

Notice of Decision and Reasons for Decision

Applicant:	'BG1'
Agency:	Victoria Police
Decision Date:	12 March 2020
Exemption and provision considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 464JA(4) of the <i>Crimes Act 1958</i> (Vic)
Citation:	'BG1' and <i>Victoria Police (Freedom of Information)</i> [2020] VICmr 61 (12 March 2020)

FREEDOM OF INFORMATION – police records – suspect interview – suspect master recording – interview recording – definition of 'suspect' – secrecy provision

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 the document requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the document is exempt in full under section 38 of the FOI Act in conjunction with section 464JA(4)(a) of the Crimes Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
12 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. Psychological Profile. Copy of Profile. Who authorised it? What circumstances / inputs / informants / complaints internal assessment(s) warranted it?
 2. Photographs of me. What photos are held of file (copies please). Evidence of authority to obtain and retain these.
 3. Anything on file notes / LEAP pertaining to interview (excluding Suspect Master Recording) of:
 - i) Alleged criminal damages [name and date]
 - ii) Alleged stalking [names and date]
 - iii) Alleged breach of PSIO [name and date]
 4. Suspect Master Recording, File notes / LEAP: Alleged criminal damages [name and timeframe]
 5. Suspect Master Recording, File notes / LEAP: Voluntary Interview conducted (am) at [location] Police Station approx. [timeframe], separate to above involvements.
2. In its decision, the Agency identified nine documents falling within the terms of the Applicant's request. It decided to grant access to these documents in part.
3. The Agency also stated it did not retrieve any copies of taped recordings (Suspect Master Recordings) as it considered these recordings to be exempt from release under sections 33(1) and 38 of the FOI Act in conjunction with section 464JA(4) of the *Crimes Act 1958* (Vic) (**Crimes Act**). I note the Agency only identified such recordings in relation to part 4 of the Applicant's request.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. On 30 January 2020, the Applicant indicated they only seek review of the Agency's application of the exemption under section 38. Accordingly, this review relates to the Suspect Master Recording only (the **Document**).
6. I have not reviewed a copy of the Document. In this instance, based on the terms of the Applicant's FOI request, I accept the Document is as identified and described by the Agency.
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;
 - (b) information provided with the Applicant's review application; and
 - (c) communications between OVIC staff, the Agency and the Applicant.

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 under sections 33(1) and 38 to refuse access to the document. In relation to section 38, the Agency also relies on section 464JA(4) of the Crimes Act. The Agency's decision letter sets out the reasons for its decision.

11. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

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.

12. For section 38 to apply, the relevant enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

13. Section 464JA(4) of the Crimes Act states:

Section 464JA Offences in relation to recordings

- (4) A person must not supply or offer to supply an audio recording or an audio visual recording to another person other than –
- (a) the suspect in relation to whom the recording was made;
 - (b) a legal practitioner representing the suspect;
 - (c) an authorised person acting in the performance of his or her duties;
 - (d) a person engaged by a person referred to in paragraph (a), (b) or (c) to transport the recording.

14. The Document is a recording of an interview conducted by police with the Applicant.

Is section 464JA(4) a secrecy provision for the purposes of section 38?

15. In summary, I am satisfied section 464JA(4) of the Crimes Act is a secrecy provision to which section 38 applies, as the first three elements of section 38 are satisfied, in that:

- (a) the Crimes Act is an enactment in force;
- (b) section 464JA(4) refers with particularity to the kind of information contained in the documents,¹ being an audio or audio-visual recording. A 'recording' is defined to mean 'a recording made in accordance with section 464B(5H), 464G or 464H';² and
- (c) section 464JA(4) specifies the persons, or class of persons, subject to the prohibition – in this instance, any person.

¹ See *News Corp Ltd v National Competition & Securities Commission* (1984) 1 FCR at 68.

² Section 464JA(1) defines 'recording' to mean '...a recording made in accordance with section 464B(5H), 464G or 464H.'

Does section 464JA(4) of the Crimes Act prohibit disclosure of the Document to the Applicant?

