

Notice of Decision and Reasons for Decision

Applicant:	'AY1'
Agency:	Victoria Police
Decision Date:	23 December 2019
Provision and exemptions and considered:	Sections 25A(5), 31(3)
Citation:	'AY1' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 218 (23 December 2019)

FREEDOM OF INFORMATION – number of police informants registered in [specific circumstances] – State Intelligence Division – Intelligence and Covert Support Command

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 requirements of section 25A(5) are met and I have decided to refuse to grant access to documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
23 December 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

...all documents (including emails, letters, file notes, diaries, notices and contracts from the LEAP database and papers) recording the statistical number of persons who were registered as police informants, [specific circumstances], from about [date] to the present date.
2. The Agency relied on section 25A(5) to refuse to grant access to the documents in accordance with the Applicant's request.
3. The Agency determined any documents falling within the terms of the Applicant's request, should they exist, would be exempt from release under section 31(3) of the FOI Act. Accordingly, the Agency refused to grant access to documents in accordance with section 25A(5) without having identified any documents relevant to the Applicant's FOI request.
4. The Agency's decision letter sets out the reasons for its decision.

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 and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application and subsequent submission; and
 - (c) information provided by the Agency to OVIC during the review.
8. 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 section 25A(5) to refuse to grant access to documents

9. The power under section 25A(5) is carefully circumscribed.¹ A decision maker must be satisfied of the following three elements, which operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all requested documents are exempt.
 - (c) Third, it must be apparent from:

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

- (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
- (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.²

10. An agency is not required to identify any or all documents to which the request relates or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.

Is the nature of the documents objectively apparent from the face of the request?

11. The request seeks access to a document or documents that record the number of police informants registered [in specific circumstances]. I am satisfied the nature of the documents is objectively apparent from the specific terms of the request.

Would all documents, as described in the request, be exempt?

12. In refusing access to the requested documents under section 25A(5), the Agency determined any documents, should they exist, would be exempt under section 31(3).

13. Section 31(3) states:

- (3) Notwithstanding anything to the contrary in this section, a document is an exempt document if it is a document created by the Bureau of Criminal Intelligence or (whether before or after the commencement of section 22 of the **Terrorism (Community Protection) (Further Amendment) Act 2006**) by the Intelligence and Covert Support Command of Victoria Police.

...

14. In its decision, the Agency stated:

Any documents pertaining to [activity] are compiled and prepared by the State Intelligence Division which is part of the Intelligence and Covert Support Department of Victoria Police. Any documents which contain the information [the applicant] are requesting would be created by that Department. I am therefore satisfied that the information is exempt in accordance with the provisions of section 31(3) of the Act.

15. During the review and following enquiries made by OVIC staff, the Agency confirmed any documents relating to registered police informants would be created by the Intelligence and Covert Support Command only.

16. In its submission, the Applicant's legal representative stated the exceptions in sections 31(2)(a) and (b) apply to the documents sought.

- (a) In the context of the current Royal Commission into the Management of Police Informants, access to the requested documents is in the public interest.
- (b) The requested documents fall squarely within sections 31(2)(a) and (b) of the FOI Act such that they cannot be considered "exempt documents", therefore, access to the documents should be granted.

² *Knight v Corrections Victoria* [2010] VSC 338.

- (c) They reject the Agency's assertion that section 31(3) applies in circumstances where that section is being relied upon by the Agency 'to conceal its own illegality'.
- (d) Such an interpretation of the FOI Act 'would cut across the entire object of the Act' which creates 'a general right of access to information in documentary form in the possession of Ministers and agencies limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies'.
- (e) There is no public interest in concealing the requested documents. The public interest favours granting access to the requested documents.
- (f) The Applicant does not seek access to 'any personal or private information concerning individuals who have been registered as Police informants [in specific circumstances] for the subject period'. Rather, they seek 'documents recording the statistical number of persons who were registered as Police informants [in specific circumstances] for the relevant period'.
- (g) The request is consistent with the objects of the FOI Act and does not breach any privacy considerations.

17. Sections 31(2)(a) and (b) provide:

- (2) This section does not apply to any document that is—
 - (a) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law;
 - (b) a document revealing the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law;

18. While I note the Applicant's reasons for seeking access to the requested documents and submission in relation to section 31(3), I do not accept this provision is subject to the exceptions in section 31(2). Rather, once it is established a document was prepared by the Intelligence and Covert Support Command, section 31(3) does not provide for any exceptions or the consideration of other factors regarding its application.

19. I accept the Agency's submission that, should any relevant documents exist, they would be prepared by the Intelligence and Covert Support Department of Victoria Police only.

20. Accordingly, I am satisfied any documents, should they exist would be exempt under section 31(3).

Is it apparent from the nature of the documents, that there is no obligation under section 25 for the agency to grant access to an edited copy of a document?

21. 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.

22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ 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 25.⁴
23. However, having considered the nature of the documents sought and relevant exemption, I am satisfied there would be no obligation on the Agency to provide an edited copy of any document to remove exempt information in accordance with section 25.

Conclusion

24. On the information before me, I am satisfied:
 - (a) any documents, should they exist, would be exempt under section 31(3); and
 - (b) while the Applicant is agreeable to receiving an edited copy of documents, I am satisfied it would not be practicable to provide the Applicant with a copy of any documents edited in accordance with section 25.
25. Accordingly, I am satisfied the requirements of section 25A(5) are met and I have decided to refuse to grant access to documents in accordance with the Applicant's request under section 25A(5).

Review rights

26. 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.⁵
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
29. 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.
30. 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.⁸

When this decision takes effect

31. 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.

³ *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].

⁴ *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].

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).