

Notice of Decision and Reasons for Decision

Applicant:	'AB8'
Agency:	Victoria Police
Decision Date:	28 March 2019
Exemptions considered:	Sections 33(1), 38
Citation	'AB8' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 17 (28 March 2019)

FREEDOM OF INFORMATION – police records – employment records – transcripts of interviews with a third party other than the Applicant – documents affecting personal privacy – documents to which secrecy provisions apply – section 4 of the *Judicial Proceedings Reports Act 1958* (Vic) – section 35 of the *Crimes Act 1958* (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 decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information to the Applicant.

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

28 March 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency through their legal representative for access to documents that appeared in a list of exhibits provided to the Applicant in response to a previous FOI request made to the Agency.
2. In its decision, the Agency identified four documents falling within the terms of the Applicant's request. It refused access to the documents in full.
3. In summary, the documents relate to [employment] records and transcripts of police interviews that led to an offender being convicted for sexual offences.

Review

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 copies of the documents subject to review. While I note the Agency's decision refers to four documents, I consider the documents are more accurately described as five documents, because one of the documents that comprises two pages is, in my view, two separate and discreet documents. Therefore, my review concerns five documents.
6. The five documents are described in **Annexure 1**.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (a) the Applicant's request and review application.
9. 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.

Review of exemptions

10. The Agency relied on the exemptions in sections 33(1) and 38 to deny access to the documents. The Agency's decision letter sets out the reasons for its decision.
11. The Applicant's legal representative provided information with the Applicant's review application, which is summarised in general terms below:
 - (a) The Applicant is a victim of child sexual abuse.
 - (b) The offender was convicted of indecent assault and was sentenced to a term of imprisonment.
 - (c) The offender is identified in publicly available court documents and media reports.
 - (d) The offender indecently assaulted the Applicant over a period of time, including during a period when the offender was employed by the Agency.

- (e) The Royal Commission into Institutional Responses to Child Sexual Abuse (the **Royal Commission**) emphasised both the importance of justice and the principle of equal access for survivors.
- (f) Any government institution's approach to FOI should be consistent with the FOI Act, but also with the spirit of the model litigant approaches recommended by the Royal Commission.
- (g) The Applicant does not object to the redaction of information capable of identifying other third parties, including alleged victims, witnesses or police officers, including the offender's name.
- (h) The Applicant does object to the redaction of the offender's name, the offender's status as a convicted sexual offender and past employment on the basis that information is in the public domain.

12. My decision considers the offender's [employment] records (Documents 1, 2 and 3) under section 33(1) and the transcripts of interview (Documents 4 and 5) under sections 38 as well as 33(1).

Documents 1 to 3 – [Employment] records

Section 33(1)

13. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant; and
- (b) such disclosure would be 'unreasonable'.

14. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.

15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

16. In this review, I have considered the following factors when deciding whether it would be unreasonable to release the personal affairs information of third parties:

- (a) the nature of the personal affairs information (for example, whether it is sensitive or its current relevance);
- (b) the extent to which the information is available to the public;
- (c) the circumstances in which the information was obtained (for example, whether it was obtained involuntarily or in confidence);
- (d) the Applicant's interest in the information (including their purpose for seeking access to the documents);
- (e) whether any public interest would be promoted by release of the information;
- (f) whether the individuals to whom the information relates object, or would be likely to object to the release of the information;
- (g) the likelihood of further disclosure of the information, if released; and
- (h) whether disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.

17. The Agency applied section 33(1) to the [employment] records. These records include a third party's name, date of birth, other identifying information, and their dates of employment.
18. I note the Agency did not consult the third party to whom these records relate in order to seek that person's views on disclosure of the documents.
19. The information in the documents constitutes the third party's personal affairs information. Therefore, I must decide whether the release of the personal affairs information would be unreasonable, with reference to relevant factors, including those listed above.
20. In the particular circumstances of this matter, I am satisfied it would not be unreasonable to release certain personal affairs information in Documents 1 to 3. In reaching this decision, I gave weight to the following factors:
 - (a) certain information in the documents is not particularly sensitive in nature, and includes largely factual information;
 - (b) certain information in the documents is already in the public domain having been aired in open court and in a court judgment;
 - (c) the Applicant's interest in and reasons for, as a victim of child sexual offences perpetrated by the offender, seeking information in the third party's [employment record] held by the Agency;
 - (d) [redacted]
 - (e) [redacted];
 - (f) while I acknowledge there is a chance the Applicant could disseminate the offender's personal affairs information, I consider there is a low risk of the Applicant disseminating the documents disclosed under FOI Act;
 - (g) in any case, a significant amount of the information to be disclosed about the offender exists in the public domain;
 - (h) the signatures of other parties on official Agency documents relate to them in their official capacity [as Agency employees] rather than in their personal or private capacity; and
 - (i) while the third party may object to release of the information (the views of the third party are not known), I am not satisfied any objection to release of certain non-sensitive personal affairs information would be an overriding consideration in light of the above factors.
21. However, I have decided it would be unreasonable to release certain personal affairs information in Documents 1 and 3 on grounds it inherently pertains to the third party as an individual, rather than as an employee and would not serve the Applicant's interests nor any public interest:
 - (a) date and location of birth;
 - (b) personal descriptors: [redacted]; and
 - (c) photograph of the third party.
22. Accordingly, I have decided to release Document 2 in full and Documents 1 and 3 in part. My reasons in relation to each document is set out in **Annexure 1**.

