

Notice of Decision and Reasons for Decision

Applicant:	'BL5'
Agency:	Victoria Police
Decision date:	9 April 2020
Provision and exemption considered:	Sections 33(1), 67
Citation:	'BL5' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 111 (9 April 2020)

FREEDOM OF INFORMATION – retrospective operation of FOI Act – documents not subject to FOI Act – documents created prior to commencement of Act – Law Enforcement Assistance Program (LEAP) – LEAP record – personal affairs information – deceased family member

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.

In relation to the documents created prior to 5 July 1978, my decision is the same as the Agency's decision, in that I am satisfied the documents are not subject to the FOI Act.

However, I am not satisfied the document subject to review is exempt under section 33(1), and access is to be granted in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

9 April 2020

Reasons for Decision

Background to review

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

I am seeking all information/documentation/photos/reports/records/publications in relation to [family member], inclusive of all police reports/departamental documents and photos of [an incident].

[Details of an incident].

I would also like a copy of my [family member's] whole police file. [Description of family member]. I also wish for the information around [another incident].

2. In its decision, the Agency identified certain documents that were created prior to 5 July 1978, which is the date before which documents held by Victorian agencies are not subject to the FOI Act, and stated these documents are not subject to the FOI Act.
3. The Agency also identified another document created after 5 July 1978 and refused access to the document in full under section 33(1). The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the documents subject to review.
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) information provided with the Applicant's review application; and
 - (c) communications between the Applicant, the Agency and OVIC staff.
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 a government agency or other public body, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Retrospective operation of the FOI Act

9. Section 67 provides:

67 Retrospective operation of law

- (1) An applicant for access to records about himself, within the meaning of section 33, shall be entitled to receive access subject to this Act to any such record notwithstanding that the record came into existence at any time prior to the date of commencement of this section.
- (2) An applicant for access to a document other than those referred to in subsection (1) shall be entitled to receive access, subject to this Act, to any such document provided that it

came into existence not more than five years prior to the date of commencement of this section.

10. In summary, section 67(2) of the FOI Act provides a 'cut off' date of 5 July 1978, prior to which the FOI Act does not apply to a document held by an agency. Therefore, such documents are not subject to access by a person under the FOI Act.
11. However, where a person seeks access to their own personal affairs information in documents created prior to 5 July 1978, section 67(1) provides such documents continue to be subject to access by that person under the FOI Act.
12. In this case, I am satisfied the Applicant seeks documents held by the Agency that came into existence more than five years prior to the commencement of section 67 (ie prior to 5 July 1978).
13. Given the documents are police records for the Applicant's [family member], I am also satisfied they contain the personal affairs information of a person other than the Applicant. As such, section 67(2) applies and the relevant documents are not subject to access under the FOI Act.

Review of exemptions

14. The Agency relied on section 33(1) to refuse access to the document created after 5 July 1978.

Section 33(1)

15. 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
 - (b) such disclosure would be 'unreasonable'.
16. 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 such information may be reasonably determined.²
17. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

Does the document contain the personal affairs information of an individual other than the Applicant?

18. The document is a LEAP record for the Applicant's deceased [family member]. As stated above, I am satisfied it contains the personal affairs information of an individual other than the Applicant.

Would disclosure of the document be unreasonable?

19. In determining whether disclosure of the deceased third party's personal affairs information would be unreasonable in the circumstances, I have considered the following factors:

¹ Sections 33(1) and (2).

² Section 33(9).

(a) The nature of the personal affairs information

Generally, I consider LEAP records contain information that is sensitive and personal in nature, particularly where it relates to a person other than an FOI applicant.

However, having reviewed the document in this matter, I note it primarily contains information that either identifies or broadly describes the Applicant's [family member]. I do not consider these particular LEAP record contains highly sensitive information.

I consider this factor weighs in favour of disclosure along with the age of the document and the relationship of the Applicant to the deceased person.

(b) Whether the individual to whom the information relates objects, or would be likely to object to the release of the information

In considering this factor, an agency must notify the relevant person (or, if deceased, the next of kin) and seek their views on disclosure of the document. In this case, the relevant third party is deceased.

I am satisfied the Applicant is a close family member who has provided me with relevant evidence to demonstrate their relationship to the deceased.

Given the non-sensitive nature of the information in the document, as well as the familial relationship between the Applicant and the deceased, this factor weighs in favour of disclosure.

(c) Whether the Applicant would be likely to further disseminate the document, if disclosed

In the circumstances of this matter, I am satisfied it is unlikely the Applicant would further disseminate or make public the document if disclosed. This factor weighs in favour of disclosure.

20. In deciding whether disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this is a relevant factor in the circumstances.
21. In balancing the above factors, I am satisfied disclosure of the personal affairs information in the document to the Applicant would not be unreasonable in the circumstances.
22. Accordingly, I am not satisfied this document is exempt under section 33(1).

Conclusion

23. In relation to the documents created prior to 5 July 1978, my decision is the same as the Agency's decision, in that I am satisfied the documents are not subject to the FOI Act.
24. However, based on the information before me, I am not satisfied the document subject to review is exempt under section 33(1), and access is to be granted in full.

Review rights

25. 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.³
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
28. 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.
29. 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.⁶

Third party review rights

30. As I have determined to grant access to information the Agency determined was exempt under section 33(1), if practicable, I am required to notify any relevant third party (if deceased, their next of kin) and advise them of their right to seek review of my decision to disclose their personal affairs information.⁷ However, in the circumstances of this matter, I am satisfied it is not practicable to do so.

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

⁴ Section 52(5).

⁵ Section 52(9).

⁶ Sections 50(3F) and (3FA).

⁷ Sections 49P(5) and 50(1)(3).