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Notice of Decision and Reasons for Decision

Applicant: 'DH9'
Agency: Victoria Police
Decision date: 28 June 2021
Exemption considered: Section 33(1)
Citation: 'DH9' and Victoria Police (*Freedom of Information*) [2021] VICmr 199
(28 June 2021)

FREEDOM OF INFORMATION – law enforcement documents – investigation documents – intervention orders – family violence – unreasonable to disclose personal affairs information – *Family Law Act 1975* (Cth)

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.

I am satisfied Document 7 is exempt under section 33(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document in accordance with section 25, I have determined to refuse access to the document in full.

Accordingly, my decision is the same as the Agency's decision in that I have not decided to release additional information in the document to the Applicant.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

28 June 2021

Reasons for Decision

Background to review

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

All relevant documents used (between [date range]) to determine that the actions of [named person] did not amount to a criminal offence including but not limited to:

- Statements made to police (including [the Applicant and a named person]; and any other individual or police informant).
- Correspondence relating to this incident (including emails, letters, etc. that may have been sent between the following – [named persons, including the Applicant]).
- File notes
- Transcripts of interviews

2. The Agency identified eight documents falling within the terms of the Applicant's request and granted access to two documents in full and refused access to five documents in part and one document in full under section 33(1). 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. In their application for review, the Applicant advised they seek review of Document 7 only. The Agency relied on section 33(1) to exempt this document from release in full. The Applicant also advised they do not seek review of the Agency's decision to exempt from release names, addresses and locations in the document.
5. I have examined copies of the documents subject to review.
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 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 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.

Complaint regarding Agency delay and document searches

10. Alongside their review application, the Applicant raised concerns regarding the Agency's delay in processing their FOI request and the adequacy of its document searches.

11. In accordance with section 61B(3), I have determined to address the Applicant's complaint concerning the Agency's document search as part of my review.
12. OVIC made inquiries with the Agency regarding the Applicant's complaint and shared its response with the Applicant, which resulted in the complaint being resolved.
13. The Applicant's complaint concerning the Agency's delay in processing their FOI request was handled separately and has also been resolved.

Review of exemption

Section 33(1) – Documents affecting personal privacy

14. 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;¹ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of individuals other than the Applicant?

15. 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.²
16. A document will disclose 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.³
17. Having carefully reviewed the document, I am satisfied it identifies one or more persons other than the Applicant (**a third party**). Further, the document contains detailed contextual information about the circumstances of the third party. In my view, the document, in its entirety, concerns the personal affairs of the third party.
18. Accordingly, I am satisfied disclosure of the document under the FOI Act would involve disclosure of a third party's personal affairs information.

Would release of the personal affairs information be unreasonable?

19. The concept of 'unreasonable disclosure' involves determining whether the public interest in the disclosure of official information is outweighed by the interest in protecting a person's personal privacy in the circumstances.
20. In *Victoria Police v Marke*,⁴ 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'.

¹ Sections 33(1) and (2).

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

21. In determining whether disclosure of the third party's personal affairs information in the documents would be unreasonable in the circumstances, I have considered the following factors:

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

The nature of the personal affairs information is described above.

The document was obtained by the Agency from the third party's legal representative during an investigation conducted by the Agency. Having considered the circumstances in which the document was obtained and the sensitive subject matter to which it relates, I am satisfied the third party's personal affairs information is sensitive, confidential and personal in nature.

I note the documents closely relate to matters concerning the Applicant, such that their personal affairs information is intertwined with the third party's personal affairs information. In my view, the document primarily concerns the third party's personal affairs information and the Applicant's personal affairs information cannot reasonably be separated.

(b) Whether the third party to whom the information relates object, or would be likely to object, to the release of their personal affairs information

The Agency's decision letter indicates it consulted with the third party to obtain their views on disclosure of their personal affairs information.

