

Notice of Decision and Reasons for Decision

Applicant:	'BE2'
Agency:	Victoria Police
Decision date:	5 March 2020
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'BE2' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 44 (5 March 2020)

FREEDOM OF INFORMATION – law enforcement documents – police documents – witness statements

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 differs from the Agency's decision.

I am not satisfied Document 1 is exempt under section 33(1) and is to be released in full.

However, I am satisfied Documents 2 and 3 are exempt in full under section 35(1)(b).

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

5 March 2020

Reasons for Decision

Background to review

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

All investigation documents and reports from Forensic Dept, all statements of persons questioned in relation to the falsifying of my documents...
2. In its decision, the Agency identified five documents falling within the terms of the Applicant's request. It decided to refuse access to two documents in full and one document in part under the FOI Act and release two documents outside the FOI Act.

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, namely the documents exempted under the FOI Act.
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 and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request; and
 - (b) information provided with the Applicant's review application.
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 in sections 33(1) and 35(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Section 35(1)(b)

9. The Agency relied on section 35(1)(b) to refuse access to Documents 2 and 3 in full.
10. 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; or
 - (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?

11. When determining whether the information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.¹
12. Documents 2 and 3 are copies of third party witness statements. Information obtained in the statements was obtained as part of the Agency's investigation into a reported offence.
13. There is nothing on the face of the documents to indicate the information was communicated in confidence. However, for the purposes of section 35(1)(b), a document need not be marked 'confidential' for the content to be considered information communicated in confidence.²
14. Having considered the content and context of information in the documents, I am satisfied the third parties who communicated the information to the Agency did so in circumstances in which confidentiality could reasonably be inferred.
15. Further, I consider the information was communicated with the expectation it would only be used for the purpose of the Agency's investigation and any subsequent legal process and consider it unlikely the third parties would anticipate the information they provided would be released to the Applicant under the FOI Act.
16. Accordingly, I am satisfied disclosure of the Documents 2 and 3 would divulge information communicated to the Agency in confidence.

Would disclosure be contrary to the public interest?

17. Section 35(1)(b) also requires consideration of whether the agency would be impaired from obtaining similar information in the future if the documents were to be disclosed under the FOI Act.
18. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same or similar information in the future. However, the provision does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which the Applicant's personal interest in the document would be served by being granted access to the documents.
19. I accept the Agency relies on information provided to it by members of the public in order to effectively perform its investigative functions. I consider if the Agency were to routinely release information of the kind in Documents 2 and 3 in response to an FOI request, the readiness of the public to provide information of this nature to the Agency would be impacted thereby impairing the Agency's ability to obtain information of a similar nature in the future.
20. This is consistent with evidence heard by the Victorian Civil and Administrative Tribunal (**VCAT**), in *Williams v Victoria Police*³ and more recently in *RFJ v Victoria Police FOI Division*,⁴ in which VCAT accepted evidence that persons would be less likely to make statements to Victoria Police if they were of the view the making of such statements was not confidential.
21. Having reviewed the content and context in which the information was provided to the Agency, I am satisfied the public interest lies in the Agency preserving the confidentiality of witness statements provided by third parties during a police investigation. Further, it would be contrary to the public

¹ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

² *Williams v Victoria Police* [2007] VCAT 1194 at [75].

³ [2007] VCAT 1194 at [73].

⁴ [2013] VCAT 1267 at 170.

interest if third parties were not able to communicate openly and transparently with the Agency out of concern information they provided would be disclosed under the FOI Act.

22. Accordingly, I am satisfied Documents 2 and 3 are exempt under section 35(1)(b) as release would be likely to impair the Agency's ability to obtain similar information in the future.

Section 33(1)

23. 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;⁵ and
 - (b) such disclosure would be 'unreasonable'.
24. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the circumstances of a matter.
25. I have not considered the application of section 33(1) to information I have determined is exempt under section 35(1)(b).
26. The Agency relied on the exemption in section 33(1) to refuse access to Document 1 in part. The information exempted by the Agency is the name, job title and signature of an Agency officer.
27. Having reviewed the document, I am satisfied it is not unreasonable to release the personal affairs information of the Agency officer in these circumstances. I am of the view the personal affairs information is not sensitive as it relates solely to the Agency officer in the context of them performing their professional duties and responsibilities and does not relate to matters concerning their personal or private lives. I consider disclosure in this instance, is not of a nature that would provide for arbitrary interference with the individual's privacy, family or home given the personal affairs information has arisen in the context of their professional employment and duties with the Agency. Therefore, I consider the public interest in transparency outweighs their personal privacy in this case.
28. This view is consistent with the Victorian Supreme Court of Appeal (**Court of Appeal**) decision of *Victoria Police v Marke*⁶ where the Court of Appeal held:

There is, of course, no absolute bar to providing access to documents which relate to the personal affairs of others. The exemption arises only in cases of unreasonable disclosure. What amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case.⁷

29. Accordingly, I am not satisfied Document 1 is exempt under section 33(1).

Deletion of exempt or irrelevant information

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ and the effectiveness of the deletions. Where

⁵ Sections 33(1) and 33(2).

⁶ [2008] VSCA 218 in at [76].

⁷ Ibid.

⁸ *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].

deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.⁹

32. I have considered the effect of deleting exempt information from Documents 2 and 3. In my view, it is not practicable for the Agency to delete the exempt information in accordance with section 25, as to do so would result in very little information being released to the Applicant, rendering the documents meaningless.

Conclusion

33. On the information before me, I am not satisfied Document 1 is exempt under section 33(1) and is to be released in full.
34. However, I am satisfied Documents 2 and 3 are exempt under section 35(1)(b). As I am satisfied it is not practicable to edit the documents to delete exempt information in accordance with section 25, I have determined to refuse access to these documents in full.

Review rights

35. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁰
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
38. 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.
39. 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

40. I have decided to release documents that contain information relating to the personal affairs of a third party.
41. I am satisfied it is practicable to notify the relevant third party of my decision and their right to apply to VCAT for review of my decision within 60 days from the date they are given notice.
42. Therefore, 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 *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].

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).

Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Statement of Forensic Services Department	5	Refused in part Section 33(1)	Release in full	Section 33(1): For the reasons set out above, I am not satisfied it would be unreasonable to release the personal affairs information in the document. Accordingly, the document is not exempt under section 33(1).
2.	Witness Statement	3	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 35(1)(b)	Section 35(1)(b): For the reasons set out above, I am satisfied release of the document would be contrary to the public interest as it would impair the ability of the Agency to obtain information of a similar nature in the future. Accordingly, the document is exempt under section 35(1)(b). Section 25: In my view, it is not practicable for the Agency to delete information in the document exempt under section 35(1)(b) in accordance with section 25. Accordingly, the document is exempt in full under section 35(1)(b). Section 33(1): As I have determined the document is exempt under section 35(1)(b) it is not necessary for me to consider the application of section 33(1) to the document.
3.	Witness Statement	3	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Section 35(1)(b)	See comments for Document 2 above.