

## Notice of Decision and Reasons for Decision

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Applicant:	'AL7'
Agency:	Victoria Police
Decision Date:	17 September 2019
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'AL7' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 106 (17 September 2019)

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FREEDOM OF INFORMATION – police records – non-authorized brief of evidence – investigations and reports – personal affairs information – third party information – unreasonable disclosure – internal working documents

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.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
17 September 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:

All documents available in relation to [Incident Number] reported on [date] including any pictures, videos, investigations, reports and analysis on the incident, I also would like to access the offender's name and address and any statement [they] made in relation to this incident, also would like to access the findings and decisions made in regards to this incident by Victoria Police.
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to some of those documents in part, and refuse access to other documents in full.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
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;
  - (b) the information provided with the Applicant's review application; and
  - (c) the Agency's correspondence with our office.
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 33(1) and 30(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

### **Section 33(1)**

9. 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;<sup>1</sup>
  - (b) Such disclosure would be 'unreasonable'.

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<sup>1</sup> Section 33(1) and (2).

*Do the documents contain personal affairs information of individuals other than the Applicant?*

10. 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.<sup>2</sup>
11. The Victorian Civil and Administrative Tribunal (**VCAT**) has held a document will disclose personal affairs information if the document is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. As the nature of 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.
12. The information the Agency exempted under section 33(1) includes the names, date of birth, appearance descriptors, communications and statements made to the Agency, and information contained in a LEAP Record.
13. I am satisfied this information is the personal affairs information of individuals other than the Applicant.

*Would the disclosure of the personal affairs information be unreasonable?*

14. The concept of 'unreasonable disclosure' involves balancing the competing public interest in the disclosure of official information with the personal interest in privacy. In the particular circumstances of this matter, I have had regard to the following factors:
  - (a) The nature of the personal affairs information: The documents contain personal affairs information of persons other than the Applicant, including third party names, dates of birth, contact details, physical descriptors, communications and statements made to the Agency.  
  
The documents concern an alleged assault reported to the Agency. Accordingly, while knowing the Applicant provided some of the information in the documents to the Agency, the nature of the information is inherently sensitive. This factor weighs against disclosure.
  - (b) The circumstances in which the information was obtained: The Agency recorded information provided by the Applicant and third parties as part of its functions in the detection, investigation and prevention of past and future criminal matters. However, from the face of the documents and advice provided by the parties during this review, the allegations have not been heard or tested in open court. This factor weighs against disclosure.
  - (c) The Applicant's interest in the information: The Applicant submits they seek a copy of the documents to explore potential legal options. I accept this represents a genuine and personal reason for seeking access to the information. This factor weighs in favour of disclosure.
  - (d) Whether any public interest would be promoted by the release of the information: The Applicant's interest in obtaining the information is private, and on the information before me there are no other particular public interest factors in favour of disclosure. This weighs against disclosure.
  - (e) Whether the individuals to whom the information relates object, or would be reasonably likely to object to the release of the information: Given the circumstances in which the Agency obtained the information, I am satisfied the third parties would be reasonably likely to object to its release. This factor weighs against disclosure.

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<sup>2</sup> Section 33(9).

- (f) The extent to which the information is available to the public: The sensitive information contained in the document is not available in the public domain. As stated above, from the face of the document, the allegations do not appear to have been heard or tested in open court. This factor weighs against disclosure.
- (g) The likelihood of further disclosure of the information, if released: The Agency advised it did not consult with third parties named in the documents to seek their views on the disclosure of their personal affairs information, as it was unreasonable. Noting the Applicant's interest in seeking access to the information, I consider it is reasonably likely the information will be further disclosed if released to the Applicant. In circumstances where the information is inherently sensitive, I consider this factor weighs against disclosure.

- 15. In balancing the above factors, I am satisfied it would be unreasonable to release the personal affairs information of the individuals other than the Applicant.
- 16. Accordingly, I have determined personal affairs information in the documents is exempt under section 33(1).

### **Section 30(1)**

- 17. The Agency applied section 30(1) to Document 3 only. Section 30(1) has three requirements:
  - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
  - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
  - (c) disclosure of the matter would be contrary to the public interest.
- 18. The exemption does not apply to purely factual material in a document.<sup>3</sup>

*Does the document contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

- 19. The document contains the police officer's preliminary opinions and observations at the time of consideration of authorisation a police brief after attending a reported incident. I am satisfied the document contains information in the nature of the Agency-officer's opinion.

*Was the information obtained in the course of, or for the purposes of, the Agency's deliberative processes?*

- 20. The term 'deliberative process' has been interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.<sup>4</sup>
- 21. I am satisfied the information was provided in the course of the Agency's deliberative processes relating to the investigation of criminal activity.

*Would release of the information be contrary to the public interest?*

- 22. I must be satisfied releasing this information is not contrary to the public interest. This requires a 'process of weighing against each other conflicting merits and demerits'.<sup>5</sup>

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<sup>3</sup> Section 30(3).

