

Notice of Decision and Reasons for Decision

Applicant:	'FO7'
Agency:	Victoria Police
Decision date:	5 February 2024
Sections and provisions considered:	Sections 31(1)(d), 33(1), and 38 in conjunction with section 4 of the <i>Judicial Proceedings Reports Act 1958</i> (Vic) and section 464JA(4) of the <i>Crimes Act 1958</i> (Vic)
Citation:	'FO7' and Victoria Police (<i>Freedom of Information</i>) [2024] VICmr 20 (5 February 2024)

FREEDOM OF INFORMATION – police records – interview recording – LEAP reports – sexual offences – personal affairs information of a victim – unreasonable disclosure of personal affairs information – disclosure would impair agency's ability to obtain similar information – *Judicial Proceedings Reports Act 1958* (Vic) – JPR Act – *Crimes Act 1958* (Vic) – former suspect – disclosure of methods for preventing, detecting, investigating breaches 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 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 information in the Documents 2 and 3 is exempt from release under sections 31(1)(d), 33(1) and 38 in conjunction with section 4(1A) of the *Judicial Proceedings Reports Act 1958* (Vic) (the **JPR Act**). As it is practicable to provide the Applicant with edited copies of these document with irrelevant and exempt information removed under section 25, access is granted in part.

I am satisfied Document 1 is exempt from release under section 38 in conjunction with section 464JA(4) of the *Crimes Act 1958* (Vic) (the **Crimes Act**) and access to the document is refused in full.

My reasons for decision follow.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

For information about further review rights through the Victorian Civil and Administrative Tribunal, please refer to the end of this decision.

Joanne Kummrow

Acting Information Commissioner

5 February 2024

Reasons for Decision

Background to review

1. The Applicant, who is [description], made several requests to the Agency seeking access to the following documents:
 1. Copy of complete written transcript/ statement/copy of written description of the complete interview regarding various Questions asked by the Police and Answers given by [the Applicant], during the Police Interview made between [named officer 1] ([named] Police Station) and [the Applicant] (DOB: [Date]), on [date] at [named] Police Station, regarding [named party] Case.
 2. Copy of complete Audio recording of Police interview regarding various Questions asked by Police and Answers given by [the Applicant], during the Police Interview made between [named officer 1] ([named] Police Station) and [the Applicant] (DOB: [Date]), on [date] at [named] Police Station, regarding [named party] Case.
 1. Copy of complete written transcript/ statement/copy of written description of the complete interview regarding various Questions asked by the Police and Answers given by [the Applicant], during the Police Interview made between [named officer 2] ([named] Police Station) and [the Applicant] (DOB: [Date]), on [date] at [named] Police Station, regarding [named party] case.
 2. Copy of complete Audio recording of Police interview regarding various Questions asked by Police and Answers given by [the Applicant], during the Police Interview made between [named officer 2],[named] Police Station) and [the Applicant] (DOB: [Date]), on [date] at [named] Police Station, regarding [named party] Case...
2. Given the similarities between the Applicant's requests, the Agency combined them into one request, interpreted that as being for access to Law Enforcement Assistance Program (**LEAP**) reports and audio recordings relating to two records of interview involving the Applicant conducted on [two dates].
3. The Agency identified four documents, comprising 12 pages and one media file, falling within the terms of the Applicant's request. The Agency advised it was unable to locate the second record of interview sought for [date]. The Agency granted access to two LEAP incident reports (**Documents 2 and 3**) in part under sections 31(1)(d), 33(1), and 38 in conjunction with section 4 of the JPR Act and refused access to the record of interview (**Document 1**) in full, under section 38 in conjunction with section 464JA(4) of Crimes Act. The Agency's decision letter sets out the reasons for its decision.
4. To assist, in addition to the documents located within the scope of the Applicant's request terms, the Agency obtained the Applicant's LEAP criminal history report (**Document 4**) which it released in full.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined a copy of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

8. I have considered all communications and submissions received from the parties.
9. I understand the Applicant seeks access to the documents in support of [further court or tribunal proceedings]. The documents relate to criminal offences of which the Applicant was convicted. The Applicant has made multiple FOI requests for access to documents in relation to [their] offending, including seeking access to [specific details about a victim]. [Identifying contextual information redacted]. I note in their submission under this review application, the Applicant further asked OVIC to obtain [further information about a victim]. A recent OVIC review decision was made on this topic on a separate related request, refer [reference number] and this will not be reconsidered here.
10. I accept the Agency's advice about not being able to locate a recording of interview for [date] as sought.
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 and personal interests, privacy and business affairs.

