

Notice of Decision and Reasons for Decision

Applicant:	'BM1'
Agency:	Victoria Police
Decision date:	17 April 2020
Exemptions and provisions considered:	Sections 33(1), and 38 in conjunction with sections 41(1) and 191(1) of the <i>Children, Youth and Families Act 2005</i> (Vic)
Citation:	'BM1' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 116 (17 April 2020)

FREEDOM OF INFORMATION – police records – law enforcement documents – Law Enforcement Assistance Program (LEAP) database – child protection – incident report – personal affairs information – secrecy provision

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 parts of a document 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 the document is exempt under sections 33(1), and 38 of the FOI Act in conjunction with sections 41(1) and 191(1) of the *Children, Youth and Families Act 2005* (Vic).

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

17 April 2020

Reasons for Decision

Background to review

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

...document[s] that are listed in the police LEAP database under [Applicant's name], intent to summons, [date].
2. In its decision, the Agency identified one document, totalling [specified number of] pages, as falling within the terms of the Applicant's request. It advised the Applicant this document, 'comprises of Law Enforcement Assistance Program (LEAP) incident report [reference number]'.
3. The Agency exempted certain information in the document under sections 33(1) and 38 in conjunction with section 191(1) of the *Children, Youth and Families Act 2005* (Vic) (**CYF Act**) and determined to grant access to the document in part. 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. The Applicant indicated they were previously unaware the document existed and believe it led to them being disadvantaged and suffering loss. The Applicant indicated they may wish to make an application to the Agency for the document to be amended. Accordingly, this review relates to information in the document exempted by the Agency.
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, dated [date];
 - (b) the Applicant's submission, dated [date];
 - (c) information provided with the Applicant's review application; and
 - (d) communications between OVIC staff, the Applicant and the Agency.
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)

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

Does the document contain personal affairs information?

- 11. 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
- 12. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.³
- 13. 'Personal affairs information' is interpreted broadly to include matters related to the health, private behaviour, home life or personal or family relationships of individuals.⁴
- 14. Information exempt from the document includes the names, addresses and contact details of third parties. It also includes relationship descriptors, observations, opinions and narratives of third parties, from which their identities may be reasonably ascertained.
- 15. I am satisfied the information exempted by the Agency constitutes the personal affairs information of individuals other than the Applicant.

Would disclosure be unreasonable in the circumstances?

- 16. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a matter.
- 17. In *Victoria Police v Marke*,⁵ the Supreme Court of Victoria 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'.
- 18. The Supreme Court also stated, '[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
- 19. I acknowledge the Applicant may already know the identity of third parties named in the document. However, even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁷
- 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'.⁸

¹ Sections 33(1) and (2).

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁴ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁵ [2008] VSCA 218 at [76].

⁶ [2008] VSCA 218 at [79].

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁸ [2008] VSCA 218 at [104].

21. In determining whether disclosure of the personal affairs information in the document would be unreasonable in the circumstances, I have given consideration to the following factors:

(a) The nature of the personal affairs information

The personal affairs information relates to the identity of third parties involved in a Department of Health and Human Services investigation concerning a child that was conducted under the CYF Act.

I note the Agency's decision highlights that no summons was authorised in relation to the investigation and the matter was not aired or tested in open court.

I consider the personal affairs information of children is sensitive and note, the involvement of the Department of Health and Human Services in determining the wellbeing and safety of a child, as in this case, is particularly sensitive. Further, I consider the sensitivity of such information concerning a person continues despite the passage of time and the fact the child may now be an adult.

These factors weigh against disclosure.

(b) The circumstances in which the information was obtained

The sensitive personal affairs information in the document was obtained by the Agency in the context of investigating a notification received under the CYF Act. Accordingly, it was obtained for official purposes and relates not only to the Applicant but other third parties.

This factor weighs against disclosure.

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

The Applicant's interest in obtaining the information arises from a private and personal interest.

I am not satisfied the public interest would be promoted by release of the personal affairs information in the document to the Applicant.

I am of the view there is a broader public interest in the Agency preserving its ability to conduct investigations of notifications under the CYF Act.

If such information were to be routinely released under the FOI Act, I am satisfied this would jeopardise the ability of the Agency to investigate sensitive matters which may inhibit the Agency's ability to ensure the safety and wellbeing of children and others in accordance with its functions.

These factors weigh against disclosure.

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

The information was obtained by the Agency through the exercise of its investigative functions, as previously stated, no brief was authorised in this matter and the allegations have not been aired or tested in open court.

Despite the passage of time since the alleged incident, I consider the release of this information would be reasonably likely to cause stress and anxiety to those concerned.

This factor weighs against disclosure.

