

Notice of Decision and Reasons for Decision

Applicant:	'BM3'
Agency:	Victoria Police
Decision date:	21 April 2020
Exemption considered:	Section 33(1)
Citation:	'BM3' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 118 (21 April 2020)

FREEDOM OF INFORMATION – law enforcement documents – police records – criminal investigation – alleged offence – personal affairs information of third party – unreasonable disclosure of personal affairs information – documents not subject to FOI Act

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 the documents are exempt under section 33(1).

As I am satisfied it is not practicable to delete exempt information in the documents in accordance with section 25, I have determined to refuse access to the documents in full.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

21 April 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - 1) ... Copy of the police brief of evidence where I am the victim. All disclosure material in this matter provided to the accused on or before the [specified type of] Hearing. Copy of the covert recording of a conversation between me and two police investigators.
 - 2) Any police diary notes, documents, correspondence, information reports, ..., covert recording and/or other intelligence relating to information provided ... to Victoria Police regarding me or my former business ...
2. In its decision, the Agency identified 20 documents falling within the terms of the Applicant's request.
3. In relation to the first category of documents, it identified 20 documents subject to the FOI Act, comprising 370 pages and one disc and decided to refuse access to those documents in full under section 33(1). The Agency also located documents that are not subject to the FOI Act due to the operation of a Commonwealth Act.
4. In relation to the second category of documents, the Agency advised the Applicant it made relevant enquiries with Agency staff and confirmed no documents were located.

Review

5. The Applicant, through their legal representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the documents 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; and
 - (c) correspondence between the Applicant and OVIC staff.
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.

Documents not subject to FOI Act

10. During the review, the Agency provided a confidential submission about documents it determined were not subject to the FOI Act due to the operation of a Commonwealth Act.
11. Having reviewed the submission, as well as the supporting evidence, I am satisfied the relevant documents are not subject to the FOI Act.

12. I am restricted in providing any further details or explanation in my reasons for decision, as to do so may inadvertently disclose information contrary to the Commonwealth Act.

Review of exemptions

Section 33(1)

13. 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'.

Do the documents contain the personal affairs information of individuals other than the Applicant?

14. 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
15. The Agency's decision letter lists the nature of the 20 documents subject to review.
16. Having carefully reviewed the documents, I am satisfied they contain the personal affairs information of individuals other than the Applicant.
17. I also note the documents contain the personal affairs information of the Applicant. However, due to the particular nature of the documents, the Applicant's personal affairs information is substantially intertwined with that of other individuals referred to in the documents.

Would the release of the personal affairs information be unreasonable?

18. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information with protecting the personal privacy of a person other than the applicant. In doing so, I have given consideration to the following factors:
- (a) The nature of the information to be disclosed

The information relates to a criminal investigation conducted by the Agency, along with other documentation related to a criminal prosecution. I consider the information to be highly personal and sensitive in nature. This factor weighs against disclosure.
 - (b) The circumstances in which the information was obtained

The information was obtained by the Agency in the course of a criminal investigation. It is reasonable to expect the information was provided to the Agency on the understanding it would only be used for the purpose of investigating alleged offending and in any subsequent prosecution of the alleged offender. This factor weighs against disclosure.
 - (c) The extent to which the information is available to the public

I note the charges were withdrawn at court. Accordingly, information in the documents was not aired or tested in open court and is not in the public domain. This factor weighs against disclosure.

¹ Sections 33(1) and (2).

² Section 33(9).

(d) The Applicant's interest in the information being disclosed

On [date], the Applicant's legal representative advised the purpose of the FOI request was to enable the Applicant to make a submission to [a Royal Commission].

I am of the view the Applicant's ability to make a submission to the Royal Commission is not dependent on them obtaining access to the documents subject to review. If the Royal Commission seeks to review the relevant documents, it would be able to do so by making necessary enquiries or by obtaining the documents directly from the Agency.

Any public interest that would be promoted by the release of the third parties' personal affairs information – by means of an FOI application which provides the Applicant with unconditional and unrestricted access to the documents – would be outweighed by the greater public interest in the Agency preserving the confidentiality of its investigative processes. This preserves the ability of the police to conduct criminal investigations and obtain the cooperation of witnesses or alleged offenders during an investigation. This factor weighs against disclosure.

(e) Whether the individuals whose personal affairs information are included in the documents would be likely to object to the release of that information

Given the nature of the information in the documents, I am satisfied the relevant individuals would be reasonably likely to object to the release of their personal affairs information in the documents. This factor weighs against disclosure.

19. 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.³ However, I do not consider this to be a relevant factor in the circumstances.
20. Having considered the above factors, I am satisfied disclosure of the documents would involve the unreasonable disclosure of the personal affairs information of individuals other than the Applicant.
21. Accordingly, I am satisfied the documents are exempt under section 33(1).
22. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Deletion of exempt or irrelevant information

23. 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.
24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
25. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am not satisfied it is practicable to delete the exempt information as the personal affairs

³ Section 33(2A).

⁴ *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].

⁵ *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].

information of the Applicant is intertwined with that of other individuals such that deleting this information would render the documents meaningless.

Conclusion

26. On the information before me, I am satisfied the documents are exempt under section 33(1).
27. As I am satisfied it is not practicable to delete exempt information in the documents in accordance with section 25, I have determined to refuse access to the documents in full.
28. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

29. 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.⁶
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
32. 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.
33. 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.⁹

When this decision takes effect

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

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	Brief heads	6	Refused in full Section 33(1)	Refuse in full Section 33(1)	<p>Section 33(1): I am satisfied disclosure of the documents would involve the unreasonable disclosure of the personal affairs information of individuals other than the Applicant.</p> <p>Section 25: I am not satisfied it is practicable to delete the exempt information in accordance with section 25, as the personal affairs information of the Applicant is intertwined with that of other individuals such that deleting this information would render the document meaningless.</p>
2	Prosecution brief coversheets	2	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comments for Document 1.
3	LEAP documents relating to offenders	11	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comments for Document 1.
4	Table of contents	2	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comments for Document 1.
5	Form [No.] – Notices of [specified type of] proceeding	6	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comments for Document 1.
6	Form [No.] – Lists of information	9	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comments for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
7	Summary of the circumstances	15	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
8	Charge sheets	3	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
9	Witness list	1	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
10	Witness list - Order of appearance	4	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
11	Exhibit list	1	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
12	Third party statement	10	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
13	Police member statements	32	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
14	Appendix 1: Exhibit 5 – Document relating to offender	42	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
15	Appendix 2: Exhibit 6 – Melway and google maps	3	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.

Annexure 1 – Schedule of Documents

Document No.	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
16	Appendix 39: Transcript relating to a third party	133	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
17	Appendices 40 and 41 – transcripts of recorded interviews with offenders	32	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
18	Photograph lists	6	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
19	Photographs	58	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.
20	A recorded conversation between the Applicant and police members	1 disc	Refused in full Section 33(1)	Refuse in full Section 33(1)	Sections 33(1) and 25: See comment for Document 1.