

Notice of Decision and Reasons for Decision

Applicant:	'DH6'
Agency:	Department of Justice and Community Safety
Decision date:	25 June 2021
Exemptions considered:	Sections 30(1) and 38 in conjunction with section 104ZZA of the Corrections Act 1986 (Vic)
Citation:	'DH6' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2021] VICmr 196 (25 June 2021)

FREEDOM OF INFORMATION – community corrections file – case note – personal or confidential information – relevant person – secrecy provision – disclosure contrary to the public interest – section 61B(3)

All reference to legislation in this document is 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 documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided to refuse access to the documents in part under sections 30(1) and 38 in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
25 June 2021

Reasons for Decision

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

I make an application for the document (s), on me attending [medical centre], [address], with [named individual] for [number of] appointments; and/or [named individual] between the dates [date range].

2. The Agency identified four documents, comprising five pages, relevant to the terms of the Applicant's request. The Agency relied on the exemptions in sections 30(1), 33(1) and 38 in conjunction with section 104ZZA of the Corrections Act, to refuse access to the documents in part. 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. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications received from the parties.
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.

Concerns regarding document searches and access to documents

9. In the course of the review, the Applicant raised concerns regarding the Agency's document searches as well as their access to documents following the Agency's decision. Specifically, they were not provided a password by the Agency to access the released documents. In accordance with section 61B(3), this concern was addressed as part of the review.
10. OVIC staff made inquiries with the Agency, and a password was obtained and provided to the Applicant. Following the Applicant's review of the documents, they advised the complaint was resolved. From those inquiries, I am also satisfied the Agency identified all relevant documents in its possession.
11. Accordingly, I am satisfied the Applicant's concerns have been pursued to the fullest extent and there is no basis for the making of further inquiries or taking further action.

Review of exemptions

Section 38 – Secrecy provision

12. 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’.

13. In order for section 38 to apply to an enactment (or a provision in legislation), the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Corrections Act

14. 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.

15. ‘Personal and confidential information’ is defined in section 104ZX of the Corrections Act:

Personal or confidential information includes the following –

- (a) information relating to the personal affairs of a person who is or has been an offender or a prisoner;
...
- (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;
...
- (i) information concerning the management of prisons;

16. The phrase ‘relevant person’ is set out in Schedule 5, 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

17. In summary, section 104ZZA of the Corrections Act protects the personal privacy of individuals identified in documents generated in relation to a prisoner and the management of prisons.
18. Information in the documents relates to matters involving the Applicant while they were serving a community corrections order. The documents are case notes and an email located on the Applicant’s community corrections file.
19. The exempt information is names, position titles and signatures of Agency officers as well as information concerning the Applicant’s community correction order ‘that concerns the security and management of prisons’.
20. 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.
21. On the information before me, I am satisfied the relevant information exempted by the Agency in the documents falls within the definition of 'personal or confidential information' in section 104ZX of the Corrections Act.
22. I note the secrecy provision in section 104ZZA is subject to exceptions in sections 104ZY and 104ZZ of the Corrections Act. Sections 104ZY(1)(b)(i)(A) and 104ZY(2)(a)(i) permit the release of personal or confidential information in certain limited circumstances. However, having reviewed the documents subject to review, I am satisfied no exceptions to the prohibition on disclosure apply in this instance.
23. Accordingly, I am satisfied information that falls within the definition of 'personal and confidential information' in the documents is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
24. Having determined the information is exempt under section 38, it is not necessary for me to consider the Agency's application of section 33(1) to the same information.

Section 30(1) – Internal working documents

25. 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.
26. The exemption does not apply to purely factual information in a document.¹
27. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency's staff and any person employed by or for an agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.

Do the documents disclose opinion, advice or recommendation made in the course of, or for the purpose of, a deliberative process of the Agency?

28. The Agency relies on section 30(1) to exempt from release the opinions, advice and observations of Agency officers and consultation or deliberation between officers recorded in the Applicant's community corrections file.
29. The term 'deliberative process' has been interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.²
30. In *Re Waterford and Department of Treasury (No. 2)*,³ the Commonwealth Administrative Appeals Tribunal held:

¹ Section 30(3).

