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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'CC8'
Agency:	Victoria Police
Decision date:	24 September 2020
Exemption considered:	Section 33(1)
Citation:	'CC8' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 273 (24 September 2020)

FREEDOM OF INFORMATION – historic law enforcement documents – police documents – court documents

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 on the Applicant's request is the same as the Agency's decision.

I am satisfied the documents are exempt under section 33(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

24 September 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents.
2. Following consultation with the Agency, the Applicant clarified their initial request seeking access to:

All documents in relation to charges against [named individual] in relation to [description of] charges against [their] family and [description of] related charges against my family.
3. In its decision, the Agency identified three documents falling within the terms of the Applicant's request. The Agency relied on the exemption under section 33(1) to refuse access to the documents in full. The Agency's decision letter sets out the reasons 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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have examined copies of the documents subject to review and considered all relevant communications received from the parties in relation to this review.
7. I note in response to OVIC staff inquiries made during this review, the Agency advised there were no documents still in existence or located relevant to the second limb of the Applicant's request, being documents concerning their family.
8. The Agency noted that due to the historical nature of the incident, all documents kept at police stations would have been destroyed. This information was communicated to the Applicant who requested the review proceed on the documents located; acknowledging their understanding the documents located do not reference the Applicant or their family.
9. 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.
10. 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

11. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document under the FOI 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).

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

12. 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 reasonably be determined.²
13. The documents contain names, addresses, dates of birth, criminal charges and witness statements made to police and other personal information relating to third parties.
14. I am satisfied this information amounts to personal affairs information for the purposes of section 33.

Would disclosure of the personal affairs information be unreasonable?

15. 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 circumstances of a matter.
16. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, subject to certain exceptions,³ an agency must notify an individual that an FOI request has been received for documents containing their personal information and seek their views on disclosure of that information.
17. The Agency determined it was not practicable to consult with third parties given the circumstances of the matter. Given the passage of time since the documents were created, I agree consultation is not practicable.
18. In determining whether the release of the personal affairs information is unreasonable, I have given weight to the following factors in the context of this matter:

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

The nature of the personal affairs information is names, addresses, dates of birth and other identifying information, as well as more sensitive information, such as the views and personal experiences of third parties and a list of criminal charges laid against a named individual.

I acknowledge the Applicant may already know some of the persons named in the documents. 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

The information was obtained in the course of the Agency undertaking an investigation and prosecution of alleged breaches of the criminal law in [year]. The information was partly provided to the Agency on a voluntary basis and partly generated in the course of its investigation.

I am of the view third parties who provided the relevant information to the Agency did so on the assumption the information would remain confidential unless required for any subsequent criminal investigation or legal proceeding.

² Section 33(9).

³ Section 33(2B).

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

(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.⁵

The Applicant advises their purpose for seeking the information as follows:

I am appealing to have these documents released to me as I believe it is reasonable in this case on the basis that I require these to send as part of submissions in an appeal and also for my Psychological treatment as the Charges of [named individual] also indicate the abuse that myself and my family were also subjected to

I acknowledge the Applicant's personal interest in and reasons for seeking access to the information, namely to pursue a separate court process and for their own wellbeing.

Noting, as detailed above, the documents subject to review do not concern the Applicant or their family directly, on the information before me, I am unable to determine whether the Applicant's purpose for seeking access to the personal affairs information in the documents would be achieved by their disclosure.

In addition, I note OVIC staff provided the Applicant with advice on alternatives for seeking access to information in relation to current or past court proceedings.

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

The Applicant's interest in the matter is private in nature.

However, on the information before me, 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.

Rather, I am of the view there is a public interest in the Agency maintaining its ability to receive confidential information from members of the public on a voluntary basis in order to conduct thorough and effective investigations into alleged breaches or possible breaches of the criminal law. If information of this type were to be routinely disclosed under the FOI Act, I am satisfied it would jeopardise the ability of the Agency to carry out its investigative and law enforcement functions.

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

I do not have any information before me as to the views of the individuals to whom the information relates as the Agency determined consultation was not practicable in the circumstances, which I accept.

Having considered the sensitive nature of the information in the documents and the circumstances in which it was obtained by the Agency, despite the age of the documents, I am of the view the individuals concerned would be reasonably likely to object to the release of their personal affairs information to the Applicant.

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

(e) The likelihood of further disclosure of the information if released

I have considered the nature of disclosure under the FOI Act, which provides for unrestricted and unconditional access to information.⁶ This means, once a document is disclosed under the FOI Act, an applicant is free to use or further disclose the information as they choose.⁷

While there is no information before me to suggest the Applicant intends to widely disseminate the documents, I consider it is reasonably likely the personal privacy of the third parties would be detrimentally impacted should their personal affairs information in the documents be disclosed under the FOI Act.

(f) Whether disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person⁸

There is no information before me to suggest this is a relevant factor in this case.

19. Having considered the above factors, on balance, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable in the circumstances.

Deletion of exempt or irrelevant information

20. 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.
21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰
22. Having reviewed the content of the documents, I am not satisfied it would be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, as deleting the exempt information would render the documents meaningless and result in the information specifically sought by the Applicant being deleted.

Conclusion

23. I am satisfied the personal affairs information of third parties in the documents is exempt under section 33(1).
24. As I have determined it would not be practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I am satisfied the documents are exempt in full.

Review rights

25. If they are not satisfied with my decision, the Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹

⁶ Ibid.

⁷ Ibid at [66].

⁸ Section 33(2A).

⁹ *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].

¹⁰ *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].

¹¹ Section 52(5).

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 an application to VCAT for a review of my decision is made.¹²

¹² Sections 50(3F) and (3FA).