

## Notice of Decision and Reasons for Decision

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Applicant:	'EA2'
Agency:	Victoria Police
Decision date:	21 April 2022
Exemptions and provision considered:	Sections 33(1), 31(1)(d), 25
Citation:	'EA2' and Victoria Police (Freedom of Information) [2022] VICmr 29 (21 April 2022)

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FREEDOM OF INFORMATION – Law Enforcement Assistance Program (LEAP) – law enforcement history – personal affairs information – deceased family member – next of kin – nature of release under the FOI Act

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 a 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 information in the document is exempt from release under sections 31(1)(d) and 33(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is refused in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

21 April 2022

## Reasons for Decision

### Background to review

1. The Applicant made an FOI request to the Agency seeking access to the Law Enforcement Assistance Program (**LEAP**) history report for their deceased [family member]. The Applicant submits their [family member] was the victim of childhood sexual abuse which had a profound and tragic impact on [their] life.
2. The Agency identified one document comprising five pages falling within the terms of the Applicant's request and refused access to the document in full under sections 31(1)(d) and 33(1). The Agency's decision letter sets out the reasons for its decision.

### Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. 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 31(1)(d) – Disclosure would disclose methods for preventing, detecting, investigating breaches of the law***

9. Section 31(1)(d) provides (subject to this section) a document is exempt if its disclosure would, or would be reasonably likely to, 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'.
10. The exemptions in section 31(1)(d) does not apply to widespread and well known methods and procedures.<sup>1</sup>
11. The Agency's decision letter states:

The denied material comprises details of the methods and procedures used by police during preventing or detecting breaches or evasions of the law.
12. The existence of LEAP and the associated database is well known to the wider public with LEAP being referenced by both the Agency, Australian Bureau of Statistics and various published media sources.

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<sup>1</sup> XYZ v Victoria Police [2010] VCAT 255 at [177].

However, I am not satisfied the specific functions, methods and procedures detailed in LEAP are widespread or widely known amongst the public.

13. I am constrained in providing any further description of the deleted information as to do so would disclose information that is the subject of the exemption.
14. However, in general terms, I am satisfied it relates to specific procedures employed by Agency officers when responding to requests for police assistance and relevant police investigations.
15. I have considered the likely effect of disclosing the information the Agency determined is exempt, noting the unrestricted and unconditional nature of release under the FOI Act. I am satisfied disclosure of the relevant information would be reasonably likely to undermine the use by the Agency and effectiveness of these methods and procedures in carrying out its law enforcement functions.
16. Section 31(2) outlines the circumstances in which the exemption under section 31(1) does not apply when there is a public interest to grant access to the document. However, I am not satisfied any of the exceptions set out in section 31(2) apply to the relevant information in the circumstances of this matter.
17. Accordingly, I am satisfied the information exempted in the document by the Agency on pages 1 and 5 is exempt from release under section 31(1)(d).

***Section 33(1) – Documents affecting personal privacy of third parties***

18. The main exemption under which the Agency exempted information in the document is section 33(1).
19. 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;<sup>2</sup> and
  - (b) such disclosure would be ‘unreasonable’.

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

20. Information relating to a person’s ‘personal affairs’ 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.<sup>3</sup>
21. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>4</sup>
22. I have reviewed the document and confirm it contains personal details of the deceased person including their name, past addresses, age and other identifying information.

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<sup>2</sup> Sections 33(1) and (2).

<sup>3</sup> Section 33(9).

<sup>4</sup> *O’Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

*Would disclosure of the personal affairs information be unreasonable?*

23. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
24. In *Victoria Police v Marke*,<sup>5</sup> the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.<sup>6</sup> The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.<sup>7</sup>
25. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

(a) The nature of the personal affairs information

LEAP records, which record a person's history of any interaction with Victoria Police (including as an offender, victim or witness), contain information that is often sensitive and personal in nature, particularly where it relates to a person other than an FOI applicant.

I have reviewed the five page LEAP record and confirm it contains details of any interactions between the Applicant's [family member] and Victoria Police up until their death.

While the document comprises five pages, this is largely due to the format of the document and how information on the LEAP database prints, rather than an extensive list of interactions with Victoria Police.

(b) The circumstances in which the information was obtained

The information was recorded by the Agency in the context of any interactions between Victoria Police and the Applicant's [family member].

Records of this nature are inherently sensitive and personal given their context and purpose. Information contained in a LEAP record may be known to a person's family members or others, but also may not have been disclosed.

