

## Notice of Decision and Reasons for Decision

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Applicant:	'DF3'
Agency:	Victoria Police
Decision date:	16 June 2021
Exemptions considered:	Section 25A(5) in conjunction with sections 33(1), 38 in conjunction with section 4 of the <i>Judicial Proceedings Reports Act 1958</i> (Vic)
Citation:	'DF3' and Victoria Police ( <i>Freedom of Information</i> ) [2021] VICmr 175 (16 June 2021)

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FREEDOM OF INFORMATION – child sexual assault – report to police – historic assault – next of kin – all documents, should any exist, would be exempt – 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 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 is the same as the Agency's decision.

I am satisfied the requirements for the application of section 25A(5) are met, and I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

16 June 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to [documents relating to the reporting of a sexual assault allegedly committed by a named person against the Applicant's parent when they were a child].

[Specific FOI request terms redacted including contextual information regarding the alleged offending and the historical reporting of it to police]

2. The Agency refused to grant access to the requested documents in accordance with the Applicant's request under section 25A(5) on grounds that all documents, should any exist, would be exempt under section 33(1) and 38 in conjunction with section 4 of the *Judicial Proceedings Reports Act 1958* (Vic) (**JPR Act**). The Agency's decision letter sets out the reasons for its decision.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications received from the parties.
6. 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.
7. 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 section 25A(5) – Requests may be refused in certain circumstances

8. The Agency determined documents falling within the terms of the Applicant's request would be exempt from release under one or more exemptions under the FOI Act. Accordingly, the Agency refused to grant access to documents in accordance with section 25A(5).
9. Section 25A(5) provides that an agency may refuse to grant access to documents in accordance with an FOI request without having identified any or all of the documents if it is apparent from the nature of the request the documents sought would be exempt under the FOI Act, and where deletion of the exempt material would not facilitate release of the documents, or it is clear the applicant does not seek an edited copy of the documents.
10. The power in section 25A(5) is carefully circumscribed. A decision maker must be satisfied of the following three elements, 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.
  - (b) Second, it must be apparent that all the documents in the request are exempt.

- (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
  - ii. The request or through consultation with the applicant that the person would not wish to have access to an edited copy of a document.<sup>1</sup>

***What is the essential character of the documents requested?***

11. The essential quality or character of the documents, as described in the Applicant's request, are documents relating to a report of sexual assault made by the Applicant's [relative] to police.

***Would the documents requested, as described by the Applicant, be exempt?***

12. In refusing access to the requested documents under section 25A(5), the Agency submitted the documents, should any exist, would be exempt under section 33(1) and 38 in conjunction with section 4 of the JPR Act.

***Section 38 – Documents subject to a secrecy provision***

13. A document is exempt under section 38 if:
- (a) there is an enactment in force;
  - (b) that applies specifically to the kind of information in the document; and
  - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

**Is there an enactment in force?**

14. I am satisfied the JPR Act is an enactment in force for the purposes of section 38.

**Does the enactment apply specifically to the kind of information in the documents?**

15. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld in a document.
16. The Agency relies on section 38 of the FOI Act in conjunction with section 4(1A) of the JPR Act, which provides:

**4 Prohibition of reporting of names**

- (1) In this section—

...

**publish** means disseminate or provide access to the public or a section of the public by any means, including by—

- (a) publication in a book, newspaper, magazine or other written publication; or
- (b) broadcast by radio or television; or
- (c) public exhibition; or

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<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338.

- (d) broadcast or electronic communication— other than for a purpose connected with a judicial proceeding;

**sexual offence** means an offence under subdivision (8A), (8B), (8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part I of the Crimes Act 1958 or under any corresponding previous enactment or an attempt to commit any such offence or an assault with intent to commit any such offence.

- (1A) A person who publishes or causes to be published any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence, or an offence where the conduct constituting it consists wholly or partly of taking part, or attempting to take part, in an act of sexual penetration as defined in section 35 of the Crimes Act 1958, is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence is pending in a court.

17. The prohibition in section 4(1A) of the JPR Act includes any particulars ‘likely to lead to the identification’ of the person against whom a sexual offence is alleged to have been committed.
18. The Agency relies on section 38 to exempt from release documents, should any exist, that specifically refer to information of a kind in section 1A of the JPR Act. That is, information that would identify a person against whom a sexual offence is alleged to have been committed.

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

19. Section 4(1A) of the JPR Act prohibits the disclosure of the information requested by the Applicant, as described above.
20. I consider none of the exceptions in section 4 of the JPR Act, including section 4(1B), apply in this case as I understand from the terms of the Applicant’s request that a complaint about the alleged offence was made to police.

