

Notice of Decision and Reasons for Decision

Applicant:	'DF9'
Agency:	Department of Justice and Community Safety
Decision date:	21 June 2021
Exemptions 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:	'DF9' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2021] VICmr 181 (21 June 2021)

FREEDOM OF INFORMATION – prisoner records – Corrections Victoria – behaviour change program – treatment report – clinician opinion – Forensic Intervention Services

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 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 is the same as the Agency's decision.

I am satisfied certain information in the document is exempt under sections 30(1), 31(1)(a) and 38 of the FOI Act, in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

As it is practicable to provide an edited copy of the document with exempt information deleted in accordance with section 25, I have granted access to the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
21 June 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following document:

I am seeking 'Treatment Summary Report' generated at the end of my [description] treatment program. The report contains recommendations from the clinicians after the end of the treatment session.
2. The Agency identified one document falling within the terms of the Applicant's request, and relied on sections 30(1), 31(1)(a), 33(1) and 38 in conjunction with section 104ZZA of the Corrections Act to refuse access to certain information in the document.
3. The Agency's decision letter sets out the reasons for its decision.

Review

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 part.
5. I have examined a copy of the document 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.
7. I have considered all communications received from the parties.
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.
9. 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.

Prisoner and intervention program records

10. The Agency is responsible for enforcing and administering the law in relation to prisoners and offenders in Victoria under the Corrections Act.
11. Clinicians across the public prison and community corrections system work with prisoners and offenders to provide behaviour change programs in relation to specific offending that are designed to reduce the risk of reoffending.
12. Generally, an assessment outcome letter is provided to a prisoner or an offender after they complete a behaviour change program. In most cases, an opportunity for the person to sit down with a clinician to receive feedback regarding their assessment or treatment report is offered by the Agency.
13. The Agency collects personal information about prisoners, offenders, their family and prison visitors to ensure:
 - (a) the appropriate placement of a prisoner within the Victorian prison system;

- (b) security is maintained in prisons and appropriate supervision in the community; and
 - (c) treatment services are provided to prisoners and offenders, including post-release services.¹
14. Parliament has determined strict parameters apply to how this type of personal and confidential information collected by the Agency is to be used and disclosed.
15. Except for certain limited circumstances where disclosure is authorised, disclosure of information identifying any person, their address, location or journey made, or any information concerning the management of a prison is prohibited under the Corrections Act. This reflects the need to ensure the confidentiality of individuals whose information is included in a Corrections document, and non-disclosure of information used in connection with the proper order and management of a prison.

Review of exemptions

Section 38 – Secrecy or confidentiality provision

16. 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’.
17. For section 38 to apply, the relevant ‘enactment’ (or law) must be formulated with such precision that it specifies the actual information sought to be withheld.

Corrections Act

18. 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.

19. ‘Personal or confidential information’ is defined in section 104ZX of the Corrections Act to include the following:
- (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;
 - ...
 - (i) information concerning the management of prisons;
 - ...

¹ See Corrections Victoria, *Personal Information and Privacy* at <https://www.corrections.vic.gov.au/prisons/going-to-prison/personal-information-and-privacy>.

20. The phrase 'relevant person' is set out in Schedule 5 of 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.
21. In summary, section 104ZZA of the Corrections Act protects the personal privacy of individuals identified in documents created in relation to a prisoner and the management of prisons in Victoria. The provision is also directed towards maintaining the confidentiality of methods and procedures used in the management and security of prisoners and prisons. The section imposes strict confidentiality requirements on Agency officers and others, subject to limited exceptions.
22. 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 in conjunction with section 104ZX of the Corrections Act identifies, with precision, the type of information to which the section applies; and
 - (c) section 104ZZA of the Corrections Act prohibits specified 'relevant persons' from disclosing the information to which it applies.
23. The document subject to review concerns the Applicant's participation in the 'Better Lives Program' while they were serving a custodial prison sentence.
24. The following information in the document was exempted by the Agency under section 38 as it determined it is 'personal or confidential information' for the purposes of section 104ZX of the Corrections Act:
- (a) names, signatures and position titles of clinicians; and
 - (b) opinions expressed in confidence by clinical staff in the course of treating and managing a prisoner, and concerns the security and management of a prison.
25. I am satisfied this information falls within the definition of 'personal or confidential information' in section 104ZX of the Corrections Act.

