

Notice of Decision and Reasons for Decision

Applicant:	'BF5'
Agency:	Victoria Police
Decision Date:	11 March 2020
Exemptions and provisions considered:	31(1)(d), 31(3), 33(1) and section 63 and 133 of the <i>Telecommunications (Interception and Access) Act 1979</i> (Cth)
Citation:	'BF5' and <i>Victoria Police (Freedom of Information)</i> [2020] VICmr 56 (11 March 2020)

FREEDOM OF INFORMATION – Law Enforcement Assistance Program (LEAP) documents – police records – law enforcement documents – police records and procedures – telecommunications warrants – police surveillance - *Telecommunications (Interception and Access) Act 1979* (Cth)

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 in that I have decided to release additional information in the documents.

I am satisfied certain information in the document is exempt under sections 31(1)(d) and 33(1).

I have also decided that disclosure of certain information, if it exists, is prohibited under the *Telecommunications (Interception and Access) Act 1979* (Cth).

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

11 March 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 clarified the initial request by telephone on 17 September 2019.
2. The clarified request was for access to the following documents:
 1. The Applicant's employment records with the Agency;
 2. The Applicant's complaint to the Office of Police Integrity;
 3. All information on any surveillance of the Applicant, their home address, phone, and vehicles;
 4. All LEAP documents relating to the Applicant;
 5. The Applicant's complaint to the Professional Standards Command;
 6. Any telecommunication warrants in relation to the Applicant;
 7. A bullying complaint made in [year].
3. In its decision, the Agency identified seven documents falling within the terms of the Applicant's request. It decided to release four documents in full and three documents in part.
4. The Agency also administratively released to the Applicant copies of original handwritten complaints that the Applicant had submitted to the Agency.
5. The Agency did not locate any documents within the scope of point 1 of the Applicant's request.
6. The Applicant was advised that the Office of Police Integrity no longer exists and that any request for documents within the scope of point 2 should be directed to the Independent Broad-Based Anti-Corruption Commission (**IBAC**).
7. The Agency advised the Applicant it was not able to conduct a thorough and diligent search in response to point 7 of the Applicant's request on the basis that the Applicant did not provide sufficient detail for the Agency to locate the incident or complaint to which this part of the request relates.
8. Further, the Agency advised the Applicant that any documents relating to telecommunications warrants are not subject to FOI Act.

Review

9. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
10. I have examined copies of the documents subject to review and have been briefed by OVIC staff who inspected the documents claimed to be exempt in part under sections 31(1)(d).¹
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.

¹ 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.

12. 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 submission dated 12 February 2020 and information provided by the Applicant during this review; and
 - (c) the Agency's submissions dated 20 February 2020 and information provided by the Agency during this review.
13. 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.

Applicant's request for telecommunications warrants

14. In point 6 of their request, the Applicant sought access to any telecommunications warrants in relation to themselves.
15. The Agency denied access to any documents relevant to point 6 of the request, should they exist, under section 297 of the *Telecommunications Act 1997* (Cth).
16. By submission dated 20 February 2020, the Agency also submitted disclosure of information relating to telecommunications warrants is prohibited under sections 63 and 133 of the *Telecommunications (Interception and Access Act) 1979* (Cth) (**TIA Act**).

Does the Applicant seek access to documents regulated by the TIA Act?

17. The TIA Act regulates telecommunications interception. In particular, the TIA Act outlines the circumstances in which agencies can obtain warrants to intercept communications and to access stored communications. The TIA also makes it an offence to use or disclose information concerning such warrants, except in specific circumstances.
18. I am satisfied that any telecommunication warrants requested by the Applicant under point 6 of their FOI request, should they exist, are regulated under the TIA Act.

Is the Agency prohibited from disclosing information regarding telecommunication warrants under the TIA Act?

19. In its submission, the Agency submits disclosure of information concerning telecommunications warrants is prohibited pursuant to sections 63(2) and 133(1) of the TIA Act.
20. Section 63 of the TIA provides:

63 No dealing in intercepted information or interception warrant information

- (1) Subject to this Part and section 299, a person shall not, after the commencement of this Part:
- (a) communicate to another person, make use of, or make a record of; or
 - (b) give in evidence in a proceeding; lawfully intercepted information or information obtained by intercepting a communication in contravention of subsection 7(1).
- (2) Subject to this Part and section 299, a person must not, after the commencement of this subsection:
- (a) communicate interception warrant information to another person; or

- (b) make use of interception warrant information; or
- (c) make a record of interception warrant information; or
- (d) give interception warrant information in evidence in a proceeding.

