

Notice of Decision and Reasons for Decision

Applicant:	AE2
Agency:	Victoria Police
Decision Date:	24 May 2019
Exemptions considered:	Sections 31(1)(a), 33(1)
Citation:	'AE2' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 38 (24 May 2019)

FREEDOM OF INFORMATION – LEAP report – personal affairs information – law enforcement – unsolved police investigation – prejudice investigation

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 release the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

24 May 2019

Reasons for Decision

Background to review

1. On 5 February 2019, the Applicant made a request to the Agency for access to a copy of the investigation report in relation to an incident at their residence.
2. By letter dated 5 March 2019, the Agency notified the Applicant it had identified one document (the **Document**) falling within the terms of the Applicant's request. It decided to release the Document in part.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access in part.
4. I have been briefed by OVIC staff who inspected the Document.¹
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated 5 March 2019; and
 - (b) the Applicant's review application.
7. 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

8. The Agency relied on the exemptions under sections 31(1)(a) and 33(1) to refuse access to parts of the Document. The Agency's decision letter sets out the reasons for its decision.

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

9. Section 31(1)(a) provides:
 - (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —
 - (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance.
10. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.² 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³

¹ Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

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

11. In relation to an investigation, a document is exempt under section 31(1)(a) if two elements are satisfied:
 - (a) there is a specific investigation of a breach or possible breach of the law; and
 - (b) the document was prepared in the course of or for the purpose of that investigation, and release of the document would be reasonably likely to prejudice that investigation.⁴
12. In its decision letter, the Agency stated the Document ‘contains details of the incident and the subsequent police investigation including details of evidence gathered by police’. The Agency further stated the investigation is unsolved.
13. Having been briefed by OVIC staff on the content of the Document, I accept the Document relates to an investigation of a breach or possible breach of the law.
14. I note the FOI Act does not impose any conditions or restrictions on an applicant’s use or further dissemination of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the information in the Document.
15. As there remains a possibility the investigation may be reopened, the information currently held by the Agency about the investigation may become important in the future. For example, it may need to be relied upon as evidence in any potential prosecution relating to the incident.
16. I agree with the views expressed by the Victorian Civil and Administrative Tribunal (**VCAT**), which accepted the following evidence of the Agency provided at a hearing:

The identified prejudice includes:

 - If the documents became known to a person who was responsible for the offence, that person would know the information that the police have obtained. It would make clear what was known to the police and also what evidence, if any, has not yet been uncovered. A person or persons could use that information to avoid being connected with the crime;
 - Even seemingly innocuous information could be extremely useful to an offender as that person could modify his or her behaviour to prepare an explanation or alibi in the event they were ever asked about their involvement;
 - If an offender or any member of the community had access to information collected during an investigation, the offender would know what evidence a witness could give before a formal interview has been conducted;
 - Release of documents could reveal evidence that could be used in laying charges and subsequent prosecutions, prior to the offender being interviewed and charged.⁵
17. In my view, releasing the Document would risk contaminating any future statements or information that any individual potentially connected with the investigation may provide to Victoria Police. I consider disclosure of the information in the Document would be reasonably likely to prejudice the investigation of a breach of the law or possible breach of the law and any subsequent prosecution.

Section 33(1) – Information relating to the personal affairs of any person

18. 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; and
 - (b) such disclosure would be ‘unreasonable’.

⁴ *Shulver v Victoria Police Force* (1995) 9 VAR 71.

⁵ *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [134].

Do the documents contain personal affairs information?

19. 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.⁶ 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'.⁷
20. The 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 disclosure under the FOI Act is not subject to restriction or condition, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁸
21. The Document contains the name, date of birth, and relationship descriptor of a third party.
22. I am satisfied the information contained in the Document relates to the personal affairs of an individual other than the Applicant.

Would disclosure involve the unreasonable disclosure of personal affairs information?

23. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
24. I have determined disclosure of the personal affairs information contained in the Document would be unreasonable for the following reasons:
 - (a) The nature of the personal affairs information - The personal affairs information is the name, date of birth, and relationship descriptor of a third party. It relates to the Agency's investigation into allegations of criminal behaviour.
 - (b) The circumstances in which the information was obtained - The information in the Document was obtained by the Agency in the context of undertaking a criminal investigation.
 - (c) The Applicant's interest in the information, including their purpose for seeking access to the documents - The Applicant is the primary victim of the burglary. I acknowledge the interest the Applicant holds in obtaining the Document in full. My view is the information does not reveal any additional detail about the reported incident or the events following the incident that would assist the Applicant.
 - (d) Whether the individuals to whom the information relates object, or would be likely to object to the release of information - The Agency attempted consultation with the individual to whom the personal information relates. The individual did not respond to consultation.
 - (e) Information that is already known - The Applicant's review application discloses information already known to the Applicant regarding the incident. As release of the information under the FOI Act would be unrestricted and unconditional, I do not consider this factor to support disclosure.

Deletion of exempt or irrelevant information

25. 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.

⁶ Section 33(9).

⁷ *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

⁸ *O'Sullivan v Department of Health & Community Services (No 2)* [1995] 9 VAR 1 at 14; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰
27. The Agency deleted the employee number of an Agency staff member who printed the Document as irrelevant. I agree that the information falls outside the scope of the Applicant's request.
28. The Agency deleted exempt information from the Document. I agree with the Agency's deletions.

Conclusion

29. My decision is the same as the Agency's decision.
30. On the information available, I am satisfied the exemptions in sections 31(1) and 33(1) apply to the Document. As it is practicable to edit the Document to delete irrelevant and exempt information, I have determined to grant access to the Document in part.

Review rights

31. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
34. 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.
35. 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.¹⁴

When this decision takes effect

36. 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.

⁹ *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].

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).