

Notice of Decision and Reasons for Decision

Applicant:	'FG4'
Agency:	Department of Justice and Community Safety
Decision date:	23 June 2023
Provisions considered:	Section 13 of the <i>Freedom of Information Act 1982</i> (Vic) and section 289(1) of the <i>Serious Offenders Act 2018</i> (Vic)
Citation:	'FG4' and Department of Justice and Community Safety (Freedom of Information) [2023] VICmr 66 (23 June 2023)

FREEDOM OF INFORMATION – post sentence report – person subject to supervision order – provision in *Serious Offenders Act 2018* (Vic) removing right to obtain access to a document under the *Freedom of Information Act 1982* (Vic) – document not subject to the FOI Act

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.

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied the document requested by the Applicant is not subject to the FOI Act due to the operation of section 289(1) of the *Serious Offenders Act 2018* (Vic).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

23 June 2023

Reasons for Decision

Background to review

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

[a report made by a psychologist about the Applicant's suitability for a supervision order]
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under sections 30(1), 31(1)(a), 31(1)(d) and 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) and section 289(1)(b) of the *Serious Offenders Act 2018* (Vic) (**Serious Offenders Act**).
3. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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 and submissions received from the parties.
8. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.
9. My jurisdiction to conduct a review under Part VI of the FOI Act extends to any decision made by an agency subject to the FOI Act 'to refuse access to documents in accordance with a request',² except where the FOI Act expressly provides otherwise, regardless of whether access is refused under a provision in the FOI Act or in another enactment.

Review

10. The combined effects of sections 3, 13 and 16 of the FOI Act is to 'confer upon a right to the public a broad and ready right of access to information'.³

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

² Section 49A(1)(a).

³ *Kelly v Department of Treasury & Finance (No 2)* (2002) 19 VAR 330; [2002] VCAT 1019 at [29].

11. In particular, section 13 provides:

Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to—

- (a) A document of an agency, other than an exempt document; or
- (b) An official document of a Minister, other than an exempt document.

12. However, the term 'Subject to this Act' qualifies that right, which may be restricted or removed by other legislation.

13. After carefully considering the information before me, for the reasons set out below, I am satisfied section 289(1) of the Serious Offenders Act operates to remove the right of an applicant to obtain access to the document under the FOI Act.

Serious Offenders Act

14. Section 289(1) of the Serious Offenders Act provides:

- (1) The **Freedom of Information Act 1982** does not apply to a document of the Authority to the extent to which the document discloses information that relates to—
 - (a) a victim of an offender, including any victim submission made under this Act; or
 - (b) a person in relation to the person being, or having been, an eligible offender or subject to a supervision order, an interim supervision order, a detention order, an interim detention order or an emergency detention order; or
 - (c) a proceeding under this Act that is or was before a court; or
 - (d) a decision of the Authority; or
 - (e) the decision-making processes of the Authority in relation to a particular matter; or
 - (f) a supervision order, an interim supervision order, a detention order, an interim detention order or an emergency detention order in respect of an offender and, in the case of a supervision order or an interim supervision order, any condition to which the order is subject; or
 - (g) any directions or instructions given under this Act to an offender; or
 - (h) the location, operation or administration of a residential facility or the management of offenders at a residential facility; or
 - (i) the location, operation or administration of a residential treatment facility or the management of offenders at a residential treatment facility; or
 - (j) the management under the **Corrections Act 1986** of an offender subject to a detention order, an interim detention order or an emergency detention order; or
 - (k) the management of an offender subject to a supervision order or an interim supervision order; or
 - (l) any other information prohibited from disclosure under this Part, unless that information is permitted to be disclosed by a publication order made by a court under section 278.

15. 'Authority' for the purpose of section 289(1) of the Serious Offenders Act means the Post Sentence Authority,⁴ which is responsible for monitoring offenders on post sentence orders, such as detention supervision orders.
16. I have reviewed a copy of the document subject to review. It is a report compiled in accordance with the Serious Offenders Act and concerns a detention and supervision order made in relation to the Applicant.
17. On the information before me, I am satisfied the document falls within the definition of section 289(1)(b) of the Serious Offenders Act as it discloses information that relates to a person being, or having been, an eligible offender subject to a supervision order. I am also satisfied the document discloses information concerning the management of an offender subject to a supervision order, as set out in section 289(1)(k) of the Serious Offenders Act.
18. On this basis, I am satisfied the document falls within the scope of sections 289(1)(b) and 289(1)(k) of the Serious Offenders Act and is not subject to access under the FOI Act.

Conclusion

19. On the information before me, I am satisfied the requested document is not subject to the FOI Act due to the operation of section 289(1) of the Serious Offenders Act.

Review rights

20. 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.⁵
21. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
22. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
23. 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.
24. 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.⁸

⁴ Section 3 of the *Serious Offenders Act 2018* (Vic).

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and 50(3FA).