

Notice of Decision and Reasons for Decision

Applicant:	'BR7'
Agency:	Victoria Police
Decision date:	24 June 2020
Exemptions considered:	Sections 31(1)(d), 33(1), 35(1)(b)
Citation	'BR7' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 170 (24 June 2020)

FREEDOM OF INFORMATION – law enforcement documents – police documents – witness statements

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 sections 31(1)(d), 33(1) and 35(1)(b).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted 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

24 June 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 - (1) Affidavit for a search warrant, court ref: [number], executed [date]
 - (2) Statements from a third party (related to same investigation)
 - (3) Investigation document (related to same investigation)
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. The Agency relied on the exemptions under sections 31, 33(1) and 35(1)(b) to refuse access to the documents in full. The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Applicant acknowledged they accepted certain third party personal affairs information may be exempt and would accept a redacted version of the documents.
5. I have examined a copy of Document 2 and been briefed by OVIC staff, who inspected Document 1, which was claimed to be exempt under section 31(1).¹
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 received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's submission dated [date] and information provided with their review application; and
 - (c) communications between OVIC staff, the Agency and the Applicant
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 31(1)(d)

9. Section 31(1)(d) provides a document is exempt if its disclosure would, or would be reasonably likely to, 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters

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.

arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'.²

10. The exemptions in section 31(1) do not apply to widespread and well known investigative or law enforcement methods and procedures.³
11. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.⁴
12. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.⁵
13. The Document 1 is an affidavit provided by an Agency police officer for the purpose of obtaining a search warrant executed on the Applicant's residence.
14. In its decision the Agency states:

The relevant information in Document 1, denied under section 31(1)(d) of the Act refers to the procedures utilised by police for dealing with matters arising out of possible breaches of the law, the disclosure of which would be likely to prejudice the effectiveness of those procedures.
15. Having been briefed by OVIC staff, who inspected the information exempted by the Agency under section 31(1)(d), I am satisfied the exempted information relates to a police investigation and discloses police intelligence gathering techniques. I am constrained in providing any further description of the exempted information as to do so would likely disclose the exempt content of the information.
16. While I note the Applicant's personal concerns with the police investigation, section 31(1)(d) is directed more broadly towards the ability of the Agency to undertake its law enforcement functions through maintaining confidentiality over its methods and procedures for preventing detecting, investigating or dealing with matters arising out of, breaches or possible breaches of the criminal law.
17. Having considered the likely effect of disclosing the relevant information under the FOI Act, which provides for unrestricted and unconditional release of information, I am satisfied disclosure would be reasonably likely to undermine the Agency's use and effectiveness of police intelligence gathering techniques in carrying out its investigative and law enforcement functions.
18. Accordingly, I am satisfied the relevant information is exempt under section 31(1)(d).
19. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 31(1)(d).

Section 33(1)

20. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI would 'involve' the disclosure of information relating to the personal affairs of a person other than the Applicant;⁶ and
 - (b) such disclosure would be unreasonable.

² *XYZ v Victoria Police* [2010] VCAT 255 at [177].

³ *Ibid.*

⁴ *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.

⁵ *Ibid.*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁶ Sections 33(1) and (2).

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

21. 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 reasonably be determined.⁷
22. A third party's opinion or observations about another person's conduct can constitute the personal affairs of the third party.⁸
23. I note the scope of 'personal affairs information' is generally interpreted broadly and can include matters relating to health, private behaviour, home life or personal or family relationships of individuals.⁹
24. The documents contain personal names, employee numbers, contact details, job descriptors, positions titles and statements made to police and other personal information relating to third parties.
25. I am satisfied such information amounts to personal affairs information for the purposes of section 33(1).

Would disclosure of the personal affairs information be unreasonable?

26. The concept of unreasonable disclosure involves balancing the public interest in the disclosure of official information with the protection of an individual's right to personal privacy in the circumstances.
27. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, subject to certain exceptions,¹⁰ an agency must notify an individual that an FOI request has been received for documents containing their personal information and seek their views on disclosure of that information.
28. The Agency determined it was not practicable to consult with third parties given the circumstances of the matter and the likelihood it would cause significant distress to those individuals.
29. In determining whether the release of the personal affairs information is unreasonable, I have given weight to the following factors:

(a) The nature of the personal affairs information

The nature of the personal affairs information is names, addresses and other identifying information, as well as more sensitive information, such as the views and personal experiences of third parties.

