

Notice of Decision and Reasons for Decision

Applicant:	'B15'
Agency:	Victoria Police
Decision Date:	25 March 2020
Exemption considered:	Section 33(1)
Citation:	'B15' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 83 (25 March 2020)

FREEDOM OF INFORMATION – law enforcement documents – police records – Law Enforcement Assistance Program (LEAP) database – LEAP audit – list of agency officers who accessed LEAP database – correspondence from agency

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 determined to release additional information in the document.

I am satisfied certain information in the document is exempt under section 33(1).

As I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, I have determined to grant access to the document in part.

The Schedule of Documents in **Annexure 1** details my decision in relation to section 33(1).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

25 March 2020

Reasons for Decision

Background to review

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

A LEAP audit on myself between [date range] for sworn members of Victoria Police only
3. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to grant access to the document in part.
4. The Agency relied on the exemption under section 33(1) to refuse access to parts of the document. 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. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) information provided by the Agency on [date];
 - (d) correspondence between the Agency and the Applicant; and
 - (e) submissions received by the Agency on [date] and [date].
9. 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

Section 33(1) – Documents containing personal affairs information

10. 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

¹ Sections 33(1) and (2).

- (b) such disclosure would be 'unreasonable'.

Does the document contain personal affairs information?

11. 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
12. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.³
13. 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
14. The document is a two page, A3 size table containing the names and user IDs of the Agency officers who have accessed information in the LEAP database regarding the Applicant, the date and time the information was accessed, 'Reason For Access' input codes and other related data.
15. The document contains the following personal affairs information of sworn members of the Agency:
 - (a) surnames;
 - (b) position titles/ranks; and
 - (c) agency user IDs/registered numbers.
16. I am satisfied the above information constitutes the personal affairs information of persons other than the Applicant.

Would the release of the personal affairs information be unreasonable?

17. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the interest in protecting a third party's right to personal privacy.
18. In *Victoria Police v Marke*,⁵ the Victorian Supreme Court of Appeal 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'.
19. As also stated in *Victoria 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
20. 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
21. In determining whether disclosure of the personal information in the document would be unreasonable, I have considered the following factors:

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].

⁵ [2008] VSCA 218 at [76].

⁶ [2008] VSCA 218 at [79].

⁷ [2008] VSCA 218 at [104].

- (a) The nature of the personal affairs information and the circumstances in which the information was obtained

The nature of the personal information is outlined above. The document records information about criminal incidents reported to or by the Agency for use in relation to its law enforcement and policing functions.

On the information before me, I do not consider it would be unreasonable to release the personal affairs information of Agency officers recorded in the document in the context of these individuals carrying out their official duties in accessing the Applicant's LEAP record.⁸ This factor weighs in favour of 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.⁹

The Applicant provided the following information with respect to their purpose for seeking the information:

The purpose of the LEAP audit was to identify all personnel who may potentially be involved in a malicious prosecution...

On the information before me, I am unable to confirm whether the Applicant's stated purpose would be achieved by granting access to the personal affairs information of persons who accessed the Applicant's LEAP record.

Accordingly, this factor neither weighs in favour or against disclosure.

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

I acknowledge there is a public interest in ensuring access by Agency officers to the LEAP database is done so in accordance with the law and Agency policies and procedures.

Providing access to such information provides an important mechanism for ensuring the integrity of such information, and that it is only accessed in connection with the Agency's law enforcement and policing functions.

This factor weighs in favour of disclosure.

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

The information redacted in the document by the Agency comprises the personal affairs information of Agency officers who objected to the release of their personal affairs information and that of a former Agency officer.

The Agency provided me with the results of its consultation with Agency officers regarding their views as to the disclosure of their personal affairs information recorded in the document.

⁸ *Milthorpe v Mt Alexander Shire Council* (1997) 12.

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

The Agency initially consulted with 15 Agency officers, 10 of whom did not object to the release of their personal affairs information, five objected to the release and one person is no longer employed by the Agency.

