

## Notice of Decision and Reasons for Decision

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Applicant:	'BQ9'
Agency:	Victoria Police
Decision date:	18 June 2020
Exemptions considered:	Sections 33(1), 38
Citation:	'BQ9' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 161 (18 June 2020)

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FREEDOM OF INFORMATION – law enforcement documents – police investigation – witness statements – audio recording – personal affairs information – disclosure unreasonable – 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 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 Documents 1-9 and 11 are exempt under section 33(1).

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt and/or information deleted in accordance with section 25, I have determined to grant access to those documents in part.

I am also satisfied a copy of the recorded interview is exempt under section 38 in conjunction with section 464JA(4) of *Crimes Act 1958 (Vic)* (**Crimes Act**).

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

18 June 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to documents relating to an incident in which the Applicant was involved.
2. In its decision, dated [date], the Agency identified 11 documents, totalling 30 pages, falling within the terms of the Applicant's request. The Agency released one document in full and relied on the exemption in section 33(1) to refuse access to four documents in full and six documents in part.
  1. LEAP Report 3 pages
  2. Memorandum [date] 1 page
  3. Issue Cover Sheet 2 pages
  4. Brief head 2 pages
  5. Intent to summons 1 page
  6. Preliminary brief 5 pages
  7. Charge sheet & summons 2 pages
  8. Photographs & list 11 pages
  9. Personal docs – accused 1 page
  10. Backing sheet of brief 1 page
  11. Notes 1 page
3. The Agency also identified a document that it determined was exempt under section 38 of the FOI Act in conjunction with section 464JA(4) of the Crimes Act.
4. The Agency's decision letter sets out the reasons 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 copies of the 11 documents subject to review.
7. Document 10 was released by the Agency in full and, therefore, is not subject to this review.
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 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) all other communications between OVIC staff, the Agency and the Applicant.
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 33(1)**

11. 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;<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

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

12. 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.<sup>2</sup>
13. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.<sup>3</sup>
14. The documents relate to an investigation of an alleged crime, and contain information such as a name, address, contact information, date of birth, photograph, third party statements and other sensitive and personal information of third parties.
15. I am satisfied the information exempted by the Agency in the documents amounts to 'personal affairs information' for the purposes of section 33(1).

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

16. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a person's personal privacy in the circumstances.
17. In determining whether the release of personal affairs information is unreasonable in this matter, I have considered the following factors:
- (a) the nature of the personal affairs information, for example, whether it is sensitive or is of current relevance;
  - (b) the circumstances in which the information was obtained by the Agency;
  - (c) the Applicant's interest in the information, including their purpose or motive for seeking access to the documents;
  - (d) whether any public interest would be promoted by disclosure;
  - (e) the likelihood of further disclosure of the information if it is released;

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

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

<sup>3</sup> *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].

- (f) whether the individuals to whom the information relates object or would be likely to object to the disclosure of information;
  - (g) whether disclosure would cause the individuals stress, anxiety or embarrassment; and
  - (h) whether the disclosure of information relating to the personal affairs of any person would, or would be like to, endanger the life or physical safety of any person.
18. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their views on disclosure of the document.<sup>4</sup> However, this obligation does not arise if:
- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
  - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
  - (c) it is not practicable to do so.<sup>5</sup>
19. The Agency did not consult with the relevant third parties, as it determined those persons would be likely to object to disclosure of their personal details.
20. Having reviewed the personal affairs information in the documents subject to review, I am of the view its disclosure would be unreasonable for the following reasons:
- (a) The information provided to the Agency is sensitive in nature.
  - (b) Having regard to the fact the documents were created as part of a police investigation, I am of the view the individuals concerned would be reasonably likely to object to the release of their personal affairs information in the documents under the FOI Act.
  - (c) The information obtained by the Agency has not been aired in open court and is not in the public domain.
  - (d) 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 disclosed to them under the FOI Act as they choose.<sup>6</sup>
  - (e) I accept information provided to a police criminal investigation in these circumstances is generally given with the expectation it will only be used for the purposes of investigating an alleged crime and any subsequent prosecution.
  - (f) While I acknowledge the Applicant has a genuine interest in obtaining access to the documents subject to review, their interest in obtaining the information is a matter of private interest. I have determined the need to protect sensitive information provided by third parties to the Agency outweighs the Applicant's personal interest in obtaining this information.
  - (g) I do not consider any public interest would be promoted by disclosure of the third parties' personal affairs information in the documents. I am of the view the public interest lies in the

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<sup>4</sup> Section 33(2B).

