

Notice of Decision and Reasons for Decision

Applicant:	'DI2'
Agency:	Victoria Police
Decision date:	29 June 2021
Exemption and provisions considered:	Sections 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:	'DI2' and Victoria Police (<i>Freedom of Information</i>) [2021] VICmr 201 (29 June 2021)

FREEDOM OF INFORMATION – law enforcement documents – police investigation – police interview – suspect interview – video recording

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

29 June 2021

Reasons for Decision

Background to review

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

The interview of [Applicant], on the [date] at the [Police Station], with [number of] Police Officers, which turn into [details of number of charges] of varies types. I understand [Agency officer] was either in charge or simpler the document[s] that I am requesting are copy of the recorded interview and copy of the transcript that was given to the Court and or the Victorian Police for their Court documents.

2. The Agency released a complete transcript of the interview outside the FOI Act and relied on section 25A(5) to refuse to grant access to any other documents responsive to 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.
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 section 25A(5) to refuse to grant access to documents

10. The power under section 25A(5) is carefully circumscribed.¹ 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

¹ *Knight v Corrections Victoria* [2010] VSC338 at [37].

- (ii) the request or through consultation with the applicant that the person would not wish to have access to an edited copy of a document² (**third limb**).

11. 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?

12. The Applicant seeks access to a recording of police interviews undertaken with the Applicant in relation to offences committed against the Applicant's [description redacted]. 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?

13. In refusing access to the requested documents under section 25A(5), the Agency determined the documents, should any 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*.

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

14. 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.

15. 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).

Is there an enactment in force?

16. Section 464 of the *Crimes Act* sets out strict procedural requirements for the conduct of investigations by police officers into alleged criminal offences. It proscribes:

- (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.

² *Knight v Corrections Victoria* [2010] VSC338.

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**.

17. 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?

18. 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 Applicant (at that time, 'the suspect') as part of the Agency's investigation into criminal offences.

Does the enactment prohibit persons from disclosing the recording?

19. It is clear from the operation of 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 circumstances³ and by certain persons.⁴ Further, the high penalties that apply if these provisions are breached further supports Parliament's intention.

20. For the purposes of section 464JA(4), the Crimes Act defines the term 'suspect' as follows:

"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;

21. The Agency submits the Applicant is no longer a 'suspect' for the purposes of section 464JA(4) on the basis they were found guilty and served a period of imprisonment for the offences the subject of the investigation.

22. I accept the Agency's submissions the Applicant is not a 'suspect', as required under section 464JA(4) of the Crimes Act, and am satisfied this provision prohibits the Agency from providing the Applicant with a copy of these documents.

23. While the FOI Act provides a statutory right for persons seeking access to documents, this right does not override the prohibitions on disclosure under section 464JA(4) of the Crimes Act.

24. 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 section 464JA(4) of the Crimes Act.

Section 25 – Is there scope to provide an edited copy of the documents requested?

25. 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.

26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where

³ For example, such as a police investigation or court process.

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

⁵ *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 an edited copy of a document is not required under section 25.⁶

27. Having considered the nature of the documents sought, I am satisfied the Agency would be prohibited from providing an edited copy of the requested documents as all 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.
28. Accordingly, I am satisfied the third limb of section 25A(5) is met.

Conclusion

29. 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.
30. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

Review rights

31. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁷
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
33. 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.
34. 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.⁹

⁶ *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].

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

⁸ Section 52(5).

⁹ Sections 50(3F) and (3FA).