

## Notice of Decision and Reasons for Decision

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Applicant:	'AQ9'
Agency:	Victoria Police
Decision Date:	4 November 2019
Exemptions considered:	Sections 31(1)(d), 33(1), 35(1)(b)
Citation:	'AQ9' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 154 (4 November 2019)

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FREEDOM OF INFORMATION – police records – witness statements – internal agency correspondence – law enforcement – 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 release the documents in part and refuse access to some of 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

4 November 2019

## Reasons for Decision

### Background to review

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

Documents in relation to an investigation jointly conducted by [another agency] and Victoria Police.  
Between the dates of [date range].
2. In its decision, the Agency identified five documents falling within the terms of the Applicant's request. It decided to grant full access to one document, part access to two documents and refuse access to two 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 four documents subject to review and been briefed by OVIC staff who inspected 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; and
  - (c) information provided by the Agency in relation to the request.
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), 35(1)(b) and 31(1)(d) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

### **Section 31(1)(d)**

9. Section 31(1)(d) provides a document is exempt if its disclosure would, or would be reasonably likely to 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'.

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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.

10. The Agency exempted certain information in Document 2 under section 31(1)(d) and stated in its decision letter:

Part of the deleted information comprises details of the methods and procedures used by police during the course [sic] investigations. I am satisfied that the release of this information would be reasonably likely to prejudice the future effective use of those methods and procedures pursuant to the provisions of section 31(1)(d) of the Act.

11. Having reviewed the exempted information, I am satisfied it relates to procedures employed by Agency officers when responding to requests for police assistance and relevant police investigations. I am constrained in providing any further description of the exempted information as to do so would likely disclose the relevant information.
12. The exemption in section 31(1)(d) does not apply to widespread and well-known police investigation methods and procedures employed by the Agency.<sup>2</sup> Having reviewed the documents, I am satisfied the exempted information is not widespread or well-known amongst the public. Having considered the likely effect of disclosing this information under the FOI Act, which provides for unrestricted and unconditional release of information, I am satisfied disclosure would be reasonably likely to undermine the use by the Agency and effectiveness of these methods and procedures in carrying out investigations and its law enforcement functions.
13. Accordingly, I am satisfied the relevant information in Document 2 is exempt under section 31(1)(d).

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

14. 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>3</sup> and
  - (b) Such disclosure would be 'unreasonable'.
15. 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.<sup>4</sup>

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

16. Documents 1, 2, 3 and 4 contain names, employee numbers, contact details, job descriptors, position titles and statements made to police and other personal information relating to third parties.
17. I am satisfied this information constitutes the personal affairs information of individuals other than the Applicant. Therefore, I must consider whether disclosure of such information would be unreasonable in the circumstances.

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

18. Consideration of whether disclosure of personal affairs information would be unreasonable involves balancing the public interest in the disclosure of official information with the personal interest in protecting the privacy of a third party in the circumstances of a particular matter.

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<sup>2</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [177].

<sup>3</sup> Sections 33(1) and (2).

<sup>4</sup> Section 33(9).

19. Having reviewed the documents, I have given weight to the following factors:

(a) The nature of the personal affairs information

The nature of the personal affairs information is names, addresses and other identifying information, as well as more sensitive information such as the views and personal experiences of relevant third parties. The information was obtained by the Agency from third parties, who provided it on a voluntary basis, in the context of the Agency undertaking a criminal investigation into an alleged crime. In these circumstances, and noting the Applicant was the subject of the Agency's investigation, I consider the information is sensitive. This factor weighs against disclosure.

(b) The circumstances in which the information was obtained

Information provided during a criminal investigation is ordinarily communicated to the Agency on a voluntary basis and with the expectation it will remain confidential, unless required for a subsequent legal proceeding or criminal prosecution. Having reviewed the information in the documents, I am of the view the third parties, who provided the information to the Agency, would not reasonably expect it would be disclosed to the Applicant, who was the subject of the police investigation, under the FOI Act. This factor weighs against disclosure.

(c) Whether there is a public interest in disclosure

There is no information before me as to whether the Applicant seeks the information as a matter of public interest.

As stated above, I consider third parties, who provide information to the Agency do so on a confidential basis and would not reasonably expect their personal affairs information would be disclosed to an applicant under the FOI Act where the applicant is or was the subject of a police investigation. Further, if such information were to be released, it would be reasonably likely to jeopardise the ability of the Agency to investigate alleged criminal offences and carry out its investigation and law enforcement functions.

In these circumstances, I am of the view there is a strong public interest in the Agency preserving its ability to conduct police investigations, a significant aspect of which involves obtaining information from witnesses and other persons on a voluntary and confidential basis.

I acknowledge the Applicant may have a personal interest in obtaining access to information that he considers concerns him. However, publicly available information confirms the Applicant was charged, convicted and served a term of imprisonment following the completion of the Agency's investigation, a criminal trial and appeal brought by the Applicant. As such, I consider it is reasonably likely he obtained, or had the ability to obtain, all relevant information through the Court process and there is no evidence of a public interest in disclosure of this information to the Applicant. Accordingly, I consider this factor weighs against disclosure.

