

Notice of Decision and Reasons for Decision

Applicant:	'ED8'
Agency:	Victoria Police
Decision date:	21 March 2022
Exemption considered:	Section 33(1)
Citation:	'ED8' and Victoria Police (Freedom of Information) [2022] VICmr 61 (21 March 2022)

FREEDOM OF INFORMATION – police records – historical sexual offence – police investigation – offender information – Law Enforcement Assistance Program (LEAP) report – diversion program

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 differs to the Agency's decision in that I have determined to release additional information in the document to the Applicant.

I am otherwise satisfied the information exempted from release by the Agency is exempt under section 33(1).

A copy of the document with the information to be released to the Applicant will be provided to the Agency with this Notice of Decision.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
21 March 2022

Reasons for Decision

Background to review

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

The police report, the outcome, anything relating to report/statements against [named person] [being the offender of historical child sexual offences perpetrated against the Applicant]
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to certain parts of the document under section 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. The Applicant indicated they do not seek the address or contact details of the offender and would be prepared to view the information at their local police station.
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.

Requested documents

9. I have examined a copy of the document subject to review. It is a LEAP report containing information regarding the offender and records limited details of an interview conducted with the offender by police some years after the offending occurred.
10. The Applicant sought further documents from the Agency in relation to the offending. I can see from emails exchanged between the police stations involved and the Agency's FOI Unit that no police day books or diaries were located.
11. The Agency also advised the Applicant in its decision letter that the Prosecution Brief would have been destroyed in accordance with Public Records Office Victoria document standards which provide for the destruction of documents by the Agency after certain periods of time.

Review of exemptions

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

12. 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 (**third party**);¹ and
- (b) such disclosure would be 'unreasonable'.

Does the document contain personal affairs information of third parties?

- 13. 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.²
- 14. 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.³
- 15. The document contains the name, address, date of birth and other identifying information of a third party. It also contains other personal information about them. While I note the Applicant does not seek the address of the third party, I am satisfied the remainder of this information is personal affairs information for the purposes of the FOI Act.

Would disclosure of the personal affairs information be unreasonable?

- 16. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the particular circumstances of a matter.
- 17. In *Victoria Police v Marke*,⁴ 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'.⁵ 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'.⁶
- 18. In its submission the Agency notes:

I can confirm that the offender was dealt with by way of the Magistrates' Court [program]. [redacted]. It would be unreasonable to release personal information which has never been aired in court and remains outside of the public domain.

- 19. In determining whether disclosure of the personal affairs information would be unreasonable in these circumstances, I have considered the following factors:

- (a) The nature of the personal affairs information

The personal affairs information recorded by the Agency in the document concerns the offender and includes brief notes relating to a police interview.

¹ Sections 33(1) and 33(2).

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

⁵ *Ibid.*

⁶ *Ibid* at [79].

I consider this is sensitive personal information of a third party and therefore this factor weighs against disclosure.

(b) The circumstances in which the information was obtained

The information was obtained during a police investigation into allegations made by the Applicant to the Agency in relation to the third party. In these circumstances, I consider the information is sensitive given it involves historical sex offences. While I note the time that has passed since the creation of the record (approximately [number] years), given the nature of the information, I consider it remains sensitive in the context of disclosure under the FOI Act.

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

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).⁷

I have given considerable weight to the Applicant's reasons for seeking access to the document in full as it relates to criminal offences committed against them as a child.

I am unable to determine on the information before me whether the information exempted from release by the Agency would assist the Applicant in understanding the outcome of the police investigation and the subsequent prosecution of the offender.

I consider questions of the usefulness or relevance of information to an applicant can generally be determined by the applicant only, particularly where the information has personal significance for the applicant, as in this matter.

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

I accept the public interest is served in maintaining the privacy of individuals who come into contact with the Agency so it can carry out its investigative and law enforcement functions efficiently and effectively. This includes obtaining information from offenders and witnesses on a voluntary basis.

However, as stated in paragraph 20 above, '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case', and while '[t]he protection of privacy ... is an important right that the FOI Act properly protects ... an individual's privacy can be invaded by a lesser or greater degree'.⁸

Generally, I consider there is a public interest in providing a victim of crime with as much official information as possible regarding a police investigation and outcome where the circumstances permit.

