

Notice of Decision and Reasons for Decision

Applicant:	'EJ2'
Agency:	Department of Justice and Community Safety
Decision date:	30 March 2022
Exemptions considered:	Sections 30(1), 31(1)(a)
Citation:	'EJ2' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2022] VICmr 111 (30 March 2022)

FREEDOM OF INFORMATION – prison records – Corrections Victoria – offender behaviour change program – law enforcement documents – internal working documents – clinical records

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.

I am satisfied information in the documents is exempt from release under sections 30(1) and 31(1)(a).

As it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to documents is granted 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

30 March 2022

Reasons for Decision

Background to review

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

Reports and notes from their own file, including those which relate to the completion of an Offending Behaviour Change program
2. The Agency identified 125 pages falling within the terms of the Applicant's request and refused access to certain pages in part and 14 pages in full under sections 30(1), 31(1)(a), 33(1) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**). The Agency's decision letter sets out the reasons for its decision.

Review application

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 indicated they seek review of information related to their participation in the [named]Behaviour Change Program and do not seek access to personal affairs information. Accordingly, this review relates to the information exempted by the Agency under sections 30(1) and 31(1)(a) on pages 103-126 of the document only.
5. I have examined a copy of the pages 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 and submissions 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.

Review of exemptions

Section 30(1) – Internal working documents

10. 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.

11. The exemption does not apply to purely factual material in a document.¹
12. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of the agency, an agency employee, and any person engaged by or on behalf of the agency, whether or not they are subject to the *Public Administration Act 2004* (Vic).
13. I am satisfied the clinical staff who produced and approved the information the Agency exempted from release in the documents are Agency officers for the purposes of section 30(1).

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?

14. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.
15. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.²
16. The documents record a clinician’s observations, opinion and recommendations regarding the Applicant’s risk of reoffending, recommended treatment and progress towards treatment goals.
17. I am satisfied this information is matter in the nature of opinion and advice 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?

18. The term ‘deliberative process’ is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.³
19. In *Re Waterford and Department of Treasury (No.2)*,⁴ the former Victorian Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

20. I am satisfied the opinion, advice and recommendations in the documents were provided in the course of, and for the purpose of, the Agency’s deliberative processes, being the management and rehabilitation of offenders.

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

21. In determining 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

¹ Section 30(3).

² *Mildenhall v Department of Education* (1998) 14 VAR 87.

³ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁴ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

promote the disclosure of information. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁵ In doing so, I have given weight to the following relevant factors:⁶

- (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; 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.

22. I have also considered the decision of *Debono v Department of Justice*⁷ (**Debono decision**) in which the Victorian Civil and Administrative Tribunal (VCAT) held clinical assessment reports for an offender in relation to a prevention of violence program were exempt from release under section 30(1).

23. In relation to the public interest considerations under section 30(1) in relation to behaviour change reports, VCAT states:

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.⁸

⁵ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Halls* [1999] VSCA 117 at [30].

⁶ *Halls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

⁷ [2008] VCAT 1791 (per Judge Macnamara, Deputy President).

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

24. I consider the nature of the reports the subject of the Debono decision, are similar in nature to the information subject to this review. Given this similarity, I adopt VCAT's reasoning in relation to public interest factors under section 30(1) in relation to the report.
25. I also accept the Agency's decision letter that disclosure of the documents would be likely to inhibit clinicians from freely expressing their opinion and recommendations in similar assessment reports in the future. Further, while I note the Applicant's intention is to use the documents for personal use and not to share them, I also accept the Agency's submission that further dissemination of the documents could provide insights into the psychological methodologies used by clinicians that could be employed to subvert the efficacy of such assessments.
26. As in the Debono decision, I consider transparency in custodial settings is a matter of public interest. However, I consider the public interest in the Agency being able to carry out its functions of supervision of rehabilitative programs outweighs the interest in transparency.
27. I am also satisfied the public interest weighs in favour of maintaining the integrity of the Agency's processes in relation to such assessments and the disclosure of the report would be contrary to the public interest.
28. Accordingly, I am satisfied the third requirement of section 30(1) is met, and the report is exempt under section 30(1) on the basis its disclosure would be contrary to the public interest.

