

Notice of Decision and Reasons for Decision

Applicant:	'DW3'
Agency:	Racing Victoria Limited
Decision date:	13 January 2022
Exemptions considered:	Sections 33(1) and 38 of the FOI Act in conjunction with section 11(1) of the <i>Surveillance Devices Act 1999</i> (Vic)
Citation:	'DW3' and Racing Victoria Limited (<i>Freedom of Information</i>) [2022] VICmr 1 (13 January 2022)

FREEDOM OF INFORMATION – regulatory documents – thoroughbred horse racing – inspection documents – telephone call – audience recording – *Surveillance Devices Act 1999* (Vic) – secrecy provision – personal affairs information

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 Document 3 is exempt from release under section 38 in conjunction with section 11(1) of the *Surveillance Devices Act 1999* (Vic).

However, I am not satisfied certain information in Document 1 is exempt under section 33(1).

Where it is practicable to provide the Applicant with an edited copy of a document with exempt or irrelevant information deleted in accordance with section 25, access to the document is granted in part. As I have determined it is not practicable to provide the Applicant with an edited copy of Document 3, access to this document is refused in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

13 January 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their initial request to the following documents:
 - documents on [the Applicant's behaviour towards] any persons employed by Racing Victoria:
 - o held by the [named] Department, including [other named departments] of Racing Victoria; and
 - o submissions to Courts, Tribunals and agencies;
 - between the period of [date range]; and
 - where the search can be conducted electronically.
3. The Agency identified five documents falling within the terms of the Applicant's request and granted access to four documents in part and refused access to one document in full under section 38 of the FOI Act in conjunction with section 11(1) of the *Surveillance Devices Act 1999* (Vic) (**SD Act**). The Agency's decision letter sets out the reasons for its decision.

Review application

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.
6. Document 3 was provided to me by the Agency for assessment following the issuing of a notice to produce issued under section 49KB on grounds the Agency considered it was prohibited from providing me with a copy of the document to review due to the secrecy provision in section 11(1) of the SD Act.
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.
10. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and 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 exemptions

Section 38 – Documents to which secrecy provisions apply

11. The Agency relies on section 38 in conjunction with section 11 of the SD Act to refuse access to Document 3.

12. 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.

13. 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; 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?

14. I am satisfied the SD Act is an enactment in force for the purpose of section 38 of the FOI Act.

15. Accordingly, I am satisfied the first condition of section 38 is met.

Does the enactment apply specifically to this kind of information in the document?

16. The Agency relies on section 38 in conjunction with section 11 of the SD Act to refuse access to Document 3.

17. Document 3 is an audio recording of a telephone call between the Applicant and an Agency officer. The purpose of the telephone call was in connection with the Agency's exercise of its regulatory powers under the *Racing Act 1958* (Vic).

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

19. Section 11 of the SD Act provides:

11 Prohibition on communication or publication of private conversations or activities

- (1) Subject to subsection (2), a person must not knowingly communicate or publish a record or report of a private conversation or private activity that has been made as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device.

Penalty: In the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both; In the case of a body corporate, 1200 penalty units.

20. 'Listening device' is defined in section 3 of the SD Act to mean:

... any device capable of being used to overhear, record, monitor or listen to a conversation or words spoken to or by any person in conversation, but does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment and permit that person to hear only sounds ordinarily audible to the human ear

21. I am satisfied a mobile telephone is a listening device for the purposes of section 3 of the SD Act.¹

¹ *Thomas v Nash* (2010) 107 SASR 309, 316 at [37].

22. 'Private conversation' is defined in section 3 of the SD Act to mean:
- a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be heard only by themselves, but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it may be overheard by someone else.
23. In relation to the meaning of 'private conversation', the Agency relies on the decision of the Supreme Court of South Australia (**Supreme Court**) in *Thomas v Nash* and submits:
- ... a 'private conversation' does not mean a 'secret' or 'confidential' conversation, rather it is a conversation that is 'not public'.² Further, a conversation can be private even though the participants are at liberty to tell others about it later.³ Therefore, even where the Applicant expected the Racing Victoria staff member to report the contents of the conversation to other members of Racing Victoria, this does not prevent the exchange from being considered a 'private conversation';
24. I also note the following from the Supreme Court's decision in *Thomas v Nash*, in which it held in relation to a 'private conversation':
- There is no reason to give a narrow meaning to the concept of "private conversation", bearing in mind the objects of the Act. There is no need to trace the precise limits of the concept of a private conversation.⁴
25. I accept the Agency officer recorded their conversation with the Applicant in connection with their professional duties. Therefore, I consider an argument could be made the conversation was not 'private' as the call formed part of the Agency officer's professional obligations on behalf of the Agency. However, I note the Supreme Court in *Sands v State of South Australia* held a police officer carrying out their usual duties could still be engaged in a 'private conversation' for the purposes of the *Listening and Surveillance Devices Act 1972 (SA)*.⁵
26. Therefore, these Supreme Court decisions provide legal precedent for a broad interpretation of 'private conversation' including the meaning of this phrase under the SD Act.
27. Having listened to the recording, I am satisfied the Applicant was not aware the call was being recorded and there is no other information to suggest that either party to the conversation was in a public forum during the call.
28. As the telephone call occurred more than [number of] years ago, I do not have any further information before me regarding the circumstances in which it was recorded, and I accept the Agency's submission it would be difficult for either party to recall the relevant circumstances in which the call was made or received.
29. Based on the information provided by the Agency and the Supreme Court decisions discussed above, I am satisfied the telephone call between the Applicant and the Agency officer constitutes a 'private conversation' for the purposes of section 3 of the SD Act.
30. Therefore, I am satisfied Document 3 is a record of a 'private conversation' that was made as a result of a listening device and is information to which the secrecy provision under section 11(1) of the SD Act applies.
31. Accordingly, I am satisfied the second condition of section 38 is met.

