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## Notice of Decision and Reasons for Decision

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Applicant:	'BX6'
Agency:	Victoria Police
Decision Date:	19 August 2020
Provision and sections considered:	Sections 25A(5), 19, 31(3), 31(4)
Citation:	'BX6' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 226 (19 August 2020)

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FREEDOM OF INFORMATION – police records – law enforcement records – information relating to the Sex Offender Register – State Intelligence Division – Intelligence and Covert Support Command – *Sex Offenders Registration Act 2004* (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.

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

- (a) it is apparent any written document that could be produced by the Agency in accordance with section 19, would be exempt from disclosure under sections 31(3) and 31(4); and
- (b) there is no obligation for the Agency to provide an edited copy of any documents in accordance with section 25.

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

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

19 August 2020

## Reasons for Decision

### Background to review

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

A deidentified list of all applications made to the Chief Commissioner of Victoria Police (or his delegated agent or the responsible unit), acting as a competent authority for the purposes of the *Australian Passports Act 2005* (Cth), under s 271A.1(3)(a) of the *Commonwealth Criminal Code 1995*, for permission for registered sex offenders to travel overseas, since the commencement of the legislative provision on 13 December 2017. I would ask that the list include:

- 1) The date the application was decided,
- 2) The identity of the decision-maker,
- 3) A general (but not specific) description of the reason for travel provided by the applicant (eg 'holiday', 'work', 'study', 'bereavement', 'family emergency', etc.)
- 4) The outcome of the application (permission granted in full, permission granted in part or with conditions, or permission refused),
- 5) Whether the Applicant was provided with reasons, either informally or after making a request under s 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth)

I note that no information can be released that is personal to (or would identify) any person on the Sex Offender Register, due to the operation of ss 63, 64 of the *Sex Offenders Registration Act 2004* (Vic). As such, I am not seeking any identifying information.

2. In its decision, the Agency advised the requested documents would need to be created by the Sex Offenders Registry of the Intelligence and Covert Support Command, and refused access to the documents on grounds '...the relevant documents are exempt in full in accordance with sections 31(3) and 31(4) of the FOI Act'.

### Review

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. As part of its submissions, the Agency advised any documents subject to the request would need to be created by the Intelligence and Covert Support Command under section 19. Therefore, no documents existed at the time of the Applicant's request. As such, I have not examined copies of any documents relevant to the Applicant's request terms.
6. Section 19 provides:

#### Requests involving use of computers etc.

Where—

- (a) a request is duly made to an agency;
- (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and
- (c) the agency could produce a written document containing the information in discrete form by—

- (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
    - (ii) the making of a transcript from a sound recording held in the agency— the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.
7. The phrase ‘document of the agency’ is defined in section 5 to mean a document in the possession of an agency, or in the possession of the agency concerned, as the case requires, whether created in the agency or received in the agency’.
  8. During the course of the review, the Applicant narrowed the scope of the documents to which they seek access to those containing the following:
    1. the total number of applications considered under s 271A.1(3)(a) of the *Commonwealth Criminal Code* since the commencement of the provision on 13 December 2017;
    2. the total number of applications granted in full;
    3. the total number of applications granted in part or on conditions;
    4. the total number of applications refused;
    5. the total number of applications still under assessment; and
    6. the total number of ‘Statements of Reason’ issued under s 13(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in relation to decisions under s 271A.1(3)(a).
  9. OVIC staff put the above revised scope to the Agency, which submitted any document created containing the ‘total number’ of various applications would still be exempt under section 31(3) as the Sex Offenders Registry holds this information. The Applicant was advised of the Agency’s response.
  10. I have considered all communications and submissions received from the parties, including:
    - (a) the Agency’s decision on the FOI request;
    - (b) the Applicant’s submissions, supplementary documents and information provided with the Applicant’s review application; and
    - (c) the Agency’s submission dated [date].
  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 that 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 Agency’s decision and role on review**

13. While I note the Agency relied on the exemptions under sections 31(3) and 31(4) to refuse access to the documents in its decision, it did so without viewing or assessing any documents relevant to the terms of the request.
14. Subsequent to its decision, the Agency further advised no document exists in a discreet form that meets the terms of the Applicant’s request.
15. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency’s original decision

was correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of my decision.

16. In making a fresh decision, I have determined to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).
17. In summary, I consider this is the most appropriate provision in the circumstances given the documents requested do not exist in a discreet form. While a document could be produced by the Agency in accordance with section 19, I am satisfied any such document, would be exempt in full under sections 31(3) and 31(4) as they would need to be created by the Intelligence and Covert Support Command, which holds such information within the Agency. My reasons are set out below.

### **Section 25A(5) – power to refuse to grant access to documents**

18. The power under section 25A(5) is carefully circumscribed.<sup>2</sup> A decision maker 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.
  - (b) Second, it must be apparent all requested documents are exempt.
  - (c) Third, it must be apparent from:
    - (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
    - (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.<sup>3</sup>
19. In relying upon section 25A(5), an agency is not required to identify any or all documents to which a request relates or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.
20. In determining section 25A(5) applies in this matter, I have considered the following three elements.

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

21. The Applicant's request seeks access to a document, or documents, that records travel requests made by sex offenders and the specific circumstances surrounding any such requests.
22. I am satisfied the nature of any such document is objectively apparent from the specific terms of the request.
23. Accordingly, I am satisfied the first requirement of section 25A(5) is met.