<sup>5</sup> Section 33(2C).

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

Agency preserving its ability to conduct investigations and obtain the cooperation of an alleged offender, witness or other person during an investigation.

- (h) I consider members of the public provide information to the Agency for the purpose of conducting investigations with the expectation it will remain confidential. 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 crimes and maintain public safety in accordance with its law enforcement functions.
- (i) In deciding whether the disclosure of a document would involve the unreasonable disclosure of personal affairs information, section 33(2A) requires I 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. In my view, there are reasonable grounds to consider concerns exist about the effect of disclosure of documents on the wellbeing and safety of third parties.

21. Having balanced the above factors, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable in the circumstance and, accordingly is exempt under section 33(1).

### **Section 38**

22. The Agency exempted one document under section 38 of the FOI Act in conjunction with section 464JA(4) of the Crimes Act. In doing so, the Agency did not view the document and based its decision on the nature of the document only.

23. The document is an audio or audio-visual recording of an interview conducted by Agency officers with a third party (the **Recording**).

24. Section 38 provides:

#### **38 Documents to which secrecy provisions of enactments apply**

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

25. Therefore, for a document to be exempt under section 38 three conditions must be satisfied:

- (a) there must be an enactment in force;
- (b) the enactment must apply specifically to the kind of information contained 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).

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

27. The Agency relies on section 464JA(4) of the Crimes Act which provides:

### **Section 464JA Offences in relation to recordings**

...

- (4) A person must not supply or offer to supply an audio recording or an audiovisual recording to another person other than –
- (a) the suspect in relation to whom the recording was made;
  - (b) a legal practitioner representing the suspect;
  - (c) an authorised person acting in the performance of his or her duties;
  - (d) a person engaged by a person referred to in paragraph (a), (b) or (c) to transport the recording.
28. I am satisfied section 464JA(4) of the Crimes Act is an enactment in force that specifically applies to the Recording.
29. Section 464JA(4) of the Crimes Act strictly prohibits persons from supplying audio or audio-visual recordings other than to persons specified in the enactment. I am satisfied the Applicant is not a person to which this provision relates.
30. Therefore, I am satisfied the Agency is prohibited from supplying a copy of the Recording to the Applicant under section 464JA(4) of the Crimes Act.
31. Accordingly, I am satisfied the Recording is exempt under section 38 of the FOI Act in conjunction with section 464JA(4) of the Crimes Act.

### ***Deletion of exempt or irrelevant information***

32. 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.
33. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>7</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>8</sup>
34. I have considered the effect of deleting exempt and irrelevant information from the documents in accordance with section 25.
35. In relation to:
- (a) Document 1, I am satisfied information the Agency determined as irrelevant to the Applicant’s request, namely, Agency staff usernames or IDs recorded while performing administrative duties falls outside the scope of the Applicant’s request;
  - (b) Documents 1, 2, 3, 6, 8, and 11, I am satisfied it is practicable to provide the Applicant with an edited copy of these documents with exempt and/or irrelevant information deleted in accordance with section 25, as to do so would not render the documents meaningless. Accordingly, I have determined these documents can be released in part;

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<sup>7</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>8</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].

- (c) Documents 4, 5, 7 and 9, I am satisfied it would not be practicable to provide the Applicant with an edited copy of these documents with exempt information deleted in accordance with section 25, as to do so would render the documents meaningless. Accordingly, I have determined these documents are exempt in full; and
- (d) the Recording, I am satisfied this document is exempt in full under section 38 of the FOI Act in conjunction with section 464JA(4) of the Crimes Act and the obligation under section 25 does not apply to this document.

### **Conclusion**

36. Accordingly, my decision on the Applicant's request is the same as the Agency's decision in that:
- (a) Documents 1, 2, 3, 6, 8 and 11 are exempt in part under section 33(1);
  - (b) Documents 4, 5, 7 and 9 are exempt in full under section 33(1); and
  - (c) the Recording is exempt in full under section 38 in conjunction with section 464JA(4) of Crimes Act.
37. Therefore, where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt and/or irrelevant information deleted in accordance with section 25, I have determined to grant access to those documents in part. In all other cases, the documents are exempt in full.

### **Review rights**

38. 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>9</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
41. 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.
42. 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>12</sup>

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

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

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

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).