

## Notice of Decision and Reasons for Decision

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Applicant:	'DE7'
Agency:	Victoria Police
Decision date:	11 June 2021
Exemptions considered:	Sections 30(1), 33(1), 35(1)(b)
Citation:	'DE7' and Victoria Police (Freedom of Information) [2021] VICmr 170 (11 June 2021)

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FREEDOM OF INFORMATION – police records – police investigation – sexual assault allegations – witness statements – medical records – Law Enforcement Assistance Program (**LEAP**) documents – Interpose investigation report – handwritten notes – section 61B(3)

All reference to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

### Notice of Decision

I conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

On the information before me, I am satisfied the documents are exempt from release under sections 30(1), 33(1) and 35(1)(b).

As it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, I have granted access to the documents in part.

Accordingly, my decision on the documents is the same as the Agency's decision.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

11 June 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to certain documents concerning sexual assault allegations made by the Applicant.
2. Following consultation with the Agency, the Applicant clarified the terms of their initial request to the following documents:

Documents in relation to a sexual assault incident against you [the Applicant] that occurred in [year]:

- (a) Law Enforcement Assistance Program (LEAP Report)
  - (b) Interpose Investigation Report
  - (c) Copy of your own Statement
  - (d) Memo & Briefing notes relating to investigation being not authorised
  - (e) Your photographs contained in the documents
  - (f) Copy of your own medical documents
3. The Agency identified 10 documents, totalling 91 pages, relevant to the Applicants request,<sup>1</sup> and granted access to six documents (totalling 57 pages) in part relying on the exemptions in sections 30(1), 33(1) and 35(1)(b). The Agency also released four documents (totalling 34 pages) outside the provisions of the FOI Act.
  4. The Agency's decision letter sets out the reasons for its decision.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to six documents in part.
6. In consultation with OVIC staff, the Applicant advised they do not seek access to certain information in the documents and this information has not been considered for release. Further advice regarding the documents and scope of the information subject to review is set out in the Schedule of Document in **Annexure 1**.

### *Adequacy of search complaint*

7. After making a review application, the Applicant made a complaint under section 61A(1) regarding the Agency's handling of their FOI request. Specifically, that the Agency did not identify all documents relevant the terms of the Applicant's request.
8. Given the nature of the complaint, it has been dealt with as part of this review in accordance with section 61B(3), which provides the Information Commissioner must dismiss a complaint if the subject matter of the complaint can be dealt with as part of a review conducted under the FOI Act.
9. OVIC staff made inquiries with the Agency regarding the Applicant's adequacy of search concerns. The Agency's response was communicated to the Applicant.

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<sup>1</sup> The Agency decision letter erroneously referenced 15 rather than 10 documents being identified.

10. Following receipt of the Agency's response, the Applicant confirmed with OVIC staff they do not wish to proceed with the complaint further.
11. Having considered the Applicant's and Agency's responses, I am satisfied the concerns have been fully pursued and there is no basis for the making of further inquiries or taking further action in relation to those concerns.
12. I have examined a copy of the documents subject to review.
13. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
14. I have considered all communications received from the parties.
15. 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.
16. 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 35(1)(b)***

17. A document is exempt under section 35(1)(b) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
18. The information exempted by the Agency under section 35(1)(b) includes statements and information provided by third parties to the Agency during a criminal investigation into allegations made by the Applicant relating to an alleged sexual assault committed against the Applicant.

### *Was the information or matter communicated in confidence to the Agency by a third party?*

19. When determining whether information was communicated in confidence to an agency, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>2</sup>
20. A document need not be marked 'confidential' for its content to be considered information communicated in confidence.<sup>3</sup>
21. In *Akers v Victoria Police*,<sup>4</sup> the Victorian Civil and Administrative Tribunal (**VCAT**) noted:

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<sup>2</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>3</sup> *Williams v Victoria Police* [2007] VCAT 1194 at [75].

<sup>4</sup> [2003] VCAT 397 at [35].

... persons who provide statements or other information to the police do so with the expectation that these will only be disclosed to the extent necessary to conduct investigations and deal with criminal charges.

22. In this case, the relevant third parties communicated information to the Agency in the context of a police investigation into the Applicant's report of an alleged criminal offence.
23. In such circumstances, I accept the third parties would have provided information to the Agency with the expectation it would be used for the purpose of the police investigation and any subsequent criminal prosecution only.
24. Further, I consider it is reasonably likely the third parties would not expect the information they provided to police investigators, or their identity, would be disclosed by the Agency under the FOI Act, including to the Applicant.
25. Accordingly, having considered the context in which the information was received, I am satisfied the information was communicated in confidence by the relevant third parties to the Agency.

