

Notice of Decision and Reasons for Decision

Applicant:	'AQ6'
Agency:	Victoria Police
Decision date:	28 October 2019
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'AQ6' and <i>Victoria Police (Freedom of Information)</i> [2019] VICmr 150 (28 October 2019)

FREEDOM OF INFORMATION – police records – witness statements – brief of evidence – personal affairs information – information obtained in confidence

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 part and in full.

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
28 October 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to a copy of the brief of evidence about an alleged crime and a subsequent Professional Standards Command complaint, and any statements made by a named third party.
2. In its decision, the Agency identified five documents falling within the terms of the Applicant's request. It decided to grant access to some 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 Applicant's submission dated 27 June 2019.
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 in sections 33(1) and 35(1)(b) 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;¹ and
 - (b) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and (2).

Do the documents contain personal affairs information?

10. 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
11. I note the decision letter of the Agency states Document 1, the Brief Head, was released in part under section 33(1). However, from my review of the documents and discussions between OVIC staff and the Applicant and Agency, the document has in fact been released in full and, therefore, is not subject to review.
12. The documents released in part under section 33(1) are Documents 2 and 3, the Preliminary Brief and Charge Sheet, which were prepared by a sworn police officer. The documents contain statements made by a named third party in relation to alleged actions by the Applicant, and a summary of the third party's witness statement.
13. The documents include the full name and residential address of the third party. They also include the individual's version of events with respect to allegations made to the Agency.
14. I am satisfied this is personal affairs information. Therefore, I must consider whether disclosure of this information is unreasonable

Would release of the personal affairs information be unreasonable?

15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a particular matter.
16. In determining whether disclosure of the personal affairs information in the document 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 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 an alleged 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.³

The Applicant provided a submission that they have requested remain confidential. I have had regard to this submission, and the Applicant's reasons for seeking review of the Agency's decision. In the circumstances, I am of the view the Applicant's reasons neither weigh for or against disclosure.

² Section 33(9).

³ *Victoria Police v Marke* [2008] VSCA 218 at [104].

(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. I consider members of the public provide information to the Agency for the purpose of conducting an investigations with the expectation it will remain confidential unless required to be used in evidence before a court.

If such information were to be routinely released under the FOI Act, I am satisfied this would jeopardise the ability of the Agency to investigate crimes and maintain public safety in accordance with its law enforcement functions. 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.

As set out above, the information that relates to the Applicant was collected during enquiries conducted by the Agency. Whether or not any relevant third party is known by the Applicant, I consider the release of such information could have a significant effect on the Agency's ability to obtain information from the public on a voluntary basis in the future.

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

The documents relate to witness statements taken by the Agency in investigating an alleged crime, which then resulted in an internal Agency investigation. I consider the release of this information is likely to cause stress and anxiety to those concerned. This factor weighs against disclosure.

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

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.

Further, section 33(2AB)(c) states that if the applicant is 'a person who is alleged to pose a risk of committing family violence', I must consider whether the disclosure would increase the risk to a primary person's safety from family violence.

I note the charge, as detailed in the documents subject to review, did not proceed to court. Nonetheless, based on the nature of the documents, I consider there are reasonable grounds to consider concerns exist about the effect of disclosure of the documents on the health and safety of third parties. This factor weighs against disclosure.

17. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable in the circumstances. Accordingly, the documents are exempt under section 33(1).

Section 35(1)(b)

18. The Agency refused access to Documents 4 and 5, both Victim Statements, under section 35(1)(b).
19. 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?

20. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁴ In this case, the person who provided the information to the Agency.
21. I must also consider that confidentiality can be express or implied from the circumstances of a matter.⁵ The circumstances in this matter are in relation to a police investigation.
22. I am satisfied the information was provided to the Agency in confidence because, as set out in my consideration of section 33(1), I consider members of the public provide information to the Agency with the expectation it will remain confidential unless required for or relied upon in a prosecution before a court.

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

23. The fact the information was communicated in confidence is not the only consideration in relation to the exemption in section 35(1)(b).
24. 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.
25. In relation to the above, and of relevance in this matter, I note the view of the Victorian Civil and Administrative Tribunal (VCAT) in *Williams v Victoria Police*,⁶ and adopted in *RFJ v Victoria Police FOI Division*:⁷

...persons would be less likely to make statements to the police if they were of the view that the making of such statements was not confidential.

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

⁵ *Ibid.*

⁶ [2007] VCAT 1194 at [73].

⁷ [2013] VCAT 1267 at [170].

26. In its decision letter, the Agency stated:

...the statements were provided to Victoria Police in confidence for the purpose of the investigation and possible prosecution. In my view the release of the statements would constitute a breach of confidentiality and would be likely to inhibit other people from providing statements to police in the future. This would clearly be contrary to public interest.

27. 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 public in relation to such incidents on a voluntary basis. If information of this nature were to be routinely 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.

28. Further, I consider disclosure would be contrary to the public interest because:

- (a) members of the public rely on the Agency to investigate possible criminal offences; and
- (b) the release of information provided to the Agency would be reasonably likely to impair it from obtaining similar information in the future as members of the public would be less likely to trust information they provide to the Agency would remain confidential or be used only for the purpose for which it was provided. This public trust is essential to the proper functioning of the Agency and its ability to carry out its law enforcement functions.

29. I am therefore satisfied the information is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

30. 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.

31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ 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 25.⁹

32. In relation to Documents 4 and 5, I have considered the effect of deleting exempt information from the documents. I am satisfied it would not be practicable to provide an edited copy of the documents as the deletions would render the documents meaningless.

Conclusion

33. 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 Documents 2 and 3 in part, and to refuse Documents 4 and 5 in full.

34. The Schedule of Documents in Annexure 1 contains a brief summary of my decision with respect to each document.

⁸ *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].

⁹ *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].

Review rights

35. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
38. 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.
39. 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.¹³

When this decision takes effect

40. 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.

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

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Brief Head	2	Released in full	Not subject to review	
2.	[Date]	Preliminary Brief	5	Released in part Section 33(1)	Release in part Section 33(1) I direct that – personal descriptors, names, contact details, versions of events and summaries of personal experiences are exempt under section 33(1), and are to remain deleted.	Section 33(1): For the reasons set out above, I am satisfied the personal affairs information relating to allegations made to the Agency, their identifying information and versions of events are unreasonable to release in the circumstances. Accordingly, it is exempt under section 33(1).
3.	N/A	Charge Sheet	3	Released in part Section 33(1)	Release in part Section 33(1) I direct that – personal descriptors and names are exempt under section 33(1), and are to remain deleted.	Section 33(1): See comments for Document 2.
4.	N/A	Victim Statement 1	5	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)	Section 35(1)(b): I am satisfied disclosure of this document would divulge information or matter communicated in confidence by a person to an agency, and disclosure

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						would be contrary to public interest. Accordingly, it is exempt under section 35(1)(b). Section 25: I am not satisfied it is practicable to provide an edited copy of the document in accordance with section 25. Accordingly, the document is exempt in full.
5.	N/A	Victim Statement 2	5	Refused in full Section 35(1)(b)	Refuse in full Section 35(1)(b)	See comments for Document 4.