

## Notice of Decision and Reasons for Decision

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Applicant:	'FQ6'
Agency:	Department of Justice and Community Safety
Decision date:	7 June 2024
Exemptions and provisions considered:	Sections 30(1), 31(1)(a) and 38 in conjunction with section 104ZZA of the <i>Corrections Act 1986</i> (Vic)
Citation:	'FQ6' and Department of Justice and Community Safety (Freedom of Information) [2024] VICmr 37 (7 June 2024)

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FREEDOM OF INFORMATION – prisoner access to computer – prisoner request – Corrections Victoria employees – secrecy provision – offence to disclose personal or confidential information – information concerning security and management of prisons – *Corrections Act 1986* (Vic)

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs slightly from the Agency's fresh decision in that I have determined some of the information in Document 2 is exempt from release under section 31(1)(a), rather than section 38 of the FOI Act in conjunction with section 104ZZA of the *Corrections Act 1986* (Vic) (**Corrections Act**). However, I have determined not to release any further information to the Applicant.

My decision on all other aspects of the Applicant's request is the same as the Agency's decision and no further information is to be released.

Please refer to the end of the decision for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
**Acting Public Access Deputy Commissioner**

7 June 2024

## Reasons for Decision

### Background to review

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

I advise [a specified Agency officer] wrote to me dated [date] at paragraphs 5 and 6 in part who declared, thus:

‘...in [year] you made an application [requesting...]. Following this application being considered by the High Risk Management Advisory Panel (HRMAP), [the request was not approved].

Additionally, this decision was under the proviso that [details of proviso omitted].’

...

...I seek to receive both documents and/or information from the Corrections Victoria internal records, in where and how or by what means, the reported existence for such claimed proviso has been: (1) raised, and (2) discussed or conveyed, required with sufficient particularity for me to appreciate the emphasised point made at paragraphs 5 and 6 of [Agency officer’s] written advices dated [date]...

2. The Agency decision states that it identified one document comprising of 62 pages falling within the terms of the Applicant’s request. The Agency granted access to 27 pages outside of the FOI Act, and refused access to 12 pages in full, and the remaining pages in part under sections 30(1) and 38 in conjunction with section 104ZZA of the 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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. During the review, the Agency advised OVIC that it made several administrative errors in its original decision letter, including about the number of documents located, the number of pages located and released, and exemptions applied. Accordingly, this resulted in the Agency electing to make a fresh decision.
6. On [date], the Agency made a fresh decision under section 49M(1). The Agency identified eight documents falling within the terms of the Applicant’s request comprising of 61 pages. The Agency released one document outside the FOI Act and seven documents in part under sections 30(1) and 38 of the FOI Act in conjunction with section 104ZZA of the Corrections Act.
7. The Applicant did not agree with the Agency’s fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.

8. During the review of the fresh decision, the Agency submitted that section 31(1)(a) could also be considered applicable to all information it considered exempt from release under section 30(1).
9. During the review, it was noted that part of paragraph 7 in Document 2 was originally refused under sections 31(1) and 38 in the Agency's original decision and refused under section 38 only in its fresh decision. The Agency clarified that this portion of information should in fact have been exempted under section 31(1)(a) and provided a further submission in support of this view.
10. I have examined a copy of the documents subject to review and considered relevant communications and submissions received from the parties.
11. 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.
12. 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 38 – Documents to which secrecy provisions of enactments apply*

13. 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.

14. Therefore, for a document to be exempt under section 38, three requirements must be met:
  - (a) there is an enactment in force;
  - (b) the enactment applies specifically to the kind of information in a document; and
  - (c) the enactment prohibits persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

*Is there an enactment in force?*

15. I am satisfied the Corrections Act is an enactment in force for the purposes of section 38.

*Does the enactment apply specifically to the kind of information in the documents?*

16. 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.<sup>1</sup>
17. Section 104ZZA of the Corrections Act provides:

**104ZZA Offence to use or disclose personal or confidential information unless authorised**

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, 104ZZ or 104ZZAA.