I acknowledge that the Applicant may already know some of the third party individuals named in the documents. However, even where an applicant claims to know the identity of a third party, disclosure of that person's personal affairs information may still be unreasonable in the circumstances.¹¹

⁷ Section 33(9).

⁸ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police* [2008] VCAT 1343 at [43]; *Pritchard v Victoria Police* [2008] VCAT 913 at [24]; *Mrs R v Ballarat Health Services* [2007] VCAT 2397 at [13].

⁹ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

¹⁰ Section 33(2B).

¹¹ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

The information was obtained in the course of the Agency undertaking an investigation into alleged breaches or possible breaches of the criminal law. The information was provided to the Agency on a voluntary basis.

These factors weigh against disclosure.

(b) The extent to which the information is available to the public

The information provided to the Agency is not publicly available. This factor weighs against disclosure.

(c) The circumstances in which the information was obtained

The information was obtained by the Agency in the course of conducting a police investigation. I am of the view third parties who provided the relevant information did so on the assumption the information would remain confidential unless required for any subsequent legal process or investigation.

In the circumstances, I am also satisfied the relevant third parties would not have unreasonably expected this information would be disclosed to the Applicant under the FOI Act.

These factors weigh against disclosure.

(d) 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.¹²

The Applicant advised the following with respect to their purpose for seeking the information:

It is my intention to sue [the Agency] for breach of a number of laws and standards, and access to the requested documents is crucial in this pursuit. The documents are also required to support my appeal in the [named] Court.

I acknowledge the Applicant's personal interest in obtaining access to the information in order to pursue an appeal and potential legal action against the Agency.

On the information before me, I am unable to determine whether the Applicant's purpose for seeking access to the personal affairs information in the documents would be likely to be achieved by disclosure.

This factor neither weighs in favour or against disclosure.

In addition, I note OVIC staff provided the Applicant with advice on alternatives for seeking access to information in relation to current or potential court proceedings, including the use subpoenas.

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

The Applicant's interest in the matter is private in nature.

¹² *Victoria Police v Marke* [2008] VSCA 218 at [104].

On the information before me, I am not satisfied there is a broader public interest that would be promoted by disclosure of the personal affairs information of the third parties.

Rather, I am of the view there is a public interest in the Agency maintaining its ability to receive confidential information from members of the public on a voluntary basis in order to conduct thorough and effective investigations into alleged breaches or possible breaches of the criminal law. If information of this type were to be routinely disclosed under the FOI Act, I am satisfied it would jeopardise the ability of the Agency to carry out its investigative and law enforcement functions.

These factor weighs against disclosure.

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

I do not have any information before me as to the views of the individuals to whom the information relates as the Agency determined consultation was not practicable in the circumstances.

Having considered the sensitive nature of the information in the documents and the circumstances in which it was obtained by the Agency, I am of the view the individuals concerned would be reasonably likely to object to the release of their personal affairs information to the Applicant. This factor weighs against disclosure.

(g) The likelihood of further disclosure of the information if released

I have taken into account the nature of disclosure under the FOI Act, which provides for unrestricted and unconditional access to information.¹³ This means, once a document is disclosed under the FOI Act, an applicant is free to use or further disclose the information as they choose.¹⁴

While there is no information before me to suggest the Applicant intends to widely disseminate the documents, I consider it is reasonably likely the personal privacy of the third parties would be detrimentally impacted should their personal affairs information in the documents be disclosed under the FOI Act. This factor weighs against disclosure.

(h) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person

I am also required to consider whether disclosure of the personal affairs information in the documents would, or would reasonably likely, to endanger the life or physical safety of any person.¹⁵

On the information before me, I am of the view there are reasonable grounds to consider concerns exist in relation to the safety of third parties should their personal affairs information be disclosed under the FOI Act.

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

¹³ Ibid.

¹⁴ Ibid at [66].

¹⁵ Section 33(2A).

32. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Section 35(1)(b)

33. A document is exempt under section 35(1)(b) if two conditions are satisfied:

- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
- (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

34. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹⁶ Confidentiality may be expressed or implied from the circumstances of the matter.¹⁷

Was the information or matter communicated in confidence?

35. The Agency relies on section 35(1)(b) to refuse access to Document 2 in full. The document contains witness statements obtained by the Agency as part of its investigation.