<sup>4</sup> *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

23. In deciding if release is contrary to public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
24. In deciding whether disclosure of the deliberative material in the document would be contrary to the public interest, I have taken the following into consideration:
  - (a) The nature of the information and the nature of the documents – The deliberative material is a record of the officer’s opinions, observations and concerns in the course of investigating a criminal matter. There is no scope for disclosing an edited copy. I am of the view that this is highly sensitive information. This weighs against disclosure.
  - (b) The stage of the decision-making process at which the document was created – As stated above, it appears the document contains an Agency officer’s observations and options for the future course of the investigation. The release of this information could potentially lead to confusion and ill-informed debate. This weighs against disclosure.
  - (c) The likelihood disclosure of the documents would inhibit the independence of officers or the making of proper and detailed research and submissions by them – In its decision letter, the Agency stated the open and free communication of professional opinions and thought processes is an integral and essential aspect of the Agency’s functions in the course of investigating criminal matters. I am of the view that the release of the officer’s deliberations could inhibit the Agency’s officers from making proper and detailed records of their opinions and observations. This weighs against disclosure.
25. I also note the Applicant’s interest in the document is as the victim of an offence, and that they are seeking information to potentially explore available legal options.
26. In balancing the above factors, I am satisfied the release of the deliberative material in Document 3 is contrary to public interest.
27. Accordingly, I have determined the deliberative material is also exempt under section 30(1).

***Deletion of exempt or irrelevant information***

28. 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.
29. Determining what is ‘practicable’ requires consideration of the effort involved in making the deletions, and the effectiveness of the deletions – that is, whether editing the document would render it meaningless.<sup>6</sup>
30. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant’s request because it relates to matters or people other than those specified in the request.
31. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, on the basis it would not require substantial time and effort, and the edited documents would retain meaning.

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<sup>5</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at 485, adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

<sup>6</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26].

### **Conclusion**

32. Having considered the relevant exemptions, I have determined certain documents are exempt in full and in part under sections 33(1) and 30(1). My decision is the same as the Agency's.
33. The Schedule of Documents in **Annexure 1** contains a brief summary of my decision with respect to each document.

### **Review rights**

34. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>7</sup>
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
37. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
38. 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.<sup>10</sup>

### **When this decision takes effect**

39. For that reason, my decision does not take effect until that 60 day period expires. or if an application to VCAT is made, until the VCAT proceeding is concluded.

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

<sup>8</sup> Section 52(5).

<sup>9</sup> Section 52(9).

<sup>10</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	LEAP incident report	4	Released in part Section 33(1)	Release in part Section 33(1)	<b>Section 33(1):</b> I am satisfied, in the circumstances of this case, it would be unreasonable to release the personal affairs information of individuals other than the Applicant.
2.	[Date]	Memo re: non- authorisation of brief	1	Released in part Section 33(1)	Release in part Section 33(1)	See comments for Document 1 above.
3.	[Date]	Memo	2	Refused in full Sections 30(1), 33(1)	Refuse in full Sections 30(1), 33(1)	<b>Section 30(1):</b> I am satisfied, in the circumstances of this case, it would be contrary to the public interest to release the deliberative information in the documents.  <b>Section 33(1):</b> See comments for Document 1 above.
4.	[Date]	Memo	1	Released in part Section 33(1)	Release in part Section 33(1)	See comments for Document 1 above.
5.	[Date]	Memo	1	Released in part Section 33(1)	Release in part Section 33(1)	See comments for Document 1 above.
6.	[Date]	Brief head	2	Refused in full Section 33(1)	Refuse in full Section 33(1)	See comments for Document 1 above.

Annexure 1 – Schedule of Documents

No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
7.	[Date]	Update offender	1	Refused in full Section 33(1)	Refuse in full Section 33(1)	See comments for Document 1 above.
8.	[Date]	Preliminary brief	6	Released in part Section 33(1)	Release in part Section 33(1)	See comments for Document 1 above.
9.	Undated	Charges	1	Refused in full Section 33(1)	Refuse in full Section 33(1)	See comments for Document 1 above.
10.	Undated	Photographs – Applicant	3	Released in part Section 33(1)	Release in part Section 33(1)	See comments for Document 1 above.
11.	Undated	Photographs/CCTV stills – accused	20	Refused in full Section 33(1)	Refuse in full Section 33(1)	See comments for Document 1 above.
12.	[Date]	Police statement – accused	3	Refused in full Section 33(1)	Refuse in full Section 33(1)	See comments for Document 1 above.
13.	[Date]	Personal documents – accused	6	Refused in full Section 33(1)	Refuse in full Section 33(1)	See comments for Document 1 above.
14.	Undated	Backing sheet	1	Released in full	Not subject to review	



**Annexure 1 – Schedule of Documents**

No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
15.	[Date]	Electronic Patrol Duty Return	8	Released in part Section 33(1)	Release in part Section 33(1)	See comments for Document 1 above.
16.	[Date]	CCTV footage/stills	1 DVD	Refused in full Section 33(1)	Refuse in full Section 33(1)	See comments for Document 1 above.