

## Notice of Decision and Reasons for Decision

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Applicant:	'BA8'
Agency:	Victoria Police
Decision Date:	24 January 2020
Exemptions considered:	Sections 31(1)(a), 31(1)(d) and 38
Citation:	'BA8' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 12 (24 January 2020)

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FREEDOM OF INFORMATION – law enforcement documents – documents concerning police operations – [name of operation] offender arrest – search warrant log – regional crime squad concept of operations – terms of reference

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.

I am satisfied the documents are exempt under sections 31(1)(a), 31(1)(d) and 38. However, having examined the documents and considered the terms of the Applicant's request, I am not satisfied all information deleted by the Agency as irrelevant, in accordance with section 25, is irrelevant to the Applicant's request. Therefore, I have determined to release additional information in 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  
24 January 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to various documents regarding Victoria Police operations [name of operation] and [name of operation] (the **Operations**).
2. The Agency interpreted the Applicants request to the following documents:
  1. In relation to operation [name of operation], documents which contain the following information:
    - (a) date/time of operation commencement;
    - (b) numbers of contacts with members of the public;
    - (c) criteria for inclusion in the operation;
    - (d) staffing numbers;
    - (e) operation principles;
    - (f) operation procedures; and
    - (g) operation location: regions, suburbs and stations.
  2. In relation to operation [name of operation], documents which contain the following information:
    - (a) date/Time of operation commencement;
    - (b) numbers of contacts with members of the public;
    - (c) criteria for inclusion in the operation;
    - (d) staffing numbers;
    - (e) operation principles;
    - (f) operation procedures; and
    - (g) operation location: regions, suburbs and stations.
3. In its decision, the Agency identified seven documents, comprising 44 pages, falling within the terms of the Applicant's request. It decided to grant access to the documents in part.
4. The Agency also advised no documents that identify specific staffing numbers were located for Operation [name of operation], on the grounds it is a current operation and associated tasks fall within the general duties of police members.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. By email dated 16 December 2019, the Applicant advised information refused by the Agency under section 33(1) was not sought as part of the review. Therefore, my review concerns the application of sections 31(1)(a), 31(1)(d) and 38 to refuse access to the documents only.
7. I have examined copies of the documents subject to review and been briefed by OVIC staff who inspected the documents claimed to be exempt under sections 31(1)(a) and 31(1)(d).<sup>1</sup>
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

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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.

9. 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 Applicant and the Agency.
10. 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.

### ***Section 25 – review of the deletion of irrelevant information***

3. In its decision, the Agency determined certain information in Documents 2, 3, 4, 5 and 7 is irrelevant to the Applicant's request, which it deleted in accordance with section 25.
4. In summary, section 25 permits, if it is practicable to do so and the applicant is agreeable, an agency to release an edited copy of a document with any information that either falls outside the scope of the applicant's request or is exempt to be deleted from the document. Alternatively, if it is not practicable to provide an edited copy of the document, or the applicant is not agreeable to receiving an edited copy, the agency is permitted to refuse access to the document in full.
5. Section 49F states I 'may review the decision that is the subject of the application for review' while section 49P provides I 'must make a fresh decision on the original application'.
6. Having reviewed the terms of the Applicant's request, I consider the Applicant seeks access to documents relating to the operating principles and procedures of the Operations as well as information that details how the Agency profiles individuals, determines operating locations, records details of officer interactions with the public and indicates staffing numbers under each operation.
7. I consider the terms of the Applicant's request are sufficiently broad such that it would be difficult to accurately determine the character of documents on the face of the Applicant's request alone. I consider documents that either directly or indirectly relate to the governance of the Operations, indicate contacts made with the public and concern the operating principles and procedures would contribute to an overall understanding of the Operations and, therefore, fall within the terms of the Applicant's request.
8. Having examined the documents and considered the terms of the Applicant's request, I am not satisfied all information deleted by the Agency as irrelevant, in accordance with section 25, is irrelevant to the Applicant's request. In some instances, I have decided the relevant document or information in a document falls within the terms of the Applicant's request and, therefore, is subject to my review in accordance with section 49P.

### ***Review of exemptions***

11. The Agency relies on the exemptions in sections 31(1)(a), 31(1)(d), 33(1) and 38 to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

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

12. Section 31(1)(d) provides, subject to that section, 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'.
13. The exemptions in section 31(1)(d) do not apply to widespread and well known investigation or law enforcement methods and procedures.<sup>2</sup>
14. In its decision letter, the Agency states:

Part of the deleted information comprises details of the methods and procedures used by police whilst managing the ongoing operations...release of this information would be reasonably likely to prejudice the future effective use of those methods and procedures...
15. The documents, refused in part, are internal briefings and guides concerning active policing operations. From my review of the documents, they include: tasking instructions, information detailing assigned duties, briefing notes, arrest logs and collected data, operation concepts and intelligence gathering processes. While I am unable to describe in detail information in the documents exempted by the Agency, as to do so would reveal exempt information, I confirm the relevant information concerns the police investigation and discloses various intelligence gathering techniques used by the Agency.
16. I accept the general public holds some knowledge of the police methods and procedures described in the documents. However, what is not well known are the circumstances in which the Agency determines such methods and procedures will be used, or in what manner particular intelligence gathering techniques will be carried out.
17. If this type of information became publicly known, I am of the view its disclosure would be reasonably likely to impede the effectiveness of the methods and procedures used by the Agency to investigate and prosecute breaches, or possible breaches, of the law. I consider these concerns to be real and reasonably based, noting release under the FOI Act is unrestricted and unconditional such that an applicant is free to use or further disseminate a document as they please.
18. Lastly, there is no information before me to indicate information in the documents has been disseminated outside the Agency such that its availability to the public would take the documents outside the ambit of section 31(1)(d).
19. Accordingly, I am satisfied certain information in Documents 1, 4, 5, 6 and 7 is exempt in part under section 31(1)(d).

### **Section 31(1)(a)**

20. Section 31(1)(a) provides a document is exempt if its disclosure under the FOI Act would, or would be reasonably likely to prejudice either; the investigation of a breach or possible breach of the law in a particular instance, or the enforcement or proper administration of the law in a particular instance.
21. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>3</sup> 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>4</sup>

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

<sup>3</sup> *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.

22. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.<sup>5</sup>
23. In relation to an investigation, a document is exempt under section 31(1)(a) if the following conditions are satisfied:
- (a) there is a specific investigation of a breach or possible breach of law;
  - (b) the document was prepared in the course of, for the purposes of that investigation; and
  - (c) release of the document would be reasonably likely to prejudice the investigation.
24. I am unable to provide further details about the information that is claimed to be exempt, as doing so may convey exempt information. However, I am satisfied that the documents were prepared for an investigatory purpose of the Agency involving police operations that are not publicly known and currently operative.
25. Accordingly, I am satisfied section 31(1)(a) apply to refuse access to Documents 5 and 7 in part.

### **Section 38**

26. The Agency applied section 38 of the FOI Act in conjunction with section 534 of the *Children's Youth and Families Act 2005* (Vic) (**CYF Act**) to a small amount of information in Document 4.
27. Section 38 provides:

#### **38 Documents to which secrecy provisions of enactments apply**

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

28. In order for a document to be exempt under section 38, three conditions must be satisfied:
- (a) there must be an enactment in force;
  - (b) the enactment must apply specifically to the kind of information contained in the document; and
  - (c) the enactment must prohibit persons referred to in the enactment from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
29. Section 534 of the CYF Act provides:
- (1) A person must not publish or cause to be published—
    - (a) Except with the permission of the President or of a magistrate under subsection (1A), a report of a proceeding in the Court or of a proceeding in any other court arising out of a proceeding in the Court that contains any particulars likely to lead to the identification of—
      - (i) The particular venue of the Children's Court, other than the Koori Court (Criminal Division), in which the proceeding was heard; or

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

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

- (ii) A child or other party to the proceeding

...

30. I am satisfied section 534 of the CYF Act is a secrecy provision to which section 38 applies as:
- (a) the CYF Act is an enactment in force;
  - (b) the provision identifies, with precision, the type of information to which it applies; and
  - (c) the provision clearly prohibits anyone from disclosing the information to which it applies.
31. The Agency applied section 534 of the CYF Act to the venue of the Children's Court. I am satisfied section 534 of the CYF Act applies specifically to the information to which the Agency refused access.
32. I note the information may be published with the permission of the President of the Children's Court. There is no information before me to indicate the President has provided permission in this instance. Therefore, I am satisfied the relevant information in Document 4 is exempt under section 38.

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

33. As stated above, the Applicant does not seek review of information exempted by the Agency under section 33(1). Therefore, this information falls outside the scope of my review.

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

34. 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.
35. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</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>7</sup>
36. I have considered the effect of deleting exempt and irrelevant information from the documents, including information exempted by the Agency under section 33(1) that the Applicant no longer seeks. In my view, it is practicable to delete exempt and irrelevant information from the documents as to do so would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

37. Having examined the documents and considered the terms of the Applicant's request, I am not satisfied all information deleted by the Agency as irrelevant, in accordance with section 25, is irrelevant to the Applicant's request.
38. On the information before me, I am satisfied information in the documents is exempt under sections 31(1)(a), 31(1)(d) and 38. As I am satisfied it is practicable to edit the documents to delete irrelevant and exempt information, I have determined to grant access to the documents in full and in part.
39. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

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<sup>6</sup> *Mickelburgh 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>7</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**

40. 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.<sup>8</sup>
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
42. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
43. 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.
44. 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>11</sup>