16. There does not appear to be any dispute the Document comprises precisely the type of information to which the prohibition in section 464JA(4) of the Crimes Act applies, namely, a recording made under sections 464B(5H), 464G or 464H of the Crimes Act. However, I am required to consider whether the Crimes Act prohibits disclosure of the Document to the Applicant in this instance.
17. In response to enquiries made by OVIC staff on 30 January 2020, the Applicant advised the Agency offered the Applicant a copy of the Document following the police interview. However, the Applicant declined to receive a copy at that time.
18. The Applicant disagrees with the Agency's view the Applicant is not entitled to a copy of the document as they are no longer a 'suspect' for the purposes of section 464(2) of the Crimes Act.
19. 'Suspect' is defined in section 464(2) of the Crimes Act:

"suspect" means a person of or above the age of 18 years who—

 - (a) is suspected of having committed an offence; or
 - (b) has been charged with an offence; or
 - (c) has been summonsed to answer to a charge;
20. The Agency submits if a person is charged with an offence, they are no longer regarded as a 'suspect'. Rather they are regarded as 'the accused'.
21. The Agency interpret the meaning of 'suspect' narrowly, as at a point in time. Accordingly, it submits the Applicant is no longer a 'suspect' for the purpose of section 464JA(4)(a) as they are not currently under suspicion for the matters put to them during the recorded interview the subject of this review (the **recorded interview**). Therefore, the prohibition in section 464JA(4) of the Crimes Act applies and the document is exempt in full under section 38.
22. During the review, I note the Applicant acknowledged they have an upcoming court matter that does not relate to the Document.

Interpretation of section 464JA(4) of the Crimes Act

23. For the reasons set out below, I am not persuaded the exception in section 464JA(4)(a) is made out in the Applicant's case. In my view, the definition of 'suspect' does not extend to a person who is no longer under suspicion of having committed an offence, or who is no longer charged with a criminal offence or summonsed to answer to such a charge.
24. In reaching that conclusion, I have considered the proper construction of the secrecy provision in section 464JA(4) and the definition of 'suspect' in section 464(2). That task begins with consideration of the words used in the legislation.³
25. The definition of 'suspect' in section 464(2) of the Crimes Act refers to a person who 'is' suspected of having committed an offence, suggesting the person must be currently under suspicion. The definition also refers to a person who 'has been' charged with an offence or summonsed to answer a charge, rather than a person who 'is' so charged or summonsed. This may suggest that the second and third limbs of the definition should be read broadly. In my view, these matters give rise to some uncertainty. To resolve this uncertainty, the provisions must be interpreted in the statutory context in which they appear.

³ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47].

26. It is necessary to construe a term, where it appears more than once in an enactment, in a way that gives it the same meaning wherever it is used. If the legislature had intended that a 'suspect' include a person who has been convicted, found not guilty, or against whom charges had not been proceeded with, it would have used express words to that effect, as it has done elsewhere in Part III of the Crimes Act.⁴
27. Further, other provisions in Part III, such as those that provide for the use of a forensic procedure on a 'suspect' who 'has been' charged or summonsed to answer a charge, clearly contemplate the use of such a procedure before the conclusion of criminal proceedings or withdrawal of charges.⁵ This lends support to giving the words 'suspect' and 'has been' in section 464(2) a similarly narrow interpretation.
28. Section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) provides an interpretation that promotes the purpose or object of an Act is to be preferred to one that would not.
29. Part III of the Crimes Act governs the provision of copies of recordings made under sections 464B(5H), 464G or 464H. The following matters lead me to conclude the object and purpose of Division 30A, within which section 464JA is located, is to establish an exhaustive and exclusive channel by which persons subject to a police interview may access a recording of their interview.
30. First, it is apparent from the Minister's Second Reading Speech, Parliament's intention in introducing the relevant legislation was to restrict the dissemination of often sensitive material discussed in interview recordings while allowing for certain uses in connection with criminal justice and related processes.
31. I note Section 464JA was inserted into the Crimes Act by the *Justice Legislation Miscellaneous Amendments Act 2009* (Vic). The offences in section 464JA were enacted in order to protect against the mischief of interview recordings being misused and widely disseminated. In explaining the need for the amendments, the Minister introducing the Bill said: [footnote omitted]

The offences are necessary, as records of interview often contain a great deal of sensitive information about the circumstances of an alleged offence and the identity and details of persons, including police investigators, suspects, victims and third parties. Clearly, in relation to some offences, there will be graphic or disturbing information that should not be freely disseminated to others who are unconnected with the criminal justice processes.

The bill seeks to preserve the integrity of the process and to protect against personal details and possibly graphic details of offences being made public unnecessarily.