Penalty: 120 penalty units

18. The term ‘personal or confidential information’ is defined in section 104ZX of the Corrections Act and includes the following, which I consider are relevant in this matter:  
...  
(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 be reasonably determined;...  
19. The Agency identified seven documents containing the names and signatures of Corrections employees and other individuals, which it considers is information falling within the definition of ‘personal or confidential information’ in section 104ZX of the Corrections Act.
20. I am satisfied the Agency has exempted information which identifies individuals other than the Applicant that falls within the definition of ‘personal or confidential information’ for the purposes of section 104ZX of the Corrections Act.

*Does the enactment prohibit persons from disclosing the information in the documents?*

21. Section 104ZZA of the Corrections Act operates to protect the personal privacy of individuals who are identified in documents generated in connection with the management and administration of the corrections system. The section imposes strict confidentiality requirements on relevant persons which apply in all but limited circumstances.
22. Section 104ZZA of the Corrections Act prohibits ‘a person who is or has been a relevant person’ from disclosing ‘personal or confidential information’ unless authorised.
23. Section 104ZX of the Corrections Act defines ‘relevant person’ as a person specified in an item of Schedule 5 and includes:

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<sup>1</sup> *News Corporation Ltd v National Competition & Securities Commission* (1984) 1 FCR 64, 68; *Re Horesh and Ombudsman* (1986) 1 VAR 149 cited in *Hulls v Victorian Casino & Gaming Authority* (1998) 12 VAR 483, 495.

...

(2) a person employed in the Department under Part 3 of the Public Administration Act 2004.

24. As such, the Agency is a relevant person for the purposes of section 104ZZA of the Corrections Act.
25. Sections 104ZY, 104ZZ and 104ZZAA of the Corrections Act set out exceptions to the prohibition on relevant persons disclosing 'personal or confidential information'. Having reviewed these exceptions and on the information before me, I am satisfied no exceptions authorise disclosure of the 'personal or confidential information' in the documents to the Applicant in this instance.
26. Accordingly, I am satisfied the Agency is prohibited under section 104ZZA of the Corrections Act from disclosing certain information in the documents to the Applicant.
27. In its original decision, the Agency applied the exemptions under sections 31(1) and 38 of the FOI Act, in conjunction with section 104ZZA of the Corrections Act, to part of paragraph 7 in Document 2. I am not satisfied this information falls within the definition of 'personal or confidential information' in section 104ZX of the Corrections Act, however I have considered the application of section 31(1)(a) to this information as indicated below.
28. I am satisfied that all other information identified by the Agency in its fresh decision as exempt under section 38, in conjunction with section 104ZZA of the Corrections Act, is exempt from release.

***Section 30(1) – Internal working documents***

29. To be exempt under section 30(1), three conditions must be satisfied:
  - (a) the document or information is matter in the nature of:
    - (i) opinion, advice or recommendation prepared by an agency officer or a Minister; or
    - (ii) consultation or deliberation that has taken place between agency officers or Ministers; and
  - (b) the matter was created during the deliberative process of an agency, Minister, or the government's functions; and
  - (c) disclosure of the matter would be contrary to the public interest.
30. The Agency applied section 30(1) in part to two documents, identified in the Agency's fresh decision letter as:
  - Memorandum – [date], Major Offenders Unit (**Document 2**); and
  - Minutes of Meeting – [date], High Risk Management Advisory Panel (**Document 3**).

*First limb – opinion, advice, recommendation, or consultation or deliberation*

31. Document 2 is a memorandum concerning the Applicant's [specified request]. The purpose of the document is for the Agency's High Risk Management Advisory Panel (**HRMAP**) to consider the Applicant's ongoing eligibility for access to [a resource] on legal grounds, and if so, whether the [Applicant's request] should be approved.
32. Having reviewed Document 2, I am satisfied the information was created for consultation and deliberation by the HRMAP, with parts of the document including information in the nature of opinion, advice and recommendation.
33. Document 3 is the minutes from the meeting at which the Applicant's [request] was considered by the HRMAP. The minutes include a record of the discussion of the Applicant's request by the HRMAP, which I am satisfied is in the nature of consultation and deliberation.

