

Notice of Decision and Reasons for Decision

Applicant: 'EC6'
Agency: Department of Justice and Community Safety
Decision date: 30 June 2022
Exemptions considered: Sections 27(2)(b), 31(1)(a), 31(1)(d)
Citation: 'EC6' and Department of Justice and Community Safety (Freedom of Information) [2022] VICmr 50 (30 June 2022)

FREEDOM OF INFORMATION – Corrections Victoria – prison records – neither confirm nor deny the existence of documents – prison intelligence – law enforcement documents

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 as 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, should any exist, would disclose information that would be exempt under sections 31(1)(a) and 31(1)(d).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to all information available in relation to an Information Report in Correction Victoria's intelligence system. Specifically, the Applicant sought to confirm when the report was made, what it says, who made it, where the intelligence came from, who it was shared with and who accessed it.
2. The Agency relied on section 27(2)(b) to neither confirm nor deny the existence of any documents relevant to the Applicant's request, which if any existed, the Agency further determined would be exempt under sections 31(1)(a) and 31(1)(d).

Review application

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 and submissions received from the parties.
6. The Agency's reliance on section 27(2)(b) obviates the need for the Agency to provide me with a copy of any documents, should any exist, that fall within the terms of the Applicant's request.
7. 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.
8. 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 section 27(2)(b)

9. Section 27(2)(b) provides that in a notice of decision concerning a document exempt from release under section 28, 29A, 31 or 31A, a decision maker may communicate their decision in terms that neither confirm nor deny the existence of any such document if doing so would disclose exempt information.
10. In this case, the Agency submits the relevant exemptions under the FOI Act are section 31(1)(a) and 31(1)(d) and that disclosing the existence of any such documents, should any exist, would disclose exempt information.
11. Sections 31(1)(a) and 31(1)(d) concern 'law enforcement documents' and are both subject to other provisions under section 31.
12. 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.

13. Section 31(1)(d) provides a document is an exempt document if its disclosure under the FOI Act would 'disclose 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'.
14. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.¹
15. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.²
16. 'In a particular instance' does not require a single specific investigation and can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of the law.³
17. The exemptions in section 31(1) do not apply to widespread and well known methods and procedures.⁴
18. The Agency's decision letter states:

Under section 31 (1)(a), the department 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* (Corrections Act) and the *Corrections Regulations 2009*.

Under section 31(1)(d), the department 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.

Disclosure of prison intelligence information 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.

19. I note the decision of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Knight v Department of Justice*⁵ (**Knight decision**) which concerns a FOI request for prison intelligence.
20. In the Knight decision, Judge Davis agreed with Deputy President Galvin in *Elsing v Department of Justice*⁶ that, the protection of intelligence information is in the public interest and 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.'⁷
21. VCAT also accepted the exemptions under sections 31(1)(a) and 31(1)(b) apply to intelligence documents in full as their 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

¹ *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.

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

³ *Cichello v Department of Justice* (Review and Regulation) [2014] VCAT 340 at [24].

⁴ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

⁵ [2011] VCAT 1276.

⁶ [1998] VCAT 1249.

⁷ *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".⁸

22. I acknowledge the risks associated with disclosure of intelligence information relating to the security and management of prisons. For example, if persons were to become aware of any intelligence information held by the Agency, it could lead to the exploitation of such knowledge which would be detrimental to any prison security and/or intelligence systems.
23. I also note the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.
24. While I note the Applicant's interest in obtaining access to the requested document, these are not matters I am able to consider further in this matter, rather, I must consider the relevant provisions of the FOI Act as described above.
25. Accordingly, I am satisfied any intelligence documents held by the Agency that fall within the terms of the Applicant's request, should any exist, would be exempt from release under sections 31(1)(a) and 31(1)(d). I am also satisfied disclosure of the existence or non-existence of intelligence documents in this particular instance would disclose information exempt from release under sections 31(1)(a) and 31(1)(d).

Conclusion

26. On the information before me, 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, should any exist, would disclose information that would be exempt under sections 31(1)(a) and 31(1)(d).

Review rights

27. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
30. 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.
31. 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.¹²

When this decision takes effect

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

⁸ Ibid at [17]-[19].

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and 50(3FA).