

Notice of Decision and Reasons for Decision

Applicant:	'CC6'
Agency:	Victoria Police
Decision date:	23 September 2020
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'CC6' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 271 (23 September 2020)

FREEDOM OF INFORMATION – police records – law enforcement documents – triple zero call – 000 – personal affairs information – internal working document

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 in that I have decided to grant access to one document in full and one document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

23 September 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:

...documents on [Applicant] and [Agency officer], where both were involved in incidents where [Agency] where [sic] concerned. Between the dates of [date range].
3. By agreement, the Applicant agreed to exclude documents relating to [redacted – details of personal circumstances].
4. In its decision, the Agency identified two documents, totalling nine pages, falling within the terms of the request.
5. The Agency relied on sections 30(1) and 33(1) to refuse access to one document in part. Its decision letter sets out the reasons for its decision.

Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document.
7. I have examined a copy of the document subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications received from the parties.
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 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 exemptions

Section 30(1)

12. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and

(c) disclosure of the matter would be contrary to the public interest.

13. The exemption does not apply to purely factual material in a document.¹

Does the document disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

14. The document contains the named officer's preliminary opinions and observations at the time of attending a welfare check at the Applicant's property. I am satisfied the document contains information in the nature of the officer's opinion.

Was the document made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?

15. The term 'deliberative process' has been interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.²

16. I am satisfied the information was provided in the course of the Agency's deliberative processes relating to a reported incident, contained in the electronic record of that process.

Would disclosure of the document be contrary to the public interest?

17. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful that the object of the FOI Act is to facilitate and promote the disclosure of information.

18. In deciding whether the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:³

(a) The nature of the information and the nature of the document

The deliberative material is a record of the named officer's opinions, observations and concerns in the course of attending the scene of a reported emergency. I am of the view that this is sensitive information.

(b) The stage of the decision making process at which the document was created

The document contains the named officer's observations upon arrival at the Applicant's property to conduct a welfare check. I recognise the importance of police officers being able to make preliminary assessments of emergency situations which may change because of further information gathered. Release of a preliminary observation in the absence of further context would only give a partial explanation to a course of action or decision by the Agency of matters involving the Applicant.

¹ Section 30(3).

² *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

³ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (c) The likelihood that disclosure would inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision

In its decision letter the Agency stated members of emergency services must be able to freely communicate their professional opinions and thought processes to ensure that these types of incidents are responded to appropriately and to ensure that decisions made regarding the attendance of police are subject to proper and thorough deliberation.

19. In balancing the above factors, I am satisfied the public interest weighs in favour of maintaining the effectiveness of the Agency's processes for undertaking welfare assessments on individuals in the community. Accordingly, I am satisfied the release of the deliberative material in the document would be contrary to public interest and the document is exempt under section 30(1).

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 Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;⁴ and
 - (b) such disclosure would be 'unreasonable'.

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

21. 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.⁵
22. The Agency denied access to the document in part. The document in question is an Electronic Patrol Duty Return Form which logs police officers' attendances throughout their shift. Information exempted by the Agency in this document under section 33(1) records the name of a third-party who contacted Triple Zero ('000') to report an incident.
23. I am satisfied the document contains the personal affairs information of that third party.

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

24. 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.
25. In *Victoria Police v Marke*,⁶ 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'.⁷
26. In determining whether disclosure of personal affairs information in the document would be unreasonable in this matter, I have considered the following factors:

⁴ Sections 33(1) and (2).

⁵ Section 33(9).

⁶ [2008] VSCA 218 at [76].

⁷ [2008] VSCA 218 at [79].

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

The personal affairs information in the document records the name of a third party who contacted '000' to report an incident. The information was obtained by the Agency in the context of responding to the '000' call.

Given the subject matter of the complaint, I accept the identity of the third party is likely 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.⁸

In this case, having considered the circumstances in which the information was obtained and the sensitive subject matter of the '000' call, I am satisfied the personal affairs information in the document is sensitive in nature.

(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 applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁹

The Applicant did not provide reasons as to why they seek access to the personal affairs information in the document.

(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.¹⁰

I have considered the likelihood of the personal affairs information in the document 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 document.

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

Having reviewed the document, I note the Agency has disclosed all substantive information related to the officer named in the Applicant's request. The withheld identity of the third party appears, in this case, to be ancillary to the request.

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

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.

⁸ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

There is no specific information before me regarding the views of the third party regarding the release of their personal affairs information.

However, in the context of this matter, I am satisfied it is reasonably likely the individual who made the '000' call 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

While the document relates to the response to a '000' call made in [year] and the related incident is likely to have been investigated and concluded a number of years ago, I am of the view release of this information is likely to cause stress and anxiety to the third party, even considering the passage of time since the date of the document's creation.

- (g) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹¹

In determining if disclosure of the 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.¹² However, there is no information before me to suggest this is a relevant factor in this case.

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

Deletion of exempt or irrelevant information

28. 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.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴
30. I have considered information the Agency deleted from the documents as 'not relevant' in accordance with section 25. I agree the information falls outside the scope of the Applicant's request and should remain deleted.
31. I have considered the effect of deleting the exempt and irrelevant information from the document in accordance with section 25. As per the Agency's decision, I am satisfied it is practicable to delete such information as to do so does not render the document meaningless.

¹¹ Section 33(2A).

¹² Section 33(2A).

¹³ *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].

¹⁴ *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].

Adequacy of search and missing documents concerns

32. Alongside their review application, the Applicant raised concerns regarding the Agency's conduct, including that documents were missing. In accordance with section 61B(3), OVIC determined to address these concerns as part of this review.
33. The Applicant's concerns regarding possible missing documents were based on an assumption documents containing specific senior officer instructions provided to the officer named in the FOI request were likely to exist.
34. OVIC made inquiries with the Agency in relation to the Applicant's concerns. The Agency advised no such documents relating to the officer named in the Applicant's request exist. In the circumstances, I am satisfied no further relevant documents exist and OVIC has pursued the Applicant's concerns to the fullest extent.

Conclusion

35. On the information before me, I am satisfied:
 - (a) the named officer's observations in the document are exempt under section 30(1); and
 - (b) the personal affairs information in the document is exempt under section 33(1).
36. In relation to providing edited copies of the document in accordance with section 25, I am satisfied it is practicable to delete the exempt and irrelevant information the document and access is granted in part.
37. Accordingly, my decision in this matter is the same as the Agency's decision.

Review rights

38. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁵ However, any application for review will not extend to concerns further documents exist, but were not identified by the Agency.
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
40. 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.
41. 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.¹⁷

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Sections 50(3F) and (3FA).