



Office of the Victorian
Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'CM9'
Agency:	Victoria Police
Decision date:	12 January 2021
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'CM9' and Victoria Police (<i>Freedom of Information</i>) [2021] VICmr 8 (12 January 2021)

FREEDOM OF INFORMATION – law enforcement documents – police documents – police investigation – applicant subject to investigation – information obtained by police from third party – 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 under sections 33(1) and 35(1)(b).

As I am satisfied it is not practicable to delete the exempt information from the document in accordance with section 25, I have determined to exempt the document in full.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

12 January 2021

Reasons for Decision

Background to review

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

an email from [country]-apparently stating that I had been threatening or trying to kill my [relationship descriptor]. The email was sent to the [Police Station].
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.

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

12. Having reviewed the document, I am satisfied it contains names, relationships descriptors, email addresses and telephone numbers, which constitutes the personal affairs information of persons other than the Applicant.

Would release of the personal affairs information be unreasonable?

13. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of an individual other than the applicant.

14. In *Victoria Police v Marke*,¹ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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'.

15. In determining whether disclosure of personal affairs information in the document would be unreasonable, I have considered the following factors:

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

In addition to names, email addresses and other identifying information, the document contains the views of relevant third parties. The information was obtained by the Agency from third parties in the context of the Agency undertaking a criminal investigation into an alleged crime. In these circumstances, and noting the Applicant was the subject of the allegations, I consider the information is sensitive.

Information provided during a criminal investigation is ordinarily communicated to the Agency on a voluntary basis and with the expectation it will remain confidential unless required for a subsequent criminal prosecution. Having reviewed the document and noting the circumstances in which it was obtained by the Agency, I am of the view the third parties, who provided the information to the Agency, would not reasonably expect their personal affairs information would be disclosed to the Applicant under the FOI Act.

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

There is no information before me to suggest the public interest would be promoted by disclosure of the third parties' personal affairs information. Rather, I consider disclosure of this information would serve the Applicant's private interests only.

I am of the view the greater public interest lies in the Agency preserving the confidentiality of information provided by witnesses, or other sources of information, during the course of an investigation. This ensures the Agency's ability to obtain the cooperation of the public and similar information in order to effectively and efficiently carry out its investigative functions. Therefore, I consider there is a greater public interest in the third parties' information not being released to the Applicant.

¹ *Victoria Police v Marke* [2008] VCSCA 218 at [68].

- (c) Whether disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁰

In determining if disclosure of the personal affairs information of third parties would be unreasonable, I am required to consider whether disclosure of information in the document would, or would be reasonably likely, to endanger the life or physical safety of any person.² However, there is no information before me to suggest this is a relevant factor in this case.

16. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information in the document is unreasonable in the circumstances. Accordingly, I am satisfied this information is exempt under section 33(1).

Section 35(1)(b)

17. 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.

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

Firstly, the duty of care of Victorian police is to its residents, [details redacted]. Section 8 of the Victoria Police Act 2003 states "The role of Victoria Police is to serve the Victorian community..."[Details redacted].

Secondly, it is assumed that the information was given in confidence. This is not the case. [Details redacted]. This point is crucial to appreciate, as Victoria Police made an incorrect assumption that the complaint was made in confidence. [Details redacted].

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

19. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.³ Further, confidentiality can be expressed or implied from the circumstances of the matter.⁴
20. The information exempted by the Agency under section 35(1)(b) contains allegations of criminality against the Applicant.
21. I am mindful in this matter that I do not have specific information before me regarding the third party's view as to whether they provided the information to the Agency on a confidential basis.
22. In any case, I consider the relevant third party would more likely than not have communicated the information to the Agency in confidence, given the nature of this matter which involves a criminal complaint and the Agency's subsequent investigation.

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

² Section 33(2A).

³ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265].

⁴ *Ibid.*

23. 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.
24. 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 would be less likely to provide such information which would impair the ability of the Agency to obtain similar information in the future.
25. 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.
26. 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

27. 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.
28. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ 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 25.⁶
29. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to do so, as it would render the document meaningless.

Conclusion

30. On the information before me, I am satisfied the document is exempt under sections 33(1) and 35(1)(b).
31. As I am satisfied it is not practicable to delete the exempt information from the document in accordance with section 25, I have determined to exempt the document in full.

⁵ *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].

⁶ *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].

Review rights

32. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
35. 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.
36. 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.¹⁰

⁷ Section 50(1)(b).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).