

## Notice of Decision and Reasons for Decision

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Applicant:	'FE5'
Agency:	Victoria Police
Decision date:	25 May 2023
Exemptions considered:	Sections 30(1), 33(1) and 31(1)(d)
Citation:	'FE5' and Victoria Police (Freedom of Information) [2023] VICmr 49 (25 May 2023)

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FREEDOM OF INFORMATION – Police record – Law Enforcement Assistance Program (LEAP) – Person History Report – opinion – personal affairs information – law enforcement document – prejudice proper administration of the law

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 from the Agency's decision. While I am satisfied certain information in the document is exempt from release under sections 33(1) and 31(1)(d), I have determined to release additional information that is not exempt under sections 30(1) and 33(1).

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

My reasons for decision follow.

Joanne Kummrow  
**Public Access Deputy Commissioner**

25 May 2023

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to a complete file concerning the Applicant held by the Agency. The Agency interpreted this to be a request for a Law Enforcement Assistance Program (**LEAP**) Person History Report concerning the Applicant.
2. The Agency identified one document falling within the terms of the Applicant's request and granted access to the document in part under sections 30(1), 33(1) and 31(1)(d). The Agency's decision letter sets out the reasons for its decision.

### Concerns about the adequacy of document searches

3. During the review, the Applicant raised concerns about the adequacy of the Agency's document searches in relation to their FOI request.
4. In accordance with section 61B(3), these concerns were dealt with by this review.
5. OVIC staff made further enquiries with the Agency to address the Applicant's concerns. The outcome of those enquiries was communicated to the Applicant.
6. Based on the Agency's response, I am satisfied the Agency undertook a thorough and diligent search for the requested documents. Accordingly, I consider the Applicant's concerns have been fully pursued and there is no need to make further enquiries or take further action under the FOI Act in relation to those particular concerns.

### Review application

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
8. I have examined a copy of the document subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties. In particular, I have reviewed various submissions made to OVIC by the Applicant.
11. 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.
12. 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 30(1) – Internal working documents***

13. 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.

14. The exemption does not apply to purely factual material in a document.<sup>1</sup>

*Does the document 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?*

15. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.

16. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.<sup>2</sup>

17. The Agency refused access to the opinion of a police member under section 30(1).

*Was the document 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?*

18. The term ‘deliberative process’ is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>3</sup>

19. In *Re Waterford and Department of Treasury (No.2)*,<sup>4</sup> the former Victorian Administrative Appeals Tribunal held:

... “deliberative processes” [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

20. Having reviewed the document and the information before me, I am satisfied the information was recorded by an Agency officer for the purposes of the Agency’s deliberative processes involved in its law enforcement functions.

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Mildenhall v Department of Education* (1998) 14 VAR 87.

<sup>3</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at [208].

<sup>4</sup> [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

*Would disclosure of the document be contrary to the public interest?*

21. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.
22. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>5</sup>
  - (a) the right of every person to gain access to documents under the FOI Act;
  - (b) the degree of sensitivity of the issues discussed in the document and the broader context giving rise to the creation of the document;
  - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
  - (d) whether disclosure of the document would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
  - (e) whether disclosure of the document would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the document; and
  - (f) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.
23. In relation to disclosure of information exempted under section 30(1), the Agency decision letter states:

Part of the denied information contains the personal opinions of the investigator in relation to this incident. I am satisfied that the personal opinions were prepared as part of the deliberative processes associated with police investigations into family incidents.