*Would disclosure be contrary to the public interest in that it would be likely to impair the Agency from receiving similar information in the future?*

26. The exemption also requires I consider whether disclosure would be contrary to the public interest on grounds the Agency would be impaired from obtaining similar information in the future if the information provided to the Agency is disclosed under the FOI Act. This means, I must be satisfied, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.
27. In considering the application of section 35(1)(b), the public interest test is narrow and does not permit me to have regard to matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the documents would be served by being granted access to the information.
28. In my view, Victoria Police relies on members of the public voluntarily providing information to assist a police investigation into alleged criminal conduct and to serve the administration of justice. As stated above, I accept members of the public generally provide information to the Agency with the expectation it will be used for the purpose of a police investigation and any subsequent criminal prosecution only.
29. There is a strong public interest in the Agency maintaining its ability to obtain information from members of the public. If such information were to be routinely released in response to an FOI request, I am of the view the Agency would be impaired from obtaining information of a similar nature in the future.
30. In doing so, I accept the views in *Williams v Victoria Police*<sup>5</sup> and in *RFJ v Victoria Police FOI Division*,<sup>6</sup> where VCAT accepted evidence that persons would be less likely to make statements to Victoria Police if they were of the view the making of such statements would not be kept confidential, subject to subsequent criminal prosecution.
31. Having considered the content of the documents, I am satisfied the public interest lies in the Agency being able to maintain the confidentiality of individuals who provide information and personal accounts during a police investigation. Further, if such information were to be routinely released, I consider it would hinder the ability of law enforcement agencies to investigate and prosecute alleged

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<sup>5</sup> *(General)* [2007] VCAT 1194 at [73].

<sup>6</sup> [2013] VCAT 1267 at [170].

criminal offences and to efficiently and effectively carry out its criminal investigation and law enforcement functions.

32. Accordingly, I am satisfied the information communicated by third parties and exempted by the Agency in accordance with section 35(1)(b) is exempt.

**Section 30(1)**

33. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

34. The exemption does not apply to purely factual material in a document.<sup>7</sup>

*Do the documents contain advice, opinion or recommendation prepared by officers of the Agency made in the course of the deliberative processes of the Agency?*

35. Having examined the documents, I am satisfied they contain the opinion, advice and recommendation of Agency officers. I am also satisfied the opinion, advice and recommendation was provided for a deliberative purpose of the Agency in connection with its criminal investigation and law enforcement functions.

*Would disclosure of the advice, opinion and recommendation be contrary to the public interest?*

36. In its decision, the Agency states 'there is a very strong public interest that officers of an agency have the opportunity to give opinion, advice and recommendation in a frank and candid manner to ensure that the public interest in having proper criminal investigations not impaired'.
37. I am not entirely persuaded by the above submission, as I do not consider release of the type of information in the documents subject to review would necessarily lead to Agency officers not recording their opinion, advice and recommendation in future investigations given their professional duties and obligations as police officers. However, I do acknowledge that the routine disclosure of this type of information would eventually lead to a diminution in the degree of openness, which in turn, may impair the Agency's proper consideration of an investigation and any subsequent deliberations.
38. I have examined the information deleted by the Agency on page 1 of Document 3. I consider it is highly sensitive and was provided for the considerations of Agency officers as to the future management of the investigation. I am satisfied its disclosure would be contrary to the public interest as the deleted information may not accurately reflect the reasons for any decision subsequently taken by the Agency. Further, I consider there is a public interest in maintaining the integrity of police investigative processes, which outweighs the Applicant's personal interest in accessing the information in this instance.

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<sup>7</sup> Section 30(3).

39. Accordingly, I am satisfied the information in the document deleted by the Agency under section 30(1) is exempt from release.

### **Section 33(1)**

40. 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>8</sup> and
- (b) such disclosure would be 'unreasonable'.

#### *Do the documents contain personal affairs information?*

41. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.<sup>9</sup>

42. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.<sup>10</sup>

43. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to identify a third party.<sup>11</sup>

44. The Agency relies on section 33(1) to exempt names, dates of birth, relationship descriptions, addresses, signatures, telephone numbers, position titles and other personal information of individuals other than the Applicant (**third parties**).

45. I am satisfied the exempted information constitutes 'personal affairs information' for the purposes of section 33(1)

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

46. The concept of 'unreasonable disclosure' involves determining whether the public interest in the disclosure of official information is outweighed by the personal interest in privacy.

47. In determining whether disclosure would be unreasonable, I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,<sup>12</sup> in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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'.

48. Further, '[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 to a lesser or greater degree'.<sup>13</sup>

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<sup>8</sup> Sections 33(1) and (2).

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

<sup>10</sup> *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

<sup>11</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].

<sup>12</sup> [2008] VSCA 218 at [76].

<sup>13</sup> [2008] VSCA 218 at [79].

49. In determining whether disclosure of the personal affairs information in the documents would be unreasonable, I have considered the following factors:

(a) The nature of the personal affairs information and the circumstances in which the information was obtained

I am satisfied the personal affairs information in the documents was obtained by the Agency in the context of a police investigation into serious allegations reported by the Applicant to the Agency.

In such circumstances, I consider the personal affairs information of members of third parties recorded in the document is inherently sensitive in nature.

(b) 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 to documents 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.<sup>14</sup>

I accept the Applicant's interest in obtaining the documents in full is for a personal and compelling reason. In the circumstances of this matter, I am not able to determine whether the Applicant's purpose for seeking the information is likely to be achieved.

