

Notice of Decision and Reasons for Decision

Applicant:	AB5
Agency:	Victoria Police
Decision Date:	26 March 2019
Exemptions considered:	Sections 25A(5), 33(1)
Citation:	'AB5' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 14 (26 March 2019)

FREEDOM OF INFORMATION – criminal history – criminal investigations – unreasonable disclosure - personal information – information requested for a professional publication

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 to grant access to the documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

26 March 2019

Reasons for Decision

Background to review

1. On 25 January 2019, the Applicant made a request to the Agency for access to the following documents:

... record documents of [deceased person], [redacted] who was murdered by [named person] in [year]. [Named person] was convicted of [the deceased]'s murder in [year]. I am seeking information about [the deceased]'s history which Victoria Police mat [sic] have on file – any investigations, convictions, etc.
2. The Applicant subsequently advised the Agency that [they] [redacted] seek the information for a [professional publication] [they are] writing.
3. By letter dated 13 February 2019, the Agency notified the Applicant of its decision to refuse to process the request in accordance with section 25A(5).
4. In denying access to the documents under the provisions of section 25A(5), the Agency claimed the documents would be exempt under section 33(1).

Review

5. By email dated 21 February 2019, the Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse to process [their] request.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (b) the Applicant's review application.
8. The Applicant indicated [the purpose of the request] and stated [they] 'sought documents relating to the deceased's history with Victoria Police and investigations or convictions... information from the time [they] left school in Year 11 up until [their] death'.
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 application of section 25A(5) to refuse to grant access to documents

10. The Agency claimed documents falling within the terms of the Applicant's request would be exempt under the FOI Act.
11. Section 25A(5) provides that an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request the documents would be exempt under the FOI Act and where removal of the exempt material would not facilitate release of the documents, or where it is clear the Applicant does not seek an edited copy of the documents.

12. The power in section 25A(5) is carefully circumscribed. A decision maker must be satisfied of three elements, which limit its application to a limited category of cases:
- (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent that all of the documents in the request are exempt.
 - (c) Third, it must be apparent from:
 - i. the nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document; or
 - ii. the request or through consultation with the applicant that the person would not wish to have access to an edited copy of a document.¹

What is the essential character of the documents requested?

13. It is apparent the essential quality or character of the documents as described in the Applicant's request, are documents relating to the deceased's history with Victoria Police, including investigations and convictions.

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

14. In refusing access to the requested documents under section 25A(5), the Agency submitted that any documents would be exempt under section 33(1).

Application of section 33(1)

15. 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;² and
 - (b) such disclosure would be 'unreasonable'.

Would the documents contain personal affairs information?

16. Information relating to the 'personal affairs' of a person includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.³
17. 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.
18. Information that relates to an individual's personal affairs is information that 'concerns or affects that person as an individual'.⁴

¹ *Knight v Corrections Victoria* [2010] VSC 338.

² Sections 33(1) and (2).

³ Section 33(9).

⁴ *Hanson v Department of Education & Training* [2007] VCAT 123.

19. I am satisfied the documents requested would contain the personal affairs information of individuals other than the Applicant, such as names, addresses, personal relationships and allegations of criminal conduct.

Would disclosure involve the unreasonable disclosure of personal affairs information?

20. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy.

21. I consider the following matters are relevant in the particular circumstances of this case:

- (a) the nature of the personal affairs information, for example, whether it is sensitive or its current relevance;
- (b) the circumstances in which the information was obtained, for example, whether it was obtained involuntarily or in confidence;
- (c) the Applicant's interest in the information, including the purpose for seeking access to the documents;
- (d) whether any public interest would be promoted by releasing the personal affairs information;
- (e) whether the individuals to whom the information relates object to the release of the information; and
- (f) the likelihood of further disclosure of the information, if released.

22. In summary, I have determined that disclosure of the personal affairs information that would be contained in the requested documents would be unreasonable for the following reasons:

- (a) The nature of the information to be disclosed:

The information sought relates to the deceased person's convictions, prior involvements with Police and investigations conducted by Police in relation to the deceased.

I consider the documents that would fall within the scope of the Applicant's request would likely include documents from police investigation files, documents concerning allegations of criminal behaviour, the deceased's criminal history and documents containing the names and contact details of witnesses, police informants and associations of the deceased. I am satisfied the information contained in the documents requested would be of a highly sensitive and personal nature.

- (b) The circumstances in which the information was obtained:

I note from the Applicant's request, the information in the documents would have been obtained by the Agency in the context of investigating criminal offences.

(c) The Applicant's interest in the information being disclosed:

In [their] application for review, the Applicant stated –

I am [redacted] writing a [professional publication].

...

The biographical information I have includes birth, adoption, schooling and death. I also have some information from [the deceased's] late mother and father, dating back to [date]. In order to write a balanced account, I require information from the time [the deceased] left school in Year 11 up until [their] death. I know some of this but I need documentation to ensure that what is written about [the deceased] is accurate.

The Applicant has not provided a [summary] of the [proposed publication] or provided information with respect to the [publication's] purpose or focus.

I am not satisfied the Applicant's interest in the information supports disclosure.

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

The Applicant has not provided a [summary] of the proposed [publication], or provided information with respect to the [publication's] purpose or focus.

It is not apparent any public interest would be served by release of the information to the Applicant. On the contrary, I am of the view the public interest, in this case, lies in preserving the privacy of the deceased individual or other third parties who would be contained in the relevant documents.

(e) Whether the individuals whose personal affairs information are included in the documents would be likely to object to the release of that information:

The documents would contain significant personal affairs information of the deceased. The documents would also contain personal affairs information of the deceased person's associations (such as family, friends, acquaintances) and the personal affairs information of investigating officers, witnesses and informants.

I note the Agency determined it was impracticable to consult with the deceased person's next of kin, citing the lapse of time since [their] death and the absence of readily available information regarding the deceased's next of kin.

In light of the sensitive nature of the documents requested and the circumstances in which the Agency obtained the information, I am satisfied the deceased and other third parties would be reasonably likely to object to the release of their personal affairs information.

(f) The likelihood of further disclosure of the information, if released:

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the third parties' personal affairs information if released.

Given the Applicant's stated interest in obtaining the information and [their] occupation [redacted], I am satisfied there is a real likelihood of further dissemination of the personal affairs information.

23. For the reasons set out above, I am satisfied any relevant documents would be exempt under section 33(1).

Is there scope to provide an edited copy of the documents requested?

24. Section 25 requires an agency to grant access to an edited copy of a document containing exempt or irrelevant information if it is practicable for the agency or Minister to delete that information, and if the applicant is agreeable to receiving such a copy.
25. Determining what is 'practicable' requires consideration of the effort involved in making the deletions 'from a resources point of view',⁵ and the effectiveness of the deletions – that is, whether editing the document would render it meaningless.⁶
26. In this instance, I consider it would be impracticable to provide access to edited copies of the documents requested, should they exist. Considering the purpose of the Applicant's request as specified in [their] application for review, I am satisfied deletion of exempt material would render information in the documents meaningless to the Applicant.
27. Accordingly, I am satisfied there is no scope for the Agency to provide an edited copy of the documents requested.

Conclusion

28. On the information available, I am satisfied the requirements for the application of section 25A(5) are met and the Applicant's request should be refused under section 25A(5).

Review rights

29. 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.⁷
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
32. 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.
33. 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.¹⁰

When this decision takes effect

34. 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.

⁵ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 [82].

⁶ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).