

Notice of Decision and Reasons for Decision

Applicant:	'CU9'
Agency:	Victoria Police
Decision date:	31 March 2021
Provision and exemption considered:	Sections 25A(5), 31(3)
Citation:	'CU9' and Victoria Police (<i>Freedom of Information</i>) [2021] VICmr 82 (31 March 2021)

FREEDOM OF INFORMATION – law enforcement documents – police records and procedures – police informants – *Terrorism (Community Protection) (Further Amendment) Act 2006* (Vic) – Intelligence and Covert Support Command

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 requirements of section 25A(5) are met, and I have refused to grant access to documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

31 March 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to:
... documents on [named individual] been [sic] a Victorian Police informer and / or snitch.
2. The Agency relied on section 25A(5) to refuse to grant access to the documents in accordance with the Applicant's request.
3. The Agency determined any documents falling within the terms of the Applicant's request, should they exist, would be exempt from release under section 31(3). Accordingly, the Agency refused to grant access to documents in accordance with section 25A(5) without having identified any documents relevant to the Applicant's FOI request.
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, including:
 - (a) the Agency's decision on the Applicant's request;
 - (b) the Applicant's review application; and
 - (c) information provided by the Agency to OVIC during the review.
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.

Review of section 25A(5) to refuse to grant access to documents

9. The power under section 25A(5) is carefully circumscribed.¹ A decision maker must be satisfied of the following three elements, which operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all requested documents are exempt.
 - (c) Third, it must be apparent from:
 - (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

- (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.²

10. An agency is not required to identify any or all documents to which the request relates or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.

Is the nature of the documents objectively apparent from the face of the request?

11. The request seeks access to a document or documents that record whether or not an individual is a registered police informant. I am satisfied the nature of the documents is objectively apparent from the specific terms of the request.

Would all documents, as described in the request, be exempt?

12. In refusing access to the requested documents under section 25A(5), the Agency determined any documents, should they exist, would be exempt under section 31(3).

13. Section 31(3) states:

Notwithstanding anything to the contrary in this section, a document is an exempt document if it is a document created by the Bureau of Criminal Intelligence or (whether before or after the commencement of section 22 of the **Terrorism (Community Protection) (Further Amendment) Act 2006**) by the Intelligence and Covert Support Command of Victoria Police.

14. Section 31(3) provides an exemption from release for documents created by the Intelligence and Covert Support Command of Victoria Police or its predecessor, the Bureau of Criminal Intelligence. To claim this exemption, the Agency must demonstrate a document was created, or would need to be created, by its Intelligence and Covert Support Command.

15. I accept the Agency's submission that, should any relevant documents exist, they would have been prepared or created by the Intelligence and Covert Support Command of Victoria Police or its predecessor.

16. Once it is established a document was created, or would need to be created, by the Intelligence and Covert Support Command, section 31(3) does not provide for any exceptions or the consideration of any other factors, such as a public interest factors.

17. Accordingly, I am satisfied any documents, should they exist, would be exempt under section 31(3) on grounds any documents the subject of the Applicant's request would have been or would need to be created by the Intelligence and Covert Support Command or its predecessor.

Is it apparent from the nature of the documents, that there is no obligation under section 25 for the agency to grant access to an edited copy of a document?

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.

² *Knight v Corrections Victoria* [2010] VSC 338.

19. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ 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 25.⁴
20. Having considered the nature of the documents sought and relevant exemption, I am satisfied if any such documents existed, they would be exempt in full under section 31(3) as there would be no obligation on the Agency to provide an edited copy of any document in accordance with section 25.

Conclusion

21. On the information before me, I am satisfied:
 - (a) the documents the subject of the Applicant's request, should any exist, would be exempt under section 31(3); and
 - (b) should any documents exist, there would be no obligation on the Agency to provide the Applicant with an edited copy of any document in accordance with section 25.
22. Accordingly, I am satisfied the requirements of section 25A(5) are met and I have decided to refuse to grant access to documents in accordance with the Applicant's request under section 25A(5).

Review rights

23. 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.⁵
24. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
25. 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.
26. 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
27. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

³ *Mickelburgh 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].

⁴ *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].

⁵ Section 50(1)(b).

⁶ Section 52(5).

⁷ Sections 50(3F) and (3FA).