

Notice of Decision and Reasons for Decision

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| Applicant: | 'AZ9' |
| Agency: | Victoria Police |
| Decision Date: | 16 January 2020 |
| Exemptions considered: | Sections 33(1) and 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 4(1A) of the <i>Judicial Proceedings Reports Act 1958</i> (Vic) |
| Citation: | 'AZ9' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 4 (16 January 2020) |

FREEDOM OF INFORMATION – personal affairs information – secrecy provision – email correspondence – text message – handwritten notes – information request form – unreasonable disclosure – police documents – *Judicial Proceedings Reports Act 1958* (Vic)

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 three documents in part and refuse access to one document in full.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

16 January 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant amended their request.
2. The amended request was for access to the following documents:

Documents provided by [a Victorian Government agency] to Victoria Police as part of the Privacy Complaint submitted to Victoria Police about [the Applicant's] concerns.

A copy of information shared with [another Victorian Government agency] by Victoria Police from [year] to current in regards to [the Applicant].

Copy of all communications between [another Victorian Government agency] and Victoria Police between [year] and [year] in regards to [the Applicant].

Dates of information requests from [another Victorian Government agency] to Victoria Police about [the Applicant] and a copy of such requests.
3. The circumstances of this matter are sensitive, in that they relate to allegations of conduct in which the Applicant was charged with a criminal offence, and the matter was heard in court. [redacted – further personal background information].
4. In its decision, the Agency identified four documents falling within the terms of the Applicant's request: email correspondence, handwritten notes, a request for personal/health information form and a screen shot of a text message.
5. The Agency decided to grant access to three documents in part and refuse access to one document in full.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
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) information provided by the Agency on 11 April 2019.
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.

Review of exemptions

11. The Agency relied on the exemptions under sections 33(1) and 38 of the FOI Act in conjunction with section 4(1A) of the *Judicial Proceedings Reports Act 1958 (JPR Act)* to refuse access to parts of Documents 1, 3 and 4.
12. The Agency relied on the exemption under section 38 in conjunction with section 4(1A) of the JPR Act to refuse access to document 2 in full.
13. The Agency's decision letter sets out the reasons for its decision.

Section 38 – Documents to which secrecy provisions of enactments apply

14. A document is exempt under section 38 if:
 - (a) there is an enactment in force;
 - (b) that applies specifically to the kind of information 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).

Is there an enactment in force?

15. I am satisfied the JPR Act is an enactment in force for the purposes of section 38.

Does the enactment apply specifically to the kind of information in the documents?

16. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
17. The Agency applied section 38 of the FOI Act in conjunction with section 4(1A) of the JPR Act, which provides:

4 Prohibition of reporting of names

- (1) In this section—

...

publish means disseminate or provide access to the public or a section of the public by any means, including by—

- (a) publication in a book, newspaper, magazine or other written publication; or
- (b) broadcast by radio or television; or
- (c) public exhibition; or

(d) broadcast or electronic communication— other than for a purpose connected with a judicial proceeding;

sexual offence means an offence under subdivision (8A), (8B), (8C), (8D), (8E), (8F) or (8FA) of Division 1 of Part I of the Crimes Act 1958 or under any corresponding previous enactment or an attempt to commit any such offence or an assault with intent to commit any such offence.

- (1A) A person who publishes or causes to be published any matter that contains any particulars likely to lead to the identification of a person against whom a sexual offence, or an offence where the conduct constituting it consists wholly or partly of taking part, or attempting to take part, in an act of sexual

penetration as defined in section 35 of the **Crimes Act 1958**, is alleged to have been committed is guilty of an offence, whether or not a proceeding in respect of the alleged offence is pending in a court.

18. The Agency applied section 38 to information contained in email correspondence, a request form, a screenshot of a text message, and handwritten notes.
19. The prohibition in section 4(1A) includes any particulars 'likely to lead to the identification' of the person against whom a sexual offence is alleged to have been committed.
20. The documents described at paragraph 11 contain the name or names and other personal affairs information of a person or persons against whom a sexual offence was alleged to have been committed. Many of the documents also contain dates, places, events, the names of third parties and other contextual information associated with allegations of sexual offending, from which people familiar with some of those details could be reasonably expected to identify a person or persons against whom a sexual offence was alleged to have been committed.
21. Accordingly, I am satisfied section 4(1A) of the JPR Act applies specifically to the kind of information contained throughout the documents.

