

Notice of Decision and Reasons for Decision

Applicant:	'BD9'
Agency:	Victoria Police
Decision Date:	5 March 2020
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'BD9' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 42 (5 March 2020)

FREEDOM OF INFORMATION – complaint investigation – personal affairs information – personal affairs information of agency officers – information provided in confidence

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.

I am satisfied the information deleted by the Agency is exempt under sections 33(1) and 35(1)(b).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

5 March 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to documents regarding a complaint made to the Independent Broad-based Anti-Corruption Commission (**IBAC**) that was referred to the Agency for investigation.
2. In its decision, the Agency identified ten documents falling within the terms of the Applicant's request. It decided to grant access to nine documents in part and one document 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 examined copies of the documents subject to review.
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) information provided by the Agency during this review.
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 under section 33(1) and 35(1)(b) to refuse access to the documents in part. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

9. 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
 - (a) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of individuals other than the Applicant?

10. 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.²

¹ Sections 33(1) and (2).

11. 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.³
12. Having viewed the documents, I am satisfied the documents contain the following 'personal affairs information' of for the purposes of section 33(1): names, relationships descriptors, employee numbers, and telephone numbers of individuals other than the Applicant.
13. Therefore, I must consider whether disclosure of this information would be unreasonable.

Is disclosure of the personal affairs information unreasonable?

14. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of an individual other than the applicant.
15. In *Victoria Police v Marke*,⁴ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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'.
16. In determining whether disclosure of personal affairs 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 the information was obtained

The personal affairs information was obtained and generated by the Agency in the context of its investigation into the Applicant's complaint. The complaint relates to a welfare check conducted by the Agency and the Applicant subsequently being detained.

Given the subject matter of the complaint, I consider it likely the identity of the third parties is known to the Applicant. However, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁵

In this matter, the names and employee numbers exempted by the Agency include those of Agency officers who attended the Applicant's address to conduct the welfare check. The documents also disclose the personal affairs information of an officer of another Victorian Government agency who was also in attendance. Accordingly, I am of the view the personal affairs information of the public servants recorded in the documents concern the performance of their usual and professional duties and does not relate to matters concerning their personal or private lives.

The documents also disclose personal affairs information of a third party who voluntarily provided information to the Agency during its investigation of the Applicant's complaint.

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

⁵ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

I generally agree that, consistent with the decision of the Victorian Civil and Administrative Tribunal (VCAT) in *Coulson v Department of Premier and Cabinet*,⁶ whether the personal affairs information of agency staff is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter. VCAT has generally accepted there is nothing particularly sensitive about matters occurring or arising out of the course of one's official duties.⁷

However, having considered the circumstances in which the information was obtained and the sensitive subject matter of the Applicant's complaint, I am satisfied the personal affairs information is sensitive.

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 to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁸

The Agency's decision letter indicates the outcome of the investigation concluded the Applicant's allegations were 'resolved' and 'not substantiated'.

There is no information before me outlining why the Applicant seeks access to the personal affairs information. In reviewing the documents, I note most information in the documents was released to the Applicant. In my view, disclosure of the personal affairs information will not assist the Applicant in understanding the documents any further.

This factor weighs against disclosure.

(c) The likelihood of further disclosure of information, if released

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.⁹

I have considered the likelihood of the personal affairs information in the documents being further disseminated and the effects broader disclosure of this information would have on the privacy of the relevant third parties. In the circumstances, I do not consider it is reasonably likely the Applicant will further disclose the personal affairs information.

This factor weighs in favour of disclosure.

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

On the information before me, I am not satisfied there is a broader public interest that would be promoted by releasing the personal affairs information of the third parties in this instance. Rather, the Applicant's interest in the information would serve a personal interest only.

⁶ *(Review and Regulation)* [2008] VCAT 229.

⁷ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

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

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [68].

In my view, it would be contrary to the public interest to release personal affairs information relating to complaint investigations as there is a strong public interest in maintaining the Agency's ability to obtain full and frank information from members of the public or staff in order to properly and thoroughly investigate complaints.

This factor weighs against disclosure.

- (e) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

There is no information before me regarding the views of third parties regarding the release of their personal affairs information.

While I do not have information before me as to the views of each third party, on the information before me, I am of the view it is reasonably likely they would not consent to the release of their personal affairs information given the context in which the personal affairs information was provided. Further, considering the sensitive circumstances surrounding the documents, I am satisfied it is reasonably likely the third parties would object to the release of their personal affairs information.

This factor weighs against disclosure.

- (f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁰

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. However, there is no information before me to suggest this is a relevant factor in this case.

17. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information in the documents is unreasonable in the circumstances. Accordingly, I am satisfied this information is exempt under section 33(1).

Section 35(1)(b)

18. A document is exempt under section 35(1)(b) if two conditions are satisfied:

- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
- (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

Was the information or matter communicated in confidence?

19. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹¹ Further, confidentiality can be expressed or implied from the circumstances of the matter.¹²

¹⁰ Section 33(2A).

¹¹ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹² *Ibid.*

20. The information exempted by the Agency under section 35(1)(b) contains notes taken by the Agency during a conversation with an officer from another Victorian Government Agency concerning the Agency's investigation of the Applicant's complaint.
21. I am mindful in this matter that I do not have specific information before me regarding the third party's view as to whether they provided the information to the Agency on a confidential basis.
22. In any case, I consider the relevant third party would more likely than not would have communicated the information to the Agency in confidence, given the nature of this matter which involves a complaint and the Agency's subsequent investigation.

Will disclosure of the information impair the Agency's ability to obtain similar information in the future?

23. The fact the information was communicated in confidence is not the only consideration in relation to the exemption in section 35(1)(b).
24. The exemption also requires I consider whether the Agency would be impaired from obtaining similar information in the future if information is disclosed under the FOI Act. This means I must consider whether, should the information be disclosed, others in the position of the communicators would be reasonably likely to be inhibited from providing similar information to the Agency.
25. I accept that if third parties, including public servants, who voluntarily provide information to the Agency about its officers, were aware the information they provide would be routinely disclosed under the FOI Act, such persons would be less likely to communicate similar information to the Agency in the future. I am satisfied this would have a detrimental impact on the integrity and ability of the Agency to carry out its complaint investigation functions.
26. On the information before me, it is not apparent any public interest would be served by release of the information to the Applicant. Rather, I am of the view the public interest lies in the preservation of the Agency's ability to obtain material provided during its complaint investigation purposes.
27. Accordingly, I am satisfied the information exempted by the Agency under section 35(1)(b) is exempt.

Deletion of exempt information

28. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴
30. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

¹³ *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].

¹⁴ *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].

Conclusion

31. On the information before me, I am satisfied information deleted by the Agency is exempt under sections 33(1) and 35(1)(b).
32. As I am satisfied it is practicable to edit the documents to delete exempt information, I have decided to grant access to the documents in part.

Review rights

33. 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.¹⁵
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
36. 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.
37. 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.¹⁸

When this decision takes effect

38. 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.

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and (3FA).