21. Further, section 133 of the TIA provides:

133 No dealing with accessed information etc.

(1) A person commits an offence if:

- (a) the person:
 - (i) communicates information to another person; or
 - (ii) makes use of information; or
 - (iii) makes a record of information; or
 - (iv) gives information in evidence in a proceeding; and
- (b) the information is:
 - (i) lawfully accessed information; or
 - (ii) information obtained by accessing a stored communication in contravention of subsection 108(1); or
 - (iia) preservation notice information; or
 - (iii) stored communications warrant information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

...

22. 'Interception warrants' and 'stored communication warrants' are defined as warrants issued under Chapters 2 and 3 of the TIA Act.

23. Section 6EA of the TIA Act defines the meaning of an 'interception warrant information', as follows:

- (a) information about any of the following:
 - (i) an application for an interception warrant;
 - (ii) the issue of an interception warrant;
 - (iii) the existence or non-existence of an interception warrant;
 - (iv) the expiry of an interception warrant; or
- (b) any other information that is likely to enable the identification of:
 - (i) the telecommunications service to which an interception warrant relates; or
 - (ii) a person specified in an interception warrant as a person using or likely to use the telecommunication service to which the warrant relates.

24. Section 6EB of the TIA Act defines the meaning of a 'stored communications warrant information', as:

- (a) information about any of the following:
 - (i) an application for a stored communications warrant;
 - (ii) the issue of a stored communications warrant;
 - (iii) the existence or non-existence of a stored communications warrant;
 - (iv) the expiry of a stored communications warrant; or
- (b) any other information that is likely to enable the identification of:
 - (i) the telecommunications service to which a stored communications warrant relates; or
 - (ii) a person specified in a stored communications warrant as a person using or likely to use the telecommunications service to which the warrant relates.

25. In its submission, the Agency advised there is no information to suggest that section 299 of the TIA Act is relevant in the circumstances of this matter.

Are there any exceptions to the prohibition to disclose information concerning telecommunications warrants?

26. Part 3-4 of the TIA Act provides the circumstances in which accessed information may be dealt with.

27. Additionally, section 67(1) of the TIA Act provides:

67 Dealing for permitted purpose in relation to agency

(1) An officer or staff member of an agency may, for a permitted purpose, or permitted purposes, in relation to the agency, and for no other purpose, communicate to another person, make use of, or make a record of the following:

(a) lawfully intercepted information other than foreign intelligence information or general computer access intercept information;

(b) interception warrant information.

...

28. 'Permitted purpose' is defined in section 5 of the TIA Act.

29. I have considered the decision of Deputy President Coghlan in *Selzer v Victoria Police* [2005] VCAT 2593 (**Selzer**), which concerns an application under the FOI Act for 'any telecommunications interception warrant issued'.

30. At [12] – [14], Deputy President Coghlan states:

[12] In this case it is clear that her application for access to the information request could not be successful for the following reasons.

[13] A Commonwealth Act, the *Telecommunications (Interception) Act 1979* (Cth), applies to telecommunications interception warrants. Section 67(1) of that Act, only permits an officer of an agency to communicate designated warrant information for a permitted purpose and for no other purpose. Section 5 of that Act defines a "permitted purpose" and release pursuant to a request such as Ms Selzer's is not a permitted purpose. In short, the Commonwealth Act does not permit the release of information Ms Selzer requests.

[14] Section 109 of the Commonwealth constitution provides that where a law of a State is inconsistent with a law of the Commonwealth, the Commonwealth law is to prevail. So where the Commonwealth Act does not permit release of the information it prevails; irrespective of any rights Ms Selzer might have had under the FOI Act and that is the end of the matter...

31. On the information before me, I am not satisfied any of the permitted purposes and dealings with accessed information, as outlined in Division 2 of Part 3-4, and section 67, apply in the circumstances of this matter.

32. I am satisfied disclosure of the documents within the scope of point 6 of the Applicant's request, if they exist, is not permitted under sections 63 and 133 of the TIA Act.

