

Notice of Decision and Reasons for Decision

Applicant:	'BO8'
Agency:	Office of Public Prosecutions
Decision date:	25 May 2020
Exemption considered:	Section 33(1)
Citation:	'BO8' and Office of Public Prosecutions (<i>Freedom of Information</i>) [2020] VICmr 142 (25 May 2020)

FREEDOM OF INFORMATION – plea submissions – personal affairs information – disclosure unreasonable

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.

I am satisfied the documents are exempt under section 33(1).

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

25 May 2020

Reasons for Decision

Background to review

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

Written submissions on plea in the criminal prosecution of [named person] for the offence of [offence description] in [case number] in the Magistrates' Court of Victoria at [location].
2. On [date], the Applicant clarified their request to:

All documents referred to in, or attached to, the defence plea submissions, including (but not limited to) medical reports and character references.
3. In its decision, the Agency identified nine documents falling within the terms of the Applicant's request and refused access to the documents in full under section 33(1).

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 correspondence received during this review; and
 - (c) the Agency's submission.
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 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)

9. 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'.

¹ Sections 33(1) and (2).

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

10. Information relating to an individual'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
11. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³
12. The documents subject to review comprise the third party's plea book, including;
 - (a) summary judgment application and plea submissions;
 - (b) agreed summary of offending;
 - (c) psychological assessment and report;
 - (d) medical reports; and
 - (e) character references.
13. I am satisfied the documents contain the personal affairs information of a person other than the Applicant (the **third party**), including the facts and circumstances of their offending, submissions, character references, and medical reports relating to their plea and sentence.
14. I am also satisfied the documents contain personal affairs information of other third parties, including medical reports, and character statements that detail their relationship, opinion and observations about the third party.

Would disclosure of the personal affairs information be unreasonable?

15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's right to personal privacy in the circumstances.
16. In *Victoria Police v Marke*,⁴ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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'.
17. 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.⁵
18. In determining whether disclosure of personal affairs information in the documents would be unreasonable, I have considered the following factors:

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

⁵ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

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

The personal affairs information in the documents predominantly relates to the third party's personal history and the circumstances of their criminal offending.

The documents were obtained by the Agency in relation of a criminal proceeding brought against the third party. The documents form part of the third party's plea material relied upon in a Magistrates' Court of Victoria criminal proceeding.

I consider the documents were prepared with an expectation they would only be used for the purpose of the criminal proceeding involving the third party.

As such, I consider it reasonably likely the third party would not expect their personal affairs information in the documents, which they provided as part of the criminal proceeding, would be disclosed under the FOI Act.

These factors weigh against disclosure in the circumstances.

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

In support of their view it would not be unreasonable to disclose the personal affairs information in the documents, the Applicant submits:

- (i) the third parties 'knew that the documents were being tendered in open court, would become publicly available and implicitly consented to their documents being disclosed to the public'; and
- (ii) no applications for confidentiality or non-disclosure were made in relation to the documents during the proceedings.

There is no information before me concerning the views of the third parties as to the release of their personal affairs information in the documents.

The Agency submits it was not able to undertake meaningful consultation with relevant third parties as the Applicant did not agree to the release of their name and details of their FOI request to the third parties.

The Agency further submits it is likely the third party would object to the release of their personal affairs information to the Applicant.

As such, given the nature of the information and the purpose for which it was obtained, I agree with the Agency that the third parties would be reasonably likely not to consent to the release of their personal affairs information in the documents under the FOI Act.

This factor weighs against disclosure.

(c) The likelihood of further disclosure of the information, if released

In its submission, the Agency states that although the identity of third party is well known to the Applicant:

it is accepted that disclosure of a document under the Act is not subject to restriction and *may* be subject to wider dissemination. Further the [Agency's] inability under the Act to impose

conditions on disclosure of a document or to restrict subsequent dissemination is generally likely to weigh against disclosure.⁶

As stated above, the nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released.⁷ This is in contrast to the restrictions that generally apply to the use by parties to a proceeding on documents in the court proceeding.

Accordingly, I have considered the likelihood of the personal affairs information in the documents being further disseminated or disclosed by the Applicant should access be granted under the FOI Act.

In the circumstances of this matter, I consider it reasonably likely the Applicant intends to further disclose the personal affairs information in the documents, if released under the FOI Act.

This factor weighs against disclosure in light of the nature of the personal affairs information and the purpose for which it was provided to and obtained by the Agency.