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

29. Section 31(1)(a) provides:

31 Law enforcement documents

Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

- (a) 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;

30. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.⁹
31. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.¹⁰
32. The phrase '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 law.¹¹
33. I note the views of the Supreme Court of 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, ... 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 considerations of the Parole Board.¹²

⁹ *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.

¹⁰ *Ibid*, Bergman at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

¹¹ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

¹² *Knight v Corrections Victoria* [2010] VSC 338 at [73].

34. The Agency relies on the second limb in section 31(1)(a), concerning the 'proper administration of the law in a particular instance'. It submits disclosure of the information subject to review would be likely to prejudice the proper administration of the Corrections Act.
35. I have also considered the Agency's reasons for decision, which state disclosure of the information could undermine the effectiveness of offender rehabilitation programs.
36. It is necessary to consider how disclosure on how the types of information in such reports would affect the future delivery of the Smart Moves behaviour change program, and the ongoing management of the Applicant.

Methodology and commentary

37. There is information in both documents outlining the methodology and instruments used for assessment in the program. I consider these aspects of the documents directly reveal the assessment methods used by clinicians in such programs.
38. The documents also contain commentary information which describes the Applicant's participation in the program and makes comments on this. I understand that information of this nature is the primary interest of the Applicant.
39. While information of this nature has already been disclosed to the Applicant and may be known to them through their participation in the program, I consider the presentation of the information in the documents reveals the relevance and weight given to certain aspects of the program. Release of this information, if viewed by future participants following release, could inform behaviour adjustments in the program.
40. As this would be reasonably likely to have a detrimental effect on the Agency's proper administration of the Corrections Act, namely the management of prisons and prisoners, I am satisfied disclosure of the methodology and commentary aspects of the report would prejudice the administration of the law in a particular instance, and this information is exempt under section 31(1)(a).

Recommendations

41. The report also contains recommendations made by its author to other Agency employees for future case management of the Applicant.
42. Based on the information before me, I consider this information was communicated confidentially to case management staff to assist them in supporting the Applicant following the program.
43. I consider release of these recommendations to the Applicant would impact Agency officers' ability to work collaboratively to support the Applicant's rehabilitative progress. As this would be reasonably likely to have a detrimental effect on the Agency's proper administration of the Corrections Act, namely the supervision of the Applicant's sentence, I am satisfied disclosure of the recommendation aspects of the report would prejudice the administration of the law in a particular instance, and this information is exempt under section 31(1)(a).

Section 25 – Deletion of exempt or irrelevant information

44. 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.
45. I note the Applicant is willing to receive even a small amount of additional information, noting a large amount of information in the documents was exempted from release by the Agency. As discussed above, I consider all information exempted by the Agency is exempt and therefore the release of the documents with further edits is not practicable.

46. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴

Conclusion

47. On the information before me, I am satisfied information in the documents is exempt from release under sections 30(1) and 31(1)(a).
48. As it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to documents is granted 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 VCAT for it to be reviewed.¹⁵
51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
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.¹⁸

¹³ *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].

¹⁴ *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].

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Page No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
103-120 <i>Page 99-111 of the document which was released to the Applicant</i>	Various	[behaviour change program] session notes	18	Released in part Sections 30(1), 31(1)a), 38	Release in part Sections 30(1), 31(1)(a), 25	<p>Section 30(1): I am satisfied that the content of the program notes discloses matter in the nature of opinion and recommendation. I consider that it would be contrary to the public interest to release this information for the reasons outlined in my Notice of Decision above.</p> <p>Section 31(1)(a): I am satisfied that disclosure of certain information in the documents would be reasonably likely to prejudice the Agency’s administration of rehabilitative programs for the Applicant and other future participants in the program and it is therefore exempt from release.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and/or irrelevant information deleted in accordance with section 25.</p>
121-126	[date]	Treatment report	5	Refuse in full Sections 30(1), 31(1)(a), 33(1), 38	Refuse in full Sections 30(1), 31(1)(a), 25	Sections 30(1), 31(1)(a) and 25: See comments for the above document.