33. In accordance with Deputy President's Coghlan's reasoning in *Selzer*, I am satisfied these provisions of the TIA Act prevails over the FOI Act in the circumstances of this matter.

34. On the basis of the above, I am not required to consider the application of section 297 of the *Telecommunications Act 1997* (Cth).

Review of exemptions for the remainder of the Applicant's request

35. The Agency relied on the exemptions under sections 31(1)(d), 31(3), 33(1) to refuse access to certain documents in part. The Agency's decision letter outlines the reasons for its decision.

Section 31(1)(d)

36. Section 31(1)(d) provides:

31 Law enforcement documents

(1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

...

(d) Disclosure 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.

37. The exemptions in section 31(1) do not apply to widespread and well-known methods and procedures.²
38. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.³
39. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁴
40. The Agency relied on this exemption in relation to parts of a Law Enforcement Assistance Program (LEAP) Person History Report, released in part to the Applicant. The report concerns a missing person report.
41. In its decision, the Agency states:
- Part of the deleted information comprises details of methods and procedures used by police during the course of an investigation into this matter. I am satisfied that the release of this information would be reasonably likely to prejudice the future effective use of those methods and procedures pursuant to section 31(1)(d) of the [FOI Act].
42. Having been briefed by OVIC staff who inspected the information exempted by the Agency under section 31(1)(d), I am satisfied the exempted information relates to methods and procedures employed by Agency officers during its investigative functions. I am constrained in providing any further description of the exempted information as to do so would likely disclose the relevant information.
43. Further, I am satisfied the exempted information is not widespread or well-known amongst the public. Having considered the likely effect of disclosing this information under the FOI Act, which provides for unrestricted and unconditional release of information, I am satisfied disclosure would be reasonably likely to undermine the use by the Agency and effectiveness of these methods and procedures in carrying out investigations and its law enforcement functions.
44. Accordingly, I am satisfied the relevant information is exempt under section 31(1)(d).

² *XYZ v Victoria Police* [2010] VCAT 255 at [177].

³ *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.

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

Section 31(3)

45. 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.

...

46. Section 31(3) provides an exemption in relation to documents created by the Intelligence and Covert Support Command of Victoria Police (or its predecessor) and contains only one criterion. In order to claim this exemption, an agency must demonstrate a document was created by the Intelligence and Covert Support Command of Victoria. The exemption applies to all documents created by this body.

47. 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.

48. In its decision, the Agency stated:

Any documents pertaining to surveillance are compiled and prepared by the State Intelligence Division which is part of the Intelligence and Covert Support Department of Victoria Police (formerly the Bureau of Criminal Intelligence).

In my view, any documents, should they exist, that match the terms of part 3 of your request would be exempt from release in accordance with the provisions of section 31(3) of the Act, as they would be created by that department. I am therefore satisfied that the information is exempt in accordance with section 31(3) of the Act.

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

50. Therefore, any documents that match the terms of point 3 of the Applicant's request, should they exist, would be created and held by that body and would be exempt from release in accordance with section 31(3).

51. Accordingly, I am satisfied any documents that relate to this part of the request, should they exist, would be exempt under section 31(3).

Section 33(1) – Documents containing personal affairs information

52. A document is exempt under section 33(1) if two conditions are satisfied:

- (c) 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
- (d) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information?

53. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.⁶

⁵ Sections 33(1) and (2).

54. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.⁷
55. 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.⁸
56. The Agency applied this exemption to the following documents in part:
- (a) a LEAP Incident Report and Case Progress; and
 - (b) a [name of educational institution] Reference Letter.
57. I am satisfied the documents contain the personal affairs information, including names, signatures, dates of birth, professional credentials, addresses and other identifying information of persons other than the Applicant.

Would release of the personal affairs information be unreasonable?

58. The concept of 'unreasonable disclosure' involves determining whether the public interest in the disclosure of official information is outweighed by the personal interest in privacy.
59. In determining whether disclosure of the 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

I am satisfied the personal affairs information contained in the LEAP Personal History Report was obtained by the Agency in the context of a missing persons report made to the Agency. In such circumstances, I consider the names of third parties involved in the matter are sensitive in nature. This factor weighs against disclosure of the LEAP report.

There is no information before me regarding the circumstances in which the Agency obtained the reference letter. Having viewed the contents of the letter and considering the document was created over [specified number of] years ago, I am not satisfied the information is particularly sensitive. This factor weighs in favour of disclosure of the letter.

