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Notice of Decision and Reasons for Decision

Applicant:	'CQ1'
Agency:	Victoria Police
Decision date:	5 February 2021
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'CQ1' and Victoria Police (Freedom of Information) [2021] VICmr 37 (5 February 2021)

FREEDOM OF INFORMATION – police records – workplace relations – Professional Standards Command – disciplinary matter – workplace investigation – disciplinary brief – varied decision

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 fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision in that I have decided to release additional information to the Applicant.

I am satisfied certain information in the documents is exempt under section 33(1).

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

5 February 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. PSC discipline brief & all PSC documents and records relating to [police officer name] of [location] Police Station discipline matter of alleged failure to comply with Chief Commissioner's instructions and failing to comply with a Lawful instruction given by a Police Officer of or above the rank of Senior Sergeant.
 2. All records (including but not limited to diary entries, emails, notes) of [police officer name] relating to discipline and PDA matter of [police officer name].
 3. All records (including but not limited to diary entries, emails, notes) of [police officer name] in relation to discipline and PDA matter of [police officer name].
 4. All records (including but not limited to, diary entries, emails, notes) of [police officer name] in relation to discipline and PDA matter of [police officer name].
 5. All records (including but not limited to notes/emails/diary entries) of [police officer name] and [police officer name] relating to meetings held with [police officer name] on the [date], [date] and [date].
 6. All records (including but not limited to Notes/emails/diary entries) of [police officer name] and [police officer name] relating to meeting held with [police officer name] on the [date].
 7. All documentation and records relating to the Bullying Complaint made by [police officer name] to Victoria Police.
 8. All documentation and records relating to the Victimization Complaint made by [police officer name] to Victoria Police.
 9. All records and correspondence (including but not limited to notes/emails/diary entries) between Workplace Relations and PSC in relation to [police officer name] (including but not limited to [police officer name], [police officer name], [police officer name], [police officer name], [police officer name], [police officer name] & police officer name)).
 2. By letter dated [date], the Agency advised the Applicant of its intention to refuse to grant access to documents in accordance with the Applicant's request, as it was satisfied the work involved in processing the request would substantially and unreasonably divert its resources from its other operations.
 3. In accordance with section 25A(6)(b), before refusing to grant access to the documents, the Agency invited the Applicant to consult with a view to making the request in a form that would remove the proposed ground for refusal.
 4. On [date], the Applicant advised the Agency they do not seek access to emails they sent or received, or 'documents provided by me to workplace relations, [police officer name], PSC'.
 5. On [date], the Applicant amended the terms of point 1 in their request and advised they no longer seek access to points 7 and 9. Point 1 was amended as follows:
 1. PSC brief and all documents and records in relation to [police officer name] written direction investigation (received [date]) that was received under s.[section number] Victoria Police Act of alleged failure to comply with Chief Commissioner's instructions and failing to comply with the lawful direction of a senior sergeant in relation to PDA matter.
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6. By letter dated [date], the Agency wrote to the Applicant inviting them to consult further in relation the request, as it continued to consider processing the request would substantially and unreasonably divert its resources from its other operations. In doing so, the Agency provided the Applicant with information concerning the likely number of pages that would be subject to review based on the current terms of the request.
7. On [date], the Applicant removed point 8 in their request and refined point 1 to 'PSC Grievance File [file number]'. The Applicant continued to seek access to points 2 to 6 of the request.
8. In response, the Agency advised the Applicant the amendment was insufficient to remove the proposed grounds for refusal and invited the Applicant to narrow the request to point 1 of the amended request, namely, 'PSC Grievance File [number]' which the Agency advised comprised of 110 pages only. The Applicant declined to do so on the basis points 2 to 6 of their request are 'basic notes and emails from 4 people' and 'are not part of the workplace relations matters' to which the Applicant no longer sought access to.
9. Although the Applicant consulted with the Agency in good faith with a view to narrowing the scope of their request, agreement was not reached between the parties.
10. In its decision letter dated [date], the Agency refused to grant access to the documents in accordance with the Applicant's request under section 25A(1), on grounds it was satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

