

## Notice of Decision and Reasons for Decision

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Applicant:	'BJ8'
Agency:	Victoria Police
Decision date:	30 March 2020
Exemptions and provisions considered:	Section 25A(5) and 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:	'BJ8' and <i>Victoria Police (Freedom of Information)</i> [2020] VICmr 96 (30 March 2020)

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FREEDOM OF INFORMATION – law enforcement documents – police investigation – police interview – suspect interview – video recording – 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 documents requested by the Applicant under the FOI Act.

I am satisfied the requirements for the application of section 25A(5) are met.

Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's FOI request under section 25A(5).

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

30 March 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - Video recordings of all interviews between [first named police officer] and [named third party] conducted at [specific police complex] on [date] from [time] continued at [times]
  - Video recordings of all interviews between [second named police officer] and [named third party] at [specific police complex] on [date].
2. The Agency relied on section 25A(5) to refuse to grant access to the documents in accordance with the Applicant's request.
3. The Agency determined any documents falling within the terms of the Applicant's request, should they exist, would be exempt from release under section 38 of the FOI Act in conjunction with section 464JA(4) of the *Crimes Act 1958* (Vic) (**Crimes Act**).
4. Accordingly, the Agency refused to grant access to documents in accordance with section 25A(5).
5. The Agency's decision letter sets out the reasons for its decision.

### Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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 and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (a) the Applicant's review application and subsequent information provided by the Applicant or their representative in the course of the review; and
  - (b) information provided by the Agency to OVIC during the review.
9. I acknowledge this is a highly personal and sensitive matter for the Applicant, who seeks information and answers following [description of the offences committed]. The Applicant seeks answers and to know what the offender said during police interviews.
10. I also note, in the course of this review, OVIC staff provided the Applicant (or their representative) with information about the operation of the FOI Act, [redacted], and the application of exemptions, including secrecy provisions, to certain types of information such as police interview recordings. Further general assistance was provided about obtaining access to information from the Agency outside the FOI Act.
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.

### Review of section 25A(5) to refuse to grant access to documents

12. The power under section 25A(5) is carefully circumscribed.<sup>1</sup> I must be satisfied of the following three requirements, which operate to limit its application:
- (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character (**first limb**).
  - (b) Second, it must be apparent from the terms of the request that all documents relevant to the request would be exempt (**second limb**).
  - (c) Third, it must be apparent from:
    - (i) the nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document; or
    - (ii) the request or through consultation with the applicant that the person would not wish to have access to an edited copy of a document<sup>2</sup> (**third limb**).
13. An agency is not required to identify any or all documents to which the request relates or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.

***Is the nature of the documents objectively apparent from the face of the request?***

14. The Applicant seeks access to video recordings of police interviews undertaken with the accused in relation to offences committed against the Applicant's [relationship descriptor]. I am satisfied the nature of the documents is objectively apparent from the specific terms of the request. Accordingly, I am satisfied the first limb of section 25A(5) is met.

***Would all documents, as described in the request, be exempt?***

15. In refusing access to the requested documents under section 25A(5), the Agency determined any documents, should they exist, would be exempt under section 38 of the *Freedom of Information Act 1982* (Vic) in conjunction with section 464JA(4) of the *Crimes Act*. In its decision letter, the Agency stated:

... it is obvious from the terms of your request that any document held by this agency which matches the terms of your request would be exempt from release in accordance with the provisions of section 38 of the Act... and of section 464JA(4) of the *Crimes Act 1958*.

The nominated records of interview were made pursuant to the requirements in section 464B(5H), 464G or 464H of the *Crimes Act 1958*. The dissemination of these recordings is governed by section 464JA of the *Crimes Act 1958*. I consider this to be a secrecy provision for the purposes of section 38 of the FOI Act and accordingly the recordings are exempt from release in accordance with section 38 of that Act.

***Sections 38 of the FOI Act and section 464JA(4) of the Crimes Act***

16. 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.

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<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

<sup>2</sup> *Knight v Corrections Victoria* [2010] VSC 338.

17. Therefore, for a document to be exempt under section 38, three conditions must be satisfied:
  - (a) there must be an enactment in force;
  - (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
  - (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications).
18. In summary, section 464 of the Crimes Act sets out strict procedural requirements for the conduct of investigations by police officers into alleged criminal offences.
19. Section 464JA of the Crimes Act concerns 'offences in relation to recordings'. Section 464JA(1) contains definitions for 'authorised person', 'recording' and 'publish'.
20. In summary, 'authorised person' includes, a police officer, prosecutor, judicial officer and court staff.
21. 'Recording' is defined as 'a recording made in accordance with sections 464B(5H), 464G or 464H'.
22. 'Publish' includes, 'bring to the notice of the public or any member of the public by any other means, including by publication on the Internet'.
23. Sections 464JA(2)-(5) and (7) prescribe:
  - (2) A person must not knowingly possess an audio recording or an audiovisual recording unless the person—
    - (a) is the suspect; or
    - (b) is a legal practitioner representing the suspect; or
    - (c) is an authorised person acting in the performance of his or her duties; or
    - (d) has possession of the recording in a sealed package in the course of his or her duties as a person engaged by a person referred to in paragraph (a), (b) or (c) to transport the recording to that person.Penalty: Level 8 imprisonment (1 year maximum).