I have considered the factors in paragraph 22 in the circumstances of this matter. This includes that the Applicant is aware of the identity of the third party; the offender has long since completed a [redacted] program and is not subject to further prosecution arising from the same matter; and no other documents exist in relation to the police investigation. As such, I consider there is a public interest in disclosure of information to inform the Applicant about

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁸ *Ibid* at [79].

the police investigation and outcome in relation to a report they made to police about historical sexual offences perpetrated against them in the interests of justice.

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

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released.⁹

Accordingly, I have considered the likelihood of the personal affairs information being further disseminated, if disclosed, and the effects its broader disclosure would have on the privacy of the relevant third party.

I note the Applicant advises they would not publish or make the information publicly known. While I do not doubt the Applicant's sincerity in this regard, once information is released under the FOI Act no restrictions or conditions can be placed on its future use or dissemination.

Given the personal affairs information relates to a third party's police record, I must consider the protection of the third party's privacy in the context of disclosure under the FOI Act. Disclosure of sensitive police information under the FOI Act is different to a court hearing in which an accused person is likely to be named and identified in association with their alleged crime in open court in the interests of open justice. Therefore, the basis of and purpose for disclosure of information differs in these two contexts.

Finally, while I note the Applicant is willing to obtain access to the document by viewing it at a police station rather receiving a copy, this constitutes a form of access under the FOI Act. As such, only information that is not exempt from release under the FOI Act can be disclosed regardless of whether access is provided in the form of a copy of the document or by viewing the document only.

(f) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the 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 disclosure of the document should occur.¹⁰ However, this obligation does not arise in certain circumstances, including if it is not practicable to do so.¹¹

The Agency advised it did not consult with the third party. I agree it would not be practicable to do so given the time that has passed since the creation of the document.

I accept given the circumstances of the matter, the third party would likely object to disclosure of information in the document. While this is a relevant factor, it is not determinative.

(g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹²

In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must consider whether the disclosure of the information would, or would be reasonably likely to, endanger

⁹ Ibid at [68].

¹⁰ Section 33(2B).

¹¹ Section 33(2C).

¹² Section 33(2A).

the life or physical safety of any person.¹³ I do not consider this is a relevant factor in this matter.

20. Having carefully weighed up the above factors, I consider there are a number of factors that weigh against disclosure of information that concerns a third party offender recorded in police documents in circumstances where that information may not have been aired and tested in open court.
21. However, I consider the specific circumstances in this matter are distinguishable in that certain information exempted from release by the Agency regarding the third party is consistent with the usual conduct of a police investigation and an offender who either pleads guilty to or does not otherwise contest some or all charges in court. In any case, I consider the additional information to be disclosed would already be known by or have been provided to the Applicant as the victim/survivor of the offending.
22. Therefore, I have determined the disclosure of additional personal affairs information relating to the third party would not be unreasonable in these particular circumstances and where their name and other identifying details are exempted from release.
23. Further, I am satisfied the document to be released with additional information is unlikely to be further or inappropriately disseminated by the Applicant given its sensitive and personal nature.
24. Accordingly, while I have determined certain information in the document is exempt from release under section 33(1), additional information is to be released to the Applicant.

Section 25 – Deletion of exempt or irrelevant information

25. 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.
26. 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
27. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as it relates to an Agency officer who was not involved in the police matter.
28. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable to delete this information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

29. My decision on the Applicant's request differs to the Agency's decision in that I have determined to release additional information in the document to the Applicant.
30. I am otherwise satisfied the information exempted from release by the Agency is exempt under section 33(1).

¹³ Section 33(2A).

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].

31. A copy of the document with additional information highlighted in yellow to be released to the Applicant will be provided to the Agency with this Notice of Decision.

Other matters

32. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.

33. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹⁶

34. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁷

35. I have decided notifying the relevant third party would be an unnecessary instruction for the following reasons:

- (a) the nature of the information;
- (b) the fact that the matter involving the Applicant is known to the applicant and is therefore not sensitive;
- (c) the third party is not named in the document.

36. On balance, given the unnecessary intrusion into the lives of the individuals whose personal information appears in the document, I am not satisfied it is practicable to notify those individuals of their right of review.

¹⁶ Re Schubert and Department of Premier and Cabinet (2001) 19 VAR 35 at [45].

¹⁷ Coulston v Office of Public Prosecutions Victoria [2010] VCAT 1234 at [42].

Review rights

37. 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.¹⁸
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
40. 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.
41. 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.²¹

When this decision takes effect

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

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

¹⁹ Section 52(5).

²⁰ Section 52(9).

²¹ Sections 50(3F) and 50(3FA).