Review

11. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
12. During the review, the Agency was provided with a preliminary view that the work involved in processing the request would not amount to a substantial and unreasonable diversion of the Agency's resources. In response, the Agency provided further submission in supports of its decision made under section 25A(1).
13. Having considered further information provided by the Agency to support its decision, the Applicant was provided with a preliminary view that the work involved in processing the FOI request, on its original terms, would amount to a substantial and unreasonable diversion of the Agency's resources.
14. Following further correspondence with the Applicant, they were invited to reconsider narrowing the terms of their FOI request to the 'PSC Grievance File', as suggested by the Agency during consultation with the Applicant. The Applicant agreed to narrowing the terms of their request to the 'PSC Grievance File', and the Agency was advised of this agreement.
15. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review. The Agency was granted an extension to make its fresh decision by [date].
16. In its fresh decision made on [date], the Agency located 24 documents falling within the refined terms of the FOI request and released four documents in full and refused access to 19 documents in part and one document in full. The Agency relied on the exemptions under sections 30(1), 32(1) and 33(1) to refuse access to certain information in the documents.
17. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.

18. During a review of the fresh decision, the Applicant raised concerns regarding the adequacy of the Agency's document search. Following inquiries by OVIC staff, no further documents were located by the Agency and the Applicant was informed of this advice. In the circumstances, I am satisfied no further action is required as the Agency conducted a thorough and diligent search and no further relevant documents were able to be located.
19. During the review, the Applicant advised OVIC staff they only seek review of certain emails only. The Applicant provided OVIC with scanned copies of the pages of documents to which they seek review and confirmed they do not seek review of an attachment to one of the pages. The documents subject to review are outlined in the Schedule of Documents in **Annexure 1**.
20. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
21. I have considered all communications received from the parties.
22. 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.
23. 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

Section 30(1)

24. Section 30(1) has three requirements:
 - (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
 - (a) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (b) disclosure of the matter would be contrary to the public interest.
25. The exemption does not apply to purely factual material in a document.¹

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

26. The term 'officer of an Agency' is defined in section 5(1). It includes a member of an agency, a member of an agency's staff, and any person engaged by or on behalf of an agency, whether or not that person is subject to the Public Administration Act 2004 (Vic).
27. Having reviewed the documents, I am satisfied certain information exempted by the Agency is in the nature of opinion expressed by Agency officers.

¹ Section 30(3).

Were the documents made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?

28. The term 'deliberative process' is interpreted widely and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.²

29. In *Re Waterford and Department of Treasury (No.2)*,³ the Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

30. I am satisfied the information was prepared in the course of, or for the purpose of, the Agency's deliberative processes relating to a disciplinary investigation concerning the Applicant and related matters that stemmed from this.

Would disclosure of the documents be contrary to the public interest?

31. I must also be satisfied disclosure of the information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.⁴

32. In doing so, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.

33. In determining whether disclosure would be contrary to the public interest, I have taken the following factors into consideration:⁵

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the making of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and

² *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

³ [1981] 1 AAR 1.

⁴ *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

⁵ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

34. In its fresh decision, the Agency states:

Part of the denied information contains the personal opinions and recommendations of a supervising member in relation to this incident and the evidence gathered during the investigation. I am satisfied that the personal opinions and advice were prepared as part of the deliberative processes associated with disciplinary investigations. In my view it would be contrary to the public interest to release this information as members of police must be able to freely communicate their professional opinions and thought processes to ensure that these types of incidents are thoroughly investigated and to ensure that decisions made regarding the direction of these types of investigations are subject to proper and thorough deliberation.