In my view it would be contrary to the public interest to release this information as members of police must be able to freely communicate their professional opinions and thought processes so as to ensure that these types of incidents are thoroughly investigated and to ensure that decisions made regarding the direction of investigations are subject to proper and thorough deliberation.
24. I recognise the importance of police officers recording their observations or opinions in relation to persons who they interact with, to ensure any future incidents are responded to appropriately. However, on consideration of the content of the document and the circumstances in which the opinion was recorded, I am not satisfied the relevant opinion is exempt from release under section 30(1) for the following reasons:

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<sup>5</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (a) I do not consider its disclosure to the Applicant would have a detrimental impact on any future dealings the Agency may have with the Applicant;
  - (b) I do not consider the opinion to be sensitive in nature;
  - (c) the nature of the opinion is not one in which disclosure would have any material impact on the thoroughness of police investigations or on the Agency's ability to conduct proper and thorough deliberations during its investigations, either concerning the Applicant or the public more broadly; and
  - (d) I do not consider release of the information would inhibit police members from recording similar information in future.
25. Accordingly, I am not satisfied the document contains information that is exempt from release under section 30(1).
26. My decision in relation to section 30(1) is set out in the Schedule of Documents in **Annexure 1**.

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

27. 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 (a **third party**);<sup>6</sup> and
  - (b) such disclosure would be 'unreasonable'.

*Does the document contain personal affairs information of individuals other than the Applicant?*

28. 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 this may be reasonably determined.<sup>7</sup>
29. 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>8</sup>
30. As stated above, the document is a Person History Report concerning the Applicant. Although it concerns the Applicant, it also contains references to third parties, including an address, relationship descriptors and other information that explicitly identifies third parties.
31. Accordingly, I am satisfied the information above constitutes the personal affairs information of third parties for the purposes of section 33(1).

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<sup>6</sup> Sections 33(1) and 33(2).

<sup>7</sup> Section 33(9).

<sup>8</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?*

32. 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.
33. In *Victoria Police v Marke*,<sup>9</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>10</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>11</sup>
34. 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 and the circumstances in which it was obtained by the Agency

The information was recorded by the Agency following an interaction with the Applicant and predominantly concerns the Applicant's background history that is unrelated to any involvement with police.

I do not consider certain historical information relating to the Applicant's relationship with third parties is sensitive in nature, noting the third parties are not victims of an alleged offence.

(b) The Applicant's interest in the information

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>12</sup>

I acknowledge the Applicant's personal interest in obtaining access to the document in full. However, the interest of the Applicant needs to be balanced against the public interest in preserving the right to privacy of third parties.

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

I acknowledge there is a public interest in ensuring transparency in the way in which the Agency carries out its law enforcement functions to ensure police officers and other Agency officers are exercising their significant powers within the boundaries of the law.

Given the nature and circumstances in which the third parties' personal affairs information was obtained by the Agency, I consider there is a public interest in

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<sup>9</sup> [2008] VSCA 218 at [76].

<sup>10</sup> Ibid.

<sup>11</sup> Ibid at [79].

<sup>12</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

protecting the personal privacy of the third parties, considering the context in which their personal affairs information is recorded.

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

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 relevant third parties.

In this matter, there is no information before me to suggest the personal affairs information would be further disseminated by the Applicant.

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

There is no information before me concerning the views of the third parties on disclosure of their personal affairs information, as the Agency determined it was unreasonable to undertake consultation. I accept consultation in these circumstances was not practicable.

Having regard to the circumstances in which the document was created and its content, I am of the view that some third parties would be reasonably likely to object to the release of their personal affairs information in the document under the FOI Act.

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

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 the life or physical safety of any person.<sup>13</sup> However, I do not consider this is a relevant factor in this matter.

35. On balance, I am satisfied most of the personal affairs information in the document is not exempt from release under section 33(1) as disclosure would not be unreasonable in the particular circumstances of this matter.

36. However, I note the Agency refused access to the personal affairs information of a third party relating to unrelated legal proceedings. In my view, disclosure of this information is unreasonable given the context to which it relates.

***Section 31(1)(d) – Law enforcement documents***

37. Section 31(1)(d) provides a document is an exempt document if its disclosure under the FOI Act 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

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<sup>13</sup> Section 33(2A).

the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures’.

