

Notice of Decision and Reasons for Decision

Applicant:	'CE9'
Agency:	Victoria Police
Decision date:	19 October 2020
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'CE9' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 294 (19 October 2020)

FREEDOM OF INFORMATION – statement – workplace complaint – personal affairs information – unreasonable disclosure – information provided in confidence – disclosure contrary to public interest

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 from disclosure under sections 33(1) and 35(1)(b).

As I am satisfied the document is exempt in its entirety, I have decided to refuse access in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

19 October 2020

Reasons for Decision

Background to review

1. The Applicant seeks access under the FOI Act to a statement of a named person.
2. The Agency identified a document falling within the terms of the Applicant's request and refused access to the document in full under sections 33(1) and 35(1)(b). 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. I have examined a copy of the document subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. I also note Parliament's intention the FOI Act must 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)

9. 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; and
 - (b) such disclosure would be 'unreasonable'.
10. 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.
11. Determining whether disclosure of a person's personal affairs information would be unreasonable involves balancing the public interest in the disclosure of official information with the interest in protecting the person's personal privacy in the circumstances.
12. In deciding whether disclosure would be unreasonable, I have given weight to the following factors:
 - (a) the nature of the personal affairs information;
 - (b) the extent to which the information is available to the public;

- (c) the circumstances in which the information was obtained by the Agency;
- (d) whether any public interest would be promoted by the release of the information;
- (e) whether any individuals, to whom the information relates, would object to its disclosure;
- (f) the likelihood of further disclosure of the information, if released; and
- (g) whether disclosure of the information would or would be reasonably likely to, endanger the life or physical safety of any person.

13. The Agency advised it consulted with the relevant third party regarding disclosure of their personal affairs information.

14. In their submission, the Applicant states:

I maintain that at no stage have I requested or require the personal affairs of now [named person]. I also maintain that as the person who is the subject of the complaint, it not unreasonable to be given access to and have a clear understanding of the allegations made against me. Additionally, I firmly believe the internal investigation, conducted by [named person] was sub-standard...

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

15. I note the Applicant's view the document does not contain the personal affairs of the named individual.

16. Having reviewed the document in its entirety, I am satisfied it contains the personal affairs information of the named person.

Would disclosure of the personal affairs information in the document be unreasonable?

17. In the circumstances, I am satisfied it would be unreasonable to disclose the named person's personal affairs information in the document for the following reasons:

- (a) The document contains sensitive personal affairs information of the named person.
- (b) The personal affairs information as recorded in the document is not publicly available, or otherwise open to access by the Applicant.
- (c) The information in the document was provided in the context of sensitive workplace matters. I consider the information, as recorded in the document, would have been provided on the basis the document would be treated confidentially.
- (d) I consider the public interest weighs in favour of the document not being disclosed as the public interest lies in the ability of the Agency to obtain and record such information confidentially.
- (e) While the Applicant submits it is not unreasonable to provide them with 'access to and have a clear understanding of the allegations made against me', I consider it is reasonably likely they would have been informed about any allegation the subject of an investigation by the Agency and provided with an opportunity to respond in accordance with the rules of natural justice. As such, I am not persuaded any public interest would be promoted by the release of the information.

18. For the above reasons, I am satisfied the document is exempt under section 33(1).

Section 35(1)(b)

19. 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.
20. In relation to the application of section 35(1)(b), the Applicant submits:

In my opinion, the statement of complaint by [named person] was not communicated in confidence as it caused an internal investigation and the contents of [their] statement would have become known to a number of people within [the Agency]... I contend there should be no reason why [the named person] was not being transparent with me and in any event... I also firmly believe the information provided to [the Agency] in these circumstances would not impair other persons from providing information of this nature to [the Agency].

Again, in my opinion, it is not unreasonable for the subject (in this case myself) being made aware of the details of the allegations.

Would disclosure divulge information communicated in confidence by a person to a government agency?

21. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹ Further, confidentiality can be expressed or implied from the circumstances of the matter.²
22. Generally, section 35(1)(b) applies to information communicated to an agency from an external source rather than internal communications between agency staff carrying out their usual duties and responsibilities. However, section 35(1)(b) may apply to information communicated in confidence between agency officers in certain circumstances. For example, where an agency officer provides confidential information to their employer, which is an agency for the purpose of the FOI Act, to assist in the investigation of a workplace incident or dispute.³ In my view, such circumstances apply in this matter.
23. I note the Applicant submits the information they seek is known to certain Agency staff. In my view, the confidentiality of such information is not affected whereby the Agency, as it is required to do, shares necessary information with relevant persons within the organisation who are charged with investigating or undertaking appropriate action in response to any allegations.

Would disclosure be reasonably likely to impair the ability of the Agency to obtain similar information in the future?

24. The second requirement under section 35(1)(b) requires me to consider whether the Agency would be impaired from obtaining similar information in the future if the confidential information in the document was to be disclosed under the FOI Act. This means, I must be satisfied if the confidential information in the document 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.
25. I note the provision of this type of information to an agency is generally on a voluntary basis. In my view the routine disclosure of such information would be reasonably likely to mean Agency officers

¹ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

² *Ibid.*

³ See *Sportsbet v Department of Justice* [2010] VCAT 8 at [71]-[78]; *XYZ v Victoria Police* [2010] VCAT 255 at [287]-[288]; and *Birnbauer v Inner and Eastern Health Care Network* [1999] VCAT 1363 at [14]-[15].

would be less likely to provide such information which would impair the ability of the Agency to obtain similar information in the future.

26. I acknowledge the Applicant's personal interest in seeking access to the document. However, I am satisfied there is a public interest in protecting personal and sensitive information provided by employees of the Agency in confidence, as receipt of this information is necessary for the Agency to efficiently and effectively perform its functions as a public sector employer to maintain and promote a safe workplace.
27. Accordingly, I am satisfied disclosure of the information in the document would be contrary to the public interest as it would be likely to impair the ability of the Agency to obtain similar information in the future. Therefore, I am satisfied the document is exempt under section 35(1)(b).

Deletion of exempt or irrelevant information

28. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable to delete the exempt information in accordance with section 25 as I am satisfied the document is exempt in its entirety.

Conclusion

29. On the information before me, I am satisfied the document is exempt from disclosure under sections 33(1) and 35(1)(b).
30. As the document is exempt in its entirety, I have decided to refuse access to the document in full.

Review rights

31. 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.⁴
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
34. 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.
35. 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.⁷

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).