

Notice of Decision and Reasons for Decision

Applicant:	'AN7'
Agency:	Victoria Police
Decision Date:	30 September 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AN7' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 124 (30 September 2019)

FREEDOM OF INFORMATION – police records – workplace incident – LEAP records – information provided in confidence – personal affairs information of third parties.

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.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 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 pertaining the search terms [Applicant's name], [business name], [named person], [named person] and [named person].

2. On 14 May 2019, the Applicant clarified their initial request and sought access to the following documents:

All documents relating to incidents between [named person], [named person] and [the Applicant] at [business name] between [month and year] and [month and year].

- The incidents began on [month and year] at [Business name and location].
- Names of any other involved: [4 named persons].
- Emails between a staff member and a member(s) of [the Agency] over allegations made by [named person] and [named person] and responses from [the Agency].
- Decision [reference number] requested allegations emails and the request was denied – I would like the responses to these emails.
- Any documents relating to the Interim Intervention Order taken against me.
- Field notes taken by [Agency officer].
- Field notes taken by Police in relation to this case.
- Reports made by [the Agency] in relation to this case.
- Notes/conversations/emails with staff member (informer) over this case.
- Any recording in relation to this incident at [business name and location] and [2 named persons].
- Any transcripts relating to incidents between [3 named persons] and the Applicant.
- Correspondence between [2 named persons].
- This Interim Order and the allegations and responses overlap with a Police Drug Squad Case involving [named person].

3. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to refuse access to one document in full and grant access to one document in part.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the documents subject to review.
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;
 - (b) the Applicant's submission dated 4 September 2019 and information provided with the Applicant's review application; and
 - (c) information provided by the Agency during this review.
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.

Applicant's submissions

9. The Applicant submitted the following in support of their review application:
 - All I want is any information that would be able to clear me of the false allegations against me.
 - [Named person] has falsely claimed the police have given me warnings and has falsely claimed I have committed various offences against [them].
 - The purpose for which [the Agency] obtained the information is an unrelated matter.
 - Although no formal complaint was made these allegations have cost me my job, caused me to suffer... Other [Agency] documents will confirm this.
 - I believe the purpose for which [the Agency] has obtained this information does not relate to this case.
 - All I require is one sentence or paragraph that may clear me of the allegations against me.
 - I only require the information to use to clear my name.
 - I do not want or require any information relating to any other case.
 - [redacted]
10. On 4 September 2019, the Applicant provided an additional submission, stating as follows:
 - The confidential folder comprises of incidents in the workplace involving a number of named persons.
 - Initial enquiries were made, no investigation commenced, no police action was taken.
 - No documentation is supported by [the Agency].
 - [redacted]
 - A confidential folder containing (140? / how ever [sic] many pages) was given to SC [name]/sworn officer by police detectives from a Police task force operating out of the [suburb] Police Station.
 - The folder contains information obtained through police surveillance, by confidence, through warrants, listening devices, emails, police information reports etc.
 - Information in the folder was obtained voluntarily and involuntarily.

Review of exemptions

11. The Agency relied on the exemptions under sections 33(1) and 35(1)(b) to refuse access to certain information in the documents. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

12. 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;¹ and
 - (b) such disclosure would be 'unreasonable'.
13. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.²
14. 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.
15. The nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.³

Do the documents contain personal affairs information?

16. I am satisfied the documents contain 'personal affairs information', for the purposes of section 33(1), of persons other than the Applicant, including:
 - (a) names;
 - (b) gender;
 - (c) date of birth;
 - (d) contact details; and
 - (e) other identifying information of persons other than the Applicant.
17. Therefore, I must decide whether disclosure of this information would be unreasonable in the circumstances.

¹ Sections 33(1) and (2).

² Section 33(9).

³ *Victoria Police v Marke* [2008] VSCA 218 at [68].

Is disclosure of the personal affairs information contained in the documents unreasonable?

18. 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.
19. The following matters are particularly relevant, in the circumstances of this matter:
 - (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 their purpose for seeking the access to the documents);
 - (d) whether any public interest would be promoted by the release of the information;
 - (e) whether the individuals to whom the information relates object, or would be likely to object to the release of the information;
 - (f) the extent to which the information is available to the public; and
 - (g) the likelihood of further disclosure of the information, if released.
20. I have determined disclosure of the personal affairs information contained in the requested documents would be unreasonable for the following reasons:
 - (a) The personal affairs information was provided to the Agency in a specific context, being an inquiry regarding workplace incidents. There is a strong public interest in maintaining the Agency's ability to obtain information voluntarily from members of the community in relation to such incidents. If personal affairs information of witnesses were released, this ability to collect information may be impaired, as people may be less likely to provide frank information on a voluntary basis and jeopardise the ability of the Agency to carry out its functions.
 - (b) I consider the personal affairs information in the documents is sensitive in nature given the circumstances in which the information was obtained, namely, in relation to a potential police investigation.
 - (c) While I acknowledge the Applicant's personal interest in the documents, the interest of the Applicant needs to be balanced against the public interest in protecting the personal privacy of third parties and the ability of the Agency to fulfil its public functions.
 - (d) There was no official investigation commenced in relation the incidents to which the documents relate, and no associated charges were laid. As such, the information is not in the public domain, as the allegations have not been heard or tested in open court. This weighs against disclosure.
 - (e) I have no information about whether the relevant third parties would object to the release of their personal affairs information. However, I consider there would have been an expectation of privacy in the communication of this information to this Agency in light of its law enforcement functions.
 - (f) I can see no countervailing public interest in the disclosure of this information.