*Second limb – deliberative process*

34. I am satisfied the documents were created during the deliberative processes of the Agency with respect to prisoner management.

*Third limb – would disclosure of the documents be contrary to the public interest?*

35. I must also be satisfied releasing this information is not contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>2</sup>
36. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>3</sup>
  - (a) the right of every person to gain access to documents under the Act;
  - (b) the sensitivity of the issues involved and the broader context of how the documents were created;
  - (c) the stage of a decision or policy development at the time the communications were made;
  - (d) whether disclosure of the documents would be likely to inhibit communications between agency officers that are essential for the agency to make an informed and well-considered decision or for those officers to properly participate in a process of the agency's functions (such as an audit or investigation, regulatory or law enforcement function);
  - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation, for the taking of a particular decision or the outcome of a process, but only where the agency would not otherwise be able to explain upon disclosure of the documents;

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<sup>2</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>3</sup> See *OVIC FOI Guidelines – Section 30(1)*

- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final decision by an agency or Minister;
  - (g) the likelihood that disclosure would inhibit the independence of officers, including their ability to conduct proper research and make detailed submissions;
  - (h) the public interest in the community being better informed about an agency's deliberative, consultative and decision-making processes;
  - (i) the public interest in government transparency and accountability by enabling scrutiny or criticism of decisions and the decision-making process and building the community's trust in government and its decision making processes;
  - (j) whether there is controversy or impropriety around the decision or the decision-making process.
37. In its fresh decision letter, the Agency stated that disclosure of the information would be contrary to the public interest because:
- Those persons responsible for the management of prisons and prisoners must be able to freely communicate and discuss opinions and thought processes to ensure strong, robust and safe decision making within the corrections system.
- The types of decision making that regularly occur within the HRMAP and the Major Offenders Unit can have broad reaching effects, not only on the local prison population and the administration/management of the specific prisons, but to the prison population and network at large. There is no broader public interest in the release of a specific discussion about your personal access to [a resource].
38. I acknowledge the Applicant's personal interest in obtaining access to the exempted information in the documents. However, I am mindful of the context and purpose for which the documents were created. Namely, for Agency officers who are responsible for the management of prisoners within the Corrections system, to record their detailed opinions, advice, recommendations, consultation and deliberation concerning prisoner management matters, to ensure the effective performance of their prison management functions under the Corrections Act.
39. While there is no specific information before me to suggest disclosure of the information would inhibit Agency officers from recording information of this nature in the future, I am of the view the routine disclosure of such information would reasonably lead to a diminution in the degree of candour in information recorded by staff. I consider this would have an adverse effect on the quality and detail of information recorded and the effective performance of their functions in relation to the general management of the prison environment.
40. Accordingly, I consider disclosure of the relevant information would be contrary to the public interest.
41. Accordingly, I am satisfied that certain parts of Documents 2 and 3 are exempt from release under section 30(1).

*Section 31(1)(a) – Disclosure of documents that would prejudice the investigation, enforcement or proper administration of the law*

42. In its original decision, the Agency applied the exemptions under sections 31(1) and 38 of the FOI Act, in conjunction with section 104ZZA of the Corrections Act, to part of paragraph 7 in Document 2.
43. During the review of the Agency's fresh decision, the Agency acknowledged that its fresh decision removed this information utilising section 38 only. However, the Agency submitted this information should have been assessed and documented as being exempt in accordance with section 31(1)(a).
44. Furthermore, it submitted that section 31(1)(a) could also be considered applicable to all information considered exempt under section 30(1). However, given my decision on sections 30(1) and 38, I have only considered the application of section 31(1)(a) to paragraph 7 in Document 2.
45. Section 31(1)(a) provides a document is exempt if its disclosure 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.