Review of exemptions

Documents subject to a secrecy provision – section 38 of the FOI Act and section 464JA(4) of the Crimes Act

12. The Agency applied section 38 in conjunction with section 464JA(4) of the Crimes Act to refuse access to Document 1, being a record of interview involving the Applicant. While I note the Agency was unable to locate the record for a second interview, I consider the below considerations would also relate to that document, if located.
13. A document is exempt from release under section 38 if the following three requirements are met:
 - (a) there must be an enactment in force;
 - (b) the enactment must be formulated with such precision that it specifies the actual information prohibited from disclosure in the document; and
 - (c) the enactment must prohibit persons referred to in the enactment from disclosing the specific kind of information in the document (either absolutely or subject to exceptions or qualifications).

Is there an enactment in force?

14. I am satisfied the Crimes Act is an enactment in force for the purpose of section 38 of the FOI Act.

Does the enactment apply specifically to the kind of information in the document?

15. For section 38 to apply, the relevant enactment must be formulated with such precision that it specifies the actual information sought to be withheld.¹
16. Section 464JA(4) of the Crimes Act concerns offences in relation to records prescribes:
 - (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.

Penalty: Level 8 imprisonment (1 year maximum).

Note

The maximum fine that may be imposed on a body corporate found guilty of an offence against this subsection is 600 penalty units: see section 113D of the **Sentencing Act 1991**.

17. Based on the Agency's advice, I am satisfied Document 1 is an audio recording of an interview conducted by a police officer with the Applicant (at that time, 'the suspect') as part of the Agency's investigation into a criminal offence or offences.
18. Accordingly, I am satisfied the enactment applies specifically to information that would be contained in Document 1.

Does the enactment prohibit persons from disclosing the recording?

19. It is clear from the operation of section 464JA of the Crimes Act that Parliament intends a 'recording' may only be possessed, played to another person, supplied or copied in strictly limited circumstances² and by certain persons. The high penalties that apply if these provisions are breached further supports Parliament's intention.
20. For the purposes of section 464JA(4), the Crimes Act defines the term 'suspect' in section 464(2) as follows:

suspect means a person of or above the age of 18 years who—

- (a) is suspected of having committed an offence; or
 - (b) has been charged with an offence; or
 - (c) has been summonsed to answer to a charge;
21. I have considered whether the prohibition on disclosure under section 464JA(4) of the Crimes Act does not operate in relation to the Applicant as they were 'the suspect in relation to whom the recording was made', giving rise to the operation of the exception in section 464JA(4)(a).

¹ See *News Corp Ltd v National Competition & Securities Commission* (1984) 1 FCR at 68.

² For example, such as a police investigation or court process.

22. I understand the Agency's position is that the Applicant is no longer a 'suspect' for the purposes of section 464JA(4) of the Crimes Act on the basis the matter has been resolved at court.
23. VCAT considered this issue in *Akers v Victoria Police*,³ which similarly involved section 464JA(4) of the Crimes Act and obtaining audio or audio-visual recordings of records of interview. This decision relevantly considered the definition of 'suspect' in section 464(2) of the Crimes Act, and whether a person, who has been a suspect, would remain a suspect such that the agency would be permitted to supply a copy of the audio-visual record of interview to that person.⁴
24. Taking into account the statutory context of the surrounding provisions and their use of present tense wording, VCAT observed:

A person who is at one point in time a suspect does not remain a suspect indefinitely, and the person will not remain a suspect for the purposes of these FOI Act and related provisions beyond the time at which the person ceases to be a suspect (for instance, because the person has pleaded guilty, the person has served a sentence, and there is no indication other than that 'the file has been closed' on the matters that were the subject of the police interview).⁵

25. Subsequently, once a person is no longer a suspect, section 464JA(4) operates to prohibit that person being provided the document.⁶

Conclusion on the applicability of section 38 in conjunction with section 464JA(4) of the Crimes Act

26. Based on the information above, I am not satisfied the exceptions in section 464JA(4)(a) or (b) are made out in the Applicant's case, where the definition of 'suspect' does not extend to a person who is no longer under suspicion of having committed an offence, or who is no longer charged with a criminal offence or summonsed to answer such a charge.
27. While the FOI Act provides a statutory right for persons seeking access to documents, this right does not override the prohibitions on disclosure under section 464JA(4) of the Crimes Act.
28. I am therefore satisfied Document 3 is exempt in full under section 38 in conjunction with section 464JA(4) of the Crimes Act.