Does a relevant exception in the Corrections Act apply?

26. The secrecy provision in section 104ZZA of the Corrections Act is subject to exceptions in sections 104ZY and 104ZZ of that Act, which authorise the release of 'personal or confidential information' in certain limited circumstances.
27. Relevantly, section 104ZY(2)(b) of the Corrections Act provides a relevant person may use or disclose personal or confidential information with the authorisation or consent of the person to whom the information relates.
28. As the Applicant seeks access to information relating to themselves, I am satisfied disclosure of certain information in the document is not prohibited under section 104ZZA due to the exception that applies under section 104ZY(2)(b).

29. Accordingly, my decision is the same as the Agency's decision to the extent it determined certain information, as described paragraph 24 above, is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act.

Section 30(1) – Internal working documents

30. 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.

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

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?

32. I am satisfied the documents contain information taken from the clinician's discussions with the Applicant and record the clinician's observations, advice and recommendations regarding the Applicant in the context of their classification and management while serving their prison sentence.

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?

33. I accept the document is designed to assist with the classification and management of a person while serving a prison sentence. Accordingly, I am satisfied the opinions, advice and recommendations were provided in the course of and for the purposes of, the deliberative processes of the Agency, namely its management and rehabilitation of a prisoner.

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

34. In determining whether disclosure of the documents would be contrary to the public interest, it is necessary to balance relevant considerations, remaining mindful the object of the FOI Act is to facilitate and promote disclosure of information.

35. In determining whether release of the clinician's advice, opinion and recommendations would be contrary to the public interest, I have considered the following factors:

- (a) the right of every person to seek 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 document;
- (c) the stage of a decision or process being undertaken at the time the communications were made;

² Section 30(3).

- (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; and
- (e) 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.
36. I have also considered the decision of *Debono v Department of Justice*³ (**Debono decision**), where the Victorian Civil and Administrative Tribunal (VCAT) affirmed a clinical assessment of participation in a violence program is exempt from disclosure under section 30(1). In the Debono decision, the applicant (who had been released from prison) sought access to two written assessments prepared by clinicians while the applicant was serving a prison sentence.
37. I am of the view the document subject to review and the documents in the Debono decision are analogous, as each were prepared for a deliberative function of the Agency to assess a prisoner's eligibility of specialised intervention programs to assess and address any risk of re-offending. Given the similarity between the documents, I consider VCAT's reasoning in relation to public interest factors under section 30(1) are relevant to the document in this review.
38. Below, I have set out the relevant points of VCAT's decision in relation to public interest factors under section 30(1):
- 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.⁴
39. I consider disclosure of the advice and recommendations in the document would be likely to inhibit clinicians from clearly recording their detailed clinical opinions, observations and recommendations in similar assessments in the future.
40. I acknowledge the Applicant's personal interest in obtaining access to the document.

³ [2008] VCAT 1791.

⁴ Ibid at [19]-[20].

41. However, I am mindful of the context and purpose for which the document was created. Namely, to provide Agency officers, who are responsible for the management of prisoners within the Corrections system, with access to detailed opinions, advice and recommendations to ensure the effective performance of their prison management functions under the Corrections Act.
42. I also consider the routine release of such information under the FOI Act, could reasonably inhibit the recording by clinicians of their detailed opinions and advice, which would adversely affect the quality and openness of information communicated in relation to clinical assessments of prisoners subject to treatment programs in prisons.
43. Further, as held in the Debono decision, I consider disclosure of such information could provide insights into psychological methodologies used by clinicians, which if they became known to prisoners, could be used to subvert the effectiveness of clinical assessments.
44. Lastly, section 30(3) provides purely factual information in a document is not exempt under section 30(1). This provision must be considered in conjunction with section 25, which allows for an edited copy of a document to be released with exempt or irrelevant information deleted where it is practicable to do so. While I acknowledge not all information in the document is exempt under section 30(1), I am of the view deleting factual information from the deliberative content would render the document meaningless given the intertwined nature of factual and deliberative information in the document.
45. In these circumstances, I consider the public interest weighs in favour of maintaining the integrity of the Agency's assessment processes relating to such treatment programs offered to prisoners. Therefore, I am satisfied disclosure of the clinician's opinions and recommendations would be contrary to the public interest.
46. Accordingly, my decision is the same as the Agency's decision to the extent it determined certain deliberative information recorded by the clinician is exempt under section 30(1).