I note the five Agency officers, who objected to release, had their views sought again during the course of this review. Three of the five officers remain opposed to the release of their personal affairs information.

While not determinative, I consider these objections weigh against disclosure of those Agency officer's personal affairs information in the circumstances

In relation to the former Agency officer, I do not have sufficient information about whether they object to the release of their information.

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

The Agency decided to release the personal affairs information of the 10 officers who did not object to the release of their information.

As stated above, upon conducting further consultation during the review, two of the five remaining members did not raise concerns regarding the release of their personal affairs information. For this reason, I consider it would not be unreasonable to release the personal affairs information of these members.

Having reviewed the remaining responses, I note the three Agency officers remain opposed to and hold concerns regarding the disclosure of their personal affairs information to the Applicant.

Having considered the information before me, I accept disclosure of certain personal affairs information in the document would be reasonably likely to lead to these individuals experiencing stress and anxiety.

This factor weighs against disclosure.

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

Finally, I must consider whether disclosure of information in the documents would, or would be reasonably likely, to endanger the life or physical safety of any person.¹⁰ I do not consider this is a relevant factor in this matter.

22. I am satisfied disclosure of the personal affairs information of the Agency officers, who did not object to the disclosure of their personal affairs in the document, is not unreasonable or exempt under section 33(1). Accordingly, this information is to be released to the Applicant.
23. However, having weighed up the above factors in relation to the disclosure of the personal affairs information of Agency officers who objected to disclosure, on balance, I am satisfied release of this information is unreasonable in the circumstances and is exempt under section 33(1).
24. The Schedule of Documents in **Annexure 1** details my decision in relation to section 33(1).

¹⁰ Section 33(2A).

Deletion of exempt or irrelevant information

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
26. 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 deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹²
27. I have considered the effect of deleting exempt information from the document in accordance with section 25. I am satisfied it is practicable to delete the exempt information as to do so would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

28. My decision on the Applicant's request differs from the Agency's decision in that I have determined to release additional information in the document on grounds its disclosure is not unreasonable in the circumstances and it is not exempt under section 33(1).
29. As I am satisfied it is practicable to delete exempt information from the document in accordance with section 25, I have determined to grant access to the document in part.
30. The Schedule of Documents in **Annexure 1** details my decision in relation to section 33(1).

Review rights

31. 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.¹³
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
34. 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.
35. 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.¹⁶

Third party review rights

36. I have decided to release further personal affairs information in the document.

¹¹ *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].

¹² *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].

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and (3FA).

37. In doing so, section 49P(5) requires, if practicable, I must notify any person, who has a right to apply to VCAT for a review of my decision, of their right to do so.
38. Given the relevant individuals, whose personal affairs information is to be disclosed, did not object to the disclosure of this information, I am satisfied it is not practicable or necessary¹⁷ to notify them of their right of review.

When this decision takes effect

39. For that reason, my decision does not take effect until the Agency's 14 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁷ While noting the provision in section 33(3A) is not repeated in section 49P, I consider the same principle applies that where a person does not object to the disclosure of their personal affairs information in a document, there is no requirement for that person to be notified of their VCAT review rights.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
1.	Various	LEAP audit report	2	Released in part Section 33(1)	<p style="text-align: center;">Release in part</p> <p style="text-align: center;">Sections 33(1), 25</p> <p style="text-align: center;">The document is to be released with the following information, which is exempt under section 33(1), deleted in accordance with section 25:</p> <p>Page 1:</p> <ul style="list-style-type: none"> (a) first listed name of the former Agency officer recorded in entry dated [date]; (b) third listed name of Agency officer recorded in entry dated [date]; and (c) sixth listed name of Agency officer recorded in entry dated [date]; <p>Page 2:</p> <ul style="list-style-type: none"> (d) second listed name of Agency officer recorded in entry dated [date].