Section 38 of the FOI Act and section 4 of the JPR Act

29. The Agency applied section 38 in conjunction with 4 of the JPR Act to refuse access information as contained in Documents 2 and 3 that would identify victims of sexual assault.

Is there an enactment in force?

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

³ (Review and Regulation) (Corrected) [2022] VCAT 720.

⁴ Ibid at [22].

⁵ Ibid at [50].

⁶ Ibid at [56].

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

31. 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.
32. 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
- (d) broadcast or electronic communication (including but not limited to social media)—
other than for a purpose connected with a judicial proceeding;

...

Sexual offence has the same meaning as it has in section 4 of the *Criminal Procedure Act 2009*.

(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 is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence or offence has commenced, is being conducted or has been finally determined.

Note Other Acts may provide that this subsection does not prevent certain disclosures of information. For example, see Division 6 of Part 9.2 of the Mental Health and Wellbeing Act 2022

(1B) Subsection (1A) does not apply if no complaint about the alleged offence had been made to a police officer.

...

33. 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.
34. It is clear from the Applicant's request and submissions that they are seeking access to documents that would identify a victim of sexual assault.

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

35. Section 4(1A) of the JPR Act prohibits the disclosure of the information requested by the Applicant, as described above.
36. Sections 4(1B) to 4(1BAB) of the JPR Act set out the circumstances where section 4(1A) does not apply, however, I am not satisfied that any of these circumstances apply in this case.

Conclusion on the applicability of section 38 in conjunction with section 4(1A) of the JPR Act

37. Having considered the above factors, I am satisfied disclosure of certain information in the documents would identify the victim or victims of sexual assault and I find this information is exempt from disclosure under section 38 of the FOI Act in conjunction with section 4(1A) of the JPR Act.

Section 33(1) – Documents affecting personal privacy

38. The Agency applied section 33(1) in conjunction with section 38 to certain information in Documents 2 and 3 and section 33(1) only to a small amount of other information in these documents. It is not necessary for me to consider the application of section 33(1) to information I have already determined is exempt from release under a secrecy provision. However, I will consider the application of section 33(1) to the remaining content in Documents 2 and 3.
39. A document is exempt from release under section 33(1) of the FOI Act where its disclosure would 'involve' releasing information relating to the 'personal affairs' of a person other than the Applicant;⁷ (a **third party**) and such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information?

40. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.⁸
41. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.⁹
42. 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.¹⁰
43. I confirm the content the Agency claimed exempt under section 33(1) alone is the personal affairs information of third parties, including about their location, recollection of events and relationships.

Would release of this information be unreasonable?

44. 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.
45. 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;

⁷ Sections 33(1) and 33(2).

⁸ Section 33(9).

⁹ *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

¹⁰ *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].

- (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of disclosure of information, if released;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information;
 - (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person;¹¹ and
 - (h) whether the disclosure would increase the risk to a primary person's safety from family violence.¹²
46. I acknowledge the Applicant's interest in obtaining access to the requested documents in full as they believe the content may assist with further court or tribunal proceedings.
47. However, in weighing the factors above, I have determined disclosure of the personal affairs information would be unreasonable for the following reasons:
- (a) I am of the view the relevant third parties would object to the release of their personal affairs information given the circumstances in which such information was obtained by the Agency.
 - (b) I consider the sensitivity of content in the documents is increased due to the circumstances of this matter where certain third parties were the victims of crimes which have been heard in court.
 - (c) There is no public interest in disclosing documents relating to a victim to the perpetrator of the offence.
 - (d) The nature of release under the FOI Act is unrestricted and unconditional, which means the Applicant could distribute any documents.
48. As such, the personal affairs information of third parties as contained in Documents 2 and 3 is exempt from disclosure under section 33(1).

Section 31(1)(d) – Disclosure of methods for preventing, detecting, investigating breaches of the law

49. The Agency applied section 31(1)(d) to a small amount of information in Documents 2 and 3.
50. Section 31(1)(d) provides a document is exempt if its disclosure 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 the disclosure of which would, or

¹¹ Section 33(2A).

¹² Section 33(2AB).

would be reasonably likely to, prejudice the effectiveness of those methods or procedures'. Section 31(1)(d) is subject to other provisions in section 31.