- (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.⁹

I note the Applicant is seeking documents that relate to themselves in order to understand [their] interactions with the Agency. I consider this factor weighs in favour of disclosure.

⁶ Section 33(9).

⁷ *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

⁸ *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].

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

The FOI Act does not impose any conditions or restrictions on an applicant's use of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information if released.

There is no information before me to indicate the Applicant intends to disseminate the information. Accordingly, this factor weighs in favour of disclosure.

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

The Applicant seeks access to the information for a personal reason. It is not apparent any public interest would be served by release of the personal affairs information. Rather, given the nature of the information, I am of the view the public interest in this case lies in preserving the privacy of third parties in the documents. 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

I do not have any information before me as to the views of the individuals to whom the information relates, as the Agency determined it was not practicable to consult with third parties.

Having regard to the circumstances in which the LEAP Incident Report was created, I am of the view the third party would be reasonably likely to object to the release of their personal affairs information. This factor weighs against disclosure.

Having viewed the reference letter, I am of the view the third parties would be unlikely to object to the release of their personal affairs information. This weighs in favour of disclosure.

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

There is no information before me to suggest this is a relevant factor in this case.

60. Having weighed up the above factors, I have determined disclosure of the personal affairs information in the LEAP Incident Report would be unreasonable, however that it would not be unreasonable to release the personal affairs information deleted by the Agency in the Reference Letter.

61. The Schedule of Documents in **Annexure 1** sets out my decision with respect to section 33(1) in relation to each of the documents.

Deletion of exempt or irrelevant information

62. 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.

63. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹¹ and the effectiveness of the deletions. Where

¹⁰ Section 33(2A).

¹¹ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹²

64. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request.
65. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

66. On the information available, I am satisfied the exemptions in sections 31(1)(d), 31(3) and 33(1) apply to certain information in the documents.
67. As it is practicable to edit the documents to delete irrelevant and exempt information, I have determined to grant access to the documents in part.

Other matters

68. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
69. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹³

70. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁴
71. I have decided notifying the relevant third parties would be an unnecessary intrusion for the following reasons:
 - (a) the nature of the information;
 - (b) the context in which the information was provided, being a professional reference for the Applicant; and
 - (c) the passage of time since the documents were created.
72. On balance, given the unnecessary intrusion into the lives of the individuals whose personal information appears in the document, I am not satisfied it is practicable to notify those individuals of their right of review.

Review rights

¹² *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

¹³ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁴ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

73. 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
74. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
75. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
76. 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.
77. 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

78. 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).

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	LEAP Person History Report	3	Released in part Sections 25, 31(1)(d)	Released in part Sections 25, 31(1)(d) The information deleted by the Agency is to remain deleted.	<p>Section 31(1)(d): I am satisfied the 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. Accordingly, I am satisfied the information deleted by the Agency is exempt under section 31(1)(d) and is to be remain deleted in accordance with section 25.</p> <p>Section 25: I am satisfied the information deleted by the Agency under section 25 is irrelevant to the Applicant's request. Accordingly, the information is to remain deleted.</p>
2.	[date]	LEAP Incident Report and Case Progress	2	Released in part Sections 33(1), 25	Released in part Sections 25, 33(1) The information deleted by the Agency is to remain deleted.	<p>Section 33(1): I consider it would be unreasonable to release the personal affairs information of third parties in this document for the reasons outlined above. Accordingly, I am satisfied the information deleted by the Agency is exempt under section 33(1).</p> <p>Section 25: See comments for Document 1.</p>

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
3.	[date]	Memorandum	1	Released in full	Not subject to review	
4.	[date]	Reference Letter	1	Released in part Section 33(1)	Release in full This document is to be released to the Applicant in full.	Section 33(1): I do not consider it unreasonable to release the personal affairs information of third parties in this document for the reasons outlined above. Accordingly, I am not satisfied the information deleted by the Agency is exempt under section 33(1).
5.	N/A	Compliments and Complaints Cover Sheet	2	Released in full	Not subject to review	
6.	N/A	Compliments and Complaints Cover Sheet	2	Released in full	Not subject to review	
7.	N/A	Compliments and Complaints Cover Sheet	2	Released in full	Not subject to review	