

## Notice of Decision and Reasons for Decision

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Applicant:	'EB9'
Agency:	Victoria Police
Decision date:	17 May 2022
Exemption and provision considered:	Sections 25A(5), 33(1)
Citation:	'EB9' and Victoria Police (Freedom of Information) [2022] VICmr 44 (17 May 2022)

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FREEDOM OF INFORMATION – police officer names – invalidly sworn police officers – refusal to process request on grounds any relevant document, should any exist, would be exempt – disclosure of third party personal affairs information would be unreasonable – satisfied any document would be exempt

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 have determined to refuse to grant access to the document in accordance with the Applicant's request as I am satisfied each of the requirements of section 25A(5) are met.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
17 May 2022

## Reasons for Decision

### Background to review

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

A complete list of the 1076 police officers as well as 157 protective services officers and up to 29 police custody officers invalidly sworn in over the past eight years.
2. The Agency refused the Applicant's request under section 25A(5). In doing so, the Agency was not required to identify any documents relevant to the terms of the request as it was satisfied all documents to which the request relates, should any exist, would be exempt in full under section 33(1).
3. The Agency's decision letter sets out the reasons for its decision.

### Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the request.
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, including the detailed submission provided by the Applicant.
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 application of section 25A(5)

9. The power under section 25A(5) is carefully circumscribed. In *Knight v Corrections Victoria*,<sup>1</sup> the Supreme Court of Victoria held section 25A(5) will apply to an FOI request where each of the following three elements are met:
  - (a) First, the exempt nature of the document 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 any requested document is exempt.
  - (c) Third, it must be apparent from:
    - (i) the nature of the document, 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

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<sup>1</sup> *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.

***Is the nature of the requested document objectively apparent from the Applicant's request?***

- 10. The Applicant seeks access to a document listing the names of all police officers, protective services officers and police custody officers who were invalidly sworn in or affirmed over an eight year period.
- 11. I consider the nature of the requested document is objectively apparent from the terms of the Applicant's request.

***Would the requested document, as described in the FOI request, be exempt from release?***

- 12. In refusing access to the requested document under section 25A(5) the Agency was satisfied any document to which the request relates, should any exist, would be exempt in full under section 33(1).

***Application of section 33(1) – Documents affecting the personal privacy of third parties***

- 13. 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 (a **third party**);<sup>2</sup> and
  - (b) such disclosure would be 'unreasonable'.
- 14. 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.<sup>3</sup>
- 15. 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.<sup>4</sup>

***Would the requested document contain personal affairs information of third parties?***

- 16. In its decision, the Agency states the requested document would likely contain the names, ranks, employee numbers and other personal affairs information relating to third parties.
- 17. I accept the requested document, should any exist, would likely contain the information described in the Agency's decision letter and would constitute 'personal affairs information' for the purpose of section 33.

***Would disclosure of the personal affairs information be unreasonable in the circumstances?***

- 18. 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 a third party in the particular circumstances.

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<sup>2</sup> Sections 33(1) and 33(2).

<sup>3</sup> Section 33(9).

<sup>4</sup> *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].

19. In *Victoria Police v Marke*,<sup>5</sup> 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'.<sup>6</sup> The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 31, is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.<sup>7</sup>
20. In its decision, the Agency states the following factors were taken into account in determining that disclosure of the personal affairs information would be unreasonable:
- it would be neither practical nor reasonable in the circumstances to consult to obtain consent to release their personal information to you
  - the affected Members were acting in good faith in their roles, and it would be unreasonable to release their personal details
  - the likelihood of the third-party objecting to the release of their personal information
  - the fact that disclosure of such personal information would be likely to cause stress, or anxiety
  - the circumstances in which Victoria Police came to possess any relevant information
  - the purpose for which Victoria Police obtained any personal information
  - the fact that a release under FOI imposes no restrictions on further use or dissemination
21. In determining whether disclosure of the personal affairs information of any third party would be unreasonable in the circumstances, I have considered the following factors:

(a) The nature of the personal affairs information

On 24 February 2022, it was widely reported and explained by the Chief Commissioner of Victoria Police and the Police Minister in a press conference that 1076 police officers, 157 protective service officers and 29 police custody officers were invalidly sworn in or affirmed over a period of eight years.

