

Notice of Decision and Reasons for Decision

Applicant:	'EQ1'
Agency:	Victoria Police
Decision date:	24 June 2022
Exemptions considered:	Sections 33(1), 35(1)(b), 38 in conjunction with section 464JA(4) of the <i>Crimes Act 1958</i> (Vic)
Citation:	'EQ1' and Victoria Police (Freedom of Information) [2022] VICmr 173 (24 June 2022)

FREEDOM OF INFORMATION – law enforcement documents – police documents – witness statements – record of interview – statements – Law Enforcement Assistance Program (LEAP) – preliminary brief – brief head – charge sheet and summons – victim impact statement – Workcover claim

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 is the same as the Agency's decision.

I am satisfied the documents are exempt from release under sections 33(1), 35(1)(b), and 38 in conjunction with section 464JA(4) of the *Crimes Act 1958* (Vic).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to three documents in part and one document 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

24 June 2022

Reasons for Decision

Background to review

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

We request full copies all relevant documents, including but not limited to:

All witness and police statements. Digital colour photographs taken at the accident scene - in .jpeg, .bmp or .tiff format. Full-page colour photographs taken at the accident scene. Any visual recordings of the accident scene, including, but not limited to, CCTV and mobile phone recordings. Digital site survey - including measurements of the accident scene in .dxf format. Full-size collision diagram in both digital and hard-copy format. Day book or diary notes of attending officers, investigating officer's and supervising officers. Patrol duty return document and running sheet of attending officer's, investigating officer's and supervising officers. Briefs of evidence including but not limited to witness statements, charge sheets, summary of charges and exhibit list. Reports completed by attending officer's, investigating officer's and supervising officers. Incident Fact Sheet. Traffic Incident System data. Please note that we are prepared to limit the scope of our request to documents that have not previously been provided to our office or our client by the Victoria Police Accident Records Office.

2. The Agency identified four documents falling within the terms of the Applicant's request and granted access to three documents in part and refused access to one document in full. The Agency relied on the exemptions under sections 33(1), 35(1)(b) and 38 in conjunction with section 464JA(4) of the *Crimes Act 1958* (Vic) (**Crimes Act**) to refuse access to information in the documents. 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 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 and submissions 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 to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 33(1) – Documents affecting personal privacy

8. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI would 'involve' the disclosure of information relating to the personal affairs of a person other than the Applicant (the **third party**);¹ and
 - (b) such disclosure would be unreasonable.

¹ Sections 33(1) and 33(2).

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

9. Information relating to an individual'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 reasonably be determined.²
10. A third party's opinion or observations about another person's conduct can constitute the personal affairs of the third party.³
11. I note the scope of 'personal affairs information' is generally interpreted broadly and can include matters relating to health, private behaviour, home life or personal or family relationships of individuals.⁴
12. The documents subject to review are statements made by third parties, and contain the names of persons other than the Applicant, employee numbers, contact details, job descriptors, positions titles, the third party's recollection of events and other personal information relating to the third parties.
13. I am satisfied such information amounts to personal affairs information for the purpose of section 33(1).

Would disclosure of the personal affairs information be unreasonable?

14. The concept of unreasonable disclosure involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the circumstances.⁵
15. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,⁶ 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'. 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'.⁷
16. In determining whether the release of the personal affairs information would be unreasonable, I have given weight to the following factors:
 - (a) The nature of the personal affairs information

The nature of the personal affairs information is names, addresses and other identifying information, as well as more sensitive information, such as the views and recollections of third parties.
 - (b) The circumstances in which the information was obtained by the Agency

The information was obtained by the Agency during a police investigation. I am of the view third parties, who provided the information, did so on the assumption the information would remain confidential unless required for a subsequent criminal investigation or legal process.

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police* [2008] VCAT 1343 at [43]; *Pritchard v Victoria Police* [2008] VCAT 913 at [24]; *Mrs R v Ballarat Health Services* [2007] VCAT 2397 at [13].

⁴ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁵ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

⁶ [2008] VSCA 218 at [76].

⁷ *Ibid* at [79].

In the circumstances, I am satisfied the third parties would not have unreasonably expected the information they provided to the Agency as part of a police investigation would be disclosed to the Applicant under the FOI Act.

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

On the information before me, I am not satisfied there is a broader public interest that would be promoted by disclosure of the personal affairs information of the third parties.

Rather, I am of the view there is a public interest in the Agency maintaining its ability to receive confidential information on a voluntary basis from third parties and witnesses in order to conduct investigations into alleged breaches or possible breaches of the criminal law. If information of this type were to be routinely disclosed under the FOI Act, I am satisfied it would jeopardise the Agency' ability to carry out its investigative and law enforcement functions.

