

Notice of Decision and Reasons for Decision

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| Applicant: | 'AX8' |
| Agency: | Victoria Police |
| Decision Date: | 19 December 2019 |
| Exemption considered: | Section 31(1)(b) |
| Citation: | 'AX8' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 216 (19 December 2019) |

FREEDOM OF INFORMATION – law enforcement documents – member statements – expert statements – charge sheets – undermine the enforcement of law – 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 is an insurance company. Its client owns a commercial property that was destroyed by fire.
2. Through its legal representative, the Applicant made a request to the Agency for access to:

all documents in respect to the fire which destroyed the premises at [address] on [date], including but not limited to the entire investigation file, reports, notes, memoranda, witness statements, transcripts of interview, emails, letters, correspondence, photographs, videos, charge sheets, briefs of evidence and any orders.
3. Following consultation with the Agency, the Applicant narrowed its initial request to seek access to police member statements, charge sheets and expert statements.
4. In its decision, the Agency identified seven documents falling within the terms of the request and refused access to the documents in full.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant submits:

Our client is the victim of a fire and has suffered substantial losses as a result of the fire. Our client's premises has been destroyed and our client simply seeks to be kept in the loop on the police investigation and prosecution (should the police ultimately charge someone with arson). Our client seeks to be kept informed about the police investigation so that it may issue recovery proceedings against the offenders to recoup its losses arising out of the fire.
7. As stated above, the client (and Applicant) in this case is the insurance owner, who insures the property owner.
8. I have been briefed by OVIC staff, who inspected the documents claimed to be exempt under section 31(1).¹
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request dated 14 August 2019;
 - (b) the Applicant's submission dated 9 September 2019; and
 - (c) information provided by the Agency during this review.
11. 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

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.

only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

12. The Agency relied on sections 31(1)(b) and 33(1) to refuse access to the documents in full. The Agency's decision letter sets out the reasons for its decision.

Section 31(1)(b)

13. 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.
14. The exemption can apply in relation to current as well as contemplated legal proceedings.

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

15. '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
16. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴
17. The phrase 'in a particular case' does not require a single specific investigation. It can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁵
18. 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).
19. Documents 1 to 7 are statements of police members and forensic experts regarding their involvement in the investigation into the fire.
20. Document 8 is a charge sheet of an accused person, who is currently subject to legal proceedings.
21. 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 disclosed information for any purpose or to any extent they wish.
 - (b) The documents are the subject of a current legal proceeding before the Court.
 - (c) The Applicant is not a party to the proceeding.

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].

⁵ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

- (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 relevant to a current legal proceeding, would be reasonably likely to prejudice the fair trial of an accused person or the impartial adjudication of the matter by the Court.

22. I note from the Applicant's review application, they have a genuine interest in accessing 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.

23. Given the nature and content of the documents and current legal proceeding, 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

24. 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.

25. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷

26. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted 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

27. 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 section 33(1) to the documents.

Conclusion

28. On the information before me, I am satisfied the documents are exempt under section 31(1)(b).

29. 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

30. 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.⁸

⁶ *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].

⁷ *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].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
33. 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.
34. 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.¹¹

When this decision takes effect

35. 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 Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).