The nature of the personal affairs information sought by the Applicant would likely include the names, ranks and other identifying information for police officers, protective service officers and police custody officers.

While the issue of invalidly sworn and affirmed officers is publicly known, the actual names of the affected officers is not. Given the role of the officers and implications of this issue, I consider a list of the affected officers would be sensitive in nature.

(b) The Applicant's interest in the information

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 under section 33(1).<sup>8</sup>

The Applicant provided a detailed submission to OVIC setting out their interest in obtaining access to the requested document.

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<sup>5</sup> [2008] VSCA 218 at [76].

<sup>6</sup> Ibid.

<sup>7</sup> Ibid at [79].

<sup>8</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

In summary, the Applicant seeks access to the requested document as they consider members of the public may have been unlawfully arrested by police officers who were invalidly sworn in or affirmed. Further, affected persons have a right to know the names of the affected officers and access to the requested information would allow them to enforce any legal right to seek a remedy. The Applicant also submits the document must be provided pursuant to the *Public Interest Disclosures Act 2012* (Vic).

(c) The likelihood of disclosure of information, if released

The FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.<sup>9</sup>

On the information before me, I am satisfied the requested documents, should any exist, would be likely to be disseminated by the Applicant given the purpose for which they seek access.

(d) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information

In determining whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.<sup>10</sup> However, this obligation does not arise in certain circumstances.<sup>11</sup>

I am satisfied the affected officers would be likely to object to disclosure of their personal affairs information under the FOI Act, having considered the factors set out above.

(e) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person<sup>12</sup>

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 consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.<sup>13</sup>

On the information before me, I am of the view there are reasonable grounds to consider concerns exist in relation to the safety of any affected police officer, protective service officer and police custody officer should the requested personal affairs information be disclosed under the FOI Act.

As such, I cannot discount the possibility dissemination of the requested information would pose a safety risk for some of the affected officers, or at the very least raise within some of the affected officers a perception of them being at risk of being targeted by members of the public.

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

I acknowledge the Applicant considers disclosure of the requested document would be in the public interest, as set out in their submission. However, in the circumstances, I am not satisfied there is a broader public interest that would be promoted by disclosure of the personal affairs

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<sup>9</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>10</sup> Section 33(2B).

<sup>11</sup> Section 33(2C).

<sup>12</sup> Section 33(2A).

<sup>13</sup> Section 33(2A).

information of the third parties in this instance. I also note the Agency has taken steps to rectify its error in invalidly swearing in and affirming the affected officers and has notified the Director of Public Prosecutions and the Independent Broad-based Anti-corruption Commission.

22. Having weighed up the above factors, I am satisfied disclosure of the requested personal affairs information would be unreasonable in the circumstances.
23. Accordingly, I am satisfied all personal affairs information in the requested document, should any exist, would be exempt from release under section 33(1).

***Is there scope to provide an edited copy of the requested documents?***

24. 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.
25. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>14</sup> 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.<sup>15</sup>
26. The Applicant states they are willing to receive an edited copy of the document with exempt and irrelevant information deleted.
27. I consider editing the document to remove personal affairs information would not be practicable as the document, should any exist, would be rendered meaningless.
28. Accordingly, I am satisfied it would not be practicable to delete the personal affairs information of any third parties and there is no scope for the Agency to provide an edited copy of the requested document, should any exist.

**Conclusion**

29. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply in a limited category of cases only.
30. Having carefully considered the application of section 25A(5) to the terms of the Applicant’s FOI request and for the reasons set out above, I am satisfied it is apparent from the nature of the requested document as described in the Applicant’s request, should any exist, would be exempt from release in full under section 33(1).
31. Accordingly, I am satisfied each of the requirements of section 25A(5) are met and access to the requested document is refused in full.

**Review rights**

32. 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.<sup>16</sup>
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>17</sup>

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<sup>14</sup> *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].

<sup>15</sup> *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].

<sup>16</sup> Section 50(1)(b).

<sup>17</sup> Section 52(5).

34. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
35. The Agency is required to notify the Information Commissioner in writing as soon as practicable if the Applicant applies to VCAT for a review of my decision.<sup>18</sup>

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<sup>18</sup> Sections 50(3F) and 50(3FA).