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

The Agency indicated it was not practicable to consult with relevant third parties whose personal affairs information is contained in the document regarding their views on disclosure of their personal affairs information. However, given the sensitive circumstances in which it was obtained by the Agency, I am of the view those individuals would be reasonably likely to object to the release of their personal affairs information in this document.

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

In deciding whether the 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.⁹

Further, section 33(2AB)(c) states that if the applicant is a 'person who is alleged to pose a risk of committing family violence', I must consider whether disclosure would increase the risk to a primary person's safety from family violence.

Based on the nature of the document, I consider there are reasonable grounds to consider concerns exist about the effect of disclosure of the document on the health and safety of third parties. This factor weighs against disclosure.

22. Given the above factors weigh against disclosure, I am satisfied disclosure of the personal affairs information in the document would be unreasonable in the circumstances and the document the relevant information is exempt under section 33(1).

Section 38 – Documents to which secrecy provisions apply

23. A document is exempt under section 38 if:

- (a) there is an enactment in force;
- (b) that applies specifically to the kind of information in the document; and
- (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).

24. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

25. The Agency exempted the document in part under section 38 of the FOI Act in conjunction with section 191 of the CYF Act.

26. For completeness, I will also consider section 41 of the CYF Act, which I consider is also relevant to the document.

⁹ Section 33(2A).

Application of the confidentiality provisions in the CYF Act

27. Section 41 of the CYF Act provides:

41 Identity of reporter or referrer confidential

- (1) If a report is made to the Secretary under section 28 or 29, a person (other than the person who made it) must not disclose to any person other than the Secretary or a community-based child and family service to which the matter is referred under section 30—
- (a) the name of the person who made the report; and
 - (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 60 penalty units.

...

- (2) Subsection (1) does not apply if the person who made the report or referral—
- (a) gives written consent to the Secretary; or
 - (b) gives written or oral consent to the community-based child and family service.

28. Section 191 of the CYF Act provides:

191 Confidentiality

- (1) If a report referred to in section 190(1) is made, a person (other than the person who made it or a person acting with the written consent of the person who made it) must not disclose to any person other than a protective intervener or a community-based child and family service in accordance with subsection (4)—
- (a) the name of the person who made the report; or
 - (b) any information that is likely to lead to the identification of the person who made the report.

Penalty: 10 penalty units.

- (2) Subsection (1) does not apply to a disclosure made to a court or tribunal in accordance with section 190.
- (3) Subsection (1) does not apply to a disclosure to the Therapeutic Treatment Board of the name or information leading to the identification of a police officer who made a report under section 185.

...

Penalty: 60 penalty units.

29. In summary, sections 41(1) and 191(1) of the CYF Act prohibit disclosure of the names of persons, as well as any information likely to lead to the identification of any person who:

- (a) provided confidential child protection information to the Department of Health and Human Services in the course of a protective intervention investigation; or
- (b) notified the Department of Health and Human Services of concerns for the wellbeing of a child.

30. Unauthorised disclosure of such information is an offence and carries penalties under the CYF Act. The financial penalty associated with unauthorised disclosure highlights the legislature's intention that such information should remain protected.

31. I am satisfied the relevant sections of the CYF Act prohibit the disclosure of the identity, or any information likely to lead to the identification of a notifier/reporter or person who gives information in confidence to the Department of Health and Human Services during an investigation under the CYP Act.
32. The exempt information includes the identity of an individual or individuals who reported concerns and information from which their identity may be reasonably ascertained.
33. Accordingly, I am satisfied:
 - (a) the CYF Act is an enactment in force, for the purposes of section 38;
 - (b) the document contains specific information prohibited from disclosure under sections 41(1) and 191(1) of the CYF Act;
 - (c) these provisions prohibit persons, in this case Agency officers, from disclosing such information; and
 - (d) the prohibition is absolute, in that disclosure is not subject to any exceptions or qualifications.
34. As such, I am satisfied information in the document is exempt under section 38 of the FOI Act in conjunction with sections 41(1) and 191(1) of the CYF Act.

Deletion of exempt or irrelevant information

35. 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.
36. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
37. 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 as it is the user ID of the officer who printed the document in the course of processing the Applicant's FOI request.
38. The Applicant is already in possession of an edited version of the document with exempt information deleted. Accordingly, I am satisfied it is practicable to delete exempt and irrelevant information in the document in accordance with section 25.

Conclusion

39. On the information before me, I am satisfied the document is exempt under sections 33(1), and 38 of the FOI Act in conjunction with sections 41(1) and 191(1) of the CYF Act.
40. As I am satisfied it is practicable to delete exempt and irrelevant information from the document in accordance with section 25, I have determined to grant access to the document in part.

¹⁰ *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].

¹¹ *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].

Review rights

41. 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.¹²
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
43. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
44. 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.
45. 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.¹⁵

When this decision takes effect

46. My decision takes effect immediately. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).