I do not have information before me as to the view of the third party on disclosure of their personal affairs information. However, on the information before me, I consider it is reasonably likely they would not consent to the release of their personal affairs information given the context in which the information was provided to the Agency and the sensitive subject matter to which the document relates.

(c) Whether any public interest would be promoted by disclosure 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. Rather, the Applicant's interest in the information would serve a personal interest only.

I am of the view there is a broader public interest in the Agency preserving its ability to obtain information from members of the public on a voluntarily basis during a police investigation and the implied need for confidentiality to facilitate the provision of such information to police.

In the event such information were to be routinely released under the FOI Act, I am satisfied the integrity and efficacy of the Agency's investigations would be compromised.

(d) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.⁵

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [104].

The Applicant seeks access to the document to determine how the Agency determined a third party did not commit a criminal offence.

In support of their review application, the Applicant submits the third party may have breached section 121(1) of the *Family Law Act 1975* (Cth) and the Agency is potentially aiding the third party in the commission of an indictable offence.

The Applicant submits the personal affairs information in the document is known to them as it concerns [description of] litigation between them and a third party. However, even where an applicant claims to know the identity of a third party, disclosure of a third party's personal affairs information under the FOI Act may still be unreasonable in the circumstances.⁶

While I acknowledge the Applicant's personal interest in obtaining access to the document, in my view, the public interest weighs in favour of preserving the confidentiality of information obtained during a police investigation. Accordingly, I consider this broader public interest outweighs the Applicant's personal interest in obtaining access to the documents.

(e) The likelihood of further disclosure of information, if released

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 as they choose once disclosed.⁷

I have considered the likelihood of the personal affairs information in the documents being further disseminated by the Applicant, if disclosed, and the effects such disclosure would have on the privacy of the third parties given the nature of the documents and their content.

There is no information before me concerning the likelihood of the documents being disseminated by the Applicant. However, having considered the circumstances in which the Agency obtained the document and the nature of the information, I consider protection of the third party's privacy outweighs the Applicant's personal interest in obtaining access to the document.

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

In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.⁸ However, I do not consider this is a relevant factor in this matter.

(g) Whether disclosure of information would increase the risk to a primary person's safety from family violence

Finally, having reviewed the documents, I note they contain references to family violence issues.

⁶ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁸ Section 33(2A).

In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, section 33(2AB) requires if:

- (a) the request is made to an agency that is an information sharing entity or an authorised Hub entity, or to a Minister for access to an official document of an agency that is an information sharing entity or an authorised Hub entity; and
- (b) the document contains information relating to the personal affairs of the person making the request; and
- (c) the person making the request is a person of concern, or a person who is alleged to pose a risk of committing family violence—

in deciding whether the disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person, the agency or Minister must also take into account whether the disclosure would increase the risk to a primary person's safety from family violence.

Accordingly, I must take into account whether disclosure of the relevant documents would increase the risk to the safety of a 'primary person'⁹ from family violence.

In this case, I am satisfied disclosure of the relevant personal affairs information would not increase the risk to the safety of a primary person from family violence.

22. In weighing up the above factors, on balance, I am satisfied it would be unreasonable to disclose the personal affairs information in the document.

Section 25 – Deletion of exempt or irrelevant information

23. 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.
24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
25. I have considered the effect of deleting exempt information from the document in accordance with section 25. I am satisfied it is not practicable to delete the exempt information, as to do so would render the document meaningless.

Conclusion

26. On the information before me, I am satisfied Document 7 is exempt from release under section 33(1).
27. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document in accordance with section 25, I have determined to refuse access to the document in full.

⁹ Section 33(9) provides 'primary person' has the meaning given in section 144E of the *Family Violence Protection Act 2008* (Vic). Section 144E of the *Family Violence Protection Act 2008* (Vic) provides that 'a person is a *primary person* if an information sharing entity reasonably believes that the person may be subjected to family violence'.

¹⁰ *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].

¹¹ *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

28. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹²
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
31. 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.
32. 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.¹⁵

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).