² *Thomas v Nash* (2010) 107 SASR 309, 316 at [37].

³ *Ibid.*

⁴ *Thomas v Nash* [2010] SASC 153; 107 SASR 309.

⁵ *Sands v State of South Australia* [2013] SASC 44 at [700]-[705].

Does the enactment prohibit persons from disclosing the information in the document?

32. Section 11(1) of the SD Act prohibits the communication or publication of the recording of a private conversation and unauthorised disclosure of such information is an offence under the Act.
33. Section 11(1) is subject to exceptions in section 11(2), which permit the communication or publication of recordings in certain limited circumstances.
34. On the information before, I am satisfied none of the exceptions apply in this instance.
35. Accordingly, I am satisfied the third condition of section 38 is met.

Conclusion in relation to section 11(1) of the SD Act

36. I am satisfied section 11(1) of the SD Act is a secrecy provision to which section 38 applies as:
 - (a) the SD Act is an enactment in force;
 - (b) section 11(1) of the SD Act identifies with precision the type of recording to which it applies; and
 - (c) section 11(1) prohibits individuals, including Agency officers from disclosing a recording to which the prohibition on disclosure applies.
37. Accordingly, on the information before me, I am satisfied information in the document is exempt under section 38 of the FOI Act in conjunction with section 11 of the SD Act.

Section 33(1) – Information affecting a third party’s privacy

38. 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’ in the circumstances.

Do the documents contain the personal affairs information of individuals other than the Applicant?

39. Information relating to the ‘personal affairs’ of a person includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.⁶
40. The information exempted from release by the Agency includes the names, position titles, signatures, telephone numbers and email addresses of third parties. I am satisfied this information constitutes ‘personal affairs information’ for the purposes of section 33(1).
41. However, I am not satisfied the date in Document 1 is ‘personal affairs information’ for the purposes of section 33(1), as its disclosure would not identify any person or disclose their address or location.
42. Accordingly, this information is not exempt under section 33(1).

⁶ Section 33(9).

Would the disclosure of the personal affairs information be unreasonable in the circumstances?

43. Determining whether disclosure of personal affairs information would be unreasonable involves balancing the public interest in the disclosure of official information held by a government agency with the interest in protecting an individual's personal privacy in the circumstances.⁷
44. The disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.⁸
45. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.⁹
46. Whether or not an agency officer's personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.¹⁰
47. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances of this matter, I have given consideration to the following factors:¹¹
 - (a) the nature of the personal affairs information;
 - (b) the circumstances in which information was obtained by the Agency;
 - (c) the Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved;
 - (d) whether any public interest would be promoted by the release of the information;
 - (e) whether any individuals to whom the information relates object, or would be likely to object to the release of the information;
 - (f) the likelihood of further disclosure of the information if released;
 - (g) the likelihood disclosure would cause distress or anxiety to individuals it relates to; and
 - (h) whether disclosure of the information or would be reasonably likely to endanger the life or physical safety of any person.
48. The Agency advises it consulted with the relevant third parties regarding their views on disclosure of their personal affairs information, as required under section 33(2B) and provided a summary of their responses for my consideration. I note certain third parties objected to the release of their personal affairs information to the Applicant. Other third parties agreed to the release of their personal affairs information, while some individuals did not respond to consultation. The fact a person does not agree to the disclosure of their personal affairs information is a relevant consideration, but is not a determinative factor.¹²
49. The personal affairs information comprises names and contact details of various Agency officers. Certain information was acquired by the Agency in the course of its Agency officers' usual work duties and responsibilities in carrying out the Agency's functions. In these circumstances, I consider the personal affairs information concerns these individuals in their professional roles rather than in their personal or private capacity.

⁷ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁹ [2008] VSCA 218 at [104].