Transcripts of interviews

Section 38

23. 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.
24. 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.
25. The Agency applied section 38 in conjunction with section 4 of the *Judicial Proceedings Reports Act 1958* (Vic) (**Judicial Proceedings Reports Act**).

Section 4 of the Judicial Proceedings Reports Act states:

4 Prohibition of reporting of names

(1) In this section—

publish means disseminate or provide access to the public or a section of the public by any means, including by—

(a) publication in a book, newspaper, magazine or other written publication; or

(b) broadcast by radio or television; or

(c) public exhibition; or

(d) broadcast or electronic communication—

other than for a purpose connected with a judicial proceeding;

sexual offence means an offence under subdivision (8A), (8B), (8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part I of the Crimes Act 1958 or under any corresponding previous enactment or an attempt to commit any such offence or an assault with intent to commit any such offence.

(1A) A person who publishes or causes to be published any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence, or an offence where the conduct constituting it consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in section 35 of the **Crimes Act 1958**, is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence is pending in a court.

26. The Agency applied section 38 to two transcripts of interviews with a person accused of committing sexual offences (Documents 4 and 5). The transcripts consist primarily of detailed allegations being put to the person and responses to those allegations. The allegations subject of the transcripts were made by third parties other than the Applicant.
27. The Judicial Proceedings Reports Act is an enactment in force and I am satisfied it is a secrecy provision to which section 38 can apply.
28. Therefore, I must consider whether any of the information in Documents 4 and 5 is described, with precision, by the relevant section of the Judicial Proceedings Reports Act and is therefore exempt from release under section 38 of the FOI Act.

29. The provision refers to information that 'contains any particulars likely to lead to the identification of a person against whom a sexual offence...is alleged to have been committed'. In my view, the application of this provision is intended to be interpreted broadly to protect the identity of victims of sexual offences.
30. In this matter, the transcripts contain the names of persons who have been the victims of relevant offences as well as other highly detailed information regarding their allegations.
31. I note the Applicant is not seeking identifying information of any alleged victims named in the documents, and is seeking the release of documents with this information removed.
32. Having reviewed the documents, the difficulty is in identifying what information in the documents could be released without identifying the persons to whom the sensitive information relates.
33. The documents contain dates, specific places, events and the names of third parties. There may be people familiar with some of those details that could use that information to identify the names of persons involved. [Redacted] I must also consider the sensitivity of the information and the purpose of the provision as described above.
34. For this reason, I consider it is likely substantial additional information in the documents, as well as the names of third parties, is subject to the secrecy provision of section 4 of the Judicial Proceedings Reports Act and exempt from release under section 38 of the FOI Act. However, with only the information before me, I am unable to determine with any certainty whether parts of the documents could be released without unintentionally or indirectly revealing the identity of any person subject to the Judicial Proceedings Act.
35. In reaching my decision, I have also had regard to the nature of disclosure under the FOI Act, which is unrestricted and conditional. This means that a person in receipt of a document disclosed under the FOI Act is generally free to do with the document as they please – including making it public, further disseminating or publishing it (including on the Internet).
36. Given the sensitive matters and the detail in which they are discussed in the transcripts of interview, I consider release of these documents, even in part, could be used in conjunction with other publicly available information (which is quite detailed) about the offender to identify him and through him, possible other victims of his offending. In my view, this would likely cause other victims of the offender significant anxiety and distress regardless of whether the documents relate to them or, possibly, another victim.
37. In relation to the application of section 38 to the transcripts I have decided:
 - (a) the names and other identifying information of the victims is exempt under section 38;
 - (b) I am unable to determine with certainty which passages, if any, of the documents could be released without unintentionally or indirectly revealing the identity of any person subject to the Judicial Proceedings Act.
38. Therefore, I will also consider whether the information in the transcripts are exempt under section 33(1).

Section 33(1)

39. Documents 4 and 5 contain names, dates of birth, addresses, vehicle registration numbers, relationship descriptions, descriptions of events and other personal information of the accused, victims, witnesses and third parties. All of the information amounts to personal affairs information. Therefore, I must decide whether it would be unreasonable to release that information.

