

Notice of Decision and Reasons for Decision

Applicant:	'AN8'
Agency:	Victoria Police
Decision date:	30 September 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AN8' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 125 (30 September 2019)

FREEDOM OF INFORMATION – witness statements – statement of deceased person – police investigation – next of kin – personal affairs information – disclosure would be unreasonable – family dispute – likelihood release of information would cause stress and anxiety

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
30 September 2019

Reasons for Decision

Background to review

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

I would like all documentation in relation to my mother [name] (deceased) date of birth [date]. There was a Victoria Police statement done at [named Hospital] late [date range], I believe the police officers attended the hospital from [named station] Police complex...I would also like a Victoria Police statement made by [name] on or before [date], or after these dates if anything is available.

2. Following further correspondence from the applicant, the agency interpreted the request to be for:

All statements as of [date and date range] in relation to police attendance at the [named Hospital] in 2018 and making enquiries into the [suburb] property and [named party].

3. In its decision, the Agency identified 18 pages of documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full.

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 received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) correspondence between the Agency and the Applicant; and
 - (c) the Applicant's review application.
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 sections 33(1) and 35(1)(b) to deny access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

10. 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

¹ Sections 33(1) and (2).

(b) such disclosure would be 'unreasonable'.

11. 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
12. 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.
13. 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. However, I do not consider this to be a relevant factor in the circumstances.
14. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.³ However, this obligation does not arise if:
 - (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
 - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
 - (c) it is not practicable to do so.⁴
15. The Agency advised it did not consult with third parties named in the documents. In relation to one of the named parties, who is deceased, the Agency did not consult with their next of kin in accordance with section 33(2B)(a). The Agency advised it considered it would be unreasonable to do so in the circumstances of this matter.

Do the documents contain personal affairs information?

16. The documents subject to this review are five statements taken by the Agency from people other than the applicant. The statements contain names, addresses, ages and personal opinions. This is personal affairs information. I therefore must consider whether disclosure of such information is unreasonable.

Would release of the personal affairs information be unreasonable?

17. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
18. In determining whether disclosure of the personal affairs information in the document would be unreasonable, I have considered the following factors:

² Section 33(9).

³ Section 33(2B).

⁴ Section 33(2C).

- (a) The nature of the personal affairs information and the circumstances in which the information was obtained

The nature of the personal affairs information is names, addresses and other identifying information, as well as more sensitive information such as their views and personal experiences.

The information was obtained by the Agency in the context of undertaking an investigation into a potential crime. This factor weighs against disclosure.

- (b) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁵

The Applicant states they seek access to the information in relation to a legal dispute.

It may be that some of the information in the documents is the type of information the applicant is specifically seeking is contained in the documents, however I do not consider it is appropriate for it to be released under the FOI Act. Rather, if the applicant is seeking the document for valid legal or court-related purposes, it is likely that they could be obtained by means of a legal subpoena.

- (c) Whether any public interest would be promoted by release of the information

The Applicant's interest in obtaining the information is a matter of private interest.

I do not consider the public interest would be promoted by release of the personal affairs information in the document to the Applicant.

I am of the view the greater public interest lies in the Agency preserving its ability to conduct investigations and obtain the cooperation of alleged offenders, witnesses and other parties during their investigations.

If this information were to be released, this would jeopardise the ability of the Agency to meet its obligations to investigate crimes and maintain public safety. This factor weighs against disclosure.

- (d) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

I do not have any information before me as to the views of the individuals to whom the information relates as the Agency determined it was unreasonable to consult with them.

However, having regard to the circumstances in which the Documents were created, that is, a police investigation, I am of the view the individuals concerned would be reasonably likely to object to the release of their personal affairs information. Information provided in these circumstances is given with the expectation that it will only be used for the purposes for which it is being gathered. This factor weighs against disclosure.

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [104].

I note that some of the information relates to the Applicant's mother who has since died, and I note the additional information the Applicant provided to the Agency such as [their] mother's Will and a copy of her passport. However, from my reading of this matter, it relates to a dispute among a family, elements of which were investigated by the Agency.

As set out above, the information that relates to the applicant's mother was collected in the course of enquiries being conducted by the Agency. Whether or not that person has died, the release of such information could have a significant affect on the Agency's ability to obtain frank information from the public should they consider that the information may be released in the future to a family member.

I also understand from the documents that there is another individual who could be considered next of kin and has not been consulted about the release their mother's personal affairs information. As with the above, I consider it likely they would object to their mother's personal affairs information being released given it relates to a police investigation and a family dispute.

- (e) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

The documents relate to statements taken by the Agency. They concern what appears to be a family dispute subject to court proceedings. I consider release of this information is likely to cause stress and anxiety to those concerned.

- (f) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person⁶

There is no information before me to suggest this is a relevant factor in this case.

19. Having weighed up the above factors, I have determined the personal affairs information is exempt under section 33(1).

Section 35(1)(b)

20. As I have decided the documents are exempt under section 33(1), there is no need for me to consider the application of section 35(1)(b) to the same documents.

Deletion of exempt or irrelevant information

21. 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.
22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸
23. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable to delete the exempt the personal affairs information from the documents, because

⁶ Section 33(2A).

⁷ *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].

⁸ *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].

doing so would render the documents meaningless and not serve the Applicant's purpose in seeking the documents.

Conclusion

24. On the information available, I am satisfied the documents are exempt from release under section 33(1). I therefore deny access to the documents in full. As I have decided the documents are exempt under section 33(1), there is no need for me to consider the application of section 35(1)(b) to the same documents.

Review rights

25. 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.⁹
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
28. 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.
29. 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.¹²

When this decision takes effect

30. 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.

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Police Statement	4	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 33(1)	Section 33(1): The document is exempt for the reasons set out above.
2.	[Date]	Police Statement	3	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 33(1)	Section 33(1): See comments for Document 1.
3.	[Date]	Police Statement	4	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 33(1)	Section 33(1): See comments for Document 1.
4.	[Date]	Police Statement	5	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 33(1)	Section 33(1): See comments for Document 1.
5.	[Date]	Police Statement	2	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 33(1)	Section 33(1): See comments for Document 1.