

Notice of Decision and Reasons for Decision

Applicant:	'DS6'
Agency:	Victoria Police
Decision date:	6 October 2021
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'DS6' and Victoria Police (Freedom of Information) [2021] VICmr 295 (6 October 2021)

FREEDOM OF INFORMATION – law enforcement documents – police documents – police 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 practicable to provide the Applicant with an edited copy of the documents with exempted information deleted in accordance with section 25, access is granted to the documents in part.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

6 October 2021

Reasons for Decision

Background to review

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

I wish to access all details and content of this information provided via [third party] including the exact time and date of the complaint, how the information was originally received, how the information was provided to [Agency], to which department, and the names if any personnel involved, and subsequent actions taken by [Agency] that may have resulted from this information. And a copy of the original complaint as supplied by [Agency].

2. The Agency identified a one document falling within the terms of the Applicant's request and refused access to the document in part under sections 33(1) and 35(1)(b). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the information Commissioner under section 49A(1) of the Agency's decision to refuse access in part.
4. I have examined a copy of the document subject to review. The document is an 8-page report containing the names and user identification (ID) numbers of the Agency officers who have investigated information from a third party or parties regarding the Applicant, the date and time the information was assessed, 'Reason For Access' input codes and other related data.
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 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 (a **third party**) other than the Applicant; and
 - (b) such disclosure would be 'unreasonable'.
10. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or disclosing their address or location.¹

¹ Section 33(9).

11. It also includes any information from which such information may be reasonably determined. A third party's opinion or observations about another person's conduct can constitute information in relation to the personal affairs of a third party.²
12. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.³ As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to identify a third party.⁴

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

13. The document is an 8-page information report relating to [another Agency] allegations made against the Applicant. The content includes the names, position titles/ranks and user identification (ID)/registered numbers of the Agency officers who investigated information received from a third party regarding the Applicant, details of the information provided, the date and time the information was assessed, 'Reason For Access' input codes and other related data.
14. I am satisfied the above information constitutes the personal affairs information of the persons other than the Applicant.

Would the release of personal affairs information be unreasonable?

15. Determining whether disclosure of a person's personal affairs information would 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.
16. In *Victoria v Marke*,⁵ 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'.
17. I accept the Agency's submission that certain Agency officers were not involved in the investigation and were merely administrative officers who had incidental involvement in the matter. Where an individual has a peripheral role in a matter, I am of the view disclosure of their name, usernames or ID numbers, mobile numbers or direct email address, where the Applicant does not already know this information, is more likely to be unreasonable. I note the Agency has released certain personal affairs information of Agency officers who had direct contact with the Applicant or were central to the investigative work undertaken.
18. In determining whether disclosure of additional personal affairs information in the document would be unreasonable, I have further 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, registered IDs 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 alleged crime. In these

² *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43].
Pritchard v Victoria Police (General) [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

³ *Hanson v Department of Education & Training* [2007] VCAT 123 at [9].

⁴ *O'Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

⁵ [2008] VCSA 218 at [68].

circumstances, and noting the Applicant was subject to 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 and administrative staff, 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.

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

In determining if disclosure of the personal affairs information of third parties would be unreasonable, I am required to consider whether disclosure of the information in the document would, or would be reasonably likely, to endanger the life or physical safety of any person.⁶

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

Section 35(1)(b)

20. 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 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 Minister to obtain similar information in the future.

21. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁷ Confidentiality may be expressed or implied from the circumstances of the matter.⁸

Would disclosure divulge information communicated in confidence?

⁶ Section 33(2A).

⁷ *XYZ v Victoria Police (General)* [2010] VCAT 255 at [265]

⁸ *Ibid.*

22. The Agency relies on section 35(1)(b) to refuse access to the documents in part. The documents contain allegations of criminality against the Applicant.
23. The Victorian Civil and Administrative Tribunal (**VCAT**) [has] noted:

...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 charge.⁹
24. 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.
25. 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.
26. In any case, I consider any relevant third parties would more likely than not have communicated the information to the Agency in confidence, given the nature of this matter.
27. Accordingly, I am satisfied disclosure of the document would divulge information communicated to the Agency in confidence.

Would disclosure be reasonably likely to impair the ability of the Agency 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. I note the views of VCAT in *Williams v Victoria Police*¹⁰ and more recently in *RFJ v Victoria Police FOI Division*,¹¹ where it was accepted that persons would be less likely to make statements to Victoria Police if they were of the view that the making of such statements was not confidential.
30. Having considered the content of the document, I am satisfied that the public interest lies in the Agency being able to maintain the confidentiality of individuals who provide statements or other information during a police investigation. Further, if such information were to be released, it could hinder the ability of the Agency to investigate alleged criminal offences and carry out its investigation and law enforcement functions.
31. Accordingly, I am satisfied section 35(1)(b) applies to the information in the document.

Deletion of exempt or irrelevant information

32. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
33. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹² and the effectiveness of the deletions. Where deletions

⁹ [2003] VCAT 397 at [35].

¹⁰ [2007] VCAT 1194 at [73].

¹¹ [2013] VCAT 1267 at [170].

¹² *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹³

34. I have considered deleting exempt information from the documents. In my view, it is practicable to delete the exempt information as to do so would not require substantial time and effort and the documents would retain meaning.

Conclusion

35. On the information before me, I am satisfied certain information in the document is exempt under sections 33(1) and 35(1)(b). Accordingly, my decision is the same as the Agency's decision and no further information is to be released to the Applicant.
36. As I am satisfied it remains practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, I have determined to grant access to the document in part.

Review rights

37. If the Applicant is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.¹⁴
38. The Applicant may apply to VCAT for a review up to 60 days, from the date they are given this Notice of Decision.¹⁵
39. 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.
40. In the event the Applicant applies to VCAT for a review of my decision, the Agency is required to notify the Information Commissioner in writing as soon as practicable.¹⁶
41. If a review application is made out to VCAT, my decision will be subject to any VCAT determination.

¹³ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

¹⁴ Section 50(1)(b).

¹⁵ Section 52(5).

¹⁶ Sections 50(3F) and (3FA).