Conclusion on the applicability of section 38

21. Having considered the above factors, I am satisfied disclosure of the majority of the documents sought by the Applicant, should any exist, would be exempt under section 38 of the FOI Act in conjunction with section 4(1A) of the JPR Act.

**Section 33(1) – Documents affecting personal privacy**

22. 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?*

23. 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>3</sup>
24. It has also been held information relates to an individual’s personal affairs if it ‘concerns or affects that person as an individual’.<sup>4</sup>

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

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

<sup>4</sup> *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

25. 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>5</sup>
26. The requested documents, should any exist, would contain the personal affairs information of the persons identified by the Applicant in their request and other third parties connected to the allegations and any police investigation into the allegations.

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

27. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy.
28. I have considered the following factors in the circumstances of this matter:

(a) The nature of the personal affairs information

The information in the documents, should any exist, relates to third parties such as the Applicant's [relative] and other individuals.

I consider the Applicant has made the request for access to [their] deceased [parent's] information as their [parent's] next-of-kin and not on behalf of [their parent].

Given the likely content of the information in the requested documents, and the context of the Applicant's request, I consider any such information would be highly sensitive and personal given it would pertain to a report of sexual assault made to police.

Further, there is no information before me to demonstrate the allegations made by the Applicant's [parent] to police resulted in a prosecution and were subject of a court hearing where any relevant evidence against an accused person was aired and tested in court.

(b) The extent to which the information is available to the public

I do not consider the information in the document is available to the public.

I also note the nature of release under the FOI Act is unrestricted and unconditional, which means a person is free to disseminate or make public documents released to them under FOI.

Where requested documents are likely to contain sensitive information regarding allegations of sexual assault made to police, the nature of release under the FOI Act is a relevant and significant factor.

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

The Applicant advises [they] seek access to the information to obtain an understanding of their deceased parent's life and assist the Applicant obtain personal closure. Therefore, I consider access to the requested documents, should any exist, would serve a personal and private interest of the Applicant rather than a broader public interest.

While I note the Applicant's genuine personal interest in seeking access to information about their deceased [parent], I do not consider there is a public interest in the disclosure of the information such that the public interest would be promoted by release of the requested documents.

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<sup>5</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].

- (d) Whether the individuals to whom the information relates would be likely to object to the release of their personal affairs information

Given the nature of the Applicant's request, should any relevant documents exist, I am of the view it is likely certain individuals to whom the requested documents relates, would be reasonably likely to object to the release of their personal affairs information.

While not a determinative factor, in circumstances where allegations made by the Applicant's [parent] to police do not appear to have resulted in a prosecution where any relevant evidence against an accused person could be aired and tested in court, I consider it is highly likely the relevant third parties would object to the release of their personal affairs information in police documents under the FOI Act.

- (e) Whether disclosure of the information would, or would be reasonably like to, endanger the life or physical safety of any person

There is no information before me to suggest this is a relevant factor.

29. In weighing the factors above, I have determined it would be unreasonable to release the personal affairs information in the requested documents, should any exist, on grounds:
- (a) I consider the requested documents, should any exist, would contain highly sensitive and personal information regarding persons other than the Applicant.
  - (b) Despite accepting the Applicant is a next of kin for their deceased [parent], where requested documents are likely to contain sensitive information regarding allegations of sexual assault made to police, the nature of release under the FOI Act is a relevant and significant factor.
  - (c) The nature of release under the FOI Act is unrestricted and unconditional.
  - (d) I am of the view it is likely certain individuals to whom the requested documents relate would be reasonably likely to object to the release of their personal affairs information.
30. I am satisfied the requested documents, should any exist, would contain personal affairs information of third parties that I am satisfied would be unreasonable to disclose in the circumstances, and would be exempt under section 33(1).

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

31. 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.
32. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</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>7</sup>
33. I have considered whether it would not be practicable to provide the Applicant with an edited copy of one or more of the requested documents, should any exist. Given the nature of the documents sought, I am satisfied it would not be practicable to grant access to an edited copy of one or more document as the deletion of any exempt information would remove the substance of information requested by the Applicant and render the documents largely meaningless.

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<sup>6</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>7</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].

34. Accordingly, I am satisfied no obligation would arise under section 25 to provide the Applicant with an edited copy of one or more of the documents.

### **Conclusion**

35. On the information before me, I am satisfied the requirements for the application of section 25A(5) are met.
36. Accordingly, I have refused to grant access to documents in accordance with the Applicant's FOI request on grounds the requested documents, should any exist, would be exempt under sections 33(1), 38 in conjunction with section 4 of the JDPRA Act.
37. Accordingly, my decision on the Applicant's request is the same as the Agency's decision.

### **Review rights**

38. 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>8</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
40. 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.
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.<sup>10</sup>

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<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Sections 50(3F) and (3FA).