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

45. 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>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</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]	Operation [name of operation]	11	Released in part Sections 31(1)(d), 33(1)	<b>Release in part</b> Section 31(1)(d), 25 Information removed by the Agency in its original decision under section 33(1) is irrelevant to the review and is to remain deleted.	<b>Section 31(1)(d):</b> For the reasons set out above, I am satisfied release of the information deleted by the Agency under section 31(1)(d) would be reasonably likely to prejudice the effectiveness of the investigation methods and procedures of the Agency when dealing with matters arising out of breaches or evasions of the law. Accordingly, I am satisfied the information removed by the Agency is exempt under section 31(1)(d). <b>Section 25:</b> The Applicant does not request a review of information exempt under section 33(1). Therefore, this information is outside the scope my review and is to be deleted in accordance with section 25.
2.	[date]	Ongoing status report	1	Released in part Section 33(1)	<b>Release in full</b> <b>Section 25</b> The information in column 4 is to be released. All other information removed by the Agency in its original decision is to remain deleted as irrelevant in accordance with section 25.	<b>Section 25:</b> The Agency deleted sections of the document it considered irrelevant to the terms of the Applicant's request. However, having examined the document, I am satisfied it falls within the nature of 'public contacts' and do not consider it was the Applicant's intention to narrow the scope of its request to public contacts of a physical nature, as opposed to all types of public contact. Accordingly, I am satisfied this information in the document is relevant to the request and subject to review.  Having considered similar information released to the Applicant in the document,



Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						I am not satisfied this information is exempt under sections 31(1)(a), 31(1)(d) or 38.
3.	[date]	Ongoing status report	2	Released in part Section 33(1) and irrelevant information deleted under section 25	<b>Release in full Section 25</b> The information in column 4 is to be released. All other information, including information removed by the Agency in its original decision in accordance with section 33(1) is to remain deleted as irrelevant in accordance with section 25.	<b>Section 25:</b> See comments in Document 2 above.
4.	Undated	[name of operation] Offender Arrest Log	5	Released in part Sections 31(1)(d), 33(1), 38 and irrelevant information deleted under section 25	<b>Release in part Sections 31(1)(d), 31(1)(a), 38, 25</b> Information removed by the Agency in its original decision under section 33(1) is irrelevant to the review and is to remain deleted in accordance with section 25.	<b>Section 31(1)(d):</b> For the reasons provided in Document 1 above. <b>Section 31(1)(a):</b> For the reasons set out above, I am satisfied disclosure of this document would be reasonably likely to prejudice the enforcement and proper administration of the law. Accordingly, it is exempt under section 31(1)(a). <b>Section 38:</b> I am satisfied certain information in the document is exempt from release under section 38 for the reasons set out above. <b>Section 25:</b> I am satisfied information deleted by the Agency is irrelevant to the

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						Applicant's request and should remain deleted.
5.	[date]	[name of region] Regional Crime Squad (Concept of Operations) - Draft	13	Released in part Sections 31(1)(a), 31(1)(d) and 33	<p><b>Release in part</b> Sections 31(1)(a), 31(1)(d), 25</p> <p>Under the heading 'Related Materials', the last row in the table is exempt under section 31(1)(a).</p> <p>All personal affairs information in the document is irrelevant and is to be deleted in accordance with section 25.</p>	<p><b>Section 25:</b> I am satisfied the document titled 'Concept of Operations' contains information which falls within the broad nature of 'operation procedures' and 'operation principles'. Therefore, the whole document is relevant to the Applicant's request. Having carefully reviewed this information, I am satisfied certain information in the document is exempt under section 31(1)(a).</p> <p><b>Section 31(1)(a) and (d):</b> See comments for Documents 1 and 4 above.</p>
6.	[date]	Operation [name of operation] Intelligence Concept Operations - Draft	4	Released in part Section 31(1)(d)	<p><b>Release in part</b> Sections 31(1)(d), 25</p> <p>Information removed by the Agency in its original decision under section 33(1) is irrelevant to the review and is to remain deleted in accordance with section 25.</p>	<p><b>Section 31(1)(d):</b> See comments for Document 1 above.</p>
7.	[date]	Operation [name of operation] (Terms of Reference) - Final	8	Released in part Sections 31(1)(a),	<p><b>Release in part</b> Sections 31(1)(a),</p>	<p><b>Section 25:</b> I am satisfied information deleted by the Agency under section 25 as irrelevant, is relevant to the terms of the</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				31(1)(d), 33(1)	31(1)(d), 25 Information removed by the Agency in its original decision under section 33(1) is irrelevant to the review and is to remain deleted in accordance with section 25.	Applicant's request and is subject to review. Having reviewed this information, I am satisfied it is exempt under section 31(1)(d). <b>Sections 31(1)(a) and (d):</b> See comments for Document 1 and 4 above.