

## Notice of Decision and Reasons for Decision

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Applicant:	'AY4'
Agency:	Victoria Police
Decision Date:	23 December 2019
Provision and exemption considered:	Sections 25, 33(1)
Citation:	'AY4' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 221 (23 December 2019)

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FREEDOM OF INFORMATION – Electronic Patrol Duty Return (ePDR) – attendance records – preliminary brief – breath testing – personal affairs information – unreasonable disclosure

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.

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  
23 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:
  1. All documents relating to the charges made against [the Applicant] on [date] in respect of the alleged offences on [date] in respect of the alleged offence on [date], and relating to the Magistrates Court Proceeding No. [number] [sic];
  2. The signed Witness Statement of Senior Constable [named person] and any other witnesses to be relied on by the Prosecution in the Magistrates Court Proceeding No. [number];
  3. The patrol duty return covering the tour of duty of the informant and any accompanying police officer for [date] concerning [the Applicant];
  4. Attendance summary for [date] concerning [the Applicant];
  5. The attendance registers which contain entries for [date] concerning [the Applicant]; and
  6. Any or all documents pertaining to the aforementioned driving offences alleged to have occurred on [date] concerning [the Applicant].
2. In its decision, the Agency identified five documents, totalling 51 pages, falling within the terms of the Applicant's request. It decided to release three documents in full and two documents in part.

### Review

3. The Applicant, through their legal representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. In their application, the Applicant's legal representative disagreed with the Agency's removal of irrelevant information in Document 4, and the deletion of exempt information from other documents under section 33(1). Accordingly, my review is concerned with the Agency's application of section 33(1) to exempt personal affairs information in Documents 3 and 5, together with the irrelevant information deleted in Document 4.
5. The Applicant's legal representative also lodged a complaint with OVIC in relation to the adequacy of document searches.
6. I have examined copies of the documents subject to this review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the information provided with the Applicant's review application.
9. 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

10. The Agency relied on section 33(1) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

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

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>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

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

12. 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>2</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>3</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>4</sup>
15. Documents 3 and 5 contain the name, user ID and position title of Agency officers and a relationship descriptor of a third party.
16. Accordingly, I am satisfied this is the personal affairs information of persons other than the Applicant.

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

17. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
18. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,<sup>5</sup> in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.
19. As also stated in *Victoria Police v Marke*, '[t]he protection of privacy, which lies at the heart of section 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.<sup>6</sup>

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

<sup>2</sup> Section 33(9).

<sup>3</sup> *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

<sup>4</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].

<sup>5</sup> [2008] VSCA 218 at [76].

<sup>6</sup> [2008] VSCA 218 at [79].

20. I acknowledge the Applicant may already know the identity of the third party referred to in the documents. However, even where an applicant claims to know the identity of a third party, disclosure of that person's personal affairs information may still be unreasonable in the circumstances.<sup>7</sup>
21. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.<sup>8</sup>
22. In determining whether disclosure of the personal 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 outlined above, at paragraph 14.

In relation to the Agency officers' information, the Victorian Civil and Administrative Tribunal (VCAT) has generally accepted there is nothing particularly sensitive about matters occurring or arising out of the course of one's official duties.<sup>9</sup> The user ID, name and position title deleted by the Agency are those belonging to officers of the Agency who were carrying out administrative functions, namely the searches of the Applicant's traffic records.

The information was obtained by the Agency in the context of undertaking information gathering in relation to allegations of criminal behaviour of the Applicant, and the matter has not yet been finalised by a court of law.

These factors weigh 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 a document is a relevant consideration in determining whether disclosure would be unreasonable in the circumstances.<sup>10</sup>

The Applicant's representative has stated that they have been instructed to seek a contested hearing in relation to the criminal matter concerning the Applicant.

I do not consider the Applicant's purpose for seeking the information is likely to be achieved by granting access to the personal affairs information of the third party or Agency officers. This is particularly so in circumstances where the relationship descriptor exempted in Document 5 refers to information that the Applicant provided to the Agency during an interview, and the name, position title and user ID are those of Agency officers carrying out administrative tasks.

