

## Notice of Decision and Reasons for Decision

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Applicant:	'BP5'
Agency:	Victoria Police
Decision date:	3 June 2020
Exemption considered:	Section 33(1)
Citation:	'BP5' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 148 (3 June 2020)

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FREEDOM OF INFORMATION – law enforcement documents – telephone call – audio recording – alleged offences – police investigation – investigation documents – 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 document is exempt under section 33(1).

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

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

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

3 June 2020

## Reasons for Decision

### Background to review

1. The Applicant's representative made a request to the Agency for access to the following documents:
  - a recording of a call between a staff member of [a [description] organisation] and our client on [date]; and
  - a transcript of a call between a staff member of [a [description] organisation] and our client on [date].
2. In its decision, the Agency identified an audio recording of approximately 7:30 minutes duration falling within the terms of the first point of the Applicant's request. It refused access to the recording in full under section 33(1).
3. The Agency did not locate a transcript of the telephone call as no transcript was created.
4. The Agency's decision letter sets out the reason for its decision.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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;
  - (b) information provided with the Applicant's review application dated [date];
  - (c) correspondence received from the Applicant by email and telephone dated [three separate dates]; and
  - (d) information provided by the Agency during the review.
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.

### Scope of review

10. On [date], the Applicant's representative advised the Applicant does not seek access to the identity of any third parties. Rather, they seek to ascertain what claims were made in relation to the Applicant's behaviour during the telephone call with a third party.
11. By further submission dated [date], the Applicant's representative submits:
  1. We do not require the entire phone call if supplying this would require the disclosure of personal information. We are seeking to clarify what specific threats our client made during this phone call. Access may be limited to this information.

2. If providing the telephone call as audio will involve an unreasonable identification of the staff member involved, we will be satisfied with a transcript of the above information.
12. While I note the Applicant does not seek access to the identity of third parties, given point 2 of the Applicant's request refers to the 'unreasonable' identification of third parties, it is nevertheless necessary to consider whether disclosure of the personal affairs information of third parties in the document would be unreasonable under section 33(1).

### **Section 33(1)**

13. A document is exempt under section 33(1) if two conditions are satisfied:
  - (a) disclosure of the document would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

*Does the document contain personal affairs information of individuals other than the Applicant?*

14. 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.<sup>2</sup>
15. 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.<sup>3</sup>
16. I am satisfied the document discloses the names of two third parties and the voice of one third party. The place of employment of the third parties can also be inferred from the document.

*Would disclosure of the personal affairs information be unreasonable?*

17. 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.
18. In *Victoria Police v Marke*,<sup>4</sup> 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'.
19. The Applicant's representative submits:

We are requesting that this decision be reviewed by OVIC as we believe that reasonable disclosure may be effected given the nature of the information and the circumstances of the production of this information. These details would already be reasonably available to our client due to their ongoing relationship with this organisation. We request that access be granted to these documents.

20. In determining whether disclosure of personal affairs information in the documents would be unreasonable, I have considered the following factors:

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

<sup>2</sup> Section 33(9).

<sup>3</sup> *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].

<sup>4</sup> [2008] VSCA 218 at [76].

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

The document is an audio recording between the Applicant and a staff member from a [description] organisation. The Applicant was referred to the organisation as part of their obligations to receive [an income support payment].

The Applicant submits a call was made to the Agency regarding the Applicant's conduct during a telephone call to the organisation, and as a result, suffered significant harm.

The documents were obtained by the Agency in relation to a police investigation into alleged offences committed by the Applicant during the telephone call. In such circumstances, I consider details of third parties are sensitive and personal in nature, even where their identity may be known to an applicant.

Further, it is reasonable to expect the information in the documents was provided to the Agency on the understanding it would only be used for the purpose of investigating the alleged offences and any subsequent prosecution or court proceeding.

In the circumstances, these factors weigh against disclosure.

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

There is no information before me concerning the views of the third parties as to the release of their personal affairs information as the Agency determined consultation was not practicable.

Having considered the nature of the information and the purpose for which it was obtained, I consider it is reasonably likely the third party would not expect their personal affairs information in the documents would be disclosed under the FOI Act and would unlikely to consent to the release of their personal affairs information in the document.

These factors weigh against disclosure.

(c) 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.<sup>5</sup>

The Applicant denies allegations made against them and seeks access to the document in order to demonstrate the allegations are false.

I acknowledge release of the document would assist the Applicant in assessing the accuracy of the allegations made against them.

However, given the nature of the document and the purpose for which it was obtained by the Agency, on balance, I consider this factor to be of limited weight in the circumstances.

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<sup>5</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

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.<sup>6</sup>

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 unlikely the Applicant would disseminate the documents given the stated purpose for which the Applicant seeks access to the documents.

However, given the nature of the document and the purpose in which it was obtained by the Agency, on balance, I am not satisfied this factor weighs in favour of unconditional disclosure under the FOI Act

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

I am of the view the public interest lies in the Agency preserving the confidentiality of information provided to it on a voluntary basis during the course of an investigation. This ensures the Agency's ability to obtain similar information and cooperation from the public in order to effectively carry out its investigative and law enforcement functions.

In the absence of any information to suggest the public interest would be promoted by the release of the personal affairs information of third parties in the document, I consider disclosure of the document would serve the Applicant's personal interests only.

This factor weighs against disclosure on public grounds.

(f) Whether disclosure would, or would be reasonably likely to endanger the life or physical safety of any person<sup>7</sup>

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

21. Having considered the above factors, on balance, I am satisfied disclosure of the personal affairs information in the document would be unreasonable in the circumstances.
22. Accordingly, I am satisfied the document is exempt under section 33(1).

***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'<sup>8</sup> 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.<sup>9</sup>

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<sup>6</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>7</sup> Section 33(2A).

<sup>8</sup> *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].

<sup>9</sup> *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].

25. I have considered the effect of deleting exempt information from the document. In my view, it is practicable for the Agency to delete most of the exempt information in the document as:
- (a) the audio recording is short in duration; and
  - (b) the Applicant's voice does not overlap with the third party for the majority of the call.
26. Accordingly, I am satisfied editing the document in accordance with section 25, to remove the exempt information, would not require substantial time and effort and the edited document would retain meaning.

### **Conclusion**

27. On the information before me, I am satisfied the document is exempt under section 33(1).
28. As I am satisfied it is practicable to edit the document to delete exempt information in accordance with section 25, I have determined to grant access to the document in part.
29. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

### **Review rights**

30. 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>10</sup>
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>11</sup>
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>12</sup>
33. 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.
34. 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>13</sup>

### **When this decision takes effect**

35. My decision does not take effect until the Agency's 14 day review period expires.
36. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Telephone call audio recording	<p><b>Refused in full</b></p> <p>Section 33(1)</p>	<p><b>Release in part</b></p> <p>Sections 33(1), 25</p> <p>All recording of the third party's voice is exempt under section 33(1) and is to be deleted in accordance with section 25.</p> <p>The remainder of the recording is to be released.</p> <p>The following is a guide of the time stamps at which the Applicant speaks.</p> <p>Full sentences should be released, except where their voice overlaps with a third party or the third party speaks during the middle of a sentence:</p> <ul style="list-style-type: none"> <li>• [Redacted – list of time stamps].</li> </ul>	<p><b>Section 33(1):</b> I am satisfied it would be unreasonable to disclose the personal affairs information in the documents, as outlined above in the Notice of Decision.</p> <p><b>Section 25:</b> I am satisfied it would be practicable to edit the documents in accordance with section 25 to remove exempt information, for reasons outlined above in the Notice of Decision.</p>