35. In my view, disclosure of the opinion in the documents would not be contrary to the public interest for the following reasons:

- (a) Although I accept workplace investigations into disciplinary matters and police conduct are generally sensitive in nature, in my view, the opinions expressed in the particular pages subject to review are not particularly sensitive in the circumstances of this matter.
- (b) It is unlikely disclosure of the opinions will have any adverse impact on ongoing matters concerning the Applicant or matters of a similar nature.
- (c) Disclosure of the opinions is unlikely to inhibit open communications between Agency officers.

36. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 30(1).

Section 33(1)

37. 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;⁶ and
- (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information?

38. 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 be reasonably determined.⁷

39. A document discloses a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁸

40. The documents subject to review contain the names, position titles, email addresses and mobile telephone numbers of third parties and Agency officers.

⁶ Sections 33(1) and (2).

⁷ Section 33(9).

⁸ *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].

Would disclosure of the personal affairs information be unreasonable?

41. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the circumstances of a matter.
42. The Victorian Court of Appeal has held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'.⁹ 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'.
43. I consider the following factors are relevant in determining whether disclosure would be unreasonable in the circumstances of this matter:
 - (a) the nature of the personal affairs information and the circumstances in which it was obtained;
 - (b) the likelihood of further disclosure of the information, if released under the FOI Act, which provides for the unrestricted and unconditional release of documents;
 - (c) whether the individuals to whom the information relates object, or would be likely to object, to the release of their personal affairs information in the documents;
 - (d) whether any public interest would be promoted by release of the information;
 - (e) the Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved through disclosure; and
 - (f) whether the disclosure of information would be, or be reasonably likely to endanger the life or physical safety of any person.¹⁰

Personal affairs information of Agency officers

44. In relation to the personal affairs information of agency officers, the Victorian and Civil Administrative Tribunal (**VCAT**) has accepted there is nothing particularly sensitive about matters concerning or arising out of the course of one official duties.¹¹
45. In this matter, I acknowledge the Applicant is reasonably likely to be aware of the identity of any Agency officers whose information appears in the documents. However, even in circumstances where a person named in a document is known to an applicant, it may still be unreasonable to release such information under the FOI Act.¹²
46. Subject to an agency demonstrating that special circumstances apply, I consider it would not be unreasonable to disclose the name and position title of an agency officer, regardless of their seniority where a document sought is an official document of the agency and provides a record of agency officers carrying out their usual employment duties and responsibilities within a professional context. The nature of such information is to be contrasted with personal affairs information relating to an agency officer in their personal or private capacity.
47. Having reviewed the documents, I have determined it would not be unreasonable to disclose certain personal affairs information of Agency officers, for the following reasons:

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [76].

¹⁰ Section 33(2A).

¹¹ *Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

¹² *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

- (a) the documents subject to review are official documents of the Agency and provide a record of Agency officers carrying out their usual employment duties and responsibilities within a professional context, namely the conduct of a disciplinary investigation and related matters;
 - (b) the personal affairs information does not concern the Agency officers in their private or personal capacity;
 - (c) the Agency officers are responsible for the conduct of the investigation and are not witnesses in the investigation; and
 - (d) the personal affairs information of the Agency officers is not particularly sensitive in the circumstances of the matter.
48. Given the Applicant is employed by the Agency and would be able ascertain the Agency email addresses of those persons, I consider there is no utility in withholding the email addresses from disclosure. In any case, I consider the risk of the Applicant widely disseminating such information outside the Agency is low.
49. However, I consider it would be unreasonable to disclose mobile telephone numbers of Agency officers, as such information will not further the Applicant's understanding of the documents or the identity of persons involved and may not be known to the Applicant.

