

Notice of Decision and Reasons for Decision

Applicant:	'BQ4'
Agency:	Victoria Police
Decision date:	15 June 2020
Exemption considered:	Section 31(1)(a)
Citation:	'BQ4' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 156 (15 June 2020)

FREEDOM OF INFORMATION – law enforcement documents – police records – ongoing police investigation – evidence gathered during police investigation – personal affairs information

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 information in the document to which the Applicant seeks access is exempt under section 31(1)(a).

As I am satisfied it is not practicable to provide an edited copy of the document with the exempt information deleted in accordance with section 25, I have decided to refuse access to the document in full.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

15 June 2020

Reasons for Decision

Background to review

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

...bank balance information of the [specified] criminal. ...request for the bank records – but only the balance over the course of the crime [specified dates]. ...
2. The Agency identified one document falling within the terms of the Applicant's request. The Agency determined pages 6 and 7 of the document are irrelevant to the terms of the Applicant's request and relied on the exemptions under sections 31(1)(a) and 33(1) to refuse access to remaining document.
3. 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 advised they do not seek access to personal affairs information in the document.
6. I have been briefed by OVIC staff who inspected the document claimed to be exempt under section 31(1) and subject to review.¹
7. The document is a seven page bank statement for an account held by a person other than the Applicant (the **third party**).
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. 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 submission dated [date]; and
 - (c) communications between OVIC staff, the Agency and the Applicant during the review.
10. 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 31(1)(a)

11. Section 31(1)(a) provides a document is exempt if its disclosure under the FOI Act would, or would be reasonably likely to prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance.

¹ Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

12. 'Reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.²
13. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
14. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁴
15. The Applicant advised in their submission they seek access to the account balances over a specified period only.
16. In its decision letter, the Agency advised disclosure would be reasonably likely to prejudice the ongoing police investigation and accordingly, relies on the exemption in section 31(1)(a) to refuse access to the document.
17. OVIC staff made enquiries with the Agency, which confirmed the investigation is not yet finalised and, consequently, the matter remains an ongoing open investigation at the time of my decision.
18. I note the decision of the Victorian Civil and Administrative Tribunal (**VCAT**) in *RFJ v Victoria Police FOI Division*⁵ where the evidence of an Agency police officer was accepted by the Tribunal in relation to prejudice in the context of disclosure of information during an ongoing police investigation. I consider the current matter involves similar considerations and I accept the evidence before the Tribunal also supports non-disclosure in this matter.

The identified prejudice includes:

If the documents became known to a person who was responsible for the offence, that person would know the information that the police have obtained. It would make clear what was known to the police and also what evidence, if any, has not yet been uncovered. A person or persons could use that information to avoid being connected with the crime;

Even seemingly innocuous information could be extremely useful to an offender as that person could modify his or her behaviour or prepare an explanation or alibi in the event they were ever asked about their involvement;

If an offender or any member of the community had access to information collected during an investigation, the offender would know what evidence a witness could give before a formal interview has been conducted;

Release of documents could reveal evidence that could be used in laying charges and subsequent prosecutions, prior to the offender being interviewed and charged;...⁶

19. Having reviewed the document and considered the circumstances of this case, I have decided the information sought by the Applicant in the document is exempt under section 31(1)(a) for the following reasons:
 - (a) I accept the document relates to an ongoing police investigation of a breach or possible breach of the law prejudice the investigation of a breach or possible breach of the law.

² *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.

³ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁴ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁵ [2013] VCAT 1267.

⁶ [2013] VCAT 1267 at [134].

- (b) I accept the Agency's decision that if evidence it has obtained were to be disclosed under the FOI Act it would be reasonably likely to prejudice the Agency's ongoing investigation of a breach or possible breach of the law and, subject to the outcome of the investigation, prejudice the enforcement or proper administration of the law in this instance.
- (c) I also accept, in matters relating to a police investigation, the Agency can decide whether the release of information obtained during the course of an investigation, is likely to assist or hinder the investigation.
- (d) The FOI Act does not impose any conditions or restrictions on an applicant's use or further dissemination of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the information. As the document could be relied upon as evidence of an alleged crime in any subsequent court proceeding, its disclosure under the FOI Act prior to the conclusion of the police investigation and possible prosecution of an offender could prejudice the Agency's ongoing investigation of the matter and the proper administration of justice.

20. Accordingly, I am satisfied the document is exempt under section 31(1)(a).

Deletion of exempt or irrelevant information

- 21. 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.
- 22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸
- 23. I have considered the effect of deleting exempt information from the documents in accordance with section 25. I am satisfied it is not practicable to delete the exempt information as to do so would render the document meaningless. Accordingly, there is no obligation under section 25 for the Agency to provide the Applicant with an edited copy of the document.

Other exemptions

- 24. Noting the Applicant does not seek access to personal affairs information in the document and in light of my decision regarding section 31(1)(a), it is not necessary for me to consider the additional exemption relied on by the Agency under section 33(1).

Conclusion

- 25. While I acknowledge the Applicant's reasons for seeking access to the document, I am satisfied it is exempt under section 31(1)(a) and there is no obligation under section 25 to provide the Applicant with an edited copy of the document.

⁷ *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].

⁸ *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

26. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
29. 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.
30. 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.¹²

When this decision takes effect

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

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

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).