

Notice of Decision and Reasons for Decision

Applicant:	'AH3'
Agency:	Victoria Police
Decision Date:	19 July 2019
Exemptions considered:	Sections 27(2)(b) and 31(1)(a)
Citation:	'AH3' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 66 (19 July 2019)

FREEDOM OF INFORMATION – neither confirm nor deny the existence of documents – disclosure would prejudice investigation or prejudice enforcement or 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 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, pursuant to section 27(2)(b), confirming or denying the existence of any documents within the scope of the Applicant's request would, in and of itself, constitute a disclosure of information that would be exempt under section 31(1)(a).

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

19 July 2019

Reasons for Decision

Background to review

1. The Applicant made the following request to the Agency:

I am requesting information on this pending charge, from [specified date and reference number]. I am no longer residing in Australia and currently living in [specified location], immigration is requesting information surrounding this charge that is pending on my police record. Seeking further information regarding the status of this charge, whether this matter has been finalised by the courts and the outcome.

2. In its decision, the Agency neither confirmed nor denied the existence of any documents falling within the scope of the Applicant's request, in accordance with sections 27(2)(b), as any decision would reveal information which, in and of itself, would be exempt information.
3. The Agency claimed any documents that may fall within the terms of the Applicant's request would be exempt under section 31(1)(a).

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Agency's reliance on section 27(2)(b) obviates the need for the Agency to provide me with a copy of any documents that would fall within the terms of the Applicant's request, if they exist.
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 received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) communications between OVIC staff, the Applicant and the Agency.
8. 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

9. The Agency relied on the exemptions under sections 27(2)(b) and 31(1)(a) to neither confirm nor deny the existence of documents relevant to the Applicant's request. The Agency's decision letter sets out the reasons for its decision.

Section 27(2)(b)

10. Section 27(2)(b) provides:

- (2) In notice under subsection (1), an agency or Minister –
 - (b) if the decision relates to a request for access to a document that is an exempt document under section 28, 29A, 31 or 31A or that, if it existed, would be an exempt document under section 28, 29A, 31 or 31A, may state the decision in terms which neither confirm nor deny the existence of any document.

11. Section 27(2)(b) requires me to consider whether, hypothetically, the documents requested by the Applicant would (for the purposes of this review) fall within the scope of section 31(1)(a) and whether information as to the existence or non-existence of such documents would, in and of itself, be exempt information under section 31(1)(a).

Application of section 31(1)(a)

12. Section 31(1)(a) provides:

31 Law enforcement documents

- (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;

13. 'Reasonably likely' means that there is a real chance of an event occurring; it is not fanciful or remote.¹
14. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.²
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.³
16. In its decision letter, the Agency stated:

... the release of any documents, should they exist, that relate to you being the subject of a police investigation would be reasonably likely to prejudice that investigation.
17. On 5 June 2019, the Agency also provided confidential submissions to this Office.
18. I am constrained in the expression of my reasons. The inherent problem in providing detailed reasons as to why the exemption under section 31(1)(a) may or may not apply is that the description may inadvertently convey the very matter that is subject to the exemption.
19. Having considered all the relevant factors, I am satisfied that to disclose any information as to the existence or non-existence of any potentially relevant documents within the scope of the Applicant's request would, in and of itself, constitute a disclosure of information that would be exempt under section 31(1)(a).
20. Putting this another way, I am satisfied that should any documents exist, they would be exempt from release in accordance with section 31(1)(a). In reaching this conclusion, I reiterate that I am neither confirming nor denying the existence of any documents which would fall the terms of the Applicant's FOI request.

Conclusion

21. On the information available, I am satisfied that, pursuant to section 27(2)(b), confirming or denying the existence of any documents within the scope of the Applicant's request would, in and of itself, constitute a disclosure of information which would be exempt under section 31(1)(a).

¹ *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.

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

³ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

Review rights

22. 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.⁴
23. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
24. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
25. 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 (international callers dial +61 3 8685 1462).
26. 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.⁷

When this decision takes effect

27. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).