

Notice of Decision and Reasons for Decision

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| Applicant: | 'CE3' |
| Agency: | Victoria Police |
| Decision Date: | 30 September 2020 |
| Exemption considered: | Section 33(1) |
| Citation: | 'CE3' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 288 (30 September 2020) |

FREEDOM OF INFORMATION – law enforcement documents – police records – alleged offence – police investigation – evidence – personal affairs information of third parties – third party consent – 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 decision to refuse access to a document 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 document is exempt under section 33(1).

As I am satisfied it is not practicable to delete 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

30 September 2020

Reasons for Decision

Background to review

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

A copy of the audio recording of [named third party] made by Victoria Police officers on [date]. The location when the recording was made was [named location]. The recording was made by officers who were part of the [named] Taskforce. I also seek a copy of any transcript made of the recording by Victoria Police. If required, I consent in advance to the removal of personal identifying information such as names, birth dates, addresses and contacts details. This request is made with the permission of [named third party]. A consent form and copy of [their] [State/Territory] Drivers License is attached to this application.

2. In its decision, the Agency identified one document, being an audio recording, falling within the terms of the Applicant's request and refused access to the document in full under section 33(1).
3. The Agency's decision letter sets out the reason 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. I have examined copies of the document subject to review.
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 relevant communications and submissions received from the parties.
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.
9. 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)

10. 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'.

¹ Sections 33(1) and (2).

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

11. 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.²
12. The document is an audio recording taken by an Agency officer of a conversation with the Applicant.
13. Having carefully reviewed the document, I am satisfied it contains the personal affairs information of individuals other than the Applicant.

Would the release of the personal affairs information be unreasonable?

14. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information with protecting the personal privacy of a person other than the applicant. In doing so, I have considered the following factors:

(a) The nature of the information to be disclosed

The document is a recording of a conversation made by the Agency in the course of a criminal investigation.

While the Applicant was a participant in the conversation, I note the document makes references to various other individuals and the Applicant's personal affairs information is substantially intertwined with that of other individuals referred to in the document.

Given the particular nature of the matters discussed, I consider the information to be personal and sensitive in nature.

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

I note the charges were withdrawn at court. Accordingly, information in the document was not aired or tested in open court and is not publicly available in its entirety.

[Redacted – description of content of the document].

I also note that nature of disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.³ [Redacted].

I acknowledge the Applicant may already know the identity of certain third party individuals in the recording. 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.⁴

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

The Agency holds a copy of the document in its capacity as a law enforcement agency.

² Section 33(9).

³ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁴ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

I consider the document was provided to or obtained by the Agency in connection with a criminal investigation and in the exercise of its law enforcement functions.

In the circumstances, I am not satisfied any public interest would be promoted by the release of the third parties' personal affairs information under the FOI Act, which provides the Applicant with unconditional and unrestricted access to a document, once released.

Rather, I consider the public interest would be promoted by the Agency preserving the confidentiality of its investigative processes and evidence gathered during a police investigation of this nature, in order to ensure police are able to effectively carry out their investigative and law enforcement functions.

(d) Whether the individuals whose personal affairs information are included in the document would be likely to object to the release of that information

The Applicant provided the written consent of the person who was involved in the audio recording for disclosure of their personal affairs information in the document. However, the audio recording does not relate solely to that person.

The Agency advised in its decision letter that due to the nature of the incident to which the audio recording relates, it was not practicable to consult with other third parties who are referred to in the audio recording.

Given the sensitive nature of the information in the document, I am satisfied the relevant third party individuals would be reasonably likely to object to the release of their personal affairs information in the document being disclosed under the FOI Act.

15. In deciding whether disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must 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.⁵ However, I do not consider this to be a relevant factor in the circumstances.
16. Having considered the above factors, I am satisfied disclosure of the document would involve the unreasonable disclosure of the personal affairs information of individuals other than the Applicant.
17. Accordingly, I am satisfied the document is exempt under section 33(1).

Deletion of exempt or irrelevant information

18. 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.
19. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
20. 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.

⁵ Section 33(2A).

⁶ *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].

⁷ *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].

Conclusion

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

Review rights

23. 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.⁸
24. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
25. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
26. 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.
27. 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.¹¹

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).