40. As noted above, the Applicant is not seeking the names of people other than the accused and seeks access to the documents with that information removed. Therefore, I need to consider whether an edited copy of the documents can be disclosed with exempt information deleted in accordance with section 25.
41. Section 25 provides where it is practicable for an agency to grant access to a copy of a document with exempt or irrelevant information deleted, and the applicant agrees to receive an edited copy, the agency must grant access to an edited copy of the document to the applicant.
42. Having reviewed the documents subject to review, even with names of persons removed from the transcripts, the documents contain detailed information from which the accused, victims, witnesses and third parties could possibly be identified. Accordingly, I am satisfied it would not be practicable for the Agency to delete exempt information from the transcripts without rendering the documents meaningless.
43. I have considered [redacted] and that some general de-identified information relating to some of the events described is available in publicly available sentencing documents. I also note the Applicant's personal and compelling interest in the matter. However, given the sensitivity of the information contained in the documents, I must be cautious. Ultimately, the information in the transcripts is detailed and deeply personal and concerns persons other than the Applicant. I also consider the fact the information was provided to the Agency by persons who were voluntarily participating in a criminal investigation and they would reasonably have the expectation the information they provided to the Agency would remain private and would not be used otherwise than to investigate allegations of criminal conduct and any subsequent prosecution.
44. As described above, based on the information before me, I cannot reasonably determine what information could be removed from the transcripts to ensure victims of sexual offending cannot be identified.
45. Again, as discussed above under section 38, I have also considered the unrestricted and unconditional nature of release under the FOI Act. In the context of sensitive documents, such as these, release under the FOI Act could see them disseminated by the Applicant or another person who obtains access to them. As discussed above, given the sensitivity of the information contained in the documents, I must be cautious.
46. I note the public interest factors supporting release of the documents to the Applicant and the abovementioned comments of the recommendations of the Royal Commission. However, in weighing public interest factors for and against release of the documents under the FOI Act, I am satisfied there is an overriding public interest in maintaining the confidentiality of these documents given their sensitive content. [redacted] A key reason is release under the FOI Act of information obtained by the Agency may result in members of the community no longer volunteering information in relation to a criminal investigation, including out of concern or fear that their privacy or confidential information will be disclosed. This could in turn have a detrimental effect on the Agency's ability to conduct criminal investigations into sexual offending, which would be contrary to the public interest.
47. Accordingly, I am satisfied it would be unreasonable to release any of the information in the transcripts and they are exempt in full under section 33(1).

Conclusion

48. On the information available, I am satisfied the exemptions in sections 33(1) and 38 apply to the documents. The Applicant is granted access to Documents 1, 3 in part, with the information described in **Annexure 1** removed as it is exempt under section 33(1), access is granted in full to Document 2 as I do not consider it unreasonable to release the personal affairs information. Access to Document 4 and 5 is refused in full under sections 33(1) and 38.

Review rights

49. 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.¹
50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²
51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.³
52. 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.
53. 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.⁴

Third party review rights

54. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
55. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.⁵

56. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.⁶
57. As discussed above, in the circumstances of this matter, where the Applicant is a victim of sexual assault perpetrated by an offender, who is the subject of Documents 1, 2 and 3, I am not satisfied it would be practicable to notify the offender of the Applicant's FOI request. For these reasons, I have determined I am not required under section 49P(5) to notify the relevant third party of their right to seek a review of my decision.

When this decision takes effect

58. My decision does not take effect until the relevant review period (as stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

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

² Section 52(5).

³ Section 52(9).

⁴ Sections 50(3F) and (3FA).

⁵ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

⁶ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	[Employment record]	1	<p>Denied in full</p> <p>Section 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>I direct the document be released to the Applicant except for the following information as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> • the information entered against the date and place of birth; • [personal descriptors]; • the photograph. 	<p>Section 33(1): I consider it unreasonable to release certain personal affairs information in this document. The document is to be released in part for the reasons set out above.</p> <p>Section 25: I am satisfied it is practicable for the Agency to release an edited copy of this document to the Applicant.</p>
2.	[Date]	[Employment record]	1	<p>Denied in full</p> <p>Section 33(1)</p>	<p>Release in full</p>	<p>Section 33(1): I do not consider it unreasonable to release the personal affairs information in this document. Accordingly, it is not exempt under section 33(1) for the reasons set out above.</p>

Annexure 1 – Schedule of Documents

3.	[Date]	[Employment record]	1	<p>Denied in full</p> <p>Section 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>I direct the document be released to the Applicant except for the following information as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> • the information entered against the date and place of birth; • .[personal descriptors] 	<p>Section 33(1): I consider it unreasonable to release certain personal affairs information in this document. The document is to be released in part for the reasons set out above.</p> <p>Section 25: I am satisfied it is practicable for the Agency to release an edited copy of this document to the Applicant.</p>
4.	[Date]	Transcript of interview	122	<p>Denied in full</p> <p>Sections 33(1), 38</p>	<p>Denied in full</p> <p>Sections 33(1), 38</p>	<p>Section 33(1): The document is exempt under section 33(1) for the reasons set out above.</p> <p>Section 38: I am satisfied the document is exempt from release under section 38 for the reasons set out above.</p>
5.	[Date]	Transcript of interview	22	<p>Denied in full</p> <p>Sections 33(1), 38</p>	<p>Denied in full</p> <p>Sections 33(1), 38</p>	<p>Section 33(1): The document is exempt under section 33(1) for the reasons set out above.</p> <p>Section 38: I am satisfied the document is exempt from release under section 38 for the reasons set out above.</p>