on an issue are not automatically exempt per section 30(1)

...

B. Revealing this data will inform the public and aid the public debate about protective quarantine arrangements

...

C. Protective quarantine arrangements are an issue in the public interest

The use of protective quarantine is an issue of ongoing public interest. Protective quarantine was introduced on 28 March 2020 and requires all people on-entry into prison to be detained in protective quarantine for a 14-day period.

The use of protective quarantine has been the subject of public debate in several news publications and has drawn the attention of a number of legal, human rights, civil liberties and Aboriginal and Torres Strait Islander community controlled organisations.

It is important that the public are properly informed about the use of protective quarantine arrangements, and have confidence that the agency responsible is diligently and effectively performing its role in reviewing and evaluating the use of protective quarantine in Victoria.

20. Having reviewed the Document and considered the information before me, I have determined disclosure of the Document in full would not be contrary to the public interest for the following reasons:

(a) I note the views expressed in *Penhalluriack v Glen Eira CC*,³ where the Victorian Civil and Administrative Tribunal (**VCAT**) held:

In relation to the second limb of s 30, there are numerous decisions of this Tribunal, its

³ [2012] VCAT 370 at [25].

predecessor and the courts which indicate that draft documents will, on consideration, generally turn out to be inappropriate for release where the final version was published ... this is not an absolute proposition, however. Every disputed document must be examined on its own merits.

While I note VCAT's views in the above decision (and other decisions of the Tribunal) I do not accept the case law endorses an approach that draft documents will, in all cases, be exempt on grounds it would be contrary to the public interest to disclose such documents. Such an interpretation is not consistent with the object and purpose of the FOI Act. The circumstances and content of each document must be considered on a case by case basis.

- (b) I acknowledge the Agency relies on section 30(1) to exempt from release a small amount of material, noting it released the majority of information in the Document.
 - (c) The Document contains a series of questions the Agency believes would need to be considered should the circumstances of the COVID-19 pandemic change. It is clear from the Document these are considerations identified at an early stage of the Agency's deliberative process in determining potential options for changes to protective quarantine arrangements in prisons.
 - (d) I do not accept disclosure of the information the Agency exempted from release would result in unnecessary or ill-informed speculation regarding options considered but not adopted by the Agency.
 - (e) Firstly, the potential for such an outcome is not a sufficient basis for determining disclosure of the Document in full would be contrary to the public interest. Rather, I must be satisfied such an outcome would be more likely than not. There is no information before me to suggest its disclosure would have such an effect in this case.
 - (f) Secondly, I do not accept members of the public are not able to understand the deliberative nature of public policy making and that options considered by an agency may not ultimately be adopted following consultation, consideration and deliberation.
 - (g) My view is that the considerations listed in the Document would not be unexpected by the general public in the context of the need for the Agency to provide for the ability to quarantine prisoners due to COVID-19 pandemic. Further, nor does this information reveal sensitive information that would affect the Agency carrying out its functions in relation to the management of prisons and prisoners in the future.
 - (h) I agree with the Applicant there is a public interest in disclosure of the relevant information so the public can be fully informed the Agency is taking relevant matters into consideration in relation to protective quarantine arrangements implemented by the Agency in prisons.
 - (i) Further, I consider disclosure will serve the public interest to enable the public to better understand and scrutinise government decision making and encourage public participation in public policy making.
21. As I am not satisfied disclosure would be contrary to the public interest, the relevant information in the Document is not exempt under section 30(1).

Conclusion

22. On the information before me, I am not satisfied the document is exempt from release under section 30(1). Accordingly, access to the document is granted in full.

Review rights

23. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁴
24. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
25. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
26. 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.
27. 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.⁷

When this decision takes effect

28. My decision does not take effect until the Agency's 14 day review period expires.
29. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).