Section 31(1)(a) – Disclosure would prejudice an investigation or the proper administration of the law

47. Subject to section 31, section 31(1)(a) provides 'a document is an exempt document if its disclosure under this 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'.
48. The term 'prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁵
49. Section 31(1)(a) may apply to a document in two instances: firstly, where its disclosure would prejudice an investigation; and secondly, where disclosure would prejudice the proper enforcement or proper administration of the law, which includes regulatory monitoring and compliance activities.⁶
50. I note the views of the Supreme Court of Victoria in *Knight v Corrections Victoria*:

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

⁵ *Sobh v Police Force of Victoria* [1994] 1 VR 41 at [55].

⁶ *JCL v Victoria Police* [2012] VCAT 1060 at [28].

considerations of the Parole Board.⁷

51. The information deleted in the document by the Agency includes the opinions and recommendations of a clinician regarding the Applicant and their participation in the [name] Program in the context of their classification and management while serving a prison sentence. The document also contains information gathered by the clinician about the Applicant and the clinician's professional assessment of that information and related opinion and recommendations provided to the Agency.
52. On the information before me, the information deleted in the document by the Agency, particularly where it reveals the methodology used by the clinician in the provision of their clinical opinion and recommendations provided to the Agency, is exempt under section 31(1)(a) for the following reasons:
 - (a) The document contains information that, if disclosed, would reveal the assessment methods used by clinicians in the classification and management of prisoners.
 - (b) The disclosure of such information could mean such assessment processes could be manipulated by prisoners to achieve certain outcomes.
 - (c) While there is no specific information before me to indicate release of the information would provide the Applicant with the means to identify methods that would impede the future effectiveness of a prisoner or offender treatment program, I acknowledge the Agency's concerns this may be an outcome if the information became generally known among prisoners, offenders and/or the general population. I consider these concerns to be real and reasonably based, noting release under the FOI Act is unrestricted and unconditional such that an applicant is free to use or further disseminate a document as widely as they please, including within a prison.⁸
 - (d) I accept that the routine release of the type of information in the document in response to an FOI request, would allow prisoners or those under the supervision of Corrections Victoria with particular contextual knowledge to gain access to information that would influence their behaviour or responses when participating in assessment processes with a view to secure a more favourable assessment. I consider this is a relevant consequence likely to flow from disclosure that would reasonably lead to a misuse of the information which would have a detrimental effect on the Agency's proper administration of the Corrections Act.
53. Accordingly, I am satisfied the information deleted by the Agency in the document is exempt under section 31(1)(a).

Section 25 – Deletion of exempt or irrelevant information

54. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
55. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰

⁷ *Knight v Corrections Victoria* [2010] VSC 338 at [73].

⁸ *Marke v Victoria Police* [2008] VSCA 218.

⁹ *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].

¹⁰ *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].

56. Given the Agency released an edited copy of the document to the Applicant, I am satisfied it is practicable to delete the exempt information from the document in accordance with section 25.

Conclusion

57. My decision on the Applicant's request is the same as the Agency's decision.
58. I am satisfied certain information in the document is exempt under sections 30(1), 31(1)(a) and 38 of the FOI Act, in conjunction with section 104ZZA of the Corrections Act.
59. Given my decision in relation to the information in the document under sections 30(1), 31(1)(a) and 38, it is not necessary for me to also consider the application of section 33(1).
60. As it is practicable to provide an edited copy of the document with exempt information deleted in accordance with section 25, I have granted access to the document in part.

Review rights

61. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
62. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
63. 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.
64. 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.¹³

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Sections 50(3F) and (3FA).