(c) Whether any public interest would be promoted by release of the information

It is not apparent any public interest would be served by release of the personal affairs information. Rather, given the nature of the information, I am of the view the public interest in this case lies in preserving the privacy of third parties' personal affairs information provided during a police investigation. In this case, I am not satisfied the public interest in transparency outweighs the personal privacy of a third party in this case.

As discussed above, I consider the preparedness of a person or a witness to cooperate with a police investigation will often be dependent on the assumption any information provided will be held in confidence and used for the purpose of the police investigation and any subsequent criminal prosecution only.

(d) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

I have limited information before me as to whether any relevant third party would object to the release of their personal affairs information.

Nonetheless, having considered the nature of the information in the documents and the circumstances in which it was provided to or obtained by the Agency, namely in the context of a police investigation into alleged sexual assault allegations, I am satisfied the third parties would be reasonably likely to object to the release of their personal affairs information in the documents under the FOI Act.

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

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents

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<sup>14</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information if released.

There is no information before me as to whether the Applicant intends to further disclose or disseminate the personal affairs information. In any case, it is relevant that the nature of disclosure of information under the FOI Act is unconditional and unrestricted, which means an applicant is free to do as they please with a document once released under the Act.

- (f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>15</sup>

There is not information before me to suggest this is a relevant factor in this matter.

50. Having considered the above factors, on balance, I am satisfied disclosure of the personal affairs information of the relevant third parties would be unreasonable in the circumstances of this matter.
51. In summary, while I acknowledge the Applicant's genuine and compelling reasons for seeking access to the documents, I have determined to refuse access to the personal affairs information of third parties in the documents due to:
- (a) the sensitive nature of the information to which the Agency refused access, which arises from serious allegations of sexual assault made by the Applicant;
  - (b) the information being provided by third parties to assist a police investigation into the serious allegations made by the Applicant;
  - (c) the information in the document has not been aired or tested in open court;
  - (d) the unconditional and unrestricted nature of disclosure under the FOI Act; and
  - (e) I am of the view the public interest in this case lies in preserving the privacy of third parties' personal affairs information provided during a police investigation.

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

52. 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.
53. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>16</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>17</sup>
54. I have considered information the Agency deleted from the documents as 'not relevant' in accordance with section 25. I agree the employee numbers of the Agency officers who printed the documents performed administrative tasks, falls outside the scope of the Applicant's request and should remain deleted.

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<sup>15</sup> Section 33(2A).

<sup>16</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>17</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].



55. I have considered the effect of providing an edited copy of the documents with the exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so, as editing the documents would take minimal effort and the documents retain meaning.

### **Conclusion**

56. On the information before me, I am satisfied the documents are exempt from release under sections 30(1), 33(1) and 35(1)(b).
57. As it is practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, I have grant access to the documents in part.

### **Review rights**

58. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>18</sup>
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>19</sup>
60. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>20</sup>
61. 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.
62. 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>21</sup>

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<sup>18</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>19</sup> Section 52(5).

<sup>20</sup> Section 52(9).

<sup>21</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents – [Case reference]

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	LEAP Incident Report	12	Released in part Section 33(1)	Not subject to review	The Applicant advised no further information is sought; therefore, this document is not subject to my review.
2.	[date]	Interpose Report	19	Released in part Sections 33(1), 35(1)(b)	Release in part Sections 33(1), 35(1)(b), 25	<p><b>Section 33(1):</b> For the reasons set out in the Notice of Decision above, I am satisfied it would be unreasonable to release the personal affairs information of third parties in the document. Accordingly, I am satisfied this information is exempt under section 33(1).</p> <p><b>Section 35(1)(b):</b> For the reasons set out in the Notice of Decision above, I am satisfied information communicated in confidence by third parties to the Agency is exempt under section 35(1)(b) as I consider its release would impair the ability of the Agency to obtain information of a similar nature in the future.</p> <p><b>Section 25:</b> 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>
3.	Various	Memos and Briefing notes	13	Released in part	Release in part	Section 33(1): See comments for Document 2.

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
				Sections 33(1), 35(1)(b), 30(1)	Sections 30(1), 33(1), 35(1)(b), 25	<p><b>Section 35(1)(b):</b> See comments for Document 2.</p> <p><b>Section 30(1):</b> I am satisfied the information exempted by the Agency is the opinion and advice of an Agency officer. Further, for the reasons set out in the Notice of Decision above, I am satisfied it would be contrary to the public interest to release this information under the FOI Act. Accordingly, I am satisfied the information is exempt under section 30(1).</p> <p><b>Section 25:</b> See comments for Document 2.</p>
4.	Various	Dental record	8	Released in part Section 33(1)	<b>Not subject to review</b>	The Applicant does not seek review of this document.
5.	[date]	Authority to release medical information	3	Released in part Section 33(1)	<b>Release in part</b> Sections 33(1), 25	<p><b>Section 33(1):</b> See comments for Document 2.</p> <p><b>Section 25:</b> See comments for Document 2.</p>
6.	Various	[Hospital name] medical record	2	Released in part Section 33(1)	<b>Not subject to review</b>	The Applicant advised they do not seek a review of this document.
7-10.	[date]	Applicant's statements	34	Released in full outside the FOI Act	<b>Not subject to review</b>	