

Notice of Decision and Reasons for Decision

Applicant:	'AW8'
Agency:	Victoria Police
Decision date:	19 December 2019
Exemption considered:	Section 31(1)(b)
Citation:	'AW8' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 207 (19 December 2019)

FREEDOM OF INFORMATION – brief of evidence – interview transcripts of interview – prejudice the fair trial of a person or impartial adjudication of a case

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 in accordance with section 31(1)(b).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
19 December 2019

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency for access to the following documents:

...copies of documents from the Victoria Police file in the Magistrates' Court prosecution of [named individual], including the charge sheet(s), details of any defence to the charges filed for or on behalf of the Defendant...
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to refuse access to both 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 been briefed by OVIC staff who inspected the documents claimed to be exempt under section 31(1)(b).¹
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) all communications between this Office and the Agency and the Applicant.
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 31(1)(b) and 35(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 31(1)(b)

9. Section 31(1)(b) provides a document is an exempt document if its disclosure would, or would be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case.
10. The exemption in section 31(1)(b) can apply in relation to current as well as contemplated legal proceedings.

¹ 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.

Would disclosure prejudice, or be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case?

11. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.² The words 'reasonably likely' require a consideration of what may happen if the documents are released to this applicant.³
12. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴
13. It is in the interests of the administration of justice that legal matters, impartially adjudicated by a court, should not be prejudiced, and a party to a proceeding has a right to a fair trial. These important protections underpin the Australian legal system and are reflected by the provision in section 31(1)(b).
14. Document 1 is a brief of evidence prepared by the Agency for the prosecution of criminal charges in the Magistrates' Court (**Court**).
15. Document 2 comprises interview transcripts prepared by the Agency as part of its investigation into, and subsequent prosecution of, charges against an accused person.
16. The Agency's decision letter advises the documents are exempt under section 31(1)(b) because they are subject to criminal proceedings currently before the Court. The Agency provided further evidence to OVIC to confirm the proceedings remain ongoing.
17. In determining whether the documents are exempt under section 31(1)(b), I have placed weight on the following factors:
 - (a) FOI provides for the unrestricted and unconditional disclosure of information to an applicant. Therefore, it is open to an applicant to disseminate the information for any purpose or to any extent they wish.
 - (b) The documents are the subject of a current criminal prosecution before the Court.
 - (c) The Applicant is not a party to the proceeding.
 - (d) Information in the documents is yet to be presented to and tested in the Court.
 - (e) Disclosure of the documents to a third party, who is not the accused person, in circumstances where the documents involve evidence in a prosecution, would be reasonably likely to prejudice the fair trial of the accused or the impartial adjudication of the criminal proceeding by the Court.
18. I note from the Applicant's review application, they have a genuine interest in obtaining access to the documents. However, it is important to note the exemptions under section 31(1) do not allow me to take into account whether an applicant's personal interest would be served by granting access to documents. Rather, my consideration is confined to whether the legal requirements of the exemption are satisfied.

² *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

³ *JCL v Victoria Police (General)* [2012] VCAT 1060 at [39].

⁴ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

19. In light of the nature and content of the documents and current criminal prosecution, I am satisfied the legal requirements of the exemption are satisfied and the documents are exempt under section 31(1)(b).

Deletion of exempt or irrelevant information

20. 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.
21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ 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 25.⁶
22. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted from the documents in accordance with section 25. In my view, it is not practicable to do so as the deletion of exempt information would render the documents meaningless.

Other exemptions relied upon by the Agency

23. As I have determined the documents are exempt in full under section 31(1)(b) it is not necessary for me to consider the application of sections 33(1) and 35(1)(b) to the documents.

Conclusion

24. On the information before me, I am satisfied the documents are exempt under section 31(1)(b).
25. As I have determined it would not be practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, the documents are exempt in full.

Review rights

26. 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.⁷
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
29. 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.

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

30. 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.¹⁰

When this decision takes effect

31. 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 Sections 50(3F) and (3FA).