

Notice of Decision and Reasons for Decision

Applicant:	'AJ9'
Agency:	Victoria Police
Decision Date:	3 September 2019
Exemptions considered:	Sections 27(2)(b) and 31(1)(d)
Citation:	'AJ9' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 90 (3 September 2019)

FREEDOM OF INFORMATION – neither confirm nor deny the existence of documents – law enforcement documents – surveillance

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 accordance with section 27(2)(b), I have decided to neither confirm nor deny the existence of any documents falling within the scope of the Applicant's request, should they exist, as to do so would, in and of itself, disclose documents that would be exempt under section 31(1)(d).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
3 September 2019

Reasons for Decision

Background to review

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

Any documents that relate to my past living in [State] and carried forward to Victoria Police to monitor to cause surveillance of self for whatever purpose that be likely to be involved.

... If person of interest or otherwise in any past or future criminal activities (allegedly) any Victoria Police media posts of my image being associated with a present or past criminal associates...

2. The Agency advised the Applicant it had interpreted the request in the following way:

1. Any document relating to surveillance of you.
2. Any Victoria Police media posts of yourself.

3. In accordance with section 27(2)(b), the Agency made a decision neither confirming nor denying the existence of any documents falling within the scope of the Applicant's request, as to do so would disclose documents, should they exist, that would be exempt documents under section 31(1)(d).
4. The Agency advised a search for Victoria Police media posts of the Applicant had been conducted by the Agency's Media and Corporate Communications Department. No documents matching the terms of the Applicant's request were located.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to neither confirm nor deny the existence of documents relating to surveillance of them.
6. The Agency's reliance on section 27(2)(b) obviates the need for the Agency to provide me with a copy of any documents, should they exist, that would fall within the terms of the Applicant's request.
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 on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) correspondence received from the Agency on 23 August 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 sections 27(2)(b) and 31(1)(d) to neither confirm nor deny the existence of documents relevant to the terms of the Applicant's request. The Agency's decision letter sets out the reasons for its decision.

Section 27(2)(b)

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

(2) In a 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.

12. Section 27(2)(b) requires me to consider whether, hypothetically, documents requested by an applicant:

(a) would fall within the scope of section 31(1)(d), and

(b) whether information as to the existence or non-existence of such documents would, in and of itself, be exempt documents under section 31(1)(d).

Section 31(1)(d)

13. Section 31(1)(d) 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—

...

(d) 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 would be reasonably likely to, prejudice the effectiveness of those methods or procedures

14. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.¹

15. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.²

16. The Applicant's request relates to any surveillance of the applicant by the Agency. Surveillance is a method used to detect and investigate suspected criminal offences. If documents relating to surveillance exist, this would directly reveal the Agency (or another law enforcement agency) had undertaken surveillance on the Applicant.

17. The exemption in section 31(1)(d) does not apply to methods and procedures that are widespread and well known.³

18. I acknowledge it is well known that in certain circumstances, law enforcement agencies, such as police, carry out surveillance as part of an investigation. Where an individual is charged with an

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 *Sobs v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

³ *XYZ v Victoria Police* [2010] VCAT 255 (16 March 2010) at [177].

offence on the basis of evidence gathered from surveillance, details of the circumstances and manner in which surveillance was conducted will be apparent to that individual from information disclosed to them throughout a relevant court process. However, what is not well known are the circumstances in which an agency determines such surveillance is warranted, or in what manner surveillance is carried out in a situation where an individual has not yet been, or may never be, charged or made aware of any surveillance.

19. If information confirming surveillance of individuals were to be released to them prior to them being charged, it would allow individuals to anticipate when and how surveillance would be implemented and make efforts to evade it. I am satisfied this would prejudice the effectiveness of surveillance as a method in the circumstances of a particular law enforcement investigation.
20. I am satisfied that should any documents exist, they would be exempt from release in accordance with section 31(1)(d). Accordingly, in accordance with section 27(2)(b), I am satisfied disclosure of the existence or non-existence of any documents falling within the scope of the Applicant's request, should they exist, would in and of itself constitute the disclosure of exempt documents under section 31(1)(d).
21. In reaching this conclusion, I reiterate that I am neither confirming or denying the existence of any documents that would fall within the terms of the Applicant's request.

Conclusion

22. In accordance with section 27(2)(b) and based on the information before me, I have decided to neither confirm nor deny the existence of any documents falling within the scope of the Applicant's request, should they exist, as to do so would, in and of itself, disclose documents that would be exempt under section 31(1)(d).

Review rights

23. 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
24. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
25. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
26. 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.
27. 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

28. My decision does not take effect until the relevant review period (stated above) expires. If an 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).