² *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

³ [1981] 1 AAR 1.

...“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.

31. The Agency exempted a small amount of information in Document 3. Having reviewed the information, I am satisfied the relevant information is in the nature of advice, opinion and recommendation. Further, I am satisfied it was produced in the course of, and for the purposes of, the Agency’s deliberative processes involved in the management and monitoring of the Applicant whilst they served a community corrections order.

Would disclosure of the advice, opinion and recommendation be contrary to the public interest?

32. Determining whether disclosure of opinion, advice and recommendations of agency officers would be contrary to the public interest requires a ‘process of the weighing against each other conflicting merits and demerits’.⁴
33. In this case, I have taken the following factors into consideration having regard to the particular circumstances of this matter:⁵
- (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 its decision, the Agency states:

Disclosure of this information would inhibit staff from freely expressing opinions, advice and recommendations as well as consult or deliberate in a frank manner to ensure the proper ongoing management of a prisoner. Any action that hinders the free exchange of information pertaining to the proper management and treatment of offenders is contrary to the public interest.

35. Having considered the above submission, I do not consider release of the type of information in the documents would necessarily lead to Agency officers not recording opinion, advice and recommendations given their professional duties and ethical obligations as Agency officers within the Corrections system. However, I accept the routine disclosure of this type of information would lead

⁴ *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].

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

to a diminution in the degree of detail in communications required to be recorded and exchanged in relation to the assessment and management of offenders on community corrections orders.

36. I am satisfied the public interest weighs in favour of maintaining the effectiveness of the Agency's processes for undertaking the ongoing assessments of an individual on a corrections order, which is required to ensure the effective management of offenders in the community, following their release from prison.
37. Accordingly, I am satisfied the advice, opinion and recommendation of Agency officers in Document 3 is exempt under section 30(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 where 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'⁶ 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 25.⁷
40. I have considered information the Agency deleted from the documents as irrelevant in accordance with section 25. I am satisfied it falls outside the terms of the Applicant's request as it records information that does concerns the attendance at the location specified in the Applicant's request.
41. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable to delete the irrelevant and exempt information, as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

42. On the information before me, I am satisfied the documents are exempt under sections 30(1) and 38 in conjunction with section 104ZZA of the Corrections Act.
43. As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, I have grant access to the documents in part.

Review rights

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

⁶ *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].

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

47. 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.
48. 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.¹¹

¹¹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents – [case reference]

Document No.	Date of Document	Document Description	No of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Case Note	1	Refused in part Sections 33(1), 38	Refuse in part Section 38	<p>Section 38: I am satisfied the information exempted by the Agency is ‘personal or confidential information’ within the meaning of section 104ZX of the Corrections Act. Accordingly, I am satisfied it is exempt under section 38 in conjunction with section 104ZZA of the Corrections Act.</p> <p>As I have determined the information is exempt under section 38, it is not necessary for me to consider the application of section 33(1) to the same information.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25. Accordingly, I have granted access to the document in part.</p>
2.	[date]	Case Note	1	Refused in part Sections 33(1), 38, 25	Refuse in part Sections 38, 25	<p>Section 38: See comments for Document 1.</p> <p>Section 25: I am satisfied the information deleted by the Agency under section 25 is irrelevant to the terms of the Applicant’s request. See comments for Document 1.</p>
3.	[date]	Case Note	2	Refused in part	Refuse in part	Section 38: See comments for Document 1.

Document No.	Date of Document	Document Description	No of Pages	Agency Decision	OVIC Decision	OVIC Comments
				Sections 30(1), 33(1), 38, 25	Sections 30(1), 38, 25	Section 30(1): I am satisfied the information exempted by the Agency is exempt under section 30(1) for the reasons set out in the Notice of Decision above. Section 25: See comments for Document 1.
4.	[date]	Email	1	Refused in part Sections 33(1), 38	Refuse in part Section 38	Section 38: See comments for Document 1. Section 25: See comments for Document 1.