Personal affairs information of other third parties

50. I am of the view there is a public interest in ensuring the ability of third parties to provide information to the Agency on a voluntary and confidential basis without concern the information they provide will be disclosed through the FOI process to a person the subject of a workplace investigation.
51. In the event such information were to be routinely released under the FOI Act and the confidentiality of an individual who has provided information to the Agency as part of an investigation was not preserved, I am satisfied the integrity and efficacy of investigations into allegations concerning the conduct of a police officer would be seriously compromised.
52. However, there is no information before me to suggest the third parties named in the documents made allegations concerning the conduct of the Applicant. Rather, their personal affairs information is included in the documents by virtue of them having been involved in an incident that led to a subsequent investigation into the Applicant's conduct and related matters. As such, I do not consider their identities are sensitive or confidential in the context of the Applicant as the subject of the investigation.
53. However, as stated above, the nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document disclosed to them under the FOI Act as they choose.¹³ Although there is no information before me to suggest the Applicant intends to widely distribute the documents, I must consider the impact of disclosure on the privacy of third parties.
54. While I consider the third parties would not object to the disclosure of certain personal affairs information in the documents, I consider they would likely object to the release of their names and expect the information they provide to police, or details of their involvement with the police, would be used for the purposes of an investigation or any related legal proceedings only.

¹³ *Victoria Police v Marke* [2008] VCSCA 218 at [68].

55. On balance, I am satisfied it would be unreasonable to disclose the names of the third parties, however, it would not be unreasonable to release their position titles.
56. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

Deletion of exempt or irrelevant information

57. 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.
58. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
59. 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 practicable for such information in certain documents to be deleted where to do so would not require substantial time and effort and the edited documents would retain meaning.

Conclusion

60. On the information before me, I am satisfied certain information in the documents is exempt under section 33(1).
61. As I am satisfied it is practicable to provide the Applicant with an edited copy of a documents with exempt information deleted in accordance with section 25, I have determined to grant access to the documents in part.
62. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

63. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁶
64. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
65. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
66. 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.
67. 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.¹⁹

¹⁴ *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].

¹⁵ *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].

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and (3FA).

Third party review rights

68. If I determine to disclose the personal affairs information of a third party, which was originally exempted by an agency under section 33(1), if practicable, I must notify the third party of their right to apply to VCAT for review of my decision.²⁰
69. In the circumstances, I am satisfied it is practicable to notify the Agency officers of their review rights. However, I am not satisfied it is practicable to notify other third parties in the circumstances of this matter.
70. Accordingly, the relevant third parties will be notified of my decision and of their review rights, which must be exercised within 60 days from the date they are given notice of my decision.²¹

When this decision takes effect

71. My decision does not take effect until the 60 day review period for the third parties expires.

²⁰ Sections 49P(5) and 50(3).

²¹ Section 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Email	3	Released in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released with the mobile telephone number, which is exempt under section 33(1), deleted in accordance with section 25.	<p>Section 33(1): I am not satisfied it would be unreasonable to disclose the personal affairs information in this email for reasons outlined in the Notice of Decision above. However, I am satisfied it would be unreasonable to disclose mobile telephone numbers.</p> <p>Section 30(1): I am not satisfied it would be contrary to the public interest to disclose the opinion in this document for reasons outlined above in the Notice of Decision.</p> <p>Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>
2.	[date]	Email	3	Released in part Sections 30(1), 33(1)	Release in part Sections 33(1), 25 The document is to be released with the following information, which is exempt under section 33(1), deleted in	<p>Section 33(1): See comments for Document 1. In addition, I am satisfied it would be unreasonable to disclose certain personal affairs information of a third party in the email.</p> <p>Sections 30(1) and 25: See comments for Document 1.</p>

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>accordance with section 25:</p> <p>(a) the first name and surname of the third party on page 2, following the words 'the notes taken by' (the position title is to be released); and</p> <p>(b) mobile telephone numbers.</p>	
3.	[date]	Email chain	1	Released in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released with the mobile telephone number, which is exempt under section 33(1), deleted in accordance with section 25.</p>	<p>Section 33(1): See comments for Document 1. In addition, I am satisfied certain information the Agency determined is exempt under section 33(1) is not personal affairs information and is to be released.</p> <p>Section 25: See comments for Document 1.</p>