(d) The extent to which the information is in the public domain

In support of their application for review, the Applicant submits:

the release of the documents could not amount to a 'disclosure' for the purposes of section 33 of the *Freedom of Information Act 1982* because the substance of the documents has already been disclosed by reason of the tender of the documents in open court, thereby making the documents publicly available (*Nasr v New South Wales* [2007] NSWCA 101 at [127]; *R v Ritson; R v Stacey* [2010] NSWDC 160 at [46]-[47]).

The Agency submits:

- (i) The Applicant is a non-party to the proceeding and is therefore only entitled to view the register containing the final sentencing orders of the Court, or receive a certified extract upon further payment;⁸
- (ii) documents tendered as exhibits in court are not publicly available;
- (iii) the documents are not available on the Court register for public inspection; and
- (iv) the plea material was served on the Agency for a specific purpose, being to support third party's plea hearing.

I have considered the Applicant's reliance on *Nasr v New South Wales* [2007] NSWCA 101 at [127] and *R v Ritson; R v Stacey* [2010] NSWDC 160 at [46]-[47] as authority for the Applicant's proposition the plea material is publicly available by reason of being tendered in open court. In my view, these cases are distinguishable from the circumstances of this matter and do not support the proposition the plea material on the Court proceeding file is publicly available or accessible to a non-party to the proceeding.

I accept the Agency's submission regarding the limited access to the Court documents sought by the Applicant, which concern a criminal proceeding. I am satisfied the plea material is not

⁶ *Victoria Police v Marke* [2008] VSCA 218.

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁸ *Magistrates' Court Act 1989* (Vic), section 18.

publicly available, and nor is it accessible to a non-party to the proceeding, including the Applicant. Further, as a non-party to the criminal proceeding, the Applicant is entitled to view the register containing the final sentencing orders of the Court, or receive a certified extract upon further payment only.

As such, access to the documents sought under the FOI Act would, in my view, circumvent the public access restrictions imposed under the *Magistrates Court Act 1989* (Vic) in relation to the documents and any other orders that may have been made by the Court to which the documents or information they contain may be subject.

This factor weighs against disclosure.

(e) 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 submits they seek access to the information to understand 'why the Magistrate imposed a lenient sentence on [the third party] for the serious offence of [specified offence] and whether justice can be seen to be done'.

I acknowledge, while not a party to the criminal proceeding, I acknowledge the Applicant's personal interest in the criminal proceeding as a prosecution witness. While I also consider the purpose for which they seek access to the information would be likely to be achieved by disclosure of the documents, the significant nature of the factors discussed above mean this consideration is of limited weight in this matter.

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

In their application for review, the Applicant submits disclosure of the document would be in the public interest in accordance with the principle of open justice.

I am not satisfied any public interest would be served if the information were to be disclosed to the Applicant under the FOI Act. While I acknowledge the Applicant's personal interest in the outcome of the criminal proceeding, there is no information before me to establish the broader public interest would be served by disclosure of the documents.

Rather, I consider access to the documents sought under the FOI Act would, in my view, circumvent the public access restrictions imposed under the *Magistrates Court Act 1989* (Vic) in relation to the documents and any other orders that may have been made by the Court to which the documents or information they contain may be subject. Access to the documents in the face of these limitations would, in my view, be contrary to the public interest in the proper conduct and administration of justice by the Court.

This factor weighs against disclosure.

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

- (g) Whether disclosure would, or would be reasonably likely to endanger the life or physical safety of any person¹⁰

There is insufficient information to satisfy me this is a relevant consideration in this matter.

19. Having considered the above factors, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable in the circumstances. Accordingly, I am satisfied the documents are exempt under section 33(1).

Deletion of exempt or irrelevant information

20. 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.
21. 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
22. I have considered the effect of deleting exempt information from the documents in accordance with section 25. In my view, it is not practicable to delete the exempt information as it would render the documents meaningless.

Conclusion

23. On the information before me, I am satisfied the documents are exempt under section 33(1).
24. As I am not satisfied it is practicable to delete the exempt information from the documents in accordance with section 25, I have determined to refuse access to the documents 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.¹³
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
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.¹⁶

¹⁰ Section 33(2A).

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).

When this decision takes effect

30. My decision does not take effect until the relevant review periods (stated above) expire.
31. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁶ Sections 50(3F) and (3FA).