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## Notice of Decision and Reasons for Decision

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Applicant:	'BX1'
Agency:	Department of Justice and Community Safety
Decision date:	13 August 2020
Exemptions considered:	Sections 30(1), 31(1)(a), 33(1), 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 104ZZA the <i>Corrections Act 1986</i> (Vic)
Citation:	'BX1' and Department of Justice and Community Safety ( <i>Freedom of Information</i> ) [2020] VICmr 221 (13 August 2020)

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FREEDOM OF INFORMATION – prisoner records – clinical assessment – Specialised Offender Assessment and Treatment Service (SOATS) Summary Report – Adult Parole Board

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.

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

As I am satisfied it is practicable to delete exempt and irrelevant information from the document in accordance with section 25, I have determined to release the document in part.

Accordingly, my decision in this matter is the same as the Agency's decision.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

13 August 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for:

A copy of the below document relating to my matter held by Community Corrections Office at [location]/Sex Offender Assessment and Treatment Services (SOATS) to be released to me as part of Freedom of Information Act:

Additional SOATS summary report completed for Child Protection (DHHS) for DHHS professional case conference on [date].

2. In its decision, the Agency identified a document falling within the terms of the Applicant's request and relied on the exemptions in sections 30(1), 31(1)(a), 33(1), and 38 in conjunction with the *Corrections Act 1986* (Vic) (**Corrections Act**) to refuse access to the document 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 inspected a copy of the document subject to review.
5. The document is a Specialised Offender Assessment and Treatment Services (**SOATS**) summary report (**Report**). SOATS aims to reduce the risk of sexual and violent reoffending and employs clinicians to administer assessment, management and therapeutic intervention services to convicted sexual and violent offenders.
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 relevant 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 that 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)**

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.<sup>1</sup>
12. The term ‘officer of an Agency’ is defined in section 5(1). It includes a member of an agency, a member of an agency’s staff, and any person engaged by or on behalf of an agency, whether or not that person is one to whom the provisions of the *Public Administration Act 2004* (Vic) apply.
13. The words ‘opinion, advice or recommendation’ convey a meaning of matters in the nature of a ‘personal view’, ‘an opinion recommended or offered’ or a ‘presentation worthy of acceptance’.<sup>2</sup>
14. It is not necessary for information in a document to be in the nature of opinion, advice or recommendation. Rather, its release must disclose information of that nature.
15. Determining whether disclosure of a document would be contrary to the public interest involves a ‘process of the weighing against each other conflicting merits and demerits’ of disclosure.<sup>3</sup>

*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?*

16. The Report records a clinician’s observations, opinion and recommendations regarding the Applicant’s risk of reoffending, recommended treatment and progress towards treatment goals.
17. Accordingly, I am satisfied the first requirement of section 30(1) is met.

*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?*

18. The term ‘deliberative process’ has been interpreted widely. In *Re Waterford and Department of Treasury (No. 2)*,<sup>4</sup> the Commonwealth 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.”

19. I am satisfied the opinion and recommendations in the Report were provided in the course of, and for the purpose of, the Agency’s deliberative processes including the management and rehabilitation of offenders.
20. Accordingly, I am satisfied the second requirement of section 30(1) is met.

*Would disclosure of the Document be contrary to the public interest?*

21. I must also be satisfied disclosure of the document would not be contrary to the public interest, which requires a ‘process of the weighing against each other conflicting merits and demerits’.<sup>5</sup>

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Halliday v Office of Fair Trading* (unreported, AAT of Vic, Coghlan PM, 20 July 1995).

<sup>3</sup> *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].

<sup>4</sup> [1981] 1 AAR 1.

22. In doing so, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
23. In deciding whether disclosure of the Report would be contrary to the public interest, I have taken the following factors into consideration having regards to the context of this matter:<sup>6</sup>
- (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;
  - (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.
24. I have also considered the decision of *Debono v Department of Justice*<sup>7</sup> (**Debono decision**), where the Victorian Civil and Administrative Tribunal (VCAT) held clinical assessment reports concerning a person in prison in relation to a prevention of violence program were exempt under section 30(1).
25. In relation to public interest factors under section 30(1), 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

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<sup>5</sup> *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].

<sup>6</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

<sup>7</sup> [2008] VCAT 1791 (per Judge Macnamara, Deputy President).

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.<sup>8</sup>

26. I consider the nature of the reports the subject of the Debono decision, are similar in nature to the Report. Given this similarity, I adopt VCAT's reasoning in relation to public interest factors under section 30(1) in relation to the Report. In my view, disclosure of the opinion and recommendations in the Report would be likely to inhibit clinicians from freely expressing their opinion and recommendations in similar assessment reports in the future.
27. I accept the Agency's submission that disclosure of such reports involves the potential for such information to be further disseminated, including among prisoners subject to similar SOATS assessment and treatment services, which could provide insights into psychological methodologies used by clinicians that could be employed to subvert the efficacy of such assessments.
28. While I note certain information in the Report may have been discussed with the Applicant, I consider it is reasonably likely the full content of the Report was not verbally communicated to the Applicant. Disclosure of the Report must be considered in accordance with the FOI Act, noting the nature of disclosure under the FOI Act does not provide for any conditions or restrictions to be placed on the use or further disclosure of a document if released.<sup>9</sup> Given the purpose of the Report, information in a document of this nature has greater weight than information verbally communicated to the subject of such a report.
29. In these circumstances, I am 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.
30. 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 disclosure would be contrary to the public interest.

### **Section 31(1)(a)**

31. The Agency relied on section 31(1)(a) to refuse access to the Report in part.
32. Subject to section 31, 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'.
33. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>10</sup>
34. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>11</sup>

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<sup>8</sup> Ibid at [19-20].

