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Notice of Decision and Reasons for Decision

Applicant:	'CT5'
Agency:	Victoria Police
Decision date:	15 March 2021
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'CT5' and Victoria Police (<i>Freedom of Information</i>) [2021] VICmr 69 (15 March 2021)

FREEDOM OF INFORMATION – law enforcement documents – police documents – witness statements

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 sections 33(1) and 35(1)(b).

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

15 March 2021

Reasons for Decision

Background to review

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

 ...document[s] on:
 [description of livestock] that were seized from the property known as [address], on [date];
 Police involved, [Agency official] & [Agency official], of either [suburb] and/or [suburb] Police Stations;
 person charged with offences: [Applicant];
 I requested documents: sales and/or gifting [livestock] to when the Police had no further charge over the [livestock], statements /invoices as to the feeding, watering, handling and such and who paid for the accounts to do this.
2. The Agency identified three documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 33(1) and 35(1)(b).
3. It did not locate any documents in relation to the sale, gifting, feeding, watering or handling of the [livestock] or any invoices or accounts in relation to the [livestock].
4. The Agency's decision letter sets out the reasons 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. 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 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 must be interpreted to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, 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 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?

11. 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
12. A third party's opinion or observations about another person's conduct can constitute the personal affairs of the third party.³
13. I note the scope of 'personal affairs information' is generally interpreted broadly and can include matters relating to health, private behaviour, home life or personal or family relationships of individuals.⁴
14. The documents subject to review are statements made by a third party, containing the names of persons other than the Applicant, employee numbers, contact details, job descriptors, positions titles, the third party's recollection of events and other personal information relating to third parties.
15. I am satisfied such information amounts to personal affairs information for the purposes of section 33(1).

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 protection of an individual's right to personal privacy in the circumstances.⁵
17. I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,⁶ in which it was 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'. Further, '[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
18. In determining whether the release of the personal affairs information is unreasonable, I have given weight to the following factors:

(a) The nature of the personal affairs information

The nature of the personal affairs information is names, addresses and other identifying information, as well as more sensitive information, such as the views and recollections of third parties. The information was provided to the Agency as part of a police investigation.

(b) The circumstances in which the information was obtained by the Agency

The information was obtained by the Agency during a police investigation. I am of the view third parties, who provided the information, did so on the assumption the information would remain confidential unless required for a subsequent criminal investigation or legal process.

² Section 33(9).

³ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police* [2008] VCAT 1343 at [43]; *Pritchard v Victoria Police* [2008] VCAT 913 at [24]; *Mrs R v Ballarat Health Services* [2007] VCAT 2397 at [13].

⁴ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

⁵ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

⁶ [2008] VSCA 218 at [76].

⁷ *Ibid* at [79].

In the circumstances, I am satisfied the third parties would not have unreasonably expected the information they provided to the Agency as part of a police investigation would be disclosed to the Applicant under the FOI Act.

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

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 on a voluntary basis from third parties and witnesses 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

In determining whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, subject to certain exceptions, 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.⁸

I do not have any information before me as to the views of the third parties to whom the information relates as the Agency determined consultation was not practicable in the circumstances.

Having considered the sensitive nature of the information in the documents and the circumstances in which it was obtained by the Agency, 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.

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

The information provided to the Agency is not publicly available.

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

The nature of disclosure under the FOI Act provides for unrestricted and unconditional access to information. 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.⁹

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.

⁸ Section 33(2B).

⁹ Ibid at [68].

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

I am also required to consider whether disclosure of the personal affairs information in the documents would, or would reasonably likely, to endanger the life or physical safety of any person.¹⁰

In considering this factor, I note the Victorian and Civil Administrative Tribunal (**VCAT**) has held physical safety is not concerned solely with actual safety, but also with the perception of the relevant person as to whether he or she is safe. Similarly, VCAT has found the maker of the documents in question may have a perception of fear if their personal information were disclosed.

Having reviewed the Agency's submission, I consider this is a relevant factor when assessing the release of the personal affairs information of the relevant third parties to the Applicant.

I have also taken into consideration the Applicant did not provide any reason for seeking access to the personal affairs information of the persons named in the documents such that any such reason could be balanced with the concerns raised.

Therefore, I am of the view there are reasonable grounds to consider concerns exist in relation to the safety of the third parties should their personal affairs information in the documents be disclosed under the FOI Act.

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

Section 35(1)(b)

21. 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.
22. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.¹¹ Confidentiality may be expressed or implied from the circumstances of the matter.¹²

Was the information or matter communicated in confidence?

23. The Agency relies on section 35(1)(b) to refuse access to all three documents in full. The documents contain witness statements obtained by the Agency as part of a police investigation.
24. There is nothing on the face of the documents to indicate the information was communicated in confidence. However, for the purposes of section 35(1)(b), a document need not be marked 'confidential' for the content to be considered information communicated in confidence.¹³

¹⁰ Section 33(2A).

¹¹ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

¹² *Ibid.*

25. VCAT [has] noted¹⁴:

... persons who provide statements or other information to the police do so with the expectation that these will only be disclosed to the extent necessary to conduct investigations and deal with criminal charges.

26. As noted above in my consideration of section 33(1), I consider the third parties, who provided information to the Agency as part of the police investigation into a criminal matter, did so with the expectation it would remain confidential unless required for a subsequent criminal investigation or legal process.

27. Accordingly, I am satisfied disclosure of the documents would divulge information communicated to the Agency in confidence.

Will disclosure of the information impair the Agency's ability to obtain similar information in the future?

28. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if information is disclosed under the FOI Act. This means, I must be satisfied, if 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.

29. The Agency relies on members of the public and officials of other agencies being able to provide confidential information to investigate and resolve criminal matters. There is a strong public interest in the Agency maintaining its ability to obtain information for the purposes of its investigations and any subsequent legal proceedings. If this information were to be routinely released in response to an FOI request, I am of the view the Agency would be impaired from obtaining information of a similar nature in the future.

30. I note the views of VCAT in *Williams v Victoria Police*¹⁵ and more recently in *RFJ v Victoria Police FOI Division*,¹⁶ where evidence was accepted that persons would be less likely to make statements to Victoria Police if they were of the view the making of such statements was not confidential.

31. Having considered the content of the documents, I am satisfied that the public interest lies in the Agency being able to maintain the confidentiality of individuals who provide witness statements during a police investigation. Further, if such information were to be released, it would hinder the ability of the Victoria Police to investigate alleged criminal offences and carry out its investigation and law enforcement functions.

32. Accordingly, I am satisfied section 35(1)(b) applies to the information in the documents.

Deletion of exempt or irrelevant information

33. 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.

34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁷ and the effectiveness of the deletions. Where

¹³ *Williams v Victoria Police* [2007] VCAT 1194 at [75].

¹⁴ [2003] VCAT 397 at [35].

¹⁵ [2007] VCAT 1194 at [73].

¹⁶ [2013] VCAT 1267 at [170].

¹⁷ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁸

35. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with 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 documents meaningless.

Conclusion

36. On the information before me, I am satisfied the documents are exempt under sections 33(1) and 35(1)(b).
37. 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.

Review rights

38. If the Applicant to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁹
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
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.²¹

When this decision takes effect

42. My decision does not take effect until the relevant review periods expire.
43. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁸ *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].

¹⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁰ Section 52(5).

²¹ Sections 50(3F) and (3FA).