

Notice of Decision and Reasons for Decision

Applicant: AC5
Agency: Victoria Police
Decision Date: 18 April 2019
Exemptions considered: Sections 31(1)(b), 33(1)

FREEDOM OF INFORMATION –LEAP database extract – Electronic Patrol Duty Return Form – undermine the enforcement of law – prejudice fair trial – unreasonable disclosure of 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 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 in that I have decided to refuse access to the documents 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
Acting Public Access Deputy Commissioner

18 April 2019

Reasons for Decision

Background to review

1. On 4 January 2019, the Applicant made a request to the Agency for information relating to a matter involving members of Victoria Police who attended at the Applicant's rental property on [date] in relation to a reported incident (the **incident**).
2. On 4 January 2019, during a telephone conversation with an Agency FOI staff member, the Applicant agreed to refine the scope of the FOI request to the police report and running sheet in relation to the incident.
3. By letter dated 22 January 2019, the Agency notified the Applicant it had identified two documents falling within the terms of the request. It decided to refuse access to both documents in full.
4. In refusing access to the documents, the Agency relied on sections 31(1)(b) and 33(1) of the FOI Act.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have been briefed by OVIC staff who inspected both documents.¹
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 received from the parties, including:
 - (a) the Agency's decision dated 22 January 2019, and
 - (b) the Applicant's request for review dated 14 February 2019.
9. 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.

Review of exemptions

10. The Agency relied on the exemptions in sections 31(1)(b) and 33(1) to refuse access to the documents in full. The Agency's decision letter sets out the reasons for its decision.

Section 31(1)(b) – Law enforcement documents

11. Section 31(1)(b) provides that a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case.
12. The exemption in section 31(1)(b) can apply in relation to current as well as contemplated legal proceedings.

¹Section 63D provides documents claimed to be exempt under section 31(1) may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

Would disclosure prejudice, or be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case?

13. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.² The words 'reasonably likely' require a consideration of what may happen if the documents are released to this applicant.³
14. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴
15. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁵
16. It is well established that it is in the interests of the administration of justice that legal matters, being impartially adjudicated by a court, should not be prejudiced, and a party to a proceeding has a right to a fair trial. These important protections underpin the Australian legal system and are reflected in section 31(1)(b).
17. The documents concern police attendance at the Applicant's rental property at the incident. The Applicant is the property landlord.
18. Document 1 is a LEAP database extract which includes details of the incident including the date, time, narrative and persons involved. The report was submitted to the LEAP database by a police member who responded to the incident.
19. Document 2 is an Electronic Patrol Duty Return Form. It records the jobs police members attended during a shift. It includes particulars of the jobs attended, including LEAP searches conducted, police units in attendance, descriptions of incidents and alerts or warnings about the job or any persons present.
20. I place significant weight on the Agency's submission the incident is currently the subject of a legal proceeding which is currently before the courts, and has been adjourned to a date to be fixed.
21. In light of the nature and content of the documents and the current legal proceeding which is before the courts, I am satisfied release of the documents to the Applicant under FOI, which provides for the unrestricted and unconditional disclosure of information to an applicant, would be reasonably likely to undermine the enforcement of law and prejudice the fair trial of an accused person.

Section 33(1) – personal affairs information

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;⁶ and
 - (b) such disclosure would be 'unreasonable'.

² *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

³ *JCL v Victoria Police (General)* [2012] VCAT 1060 at [39].

⁴ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁵ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁶ Sections 33(1) and (2).

Do the documents contain personal affairs information?

23. Information will relate to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.⁷ It has also been held that information will relate to a person's personal affairs if it 'concerns or affects that person as an individual'.⁸
24. The Victorian Civil and Administrative Tribunal (**VCAT**) has accepted that a document will disclose personal affairs information if the document is capable, either directly or indirectly, of identifying a particular individual whose personal affairs are disclosed. As stated above, as disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁹
25. Documents 1 and 2 contain the names, addresses, vehicle registration numbers, telephone numbers and other personal affairs information of an accused person, investigating officers and a third party.
26. I am satisfied the information in the documents relates to the personal affairs of individuals other than the Applicant.

Would disclosure involve the unreasonable disclosure of personal affairs information?

27. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
28. I have determined disclosure of the personal affairs information contained in the requested documents would be unreasonable for the following reasons:

(a) The nature of the personal affairs information

The personal affairs information relates to the Agency's investigation into allegations of criminal behaviour and is therefore sensitive. The fact that a legal proceeding is currently before the courts increases the sensitivity of the information.

(b) The circumstances in which the information was obtained

The information in the documents was obtained by the Agency in the context of undertaking a criminal investigation and in any resultant legal proceeding.

(c) The Applicant's interest in the information, including their purpose for seeking access to the documents

The Applicant seeks access to the information to assist her in evicting a person from her rental property.

I acknowledge the Applicant's personal interest in the documents. However, the interest of the Applicant needs to be balanced against the greater public interest in preserving the right of an accused person to a fair trial.

⁷ Section 33(9).

⁸ *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

⁹ *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 objects, or would be likely to object to the release of the information

There is no information before me to suggest the Agency consulted with the individuals to whom the personal affairs information relates. However, given the nature of the information and the circumstances in which it was obtained, I am of the view the individuals whose personal information is contained in the documents would be likely to object to the release of that information.

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

I have considered the Applicant's expressed frustrations and agitation over the allegations made against the accused and her indication that she would contact the media if she were to be unsuccessful in having the accused evicted. These factors suggest an increased likelihood of dissemination of the information if it were released to the Applicant. This is a significant factor given the current legal proceeding before the courts.

- (f) Information that is already known

I have considered the Applicant's communications with OVIC staff during which the Applicant advised of the information already known to her about the nature of the allegations made against the accused. Regardless of what information the Applicant may already hold, I do not consider this factor to support disclosure.

Deletion of exempt or irrelevant information

29. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
30. Determining what is 'practicable' requires consideration of the effort involved in making the deletions 'from a resources point of view'¹⁰ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹¹
31. I am satisfied all but nine rows of information contained in Document 2 fall outside the scope of the Applicant's request. The content is irrelevant as it relates entirely to other persons and to matters unrelated to the incident described by the Applicant in her request.
32. I consider it would be not be practicable for the Agency to provide access to edited copies of the remainder of the documents requested. I am satisfied deletion of exempt material would render information in the documents meaningless.
33. Accordingly, I am satisfied there is no scope for the Agency to provide an edited copy of the documents requested in accordance with section 25.

¹⁰ *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].

¹¹ *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].

Conclusion

34. On the information available, I am satisfied the exemptions in sections 31(1)(b) and 33(1) apply to the documents. I have decided to refuse access to both of the documents in full.

Review rights

35. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
38. 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.
39. 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.¹⁵

When this decision takes effect

40. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).

Annexure 1 –Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
1.	[Date]	LEAP Incident Report	8	Refused in full Sections 31(1)(b), 33(1)	Refused in full Sections 33(1)(b), 33(1)
2.	[Date range]	Electronic Patrol Duty Return Form	14	Refused in full Sections 31(1)(b), 33	Refused in full and parts of the document are irrelevant to the Applicant's request Section 31(1)(b), 33(1), 25