Does the enactment prohibit persons from disclosing the information in the documents?

22. Section 4(1A) of the JPR Act prohibits the disclosure of the information in the documents identified above.

Conclusion on the applicability of section 38

23. Having considered the above factors, I am satisfied that some of the information contained in the documents is exempt under section 38 of the FOI Act in conjunction with section 4(1A) of the JPR Act.

Section 33(1) – Documents containing personal affairs information

24. 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;¹ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information?

25. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.²
26. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.³
27. 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.⁴

¹ Sections 33(1) and (2).

² Section 33(9).

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

⁴ *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].

28. The documents contain the following personal affairs information of Agency officers, another agency's officers and third parties, including:
- (a) names;
 - (b) addresses;
 - (c) dates of birth;
 - (d) relationship descriptors;
 - (e) telephone numbers;
 - (f) position titles/ranks;
 - (g) registered numbers;
 - (h) other contextual information which is reasonably capable of identifying third parties; and
 - (i) the personal views provided by third parties to the Agency.
29. Accordingly, I am satisfied the documents contain the personal affairs information of individuals other than the Applicant.

Would release of the personal affairs information be unreasonable?

30. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
31. I respectfully adopt the view of the Supreme Court of Victoria Court of Appeal in *Victoria Police v Marke*⁵ 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'.
32. The Supreme Court 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'.⁶
33. 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'.⁷
34. In determining whether disclosure of the personal information in the documents would be unreasonable, I have considered the following factors:
- (a) The nature of the personal affairs information and the circumstances in which it was obtained

The nature of the personal affairs information is outlined above, at paragraph 28. The information was obtained by the Agency in the context of undertaking an investigation into allegations of criminal behaviour made against the Applicant.

⁵ [2008] VSCA 218 at [76].

⁶ [2008] VSCA 218 at [79].

⁷ [2008] VSCA 218 at [104].

The Agency exempted the personal affairs information of Agency officers, Victorian public service employees of other Agencies, and other third parties.

I appreciate the confidential context in which the information in the documents was obtained by the Agency, being the investigation into an alleged criminal offence. Further, I have considered the matters to which the documents relate ultimately proceeded to charges being laid, and it is likely some of the information in the documents was presented in court.

This factor weighs 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.⁸

Correspondence received from the Applicant indicates an intention to allege corruption against public sector employees, and a miscarriage of justice.

The Applicant's purpose for seeking the information may be achieved by granting access to the personal affairs information of third parties acting within their professional or official capacity, as the information may enable the Applicant to accurately identify any individuals they consider to have acted unlawfully.

This factor weighs in favour of disclosure.

(c) Whether any public interest would be promoted by release of the information

I acknowledge the Applicant's personal interest in seeking access to the information.

However, I do not consider any broader public interest would be promoted by releasing the personal affairs information in the documents. Further, I consider that the public interest in the circumstances of this case falls in favour of preserving the confidentiality of information provided by third parties so as to best allow police and law enforcement agencies to obtain necessary information during their investigations.

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 have limited information before me as to the views of the persons to whom the information relates. However, having considered the nature of the information and the circumstances in which it was obtained, I am of the view the third parties whose personal affairs information is contained in the documents would be likely to object to the release of that information.

This factor weighs against disclosure.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

- (e) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

Having considered the nature of some the information and the circumstances in which it was obtained, I consider it reasonably likely release of certain documents could lead to some of the persons to whom they relate suffering stress and anxiety.

I consider this factor to weigh against disclosure.

- (f) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person⁹

I do not have any information before me to suggest disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.

Conclusion on the applicability of section 33(1)

35. Accordingly, weighing the above factors, I have determined releasing the personal affairs information of third parties is unreasonable, and the information is exempt under section 33(1).

Conclusion

36. On the information available, I am satisfied the exemptions in sections 33(1) and 38 apply to the documents.
37. My decision is the same as the Agency's decision in that I have decided to grant access to the documents in part, with exempt and irrelevant material deleted. I agree with the deletions made by the Agency in accordance with section 25.

Review rights

38. 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.¹⁰
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
41. 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.
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.¹³

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.

⁹ Section 33(2A).

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).