(d) Whether any individuals to whom the information relates object, or would 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, subject to certain exceptions, an agency must notify an individual that an FOI request has been received for documents containing their personal information and seek their views on disclosure of that information.⁸

I do not have any information before me as to the views of the third parties to whom the information relates.

Having considered the sensitive nature of the information in the documents and the circumstances in which it was obtained by the Agency, I am of the view the individuals concerned would be reasonably likely to object to the release of their personal affairs information under the FOI Act.

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

The information provided to the Agency is not publicly available.

(f) The Applicant's interest in the information

The FOI Act provides a general right of access that can be exercised by 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 reasonable.⁹

The Applicant, through their legal representative, submits:

We require the witness statements in order to investigate our client's WorkCover entitlements arising out of these circumstances ...

To deny our client access to witness statements, when they would have been available to the perpetrator, is unjust on its face. Denial of access to the witness statements also further impedes and delays the efficient investigation and resolution of our client's WorkCover claim.

Accordingly, the Applicant's interest in obtaining access to the documents in full would serve a personal interest.

⁸ Section 33(2B).

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

Having reviewed the documents, I consider their provision to the Applicant would provide them with the opportunity to seek legal advice regarding the merits or otherwise of taking appropriate legal action. However, this is one factor only that I must consider in deciding whether disclosure would be unreasonable.

(g) The likelihood of further disclosure of the 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. Accordingly, I must consider the likelihood and potential effect of further dissemination of a third party's personal affairs information, if released.¹⁰

While there is no information before me to suggest the Applicant intends to widely disseminate the documents, I consider it is reasonably likely the personal privacy of the third parties would be detrimentally impacted should their personal affairs information in the documents be disclosed under the FOI Act.

(h) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹¹

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

17. Having considered the above factors, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable in the circumstances. While I acknowledge the Applicant's concerns and their reasons for requesting the documents, I must give due weight to the factors listed above that in my view outweigh the Applicant's interest in the documents, particularly in relation to the integrity of law enforcement processes.
18. Accordingly, I am satisfied the personal affairs information of third parties in the documents is exempt from release under section 33(1).

Section 35(1)(b) – Documents containing material obtained in confidence

19. 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.
20. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹² Confidentiality may be expressed or implied from the circumstances of the matter.¹³

Was the information or matter communicated in confidence?

21. The Agency relies on section 35(1)(b) to refuse access to one document in part. The document contains witness statements obtained by the Agency as part of a police investigation.

¹⁰ Ibid at [68].

¹¹ Section 33(2A).

¹² *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

¹³ Ibid.

22. There is nothing on the face of the documents to indicate the information was communicated in confidence. However, for the purposes of section 35(1)(b), a document need not be marked 'confidential' for the content to be considered information communicated in confidence¹⁴
23. In *Akers v Victoria Police*,¹⁵ VCAT noted:
- ... 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.
24. As noted above in my consideration of section 33(1), I consider the third parties, who provided information to the Agency as part of the police investigation into a criminal matter, did so with the expectation it would remain confidential unless required for a subsequent criminal investigation or legal process.
25. Accordingly, I am satisfied disclosure of the documents would divulge information communicated to the Agency in confidence.

Will disclosure of the information impair the Agency's ability to obtain similar information in the future?

26. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if information is disclosed under the FOI Act. This means, I must be satisfied, if confidential information in the document 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. The Applicant submits:
- There is no evidence to say that the witnesses requested, or were assured, that their statements would remain confidential. On the contrary, by willingly providing statements, the witnesses would likely have known that the details would be disclosed to others.
- Any witness statements included in the Preliminary Brief would ordinarily need to be provided to the accused after the charge sheet is filed (s 24, *Criminal Procedure Act 2009*). This information can be easily found on government websites (<https://www.victimsofcrime.vic.gov.au/police-investigation/making-a-statement>).
- Furthermore, it is common knowledge that witnesses can be called to give evidence in open court, which would be accessible to the public.
28. The Agency relies on members of the public and officials of other agencies being able to provide confidential information to investigate and resolve criminal matters. There is a strong public interest in the Agency maintaining its ability to obtain information for the purposes of its investigations and any subsequent legal proceedings. While I acknowledge the Applicant's submission that witness statements are often subject to public scrutiny as part of formal criminal proceedings, if this 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.
29. I note the views of VCAT in *Williams v Victoria Police*¹⁶ and more recently in *RFJ v Victoria Police FOI Division*,¹⁷ where evidence was accepted that persons would be less likely to make statements to Victoria Police if they were of the view the making of such statements was not confidential.

¹⁴ *Williams v Victoria Police* [2007] VCAT 1194 at [75].

¹⁵ [2003] VCAT 397 at [35].