*Does information in the document relate to enforcing or administering a law in a particular instance?*

46. The proper administration of the law deals with how the law is administered and includes, for example, regulatory, monitoring and compliance activities.<sup>4</sup>
47. The terms 'in a particular instance' qualifies the terms 'enforcement or proper administration of the law', but it does not require a single specific investigation. Rather, the scope of this exemption can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.<sup>5</sup>
48. The Agency considers disclosure could improperly affect the proper administration of the law in the instance of maintaining good order within the prison environment in accordance with the Corrections Act and the *Corrections Regulations 2019* (Vic).
49. I am satisfied Document 2 relates to the administration of the Corrections Act, specifically with respect to prisoner management.

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<sup>4</sup> *Cichello v Department of Justice* [2014] VCAT 340 at [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 at [28] and *Croom v Accident Compensation Commission* (1989) 3 VAR 441 (affirmed on appeal [1991] 2 VR 322).

<sup>5</sup> *O'Sullivan v Police Force* (Vic) (1986) 1 VAR 171 at [175]-[176]; *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [69]; *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].



*Would disclosure of the document prejudice, or be reasonably likely to prejudice, the enforcement or proper administration of the law?*

50. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>6</sup>
51. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>7</sup>
52. Accordingly, I must consider whether disclosing the document would prejudice the proper administration of the Corrections Act, and why this prejudice would, or would be reasonably likely to occur.
53. Information exempted in Document 2 concerns the management of the Applicant in the context of their [request]. The document addresses risk management and placement issues, and the basis for them.
54. Disclosure would be likely to prejudice the administration of the Corrections Act by disrupting prisoner management. I am mindful that the release of documents under the FOI Act involves the unrestricted and unconditional release of a document, which means an applicant is free to use or further disseminate a document as they please. In this case, disclosure of certain information in the document under the FOI Act could reasonably facilitate its dissemination to other prisoners, offenders and/or the general public. If information of the nature exempted in Document 2 were to be disclosed routinely under the FOI Act, the assessment processes for managing prisoners could be manipulated or misused by prisoners to achieve certain outcomes.
55. As such, I am satisfied the information exempted by the Agency in paragraph 7 in Document 2 is exempt from disclosure under section 31(1)(a), on grounds disclosure would be reasonably likely to prejudice the proper administration of the law, in this case, the administration of the Corrections Act.

***Section 25 – Deletion of exempt or irrelevant information***

56. 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.
57. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>8</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>9</sup>

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<sup>6</sup> *Bergman v Department of Justice* [2012] VCAT 363 at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

<sup>7</sup> *Bergman v Department of Justice* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

<sup>8</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>9</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], [155].

58. In its fresh decision letter, the Agency advised the following information was considered as 'Not Relevant' to the Applicant's request and therefore removed:
- (a) topics/discussions in meetings about topics not included in the terms of the Applicant's request; and
  - (b) information/discussions about other individuals that was not relevant to the Applicant's request.
59. I agree this information is not relevant to the Applicant's request.
60. The Agency has provided the Applicant with an edited copy of the released document with irrelevant and exempt information deleted in accordance with section 25.

### Conclusion

61. On the information before me, I have determined part of paragraph 7 in Document 2 is exempt from disclosure under section 31(1)(a). I am satisfied that all other information exempted by the Agency in its fresh decision remains exempt from release under sections 30(1) and 38 of the FOI Act, in conjunction with section 104ZZA.
62. Accordingly, I have decided not to release any further information in the documents to the Applicant.
63. However, noting the Agency has not released the fresh decision documents to the Applicant, the Agency is to release these documents to the Applicant without any further delay. In particular, Document 2 is to be released in accordance with the version that the Agency provided to OVIC on [date].

### Timeframe to seek a review of my decision

64. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>10</sup>
65. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
66. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</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.

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<sup>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

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>13</sup>

**When this decision takes effect**

69. My decision does not take effect until the Agency's 14 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>13</sup> Sections 50(3F) and 50(3FA).