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

<sup>2</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

<sup>3</sup> *Knight v Corrections Victoria* [2010] VSC 338.

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

24. In refusing access to the requested documents, the Agency determined any documents would be exempt under sections 31(3) and 31(4) without having identified any documents relevant to the Applicant's request.
25. Section 31(3) states:
- (3) Notwithstanding anything to the contrary in this section, a document is an exempt document if it is a document created by the Bureau of Criminal Intelligence or (whether before or after the commencement of section 22 of the *Terrorism (Community Protection) (Further Amendment) Act 2006*) by the **Intelligence and Covert Support Command** of Victoria Police.
26. Section 31(4) states:
- (4) Despite anything to the contrary in this section, a document is an exempt document if it is a document contained in the Register established and maintained under section 62 of the **Sex Offenders Registration Act 2004**.
27. During the review, and following enquiries made by OVIC staff, the Agency confirmed any documents relating to the Sex Offender Register, as maintained in accordance with section 62 of the *Sex Offenders Registration Act 2004 (Vic)*,<sup>4</sup> would be need to be created by the Intelligence and Covert Support Command, which holds such information within the Agency.
28. In their submission, the Applicant states they have been granted access to similar information in other Australian FOI jurisdictions.
29. The Applicant also states:
- The power given to the Victorian Police Chief Commissioner is unique and unprecedented in a number of senses. *First*, it applies by default to any offender subject to reporting obligations by automatic application of the *Sex Offender Registration Act 2004 (Vic)*, rather than via a consideration of an offender's unique circumstances (unlike, for example, high risk offender or control order regimes). *Second*, the power to impose a restriction on an offender's liberty is given to a statutory officer (the Victorian Police Chief Commissioner – a member of the State Executive) rather than to a judge or magistrate. *Thirdly*, the power for State police commissioners to grant or refuse permission in certain cases is entirely unreviewable (except for via judicial review) – unlike other powers exercised by the Commissioner, no provision is made for review by VCAT or the AAT. *Finally*, the legislative provision provides no explicit criteria to govern the exercise of this power, and the power has therefore been recognised in the courts as broad.
30. I acknowledge the Applicant's interest in obtaining access to the documents requested. While I accept the information has been released or provided to the Applicant in other Australian FOI jurisdictions, I am required to comply with the law as it applies in Victoria.
31. In undertaking my review, I have considered the exceptions that apply to section 31 under section 31(2):
- (2) This section does not apply to any document that is-
- (a) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law;

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<sup>4</sup> Section 62 of the *Register of Sex Offenders of the Sex Offenders Registration Act 2004 (Vic)* provides, the Chief Commissioner of Police is to establish and maintain, or arrange for another entity to establish and maintain, a Register of Sex Offenders, and prescribes the specific types of information the register is to contain in relation to each registrable offender.

- (b) a document revealing the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law;
- (c) a document containing any general outline of the structure of any programme adopted by an agency or investigating breaches of, or enforcing or administering the law;
- (d) a report on the degree of success achieved in any programme adopted by an agency for investigating breaches of, or enforcing or administering, the law;
- (e) a report prepared in the course of routine law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with a particular law other than the criminal law;
- (f) a report on a law enforcement investigation, where the substances of the report has been disclosed to the person who, or the body which, was the subject of the investigation –

if it is in the public interest that access to the document should be granted under this Act.

32. I am satisfied none of the above exceptions apply in this case.

33. Having carefully considered this matter and the relevant legislation, I have determined documents meeting the terms of the Applicant's request would need to be created by the Intelligence and Covert Support Command of Victoria Police from information held on the Sex Offender Register. As such, I am satisfied any such documents would be exempt under sections 31(3) and 31(4).

34. Accordingly, I am satisfied the second requirement of section 25A(5) is met.

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

35. 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.

36. 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 the document is not required under section 25.<sup>6</sup>

37. Having considered the nature of the documents the subject of the Applicant's request, I am satisfied it would not be practicable to provide the Applicant with an edited copy of the documents requested with exempt information deleted as the documents, should any exist, would be exempt under sections 31(3) and 31(4) in full. As such, I am satisfied there would be no obligation for the Agency to provide an edited copy of any documents in accordance with section 25.

38. Accordingly, I am satisfied the third requirement of section 25A(5) is met.

***Conclusion***

39. On the information before me, while the documents requested could be produced by the Agency in accordance with section 19, I am satisfied any such document, would be exempt in full under sections 31(3) and 31(4), as they would be need to be created by the Intelligence and Covert Support Command, which holds such information within the Agency.

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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].

40. I am also satisfied the requirements for the application of section 25A(5) are met, as:
- (a) it is apparent from the terms of the request that any written document, which could be produced by the Agency in accordance with section 19, would be exempt from disclosure under sections 31(3) and 31(4) in full; and
  - (b) there would be no obligation for the Agency to provide an edited copy of any documents in accordance with section 25.
41. Accordingly, having conducted a review, I have determined to refuse to grant access to the documents requested in accordance with the Applicant's request under section 25A(5).
42. The effect of my decision is the Agency is not required to process the Applicant's request.

### **Review rights**

43. 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>
44. 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>
45. 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>
46. 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.
47. 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>

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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).