¹⁰ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

¹¹ *Ibid.*

¹² *Marke v Victoria Police* (2007) 28 VAR 84; [2007] VSC 522 at [45], *Marke v Victoria Police* [2007] VCAT 747 at [22].

50. However, I consider the personal affairs information was obtained by the Agency in a sensitive context, where Agency officers were engaging with the Applicant in the course of their professional duties.
51. The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.¹³
52. The Applicant did not provide a reason why they seek access to the personal affairs information of the third parties. I note the majority of information in the documents was released to the Applicant by the Agency. In my view, disclosure of the remaining personal affairs information would not assist the Applicant in understanding the substance of the documents.
53. Further, I do not consider any public interest would be served by disclosure of the personal affairs information.
54. I am also required under section 33(2A) to consider whether disclosure of the personal affairs information would, or would be reasonably likely, to endanger the life or physical safety of any person. The term 'any person' is broad and extends to any relevant endangerment involving the safety of an applicant, a related third party or any other person. However, I do not consider this to be a relevant factor noting the passage of time since the documents were created.
55. Having weighed up the above factors, on balance, I am satisfied disclosure of the majority of the personal affairs information in the documents would be unreasonable in the circumstances. Accordingly, I am satisfied this information is exempt under section 33(1).
56. However, I am not satisfied it would be unreasonable to disclose the position title of a third party, where this information was released in other documents subject to review. Accordingly, I am not satisfied this information is exempt under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

57. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
58. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
59. Similarly to the Agency, I am satisfied the information in Document 5 is irrelevant and is not relevant to the terms of the Applicant's request.
60. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is practicable to edit certain documents as to do so would not require substantial time and effort, and the edited documents would retain meaning.

¹³ *Victoria Police v Marke* [2008] VSCA 218 at [104].

¹⁴ *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].

¹⁵ *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].

61. However, I am not satisfied it is practicable to edit Document 3, as the remaining document would not retain any meaning.

Conclusion

62. On the information before me, I am satisfied certain information is exempt from release under section 33(1) and section 38 in conjunction with section 11(1) of the SD Act.
63. However, I am not satisfied other information is exempt under section 33(1).
64. Where it is practicable to edit documents to delete exempt and irrelevant information, I have determined to grant access to the documents in part. Where it is not practicable to edit Document 3 to delete exempt information, I have determined to refuse access to the Document in full.

Review rights

65. 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.¹⁶
66. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
67. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
68. 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.
69. 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.¹⁹

Third party review rights

70. As I have determined to release documents that contain information the Agency exempted under section 33(1), if practicable, I am required to notify the relevant third parties who provided the information to the Agency of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.²⁰
71. I am satisfied it is not practicable to notify that individual of their review rights, where this information has been previously released by the Agency in other documents.
72. However, I note it is open to the Agency to notify the relevant third party should it wish to do so.

When this decision takes effect

73. My decision does not take effect until the Agency's relevant 14 day review period expires.
74. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and (3FA).

²⁰ Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number Of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated	Report and Conversation Record	1	Released in part Sections 33(1), 25	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released with the following information deleted as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> All third party names deemed exempt by the Agency. 	<p>Section 33(1): I am satisfied certain information in the document is exempt under section 33(1) for the reasons outlined in the Notice of Decision above.</p> <p>However, I am not satisfied other information is exempt under section 33(1) for the reasons outlined above.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of the document to the Applicant with exempt information deleted in accordance with section 25.</p>
2.	[date]	[Location] Inspection	1	Released in part Sections 33(1), 25	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released with the following information deleted as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> All information exempted from release by the Agency. 	<p>Section 33(1): I am satisfied certain information in the document is exempt under section 33(1) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: See comments for Document 1.</p>

Document No.	Date of Document	Document Description	Number Of Pages	Agency Decision	OVIC Decision	OVIC Comments
3.	[date]	Voice recording of phone call	MP3 3 mins 26 seconds	Refused in full Section 38	Refused in full Section 38	<p>Section 38: For the reasons outlined in the Notice of Decision above, I am satisfied the Document is exempt under section 38 in conjunction with section 11(1) of the SD Act.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>
4.	Undated	Draft Veterinary Report	2	Released in part Sections 33(1), 25	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released with the following information deleted as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> • All information exempted from release by the Agency. 	<p>Section 33(1): See comments for Document 2.</p> <p>Section 25: See comments for Document 1.</p>
5.	[date]	Email	2	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25	Section 33(1): See comments for Document 2.

Document No.	Date of Document	Document Description	Number Of Pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>The document is to be released with the following information deleted as it is exempt under section 33(1):</p> <ul style="list-style-type: none"> • All information exempted from release by the Agency. <p>All information the Agency determined is irrelevant is to remain deleted in accordance with section 25.</p>	<p>Section 25: I am satisfied the information the Agency determined is irrelevant in the document is not relevant to the terms of the Applicant's request.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.</p>