36. There is nothing on the face of the documents to indicate the information was communicated in confidence. However, for the purposes of section 35(1)(b), a document need not be marked 'confidential' for the content to be considered information communicated in confidence.¹⁸

37. In *Akers v Victoria Police*,¹⁹ VCAT noted:

... persons who provide statements or other information to the police do so with the expectation that these will only be disclosed to the extent necessary to conduct investigations and deal with criminal charges.

38. As noted above in my consideration of section 33(1), I consider that members of the public who provide information to the Agency as part of an investigation of a criminal matter do so with the expectation that it will remain confidential unless required for or relied upon in a prosecution before the court.

39. Accordingly, I am satisfied disclosure of Document 2 would divulge information communicated to the Agency in confidence.

Will disclosure of the information impair the Agency's ability to obtain similar information in the future?

40. The fact the information was communicated to the Agency in confidence is not the only consideration in relation to the exemption in section 35(1)(b). Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if information is disclosed under the FOI Act.

41. This means, I must be satisfied, if the information were to be disclosed, others in the position of the communicator would be reasonably likely not to provide similar information to the Agency in the future.

42. The Agency submitted:

¹⁶ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

¹⁷ *Ibid.*

¹⁸ *Williams v Victoria Police* [2007] VCAT 1194 at [75].

¹⁹ [2003] VCAT 397 at [35].

...release or dissemination of this kind of information would constitute a breach of confidentiality and would be likely to inhibit other people from providing such information to the police in the future. Further, the capacity of [the Agency] to investigate and resolve such matters would be substantially reduced. This would then hinder the proper functioning of [the Agency], which would clearly be contrary to public interest.

43. I accept the Agency's view it relies on members of the public being able to provide confidential information to investigate and resolve criminal matters. There is a strong public interest in the Agency maintaining its ability to obtain information from members of the public. If this information were to be routinely released in response to an FOI request, I am of the view the Agency would be impaired from obtaining information of a similar nature in the future.
44. I note the views of VCAT in *Williams v Victoria Police*²⁰ and more recently in *RFJ v Victoria Police FOI Division*,²¹ where evidence was accepted that persons would be less likely to make statements to Victoria Police if they were of the view the making of such statements was not confidential.
45. Having considered the content of Document 2, I am satisfied that the public interest lies in the Agency being able to maintain the confidentiality of individuals who provide witness statements during a police investigation. Further, if such information were to be released, it would hinder the ability of the Victoria Police to investigate alleged criminal offences and carry out its investigation and law enforcement functions.
46. Accordingly, I am satisfied section 35(1)(b) applies to the information contained in the Document 2.
47. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 35(1)(b).

Deletion of exempt or irrelevant information

48. 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.
49. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²² 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 25.²³
50. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to delete the exempt information, as to do so would render the documents meaningless.

Conclusion

51. On the information before me, I am satisfied the documents are exempt under sections 31(1)(d), 33(1) and 35(1)(b).
52. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

²⁰ [2007] VCAT 1194 at [73].

²¹ [2013] VCAT 1267 at [170].

²² *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].

²³ *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].

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

Review rights

54. If the Applicant to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²⁴

55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁵

56. 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.

57. 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.²⁶

When this decision takes effect

58. My decision does not take effect until the relevant review periods expire.

59. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁵ Section 52(5).

²⁶ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Affidavit	4	Refused in full Sections 31(1)(d), 33(1)	Refuse in full Sections 31(1)(d), 33(1)	<p>Section 31(1)(d): I am satisfied the release of the information exempted by the Agency under section 31(1)(d) would be reasonably likely to prejudice the effectiveness of the Agency's investigative methods and procedures when dealing with matters arising out of breaches or possible breaches of the law. Accordingly, I am satisfied the relevant information is exempt under section 31(1)(d).</p> <p>Section 33(1): I am satisfied the disclosure of the personal affairs information in the document would be unreasonable in the circumstances. Accordingly, I am satisfied the relevant information is exempt under section 33(1).</p> <p>Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information in the documents in accordance with section 25.</p>
2.	[Date]	Witness statements	7	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Sections 33(1), 35(1)(b)	<p>Sections 33(1) and 25: See comments for Document 1</p> <p>Section 35(1)(b): I am satisfied disclosure of the document would divulge information or matter communicated in confidence by a person to the Agency, the disclosure of which would be contrary to the public interest.</p>