**Note**  
The maximum fine that may be imposed on a body corporate found guilty of an offence against this subsection is 600 penalty units: see section 113D of the **Sentencing Act 1991**.
  - (3) A person must not play an audio recording or an audiovisual recording to another person unless—
    - (a) the recording is played for purposes connected with any civil or criminal proceeding and any inquiry before any court or tribunal; or
    - (b) the recording is played for purposes connected with an investigation of a death or a fire or an inquest held by a coroner;
    - (c) the recording is played for purposes connected with disciplinary action against a police officer under the **Victoria Police Act 2013**; or
    - (d) the recording is played for purposes connected with disciplinary action against a legal practitioner; or
    - (e) the recording is played in accordance with the direction of a court under section 464JB; or
    - (f) the recording is played in accordance with section 464JD; or
    - (g) the recording is played by an authorised person acting in the course of his or her duties.Penalty: Level 8 imprisonment (1 year maximum).

**Note**

The maximum fine that may be imposed on a body corporate found guilty of an offence against this subsection is 600 penalty units: see section 113D of the **Sentencing Act 1991**.

- (4) A person must not supply or offer to supply an audio recording or an audiovisual 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.
- Penalty: Level 8 imprisonment (1 year maximum).

**Note**

The maximum fine that may be imposed on a body corporate found guilty of an offence against this subsection is 600 penalty units: see section 113D of the **Sentencing Act 1991**.

- (5) A person, other than an authorised person acting in the performance of his or her duties, must not copy the whole or any part of an audio recording or an audiovisual recording or permit another person to make such a copy, unless the person is acting in accordance with the direction of a court under section 464JB.
- Penalty: Level 8 imprisonment (1 year maximum).

**Note**

The maximum fine that may be imposed on a body corporate found guilty of an offence against this subsection is 600 penalty units: see section 113D of the **Sentencing Act 1991**.

...

- (7) A person must not publish or cause to be published the whole or any part of an audio recording or an audiovisual recording except in accordance with the direction of a court under section 464JB.
- Penalty: Level 7 imprisonment (2 years maximum).

**Note**

The maximum fine that may be imposed on a body corporate found guilty of an offence against this subsection is 1200 penalty units: see section 113D of the **Sentencing Act 1991**.

*Is there an enactment in force?*

24. I am satisfied the Crimes Act is an enactment in force for the purposes of section 38 of the FOI Act.

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

25. I am satisfied any documents that would fall into the terms of the Applicant's request would constitute video recordings of interviews conducted by police officers with the accused person (at that time, 'the suspect') as part of the Agency's investigation into a criminal offence.

*Does the enactment prohibit persons from disclosing the recordings?*

26. It is clear from the operation of the above provisions in section 464JA of the Crimes Act that Parliament intends a 'recording' may only be possessed, played to another person, supplied or copied in strictly limited circumstances<sup>3</sup> and by certain persons<sup>4</sup> only. Further, the high penalties that apply if these provisions are breached further supports Parliament's intention.

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<sup>3</sup> For example, such as a police investigation or court process.

<sup>4</sup> For example, including a police officer, suspect, a suspect's legal practitioner or an 'authorised person' under section 464JA(1) of the Crimes Act.

27. While I am sympathetic to the personal reasons for which the Applicant seeks access to the documents, the Applicant is not an 'authorised person' as referred to in section 464JA(1) of the Crimes Act.
28. Having considered sections 464JA(2) and 464JA(4) of the Crimes Act, I am satisfied these provisions prohibit the Applicant from possessing video recordings of the requested interviews, and prohibit the Agency from providing the Applicant with a copy of these documents. While the FOI Act provides a statutory right for persons seeking access to documents, this right does not override the prohibitions on disclosure under sections 464JA(2) and 464JA(4) of the Crimes Act.
29. Accordingly, the second limb of section 25A(5) is met as I am satisfied that any documents meeting the terms of the Applicant's request would be exempt under section 38 of the FOI Act in conjunction with sections 464JA(2) and (4) of the Crimes Act.

***Is there scope to provide an edited copy of the documents requested?***

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>5</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of an edited copy of a document is not required under section 25.<sup>6</sup>
32. However, having considered the nature of the documents sought and relevant exemption, I am satisfied the Agency would be unable to provide an edited copy of the requested documents as all of the information to which the request relates is exempt by virtue of section 38 of the FOI Act and section 464JA(4) of the Crimes Act.
33. Accordingly, I am satisfied the third limb of section 25A(5) is met.

***Conclusion***

34. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:
  - (a) the exempt nature of the documents is apparent from the Applicant's FOI request, that is, the documents sought would be exempt from release under section 38 of the FOI Act in conjunction with section 464JA(4) of the Crimes Act;
  - (b) all documents sought by the Applicant would be exempt for that reason; and
  - (c) there is no capacity for the Agency to provide an edited copy of the documents in accordance with section 25.
35. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's FOI request under section 25A(5).

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<sup>5</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>6</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].

## **Review rights**

36. 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.<sup>7</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
39. 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.
40. 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>10</sup>

## **When this decision takes effect**

41. 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.

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<sup>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

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

<sup>10</sup> Sections 50(3F) and (3FA).