- (g) I have considered the Applicant's expressed frustrations over the [redacted] and allegations made against them and their motive for seeking access to the documents. In the circumstances, I consider there is an increased likelihood of dissemination of the information if it were to be released to the Applicant.
- (h) Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. On the information before me, I do not consider this to be a relevant factor in this matter.

- 21. Accordingly, I am satisfied certain information in the documents is exempt under section 33(1).
- 22. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 33(1) to each document.

Section 35(1)(b)

- 23. A document is exempt under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Was the information or matter communicated in confidence?

- 24. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁴ Further, confidentiality can be expressed or implied from the circumstances of the matter.⁵
- 25. Document 2 comprises a collection of documents provided to the Agency by a third party for the purpose of the Agency's enquiries into the subject of this request.
- 26. I am mindful in this matter that I do not have specific information before me regarding the third party's view as to whether they provided the documents to the Agency on a confidential basis.
- 27. In any case, I consider the relevant third party would more likely than not have considered that the information was communicated in confidence to the Agency given the nature of this matter and the purpose for which they provided the documents to the Agency.

Will disclosure of the information impair the Agency's ability to obtain similar information in the future?

- 28. The fact the information was communicated in confidence is not the only consideration in relation to the exemption in section 35(1)(b).
- 29. The exemption also requires I consider whether the Agency would be impaired from obtaining similar information in the future if information is disclosed under the FOI Act. This means I must consider whether, should the information be disclosed, others in the position of the communicators would be reasonably likely to be inhibited from providing similar information to the Agency.

⁴ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

⁵ *Ibid.*

30. In its decision letter, the Agency stated-

Some of the information in the documents assessed here was provided in confidence and I am of the view that such confidence would be breached if the information were to be released and as a result, the third parties may be less inclined to assist the police in the future.

Victoria Police investigators regard both security and confidentiality as matters of great importance. The capacity of Victoria Police to obtain information would be substantially reduced if it was unable to provide an assurance of confidentiality to third parties. This assurance of confidentiality would fail if information, of the type sought in [this] application, were to be made available under provisions of the [FOI] Act.

31. In the circumstances, I accept the Agency's submission. There is a strong public interest in maintaining its ability to obtain information from members of the community in relation to such incidents on a voluntarily basis. If information of this nature were to be released under the FOI Act, I am satisfied the Agency's ability to obtain such information in the future would be impaired, as members of the public would be less likely to provide information on a voluntary basis and this would jeopardise the ability of the Agency to carry out its investigation and law enforcement functions.
32. I note certain information in Document 2 relates to the Applicant and would likely be in the possession of the Applicant. While this is a relevant consideration in this matter, I consider the circumstances in which those documents were provided to, and considered by, the Agency carries considerable weight. In the circumstances, the fact the documents were provided in confidence, and their release would be contrary to the public interest outweighs this consideration.
33. Accordingly, I am satisfied Document 2 is exempt under section 35(1)(b).
34. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b) to each document.

Deletion of exempt or irrelevant information

35. 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.
36. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
37. 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 people other than those specified in the request.
38. In relation to Document 1, I have considered the effect of deleting irrelevant and exempt information from the document. In my view, it is practicable for the Agency to delete the irrelevant and exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

⁶ *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].

⁷ *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].

39. However, in relation to Document 2, I do not consider it would be practicable to edit the documents as they are exempt in full under section 35(1)(b). Accordingly, I have determined this document is exempt in full.

Conclusion

40. On the information available, I am satisfied the exemptions in sections 33(1) and 35(1)(b) apply to the documents and have determined to release Document 1 in part, and to refuse Document 2 in full.
41. The Schedule of Documents in **Annexure 1** outlines my decision in relation to each document.

Review rights

42. 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.⁸
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
45. 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.
46. 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.¹¹

When this decision takes effect

47. 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.

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	LEAP	2	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25 This document is to be released to the Applicant, except for the following information: (a) the involvement code, name type, sex, surname, 1 st given names, date of birth corresponding to the third party under the heading 'Persons involved' which is exempt under section 33(1); and (b) the user ID which is irrelevant and is to be deleted in accordance with section 25.	Section 33(1): I am satisfied it would be unreasonable to release the personal affairs information in the document for the reasons set out above. Section 25: I am satisfied information deleted by the agency is irrelevant to the Applicant's FOI request as it relates to other matters attended to by the Agency not related to the incident subject of this request.
2.	Multiple	Various documents	142	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 35(1)(b)	Section 35(1)(b): I am satisfied the information deleted by the Agency under section 35(1)(b) is exempt, for the reasons outlined above.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						<p>Section 25: I do not consider it would be practicable to edit the documents as they are exempt in full under section 35(1)(b). Accordingly, this document is exempt in full.</p> <p>Section 33(1): In light of my decision in relation to sections 35(1)(b) and 25, it is not necessary to consider the application of section 33(1) to the same document.</p>