<sup>9</sup> *Marke v Victoria Police* [2008] VSCA 218.

<sup>10</sup> *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.

<sup>11</sup> Ibid, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

35. 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.<sup>12</sup>
36. 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.<sup>13</sup>
37. 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 Report would be likely to prejudice the proper administration of the Corrections Act.
38. I have also considered the Agency's reasons for decision, which state disclosure of information in the Report could undermine the effectiveness of offender rehabilitation programs.
39. The Report relates to the Applicant's participation in a clinical assessment as part of the Agency's SOATS assessment program. As stated above, the assessment was undertaken and the Report prepared by a clinician. The Report contains information collated from various SOATS related documents, including the clinician's discussions with the Applicant, a record of the clinician's observations, opinion, advice and recommendations to assist in the Applicant's rehabilitation, treatment, classification and management.
40. Therefore, it is necessary to consider the impact of disclosure, specifically how the use of the type of information in such reports would affect the SOATS assessment program, which is employed to assist with the management of prisons and prisoners.
41. The Agency submits, noting the unrestricted nature of disclosure under the FOI Act, information in the Report may provide additional insight into the methodologies used by clinicians that, if provided to or otherwise obtained by prisoners could be used with the intent of attempting to subvert the effectiveness of assessment and treatment programs.
42. Having viewed the content of the document, I accept that to routinely release the type of information contained in the SOATS reports could reasonably lead to a diminution in the degree of candour provided by clinicians, which would be reasonably likely to adversely affect the quality of information provided in such reports to the Adult Parole Board.
43. Based on the above factors, I accept the likely impact of disclosure of the Report under the FOI Act would undermine the effectiveness of the SOATS assessment and treatment program. I consider such an outcome could reasonably lead to the misuse of information in the Report which 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.
44. Accordingly, I am satisfied disclosure of the Report would prejudice the administration of the law in a particular instance, and the Report is exempt under section 31(1)(a).

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<sup>12</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

<sup>13</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [73].

45. For completeness, I also consider section 31(2)(f)<sup>14</sup> is not applicable in these circumstances, given the Report is not a report on a law enforcement investigation. Rather, it has been provided as part of an administrative assessment process namely, the classification, management and potential parole of a prisoner.
46. I understand arrangements may be made for the Applicant to view the Report with an Agency clinician, which should provide them with a further opportunity to engage with the Agency regarding any findings and recommendations in the Report.

### **Section 38**

47. The Agency relied on section 38 to refuse access to the Report in part.
48. 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'.
49. In order for section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

### *Corrections Act*

50. 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.

51. The phrase 'personal and confidential information' is defined in section 104ZX of the Corrections Act, which relevantly provides:

***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;
- (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;
- ...
- (j) information concerning –  
...

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<sup>14</sup> This section provides a document is not exempt under section 31(1) if it is a report on a law enforcement investigation and where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation.

(ii) security measures taken to protect the community from offenders;

52. The phrase 'relevant person' is set out in Schedule 5, which 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

53. In summary, section 104ZZA of the Corrections Act protects the personal privacy of individuals who are identified in documents generated in connection with the management and administration of the corrections system. It is also directed towards maintaining the confidentiality of methods and procedures used in the management of offenders and prisoners. The section imposes strict confidentiality requirements on Agency officers and others, subject to limited exceptions.

54. 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 identifies with precision the type of information to which it applies; and

(c) section 104ZZA prohibits specified 'relevant persons' from disclosing the information to which it applies.

55. The Agency relies on section 38 to exempt:

(a) the names of clinicians and their signatures;

(b) information relating to family members of the Applicant; and

(c) information relating to security measures taken to protect the community from an offender.

56. On the information before me, I am satisfied the information exempted by the Agency in Report falls within the definition of 'personal or confidential information' in section 104ZX of the Corrections Act and is information to which the secrecy provision applies.

57. Conversely, the secrecy provision in section 104ZZA is subject to exceptions outlined in sections 104ZY and 104ZZ. Sections 104ZY(1)(b)(i)(A) and 104ZY(2)(a)(i) permit the release of personal or confidential information in certain limited circumstances. However, I am satisfied no exceptions to the prohibition on disclosure apply in this instance.

58. Accordingly, I am satisfied the relevant 'personal and confidential' information in the document is exempt under section 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.

59. In light of my decision, it is not necessary for me to consider the application of section 33(1) by the Agency to the same information.



### ***Deletion of exempt or irrelevant information***

60. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
61. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>15</sup> 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.<sup>16</sup>
62. I have considered whether it is practicable to provide the Applicant with an edited copy of the Report with exempt information deleted from the document in accordance with section 25. I am satisfied it is practicable to delete the exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

63. On the information before me, I am satisfied certain information in the document to which the Applicant seeks access is exempt under sections 30(1), 31(1)(a), and 38 in conjunction with section 104ZZA of the Corrections Act.
64. As I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, I have determined to release the document in part.
65. Accordingly, my decision in this matter is the same as the Agency's decision.

### **Review rights**

66. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>17</sup> Any such application must be made to VCAT within 60 days from the date the Applicant receives this Notice of Decision.<sup>18</sup>
67. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
68. 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.<sup>19</sup>

### **When this decision takes effect**

69. My decision does not take effect until the relevant review period (stated above) expires.

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<sup>15</sup> *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].

<sup>16</sup> *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].

<sup>17</sup> Section 50(1)(b).

<sup>18</sup> Section 52(5).

<sup>19</sup> Sections 50(3F) and (3FA).