¹⁶ [2007] VCAT 1194 at [73].

¹⁷ [2013] VCAT 1267 at [170].

30. Having considered the content of the documents, I am satisfied that the public interest lies in the Agency being able to maintain the confidentiality of individuals who provide witness statements during a police investigation. Further, if such information were to be released, it would hinder the ability of the Victoria Police to investigate alleged criminal offences and carry out its investigation and law enforcement functions.
31. Accordingly, I am satisfied section 35(1)(b) applies to the information in the documents.

Section 38 – Documents to which secrecy provisions of enactments apply

32. The Agency exempted one document under section 38 of the FOI Act in conjunction with section 464JA(4) of the Crimes Act. In doing so, the Agency did not view the document and based its decision on the nature of the document only.
33. The document is an audio or audio-visual recording of an interview conducted by Agency officers with a third party (the **Recording**).
34. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

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.

35. 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 apply specifically to the kind of information contained 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).
36. For section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
37. The Agency relies on section 464JA(4) of the Crimes Act which provides:

Section 464JA Offences in relation to recordings

...

- (4) A person must not supply or offer to supply an audio recording or an audiovisual recording to another person other than –
 - (a) the suspect in relation to whom the recording was made;
 - (b) a legal practitioner representing the suspect;
 - (c) an authorised person acting in the performance of his or her duties;
 - (d) a person engaged by a person referred to in paragraph (a), (b) or (c) to transport the recording.
38. I am satisfied section 464JA(4) of the Crimes Act is an enactment in force that specifically applies to the Recording.

39. Section 464JA(4) of the Crimes Act strictly prohibits persons from supplying audio or audio-visual recordings other than to persons specified in the enactment. I am satisfied the Applicant is not a person to which this provision relates.
40. Therefore, I am satisfied the Agency is prohibited from supplying a copy of the Recording to the Applicant under section 464JA(4) of the Crimes Act.
41. Accordingly, I am satisfied the Recording is exempt under section 38 of the FOI Act in conjunction with section 464JA(4) of the Crimes Act.

Deletion of exempt or irrelevant information

42. 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.
43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁸ 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 25.¹⁹
44. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is practicable to delete the exempt information in Documents 1 to 3, as it would not require substantial time and effort, and the edited documents would retain meaning.
45. However, it is not practicable for the Agency to delete the exempt information in Document 4, as to do so would render the documents meaningless.
46. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Conclusion

47. On the information before me, I am satisfied the documents are exempt from release under sections 33(1), 35(1)(b) and 38.
48. As I am satisfied it is practicable to provide the Applicant with an edited copy of certain documents with exempt information deleted in accordance with section 25, I have determined to refuse access to Document 1 to 3 in part and Document 4 in full.

Review rights

49. If the Applicant to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁰
50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²¹
51. 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.

¹⁸ *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].

¹⁹ *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].

²⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²¹ Section 52(5).

52. 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.²²

When this decision takes effect

53. My decision does not take effect until the relevant review periods expire.
54. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²² Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	LEAP incident report	4	Refuse in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released except for information that is exempt under section 33(1) or irrelevant, which is to be deleted in accordance with section 25, being:</p> <ul style="list-style-type: none"> the redactions made by the Agency in the document. 	<p>Section 33(1): I am satisfied the disclosure of the personal affairs information the Agency determined is exempt under section 33(1) would be unreasonable to disclose for the reasons outlined above in the Notice of Decision.</p> <p>Section 25: 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>
2.	Various	Brief of Evidence	17	Refuse in part Sections 33(1), 35(1)(b)	<p>Release in part Sections 33(1), 35(1)(b), 25</p> <p>The document is to be released except for information that is exempt under section 33(1) or irrelevant, which is to be deleted in accordance with section 25, being:</p> <ul style="list-style-type: none"> the redactions made by the Agency in the document. 	<p>Section 35(1)(b): I am satisfied the information provided by third parties to Agency officers is exempt under section 35(1)(b) for the reasons outlined above in the Notice of Decision.</p> <p>Sections 33(1) and 25: See comments for Document 1 above.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
3.	Various	Victim Impact Statements	9	Refuse in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released except for information that is exempt under section 33(1) or irrelevant, which is to be deleted in accordance with section 25, being:</p> <ul style="list-style-type: none"> the redactions made by the Agency in the document. 	Sections 33(1) and 25: See comments for Document 1 above.
4.	Undated	Record of interview	N/A	Refuse in full Section 38	Refuse in full Section 38	<p>Section 38: I am satisfied the document is exempt from release under section 38 in conjunction with section 464JA(4) of the Crimes Act for the reasons provided in the Notice of Decision.</p> <p>Section 25: I am not 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>