51. The exemptions in section 31(1) do not apply to widespread and well-known methods and procedures.¹³
52. I am constrained by the information I can provide in this decision in relation to the information refused by the Agency under section 31(1)(d) as to do so may reveal exempt information.
53. However, having reviewed the documents and the small amount of information exempted under section 31(1)(d), I am satisfied disclosure would reveal a method of preventing, detecting or investigating breaches of the law and it is therefore exempt under section 31(1)(d).

Section 25 – Deletion of exempt information

54. 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.
55. 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 an edited copy of a document is not required under section 25.¹⁵
56. I confirm the information the Agency marked as not relevant in the documents is the employee details of the staff member who printed the documents to allow the processing of the request. I agree this content is irrelevant to the Applicant's request terms.
57. In relation to Documents 2 and 3, I am satisfied it remains practicable for the Agency to provide edited copies to the Applicant with irrelevant or exempt information deleted under section 25.
58. In relation to Document 1, I am satisfied the Agency would be prohibited from providing an edited copy of this document as all information is exempt by virtue of section 38 of the FOI Act and section 464JA(4) of the Crimes Act.

Conclusion

59. My decision on the Applicant's request is the same as the Agency's decision. No further information is released to the Applicant.
60. I am satisfied information in the Documents 2 and 3 is exempt from release under sections 31(1)(d), 33(1), and 38 in conjunction with section 4(1A) of the JPR Act. As it is practicable to provide the Applicant with edited copies of these document with irrelevant and exempt information removed, access is granted in part.

¹³ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

¹⁴ *Mickelburgh 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].

61. Document 1 is exempt from release under section 38 of the FOI Act in conjunction with section 464JA(4) of the Crimes Act, and access is refused in full.
62. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Timeframe to seek a review of my decision

63. If they are not satisfied with my decision, the Applicant is entitled to apply to VCAT for it to be reviewed.¹⁶ Such an application must be made within 60 days from the date the Applicant receives this Notice of Decision.¹⁷
64. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted at admin@vcat.vic.gov.au or on 1300 018 228.

¹⁶ Section 50(1)(b).

¹⁷ Section 52(5).

Annexure 1 – Schedule of Documents

Document No.	Date of document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	Record of Interview	N/A	<p>Refused in full</p> <p>Section 38 in conjunction with section 464JA(4) of the Crimes Act</p>	<p>Refuse in full</p> <p>Section 38 in conjunction with section 464JA(4) of the Crimes Act</p>	<p>Section 38: I am satisfied this document is exempt in full from release under the FOI Act by virtue of section 38 in conjunction with section 464JA(4) of the Crimes Act as described above in the Notice of Decision.</p>
2.	[Date]	LEAP Incident Report: [number, date of printing]	4	<p>Released in part</p> <p>Sections 31(1)(d), 33(1), 38 in conjunction with 4 of the JPR Act</p>	<p>Release in part</p> <p>Sections 31(1)(d), 33(1), 25 and 38 in conjunction with 4(1A) of the JPR Act</p> <p>The document is to be released with exempt information deleted in accordance with section 25.</p>	<p>Section 38: I am satisfied information identified by the Agency is exempt from release under the FOI Act by virtue of section 38 in conjunction with section 4(1A) of the JPR Act as described above in the Notice of Decision.</p> <p>Section 33(1): I am satisfied the information identified by the Agency is exempt under section 33(1) for the reasons described above in the Notice of Decision.</p> <p>Section 31(1)(d): I am satisfied the information identified by the Agency is exempt under section 31(1)(d) for the reasons described above in the Notice of Decision.</p> <p>Section 25: The information deemed irrelevant by the Agency is irrelevant to the request. I am satisfied it is practicable</p>

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						to provide the Applicant with an edited copy of this document with irrelevant and exempt information deleted in accordance with section 25.
3.	[Date]	LEAP Incident Report: [number, date of printing]	5	Released in part Sections 31(1)(d), 33(1), 38 in conjunction with 4 of the JPR Act	Release in part Sections 31(1)(d), 33(1), 25 and 38 in conjunction with 4(1A) of the JPR Act The document is to be released with exempt information deleted in accordance with section 25.	Sections 38, 33(1), 31(1)(d), 25: See comments for Document 2.
4.	[Date]	LEAP Criminal Record report, [date of printing]	2	Released in full	Not subject to review	