(c) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved

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 under section 33(1).<sup>8</sup>

I accept the Applicant is the deceased person's [family member] and is a next of kin, although not a senior next of kin.

As stated above, the Applicant submits their [family member] was a victim of childhood sexual abuse. It is clear from the Applicant's review application and advocacy, they indicate they wish to be able to tell their [family member's] personal story.

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<sup>5</sup> [2008] VSCA 218 at [76].

<sup>6</sup> Ibid.

<sup>7</sup> Ibid at [79].

<sup>8</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

(d) Whether any public interest would be promoted by release of the personal affairs information

As noted above, the Applicant submits there is a public interest in releasing the personal affairs information to enable their [family member's] personal story to be publicly shared.

While I acknowledge the Applicant's interest in obtaining access to the information, I consider disclosure would predominantly serve a personal interest rather than a public interest.

I am of the view there is a public interest in the Agency preserving its ability to record law enforcement information in the LEAP database either through their interactions with persons, such as offenders, victims or witnesses, and through investigations and intelligence sources in carrying out their law enforcement functions.

(e) The likelihood of disclosure of information, if released

The FOI Act does not place any restrictions on an applicant's use or dissemination of a document obtained under FOI.<sup>9</sup>

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the deceased person.

The Applicant states they intend to share their [family member's] story with the wider community to highlight the tragic impact of childhood sexual abuse had on[them].

Accordingly, I am satisfied it is likely the Applicant would further disseminate or make public the sensitive contents of the document if it is disclosed under the FOI Act.

(f) Whether the person to whom the information relates would be likely to object to the disclosure of their personal affairs information

In determining whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for a document containing their personal information and seek their view as to whether its disclosure should occur.<sup>10</sup>

However, this obligation does not arise if:

- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
- (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
- (c) it is not practicable to do so.<sup>11</sup>

Given the LEAP record concerns the Applicant's deceased [family member] in tragic circumstances, the Agency determined it was not practicable to consult with the deceased person's senior next of kin (a living parent).

As noted above, I am satisfied the Applicant is a [family member] of the deceased person based on relevant evidence they provided to OVIC with their review application. However,

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<sup>9</sup> Ibid at [68].

<sup>10</sup> Section 33(2B).

<sup>11</sup> Section 33(2C).

based on the information before me, I am satisfied the Applicant is not the deceased person's senior next of kin. While this is not determinative in giving consideration to this factor, given the sensitive nature of the information in the document, I am not fully satisfied the deceased person's senior next of kin agrees or would agree to disclosure of the sensitive information in the document for the Applicant's stated purpose.

26. Having reviewed the content of the document and considered the sensitive and personal nature of the information contained in the document, which pertains to the Applicant's [family member], I have determined disclosure of the personal affairs information would involve the unreasonable disclosure of deceased person's personal affairs information despite the Applicant's close relationship to their [family member] and the tragic circumstances of their [family member] death.
27. Despite the passage of time since their death and the compassionate and compelling factors arising in this matter, on balance, I have determined to protect the deceased person's personal privacy given the nature and content of the document.
28. Accordingly, I am satisfied certain personal affairs information in the document is exempt under section 33(1).

### ***Section 25 – Deletion of exempt or irrelevant information***

29. 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.
30. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>12</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>13</sup>
31. I have considered the effect of deleting exempt information from the LEAP record. In my view, it is not practicable to delete this information as do so would render any remaining substantive content in the document meaningless.

### **Conclusion**

32. On the information before me, I am satisfied certain personal affairs information of the Applicant's deceased [family member] in the document is exempt from disclosure under sections 31(1)(d) and 33(1).
33. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is refused in full.
34. While I recognise this decision will be likely to disappoint the Applicant, it is not intended to silence or prevent access to information to inform or make public the devastating impact and consequences of sexual abuse committed on children or adult victims and survivors. Rather, it reflects the nature of release of information under the FOI Act that occurs without the ability to impose any conditions or restrictions on its future use or disclosure. In the case of highly personal and sensitive information concerning a third party, including a deceased person, it will often be the case that their continued right to privacy in relation to any information provided to or obtained by Victoria Police in carrying out their law enforcement functions is likely to be unreasonable to disclose under the FOI Act.

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<sup>12</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>13</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

35. 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>14</sup>
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>15</sup>
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>16</sup>
38. 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.
39. 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>17</sup>

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<sup>14</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>15</sup> Section 52(5).

<sup>16</sup> Section 52(9).

<sup>17</sup> Sections 50(3F) and 50(3FA).