38. The exemption in section 31(1)(d) does not apply to widespread and well known investigation methods and procedures.<sup>14</sup>
39. The Agency’s decision letter states:

I am satisfied that some of the information denied comprises details of methods and procedures used by police during the course of investigations. I am satisfied that the release of this information would be reasonably likely to prejudice the future effective use of those methods and procedures, pursuant to the provisions of section 31(1)(d) of the Act.
40. Having reviewed the relevant information, I am satisfied it relates to specific procedures employed by Agency officers when responding to requests for police assistance and relevant police investigations.
41. I am constrained in providing any further description of the deleted information as to do so would likely disclose information that is the subject of the exemption.
42. The existence of LEAP and the associated database is well known to the public with LEAP being referenced by both the Agency, Australian Bureau of Statistics and various published media sources. However, I am not satisfied the functions, methods and procedures associated with LEAP and the associated database are widespread or widely known amongst the public.
43. I have considered the likely effect of disclosing the information the Agency determined is exempt, noting the FOI Act provides for the unrestricted and unconditional release of information. I am satisfied disclosure would be reasonably likely to undermine the use by the Agency and effectiveness of these methods and procedures in carrying out investigations and its law enforcement functions.
44. 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 deleted information.
45. Accordingly, I am satisfied information in the document is exempt from release under section 31(1)(d).

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

46. 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.
47. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>15</sup> and the effectiveness of the deletions.

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<sup>14</sup> XYZ v Victoria Police [2010] VCAT 255 at [177].

<sup>15</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].



Where deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.<sup>16</sup>

48. The Agency deleted the 'USER ID' of an Agency officer who generated the document for the purpose of processing the Applicant's FOI request. I accept it is irrelevant information that is to remain deleted in accordance with section 25.
49. I have considered the effect of deleting irrelevant and exempt information from the document. I am satisfied it is practicable to do so as it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

50. On the information before me, I am satisfied the certain information in the document is exempt from release under sections 33(1) and 31(1)(d). However, I have determined to release additional information that is not exempt under sections 30(1) and 33(1).
51. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.
52. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

### **Review rights**

53. 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>17</sup>
54. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
55. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
56. 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.
57. 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>20</sup>

### **Third party review rights**

58. As I have determined to release personal affairs information to which the Agency refused access under section 33(1), if practicable, I am required to notify any relevant individual of

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<sup>16</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].

<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</sup> Sections 50(3F) and 50(3FA).

their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>21</sup>

59. In the circumstances, I have decided notifying the relevant third parties of their review rights would be an unnecessary intrusion for the following reasons:
- (a) the nature of the information, which was provided by the Applicant to the Agency;
  - (b) the context in which the information was provided; and
  - (c) the record was made in 2014.

***When this decision takes effect***

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

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<sup>21</sup> Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents –

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	LEAP Person History Report	3	Released in part Sections 30(1), 33(1), 31(1)(d)	<p>Release in part Sections 30(1), 33(1), 31(1)(d), 25</p> <p>The information to which the Agency refused access is to remain deleted, except for the following information which is to be released:</p> <p>(a) the information the Agency exempted from release under section 30(1); and</p> <p>(b) the personal affairs information exempted by the Agency in lines 12, 13 and 15 of the [document type] on page 2.</p>	<p><b>Section 30(1):</b> I am not satisfied disclosure of certain information in the document would be contrary to the public interest and is to be released for the reasons outlined in the Notice of Decision.</p> <p><b>Section 33(1):</b> I am satisfied disclosure of certain third party personal affairs information, to which the Agency refused access, would be unreasonable and is exempt from release under section 33(1). However, where certain information is not sensitive in nature, it is not exempt from release under section 33(1) for the reasons outlined in the Notice of Decision.</p> <p><b>Section 31(1)(d):</b> I am satisfied certain information in the document is exempt from release under section 31(1)(d) for the reasons outlined in the Notice of Decision.</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant and exempt information deleted in accordance with section 25.</p>