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

While the Agency did not consult with the relevant individuals to seek their views on disclosure of their personal affairs information, I am of the view the relevant third parties would be likely to object its release in light of the circumstances discussed above. This factor weighs against disclosure.

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

In the circumstances, I am satisfied this factor, which I am required to consider when determining if disclosure would be unreasonable, is relevant and weighs against disclosure.

20. Accordingly, I am satisfied disclosure of the personal affairs information of third parties in the document would be unreasonable in the circumstances and the relevant information in documents is exempt under section 33(1).

**Section 35(1)(b)**

21. The Agency refused access to Documents 3 and 4 under section 35(1)(b). The documents are witness statements.
22. 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 Minister to obtain similar information in the future.

*Was the information or matter communicated in confidence?*

23. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.<sup>5</sup> In this case, the persons who provided the information to the Agency.
24. Confidentiality can be express or implied from the circumstances of a matter.<sup>6</sup> The circumstances of this matter are that it relates to a police investigation into the Applicant that resulted in the Applicant being charged, convicted and serving a term of imprisonment.
25. In such circumstances, I consider the third parties, who provide information to the Agency did so on a confidential basis, unless they were required to be identified in order to bring or support the prosecution of the Applicant. Otherwise, I am satisfied they would not reasonably expect information they provided to the Agency on a confidential basis would be disclosed to the Applicant under the FOI Act.

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

26. The exemption also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the 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 in the future.
27. 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*,<sup>7</sup> and adopted in *RFJ v Victoria Police FOI Division*:<sup>8</sup>

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<sup>5</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>6</sup> *Ibid.*

<sup>7</sup> [2007] VCAT 1194 at [73].

<sup>8</sup> [2013] VCAT 1267 at [170].

...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.

28. In its decision letter the Agency stated:

...I am satisfied that 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 the public interest.

29. In the circumstances, I accept the Agency's submission and agree there is a strong public interest in maintaining its ability to obtain information from members of the public on a confidential and voluntary basis in relation to alleged criminal offences.

30. I am satisfied if information of this nature were to be routinely released under the FOI Act, the Agency's ability to obtain similar information in the future would be impaired as members of the public and witnesses would be reluctant to provide information to assist police investigations if they could not do so on a confidential basis. Further, if such information were to be released, it would be reasonably likely to jeopardise the ability of the Agency to investigate alleged criminal offences and carry out its investigation and law enforcement functions.

31. Accordingly, I am satisfied certain documents are exempt under section 35(1)(b).

#### ***Deletion of exempt information***

32. 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.

33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>9</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>10</sup>

34. In relation to Documents 3 and 4, 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.

35. I have also considered irrelevant information the Agency deleted from the documents and confirm this information falls outside the scope of the Applicant's request.

#### ***Conclusion***

36. On the information before me, I am satisfied the documents are exempt under sections 33(1), 35(1)(b) and 31(1)(d) and have decided to grant access to certain documents in part and refuse access to certain documents in full.

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

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<sup>9</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>10</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].

## **Review rights**

38. 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>11</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>
41. 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.
42. 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>14</sup>

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

43. 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>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

<sup>14</sup> 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]	Law Enforcement Assistance Program (LEAP) report	11	Released in part Section 33(1)	Release in part Sections 33(1), 25	<p><b>Section 33(1):</b> I am satisfied disclosure of the personal affairs information contained in this document would be unreasonable in the circumstances. Accordingly, I am satisfied it is exempt under section 33(1).</p> <p><b>Section 25:</b> I am satisfied it is practicable to provide an edited copy of the document with the exempt and/or information deleted.</p>
2.	Various	Electronic Patrol Duty Return (ePDR) Form	14	Released in part Sections 31(1)(d), 33(1)	Released in part Sections 31(1)(d), 33(1), 25	<p><b>Section 31(1)(d):</b> I am satisfied disclosure of the relevant information in this document would be reasonably likely to prejudice the effectiveness of methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law. Accordingly, I am satisfied it is exempt under section 31(1)(d).</p> <p><b>Section 33(1):</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
3.	[Date]	Witness statement	2	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Sections 33(1), 35(1)(b)	<p><b>Section 35(1)(b):</b> I am satisfied disclosure of this document would divulge information or matter communicated in confidence by a person to an agency, and disclosure would be contrary to the public interest. Accordingly, I am satisfied it is exempt under section 35(1)(b).</p>



**Annexure 1 – Schedule of Documents**

<b>Document No.</b>	<b>Date of Document</b>	<b>Document Description</b>	<b>Number of Pages</b>	<b>Agency’s Decision</b>	<b>OVIC Decision</b>	<b>OVIC Comments</b>
						<p><b>Section 33(1):</b> See comments for Document 1.</p> <p><b>Section 25:</b> I am satisfied it is not practicable to provide an edited copy of the document with exempt information deleted.</p>
4.	[Date]	Witness statement	4	<p><b>Refused in full</b></p> <p>Sections 33(1), 35(1)(b)</p>	<p><b>Refuse in full</b></p> <p>Sections 33(1), 35(1)(b)</p>	<p><b>Section 35(1)(b):</b> See comments for Document 3.</p> <p><b>Section 33(1):</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 3.</p>
5.	[Date]	Photographs	3	Released in Full	<b>Not subject to review</b>	