

Notice of Decision and Reasons for Decision

Applicant:	'BZ6'
Agency:	Victoria Police
Decision date:	28 August 2020
Exemption considered:	Section 33(1)
Citation:	'BZ6' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 244 (28 August 2020)

FREEDOM OF INFORMATION – arrest – police complaint – internal investigation – personal affairs
information of third party – agency officer names – unreasonable disclosure

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 fresh decision to refuse access to a document
requested by the Applicant under the FOI Act.

On the information before me, I am satisfied the personal affairs information in the documents is exempt
under section 33(1).

In relation to providing edited copies of the documents in accordance with section 25, I am satisfied it is
practicable to delete the exempt information in Documents 3, 4, 7 and 8, and access to these documents is
granted in part. However, I am not satisfied it is practicable to do so in relation to Documents 1, 2, 5, 6 and
9, and access to these documents is refused in full.

Accordingly, my decision in this matter is the same as the Agency's fresh decision.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

28 August 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request as follows:
 - . . .document[s], [diary] notes, files and such on: the [description of] complaint that I made; between [specified dates]:
 - Police statement[s]: on the arrest of me ([Applicant name]);
 - statement[s] made for the Police investigation for this [description of] complaint;
3. In its decision, the Agency identified nine documents totalling 30 pages that fall within the terms of the Applicant's request.
4. The Agency relied on section 33(1) to refuse access to the documents. Its 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 to the document.
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On [date], the Agency made a fresh decision in accordance with section 49M(2).
8. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
9. I have examined copies of the documents subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (a) information provided with the Applicant's review application; and
 - (b) information provided by the Agency during this review.
12. 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.
13. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemption

14. In its fresh decision, the Agency granted access to four documents in part and denied access to five documents in full under section 33(1). The Agency's fresh decision letter sets out the reasons for its decision.

Section 33(1)

15. 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'.

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

16. Information relating to a person's 'personal affairs' includes, but is not limited to, 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
17. Personal affairs information that relates to an individual 'concerns or affects that person as an individual'.³
18. A document will disclose personal affairs information if it is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁴
19. The Agency denied access to Documents 3, 4, 7 and 8 in part. These documents are witness statements provided by Agency officers and were made at the time of and in relation to the Applicant's arrest. Information exempted by the Agency in these documents under section 33(1) records the names, addresses, ranks, registered numbers, job titles and signatures of Agency officials, witnesses and third parties.
20. The Agency denied access to Documents 1, 2, 5, 6 and 9 in full. These documents are witness statements provided by Agency officers and were made in response to a complaint regarding the Applicant's arrest and contain the Agency officers' version of events with respect to the allegations.
21. Based on the terms of the Applicant's request, and the nature of the documents subject to review, I am satisfied the documents contain the personal affairs information of Agency officers.

Would release of the personal affairs information be unreasonable in the circumstances?

22. 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 particular circumstances.

¹ Sections 33(1) and (2).

² Section 33(9).

³ *Hanson v Department of Education & Training* [2007] VCAT 123.

⁴ *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].

23. In *Victoria Police v Marke*,⁵ the Victorian Court of Appeal held there is ‘no absolute bar to providing access to documents which relate to the personal affairs of others’, and 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’. The Court further held, ‘[t]he protection of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual’s privacy can be invaded to a lesser or greater degree’.⁶
24. Whether or not an agency staff member’s personal affairs information is exempt under section 33(1), must be considered in the context of the particular circumstances of each matter.⁷ Therefore, it is necessary to consider ‘all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend’.⁸
25. In determining whether disclosure of personal affairs information in the documents would be unreasonable in this matter, I have considered the following factors:

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

The personal affairs information in the released documents includes, names, addresses and other identifying information, as well as more sensitive information, such as Agency officer’s views and personal experiences. The information was obtained by the Agency in the context of undertaking a criminal investigation.

The personal affairs information in the unreleased documents was obtained and generated by the Agency in the context of its investigation into the Applicant’s complaint. The complaint relates to a welfare check conducted by the Agency and the Applicant subsequently being detained and arrested.