In reviewing the documents, I note that the majority of the information in the documents has been released to the Applicant. In my view, disclosure of the information

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<sup>7</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>8</sup> [2008] VSCA 218 at [104].

<sup>9</sup> *Milthorpe v Mt Alexander Shire Council* (1997) 12.

<sup>10</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

exempted by the Agency will not assist the Applicant and their legal representative in the court proceedings.

(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, to contest the charges which are being brought before the Magistrates' Court of Victoria.

I do not consider the public interest would be promoted by release of the Agency officers' and third party's personal affairs information to the Applicant. 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 persons to whom the information relates. The Agency considered it would not be practicable to consult with the Agency officers and the third party, on the basis that the matter is 'sub judice'.

Having considered the nature of the information and the circumstances in which it was obtained, I am of the view the third party whose personal affairs information is in one of the documents, would be unlikely to object to the release of that information to the Applicant. However, I am of the view that the Agency officers would be likely to object to the release of their personal affairs information given their incidental involvement in administrative tasks. This factor weighs both in favour of and against disclosure.

(e) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>11</sup>

I have considered section 33(2A) in determining if release of the personal affairs information of third parties would be unreasonable. This provision requires that I consider whether disclosure of information in the documents would, or would be reasonably likely, to endanger the life or physical safety of any person.

I have not been provided with any information to indicate that this is a relevant consideration in these circumstances.

23. Having weighed up the above factors, I have determined disclosure of the personal affairs information in Documents 3 and 5 is unreasonable in the circumstances.
24. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each document.

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

25. 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.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>12</sup> and the effectiveness of the deletions. Where

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<sup>11</sup> Section 33(2A).

<sup>12</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].

deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>13</sup>

27. I have considered the information the Agency deleted as irrelevant from Document 4. I agree it falls outside the scope of the Applicant's request because the information deleted is the employee number of the staff member who printed the Electronic Patrol Duty Return (**ePDR**) and information within the ePDR which does not contain any reference to the Applicant's matter. Accordingly, this information is outside the scope of the Applicant's FOI request and should remain deleted as irrelevant information.
28. I have considered the effect of deleting exempt information from the Documents 3 and 5, and irrelevant information from Document 4. In my view, it is practicable for the Agency to delete the exempt and irrelevant information, because it would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

29. On the information available, I am satisfied the exemption in section 33(1) applies to parts of Documents 3 and 5. I have decided to grant access to these documents in part.
30. I am further satisfied that the information deleted by the Agency in Document 4 is irrelevant to the FOI request and should remain deleted under section 25.
31. As it is practicable to edit the documents to delete irrelevant and exempt information, I have determined to grant access to the documents in part.

### **Review rights**

32. 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>14</sup>
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>15</sup>
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>16</sup>
35. 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.
36. 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>17</sup>

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

37. 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>13</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].

<sup>14</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>15</sup> Section 52(5).

<sup>16</sup> Section 52(9).

<sup>17</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]	Penalty Infringement Notice	1	Released in full	Not subject to review	
2.	[Date]	Attendance Records	11	Released in full	Not subject to review	
3.	[Date]	Preliminary Brief	11	Released in part Section 33(1)	Release in part Section 33(1)	Section 33(1): I am satisfied the document contains the personal affairs information of Agency officers and disclosure would be unreasonable for the reasons provided in this Notice of Decision.
4.	[Date]	Electronic Patrol Duty Return (ePDR)	12	Released with irrelevant material deleted under section 25	Release with irrelevant information deleted under section 25	Section 25: I am satisfied the information deleted by the Agency as irrelevant information is outside the scope of the FOI request as it does not relate to the matter concerning the Applicant.  The information deleted as irrelevant by the Agency is to remain deleted under section 25.
5.	[Date]	[redacted] Operator and Authorised Officer as Informant	16	Released in part Section 33(1)	Release in part Section 33(1)	Section 33(1): I am satisfied the document contains the personal affairs information of a third party and disclosure would be unreasonable for the reasons provided in this Notice of Decision.