Section 464JA is a counterbalance, designed to protect the interests of the community, without impinging on the human rights of a person having to answer a suspicion or charge that they have engaged in offending behaviour. Where a person must answer an allegation, they have a right to the recording, once any need to answer that allegation has ended, so too does their right to the document.

32. Having had regard to extrinsic material such as the relevant Explanatory Memorandum and parliamentary debates, I am of the view section 464JA aims to strike a balance between the desire to restrict access, use and disclosure of interview recordings, and the need to ensure the fair and proper administration of the criminal justice process. The provision of access, other than in accordance with the scheme set out in Division 30A, would be inconsistent with, and may even potentially undermine, this object.

⁴ For example, the definition of 'serious offenders index' in section 464(2) refers to 'suspects who have been convicted of an offence'; section 464ZG(3)(b) refers to a person (being a suspect upon whom a forensic procedure has been conducted) who has been '...charged but the charge is not proceeded with or the person is found not guilty ...of the offence or any other relevant offence, whether on appeal or otherwise...'; section 464ZG(4) refers to an offender who 'has been pardoned or acquitted of the offence concerned'; section 464K(2)(e) refers to a person who is charged but where the charge is not proceeded with.

⁵ For example, section 464R of the Crimes Act.

33. Second, other provisions in Division 30A specifically and exhaustively deal with the circumstances in which a suspect, or charged person, is to be given a copy of their interview recording.
34. Section 464H(3) requires an investigating official to provide a person interviewed under Division 30A with a copy of their interview recording as soon as practicable after the interview, and at the latest within seven days.⁶
35. Additionally, section 464H(3A) entitles a 'person charged with an offence'⁷ (which I read to mean a person currently charged) to request an additional copy of that recording – for instance, where one is lost or misplaced.⁸ These provisions are clearly designed to facilitate the prompt provision of access to a suspect for use in active criminal proceedings. To interpret the exceptions in sections 464JA(4)(a) and (b) more broadly, would be to do the work of sections 464H(3) and (3A).
36. Third, section 464JB provides a mechanism for obtaining recordings through the court. The court has a discretion to impose conditions when giving directions permitting the supply, or other dealing with respect to an interview recording. The fact the legislature has clearly turned its mind to the potential need for such conditions to give effect to the object of the provisions, and the fact I am unable to similarly impose conditions upon release under the FOI Act, further supports a narrow interpretation of the definition of 'suspect'.
37. Fourth, section 464JA makes it an offence not only to supply, but also to make a copy of or play a recording made in accordance with sections 464B(5H), 464G or 464H of the Crimes Act and attracts a penalty of up to one year imprisonment.
38. If the Applicant were granted access to the recording under the FOI Act, the offences would continue to operate, such that the Applicant could not be able to make use of the recording, without a court order permitting [them] to do so.
39. In my view, the above matters support a narrow interpretation of the definition of 'suspect' in section 464(2) and the exceptions to the secrecy offence in section 464JA(4)(a).
40. Therefore, I am not satisfied any of the exceptions in section 464JA(4)(a) are met in relation to the Applicant. Accordingly, I am satisfied the prohibition on disclosure under section 464JA(4) applies in this instance to the Applicant, and the document is exempt under section 38 of the FOI Act.
41. In light of my decision, it is not necessary for me to consider the other exemption relied on by the Agency, such as section 33(1).

Deletion of exempt or irrelevant information

42. Section 25 requires an agency to grant access to an edited copy of a document if it is practicable to delete exempt or irrelevant information in the document and the applicant agrees to receiving such a copy.
43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ and the effectiveness of the deletions. Where

⁶ The provisions also entitle a person who is later charged to be provided with an audio visual recording of their interview as soon as practicable after being charged (or within 7 days), if they have not already received such a recording.

⁷ Or a legal practitioner representing that person.

⁸ See page 3 of the Explanatory Memorandum to the *Justice Legislation Miscellaneous Amendments Bill 2009*.

⁹ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁰

44. I have considered the effect of deleting exempt information in accordance with section 25. I am satisfied it is not practicable to delete such information as I consider the nature of the prohibition on disclosure under section 464JA(4)(a) of the Crimes Act means the document is exempt under section 38 as a whole.

Conclusion

45. On the information before me, I am satisfied the document is exempt in full under section 38 in conjunction with section 464JA(4)(a) of the Crimes Act.

Review rights

46. 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.¹¹
47. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
49. 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.
50. 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.¹⁴

When this decision takes effect

51. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).