Given the subject matter of the complaint, I accept the identity of the third parties is known to the Applicant. However, 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.⁹

Determining whether the personal affairs information of an agency officer is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.¹⁰ In my view, subject to special circumstances, there is nothing particularly sensitive about matters occurring or arising out of the course of an agency officer’s professional duties or work responsibilities as a public servant.¹¹

In this case, having considered the circumstances in which the information was obtained and the sensitive subject matter of the Applicant’s complaint, I am satisfied the personal affairs information in the documents is sensitive.

(b) 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

⁵ [2008] VSCA 218 at [76].

⁶ [2008] VSCA 218 at [79].

⁷ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

⁸ [2008] VSCA 218 at [104].

⁹ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

¹⁰ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2008] VCAT 229.

¹¹ *Re Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.¹²

The Applicant has not provided reasons to why they seek access to the personal affairs information in the documents.

(c) The likelihood of further disclosure of 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.¹³

I have considered the likelihood of the personal affairs information in the documents being further disseminated and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

In the circumstances, I do not consider it is reasonably likely the Applicant intends to further disclose the documents.

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

Having reviewed the documents, I note the Agency has disclosed all substantive information except for the personal affairs information in the documents.

The Applicant has not provided any information as to any public interest that would be promoted by release of this information in the documents.

In the circumstances, 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 in this instance.

Rather, I consider the Applicant's interest in the information would serve a personal interest only.

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

In its submission the Agency stipulated that 'a number' of the authors of the witness statements in the unreleased documents objected to disclosure of their personal affairs information. There is, however, no specific information before me regarding the views of third parties regarding the release of their personal affairs information.

While I do not have information before me as to the views of each third party, in the context of this matter, I am satisfied it is reasonably likely authors of the witness statements would not consent to the release of their personal affairs information.

(f) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

The documents relate to witness statements taken by the Agency in investigating an alleged crime, which then resulted in an internal Agency investigation. I consider the relevant complaint is likely to have been investigated and concluded a number of years ago.

In such circumstances, and when considered in combination with the factors discussed above and the passage of time, I am of the view release of this information at this time is likely to

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

¹³ *Victoria Police v Marke* [2008] VSCA 218 at [68].

cause stress and anxiety to those concerned in the absence of a basis for the Applicant seeking access the personal affairs information in the documents.

- (g) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁴

In determining if disclosure of a third party's personal affairs information would be unreasonable, I am required to consider whether disclosure of such information in a document would, or would be reasonably likely, to endanger the life or physical safety of any person.¹⁵ However, there is no information before me to suggest this is a relevant factor in this case.

26. Having weighed up the above factors, on balance, I am satisfied disclosure of the personal affairs information of third parties in the documents would be unreasonable. Accordingly, I am satisfied it is exempt under section 33(1).

Deletion of exempt or irrelevant information

27. 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.
28. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁶ 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 25.¹⁷
29. I have considered whether it would be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25.
30. In relation to the documents to which the Agency granted access in part, I am satisfied it would be practicable to provide an edited copy of those documents as the Agency has already done so.
31. However, in relation to the documents to which the Agency denied access in full, I am not satisfied it would be practicable to provide the Applicant with an edited copy, as to do would render the documents meaningless.

Conclusion

32. On the information before me, I am satisfied the personal affairs information in the documents is exempt under section 33(1).
33. In relation to providing edited copies of the documents in accordance with section 25, I am satisfied it is practicable to delete the exempt information in Documents 3, 4, 7 and 8, and access to these documents is granted in part. However, I am not satisfied it is practicable to do so in relation to Documents 1, 2, 5, 6 and 9, and access to these documents is refused in full.
34. Accordingly, my decision in this matter is the same as the Agency's fresh decision.

¹⁴ Section 33(2A).

¹⁵ Section 33(2A).

¹⁶ *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].

¹⁷ *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

35. 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.¹⁸
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
38. 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.
39. 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.²¹

¹⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁹ Section 52(5).

²⁰ Section 52(9).

²¹ Sections 50(3F) and (3FA).