

## Notice of Decision and Reasons for Decision

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Applicant:	'AP5'
Agency:	Victoria Police
Decision date:	10 October 2019
Exemptions considered:	Section 33(1)
Citation:	'AP5' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 140 (10 October 2019)

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FREEDOM OF INFORMATION – criminal investigation – unreasonable disclosure – personal affairs information – information requested for a professional publication

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 in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
10 October 2019

## Reasons for Decision

### Background to review

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

This Freedom of Information request is about a [gender] named [name]... a resident of [address] in [date] when [they were] charged with what [they] have described to me as “disclosing confidential information”. As a result of that, [they] appeared in the [location] Magistrates’ Court on [date] on a charge – part of this FOI request is to discover the exact wording of the charge.

I believe the informant in the case at court was an [name] of Victoria Police, although I do not have [their] rank. The [location] Magistrates’ Court has given the case the court number of [case number] and they could possibly supply you with more information for this FOI.

What I am seeking via this FOI is as much information that you can give me about the whole event – including the exact charge placed against [named person], any statements or records of interviews made by any people in relation to the case, including [named person], and the result of the court case as viewed by the informant.

2. In its decision, the Agency identified 18 documents falling within the terms of the Applicant’s request. It decided to grant access to two documents in part and refuse access to 16 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 and have been briefed by OVIC staff who inspected the parts of the documents claimed to be exempt under section 31(1).<sup>1</sup>
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 received from the parties, including:
  - (a) the Agency’s decision on the FOI request;
  - (b) information provided with the Applicant’s review application;
  - (c) correspondence provided by the Agency on 20 September 2019; and
  - (d) correspondence received from the Applicant on 7 October 2019.
7. During the review, the Applicant limited the scope of the review to Documents 12, 13, 14, 15, 17 and 18 (the **Documents**). Accordingly, my review considers the Agency’s decision with respect to these Documents only.
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.

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<sup>1</sup> Section 63D provides such documents may only be inspected at an agency’s premises and the Information Commissioner is not entitled to take possession of them.

## Review of exemptions

9. The Agency relied on the exemptions in sections 33(1) and 35(1)(b) to refuse access to the Documents in full.
10. The Agency's decision letter sets out the reasons for its decision.

### ***Section 33(1) – Documents containing personal affairs information***

11. 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>2</sup> and
  - (a) such disclosure would be 'unreasonable'.

#### *Do the documents contain personal affairs information?*

12. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.<sup>3</sup>
13. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.<sup>4</sup>
14. 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 identify a third party.<sup>5</sup>
15. The Documents comprise an exhibit list, two statements, email correspondence, a letter and a statutory declaration. The Applicant was not involved in this matter and is not named in any of the Documents.
16. The Documents contain the following personal affairs information:
  - (a) names;
  - (b) position titles;
  - (c) telephone numbers;
  - (d) residential addresses;
  - (e) signatures; and
  - (f) other contextual information which is reasonably capable of identifying the main individual named in the Applicant's request (**named person**) and other third parties.
17. Accordingly, I am satisfied the Documents contain the personal affairs information of individuals other than the Applicant.

#### *Would release of the personal affairs information be unreasonable?*

18. The concept of 'unreasonable disclosure' involves determining whether the public interest in the disclosure of official information is outweighed by the personal interest in privacy.

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

<sup>3</sup> Section 33(9).

<sup>4</sup> *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

<sup>5</sup> *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

19. In determining whether disclosure of the personal affairs information in the Documents would be unreasonable, I have considered the following factors:

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

The nature of the personal information is outlined above, at paragraphs 15 and 16.

The information was obtained by the Agency in the context of undertaking an investigation into allegations of criminal offending. 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.<sup>6</sup>

In their application for review, the Applicant stated:

...the reason I am seeking this information is that I am [redacted] and writing a [professional publication] [which] contains a brief chapter on [named person] and why they [redacted] appeared in court because [of their action]].

The Applicant has not provided [a summary] of the proposed [publication] or information with respect to the [publication's] purpose.

On the information before me, I am not satisfied the Applicant's interest in the information supports disclosure.

(c) The likelihood of further disclosure of information, if released

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the third parties' personal affairs information if released.

In light of the Applicant's stated interest in obtaining the information and their occupation [redacted], I am satisfied there is a real likelihood of further dissemination of the personal affairs information. This factor weighs against disclosure.

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

As indicated above, the Applicant has not provided [any further information on the content or purpose of the proposed publication].

It is not apparent any public interest would be served by release of the information to the Applicant. On the contrary, I am of the view the public interest in this case lies in preserving the privacy of the named person and other third parties contained in the documents. This factor weighs against disclosure.

(e) 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 due to the outcome of the criminal investigation and the age of the matter.

The Applicant contends the named person has 'no objection to the release of any information about this matter', as the Applicant has spoken to the named person over the phone, and the named person has written to the Applicant about the investigation and court outcome. The Applicant has provided a copy of the handwritten letter reportedly authored by the named person.

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<sup>6</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

The letter appears to be addressed to the Applicant. It refers to a criminal investigation conducted against the named person and the outcome of that investigation. I am not satisfied this document is sufficient to establish the named person consents to release of their personal affairs information to the Applicant.

Having regard to the circumstances in which the documents were created, I am of the view the named individual would be reasonably likely to object to the release of their personal affairs information. This factor weighs against disclosure.

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

Having regard to the nature of the information contained within the Documents, the circumstances in which the Documents were created, and that the matter has been finalised, I consider release of the information under the FOI Act would be reasonably likely to cause stress and anxiety to some of the persons to whom it relates.

- (g) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>7</sup>

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

20. Having weighed up the above factors, I have determined disclosure of the personal affairs information contained in the Documents would be unreasonable in the circumstances.

#### ***Section 35(1)(b) – Document containing material obtained in confidence***

21. In light of my decision with respect to section 33(1), it is not necessary for me to also consider the application of section 35(1)(b) to the Documents.

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

22. 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.
23. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>8</sup> 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.<sup>9</sup>
24. The Applicant indicates they are seeking ‘partial release’ of the Documents. I consider this to mean the Applicant agrees to receiving an edited copy.
25. I have considered the effect of deleting exempt information from the Documents. In my view, it is not practicable for the Agency to delete the exempt information, because doing so would render the Documents meaningless.

#### ***Conclusion***

26. On the information available, I am satisfied the exemption in section 33(1) applies to the Documents.

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<sup>7</sup> Section 33(2A).

<sup>8</sup> *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].

<sup>9</sup> *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].

27. As it is not practicable to edit the Documents to delete exempt information, I have determined to refuse access to the Documents in full.

### **Review rights**

28. 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.<sup>10</sup>
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
31. 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.
32. 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>13</sup>

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

33. 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.

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<sup>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).