

Notice of Decision and Reasons for Decision

Applicant:	'CA1'
Agency:	Victoria Police
Decision date:	4 September 2020
Exemption considered:	Section 33(1)
Citation:	'CA1' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 248 (4 September 2020)

FREEDOM OF INFORMATION – law enforcement documents – police records – photograph – 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.

My decision is the same as the Agency's decision.

I am satisfied the document is exempt under section 33(1).

As I am satisfied it is not practicable to delete the exempt information in the document in accordance with section 25, I have determined to refuse access to the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
4 September 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to a copy of a photograph taken at a police station following a neighbourhood incident and an alleged assault. The photograph sought shows a [body-part] injury to a named third party in relation to whom the Applicant was charged with an alleged assault. The Applicant advised they require access to the document for a pending court hearing.
2. The Applicant made a request to the Agency for access to an additional document of an object involved in the alleged assault.
3. In its decision, the Agency identified a document comprising two photographs falling within the terms of the Applicant's initial request. It decided to refuse access to the document in full under section 33(1). The Agency conducted a search for a document falling within the terms of the Applicant's additional request, however, no document was found.
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 copies 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 relevant communications and submissions received from the parties.
9. In the course of the review, OVIC staff made additional inquiries with the Agency to confirm no documents exist in relation the second part of the Applicant's request. I note the Applicant has since advised OVIC that they do not seek to pursue this point further; however, for completeness I confirm I am satisfied no document exists meeting the second part of the Applicant's request.
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.
11. I note Parliament's intention the FOI Act be interpreted so as to further the object of the Act and 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 exemptions

Section 33(1)

12. 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;¹ and
- (b) such disclosure would be 'unreasonable'.

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

- 13. 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.²
- 14. 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.³
- 15. I am satisfied the photographs are of a person other than the Applicant.

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 interest in protecting an individual's right to personal privacy in the circumstances.
- 17. In *Victoria Police v Marke*,⁴ 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'.
- 18. In determining whether disclosure of personal affairs information in the document would be unreasonable, I have considered the following factors:

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

The document comprises photographs of a third party who is known to the Applicant and relate to an alleged assault involving the Applicant and the third party. I am satisfied the personal affairs information is that of a person other than the Applicant.

The Applicant submits they know the name, date of birth and address of the third party and thus the document is not exempt.

The document was obtained by the Agency in relation to a police investigation into an alleged assault committed by the Applicant. In such circumstances, I consider information of the third party to be sensitive and personal in nature, even in circumstances where their identity may be known to the Applicant.

Further, it is reasonable to expect the information in the document was provided to the Agency on the understanding it would be used for the purpose for which it was obtained only, namely to investigate the alleged assault and any subsequent prosecution or court proceeding.

¹ Sections 33(1) and 33(2).

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

- (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 relevant third party as to the release of their personal affairs information in the document as the Agency determined consultation was not practicable.

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

- (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.⁵

I understand the Applicant seeks access to the document for a pending court hearing. I further note the Applicant's submits they were the victim in this incident, not the third party. While I acknowledge the Applicant's stated interest in the document, I am unable to determine on the information before me whether its disclosure would assist the Applicant in relation to their stated purpose.

- (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.⁶

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated or disclosed by the Applicant should access be granted under the FOI Act.

There is no information before me as to whether the Applicant is likely to further disseminate the document. However, given my consideration of the above factors, I consider there is a possibility of it being further disseminated. Where the third party is the alleged victim in this matter, I am of the view such dissemination would cause distress to the third party.

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

I consider 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 the third party in the document, I consider disclosure of the document would serve the Applicant's personal interests only.

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁶ *Ibid* at [68].

- (f) Whether disclosure would, or would be reasonably likely to endanger the life or physical safety of any person⁷

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

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

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'⁸ 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 25.⁹
23. I have considered whether it is practicable to provide an edited copy of the document with the 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 document meaningless.

Conclusion

24. On the information before me, I am satisfied the document is exempt under section 33(1).
25. As I am satisfied it is not practicable to delete the exempt information in the document in accordance with section 25, I have determined to refuse access to the document in full.

Review rights

26. 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.¹⁰
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
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.¹³

⁷ Section 33(2A).

⁸ *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].

⁹ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

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

¹¹ Section 52(5).

¹² Section 52(9).