

## Notice of Decision and Reasons for Decision

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Applicant:	'BG5'
Agency:	Transport Accident Commission
Decision Date:	13 March 2020
Provision and exemptions considered:	Sections 27(2)(b), 31(1)(c), 31(1)(d), 33(1), 33(6)
Citation:	'BG5' and Transport Accident Commission ( <i>Freedom of Information</i> ) [2020] VICmr 65 (13 March 2020)

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FREEDOM OF INFORMATION – law enforcement documents – neither confirm nor deny the existence of documents – personal affairs information of third parties

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 any documents falling within the scope of the Applicant's request, should any exist, would reveal information that, in and of itself, would be exempt under sections 31(1)(c), 31(1)(d) and/or 33(1).

Accordingly, I have determined to neither confirm nor deny the existence of any such documents in accordance with sections 27(2)(b) and 33(6).

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

13 March 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:  
  
Documents containing [surname 1] or [surname 2]  
  
Documents provided by [surname 1] or [surname 2]
2. In its decision, the Agency determined to neither confirm nor deny the existence of any documents falling within the scope of the Applicant's request, in accordance with section 27(2)(b).

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Agency's reliance on sections 27(2)(b) (and 33(6)) obviates the need for the Agency to provide me with a copy of any documents, should any exist, that would fall within the terms of the Applicant's request.
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 dated [date];
  - (b) the Applicant's submissions dated [date] and [date];
  - (c) the Agency's submission dated [date]; and
  - (d) communications between OVIC staff, the Applicant and the Agency.
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. As stated above, the Agency determined to neither confirm nor deny the existence of any documents falling within the scope of the Applicant's request, in accordance with section 27(2)(b), as to do so would reveal information that in and of itself would be exempt under sections 31(1)(c), 31(1)(d) or 33(1). The Agency's decision letter sets out the reasons for its decision.

## **Section 27(2)(b)**

9. Section 27(2)(b) provides:

(2) In notice under subsection (1), an agency or Minister –

...

(b) if the decision relates to a request for access to a document that is an exempt document under section 28, 29A, 31 or 31A or that, if it existed, would be an exempt document under section 28, 29A, 31 or 31A, may state the decision in terms which neither confirm nor deny the existence of any document.

10. For the purposes of this review, section 27(2)(b) requires me hypothetically to consider whether the requested documents would fall within the scope of sections 31(1)(c) and/or 31(1)(d) as the very fact of identifying if any relevant documents exist would, in and of itself, disclose exempt information.
11. The nature of section 27(2)(b) means I am constrained as to the amount of information available upon which to base my reasons for decision when considering the application of the exemptions under sections 31(1)(c) and/or 31(1)(d).

### *Application of section 31(1)(c)*

12. The exemption under section 31(1)(c) is concerned with protecting the identity of informants and their provision of information to an agency.
13. Section 31(1)(c) provides a document is exempt document if its disclosure under the FOI Act would, or would be reasonably likely to disclose, or enable a person to ascertain, the identity of a confidential source of information in relation to the enforcement or administration of the law.
14. ‘Reasonably likely’ means there is a real chance of an event occurring; that is not fanciful or remote.<sup>1</sup>
15. ‘Information’ for the purpose of section 31(1)(c) is not confined to facts, as distinct from false or erroneous information: rather, ‘... [t]he legislation is designed to protect the identity of informers and does not differentiate between the good, the bad or the indifferent’.<sup>2</sup>
16. When relied upon in conjunction with section 27(2)(b), section 31(1)(c) further protects persons who may or may not be confidential informants as it prevents an applicant from attempting to use an FOI request as a means to possibly ascertain or establish if a person is a confidential source of information for an agency.
17. Having considered the relevant factors in this case, I am satisfied disclosure of any information, as to the existence or non-existence of any documents falling within the scope of the Applicant’s request, should any exist, would in and of itself disclose information that would be exempt under section 31(1)(c).

### *Application of section 31(1)(d)*

18. Section 31(1)(d) provides a document is an exempt document if its disclosure under the FOI Act would, or would be reasonably likely to disclose 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.

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<sup>1</sup> *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.

<sup>2</sup> *Richardson v Commissioner for Corporate Affairs* (1987) 2 VAR 51 at pp 52-53.

19. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>3</sup>
20. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>4</sup>
21. Section 31(1)(d) does not apply to methods and procedures that are widespread and well known.<sup>5</sup>
22. Having considered the relevant factors in this case, I am satisfied disclosure of any information, as to the existence or non-existence of any documents falling within the scope of the Applicant's request, should any exist, would in and of itself disclose information that would be exempt under section 31(1)(d).

### **Section 33(6)**

23. Section 33(1) provides a document is exempt if its disclosure under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).
24. Section 33(6) provides:
  - (6) Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document of a kind referred to in subsection (1) where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last mentioned document to be an exempt document by virtue of this section.
25. In *Re O'Sullivan and Department of Health and Community Services*<sup>6</sup> (**O'Sullivan Decision**), the former Administrative Appeals Tribunal of Victoria observed:

Subsection (6) of [section] 33 raises a particular difficulty. Where a respondent relies upon its terms, the Tribunal does not have the advantage of perusing any disputed documents. Were the presiding Tribunal Member to be seen to be perusing documents "the game would be given away"; the applicant would be aware that the respondent agency did in fact possess documents relating to the personal affairs of a particular named individual and had probably been in contact with that individual.<sup>7</sup>
26. Similarly, to this matter, the applicant in the O'Sullivan decision was seeking (amongst other things) documents that referenced or named particular individuals.
27. The test in section 33(6) requires consideration of whether a hypothetical document, containing a reference as to the existence or non-existence of the actual documents sought by an applicant, would be exempt under section 33(1).

### *Application of section 33(1)*

28. 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;<sup>8</sup> and

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<sup>3</sup> *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.

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

<sup>5</sup> *XYZ v Victoria Police* [2010] VCAT 255 (16 March 2010) at [177].

<sup>6</sup> (No 2) (1995) 9 VAR 1.

<sup>7</sup> *Ibid* at [7]

<sup>8</sup> Sections 33(1) and (2).

- (b) such disclosure would be 'unreasonable'.
29. Determining whether disclosure of a person's personal affairs information would be 'unreasonable' involves balancing the public interest in the disclosure of official information with the interest in protecting that person's right to privacy in the circumstances.
30. I consider any documents held by the Agency about individuals would relate to private medical and financial matters of a sensitive nature.
31. Hypothetically speaking, if the Agency were to hold documents about an individual, that individual would reasonably expect their personal affairs information regarding medical treatment and financial compensation would not be released to a person under the FOI Act. Nor would a person expect their participation in the Agency's compensation scheme following a transport accident would be confirmed or denied to an unrelated third party, including on personal privacy grounds.
32. Therefore, should any documents exist that fall within the terms of the Applicant's request, I am satisfied:
- (a) they would contain the personal affairs information of persons other than the Applicant;
  - (b) given the nature of personal affairs information held by the Agency regarding individuals, disclosure of any such information to an unrelated third party under the FOI Act would be unreasonable; and
  - (c) further, disclosure of the existence of any such information, should it exist, would establish that a person had been in contact with or received services from the Agency, which in and of itself would disclose information exempt under 33(1).
33. Having considered the relevant factors in this case, I am satisfied disclosure of any information, as to the existence or non-existence of any documents falling within the scope of the Applicant's request, would in and of itself disclose information that would be exempt under section 33(1). Accordingly, I have determined to neither confirm nor deny the existence of any such information in accordance with section 33(6).

### **Conclusion**

34. On the information before me, I am satisfied any documents falling within the scope of the Applicant's request, should any exist, would reveal information that, in and of itself, would be exempt under sections 31(1)(c), 31(1)(d) and 33(1).
35. Accordingly, I have determined to neither confirm nor deny the existence of any such documents in accordance with sections 27(2)(b) and 33(6).
36. In doing so, I reiterate these provisions require me hypothetically to consider whether the requested documents would fall within the scope of sections 31(1)(c), 31(1)(d) and 33(1) and this decision should not be considered as confirmation or denial of the existence of any documents that would fall within the terms of the Applicant's FOI request.

### **Review rights**

37. 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.<sup>9</sup>

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<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
40. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
41. 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.<sup>12</sup>

***When this decision takes effect***

42. 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.

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<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).