

Notice of Decision and Reasons for Decision

Applicant:	'EE2'
Agency:	Victoria Police
Decision date:	16 May 2022
Exemption considered:	Section 33(1)
Citation:	'EE2' and Victoria Police (Freedom of Information) [2022] VICmr 64 (16 May 2022)

FREEDOM OF INFORMATION –Confidential Forensic Medical Report – fitness for interview – name of Agency officer – name of medical professional

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 differs from the Agency's decision in that I have decided to release a small amount of additional information in the document.

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

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.

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

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

16 May 2022

Reasons for Decision

Background to review

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

Documents where Doctor [Name] Clinical Forensic Medical Register, spoke / interviewed me, [Applicant's name] at [Location] Police Station on either the [Dates and month] [year], between the hours of [time] on the [Date and month] [year] and [time] on the [Date and month] [year]. one of the arresting officers was [rank] [Name].

2. The Agency identified one document falling within the terms of the Applicant's request and decided to release the document in part, relying on section 33(1) to refuse access to parts of the document. 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.
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 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) – Documents affecting personal privacy of third parties

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 (a **third party**);¹ and
 - (b) such disclosure would be 'unreasonable'.

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

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 this may be reasonably determined.²

¹ Sections 33(1) and 33(2).

² Section 33(9).

11. 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 does not impose any conditions on information released, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³
12. The document contains the following personal affairs information that was exempted from release by the Agency under section 33(1):
 - (a) the name of an Agency officer under the heading 'report prepared for';
 - (b) the name of a third party medical professional;
 - (c) biographical information about that medical professional; and
 - (d) signatures of an Agency officer and a medical professional.
13. I do not consider the position title or address of the Agency officer, to which the document is addressed, is specific enough to amount to personal affairs information.

Would disclosure of the personal affairs information be unreasonable?

14. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting a third party's personal privacy in the particular circumstances.
15. 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'.⁵ The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.⁶
16. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
 - (a) the nature of the personal affairs information;
 - (b) the circumstances in which the information was obtained;
 - (c) the Applicant's interest in the information;
 - (d) whether any public interest would be promoted by release of the personal affairs information;
 - (e) the likelihood of disclosure of the information, if released;
 - (f) whether the individuals to whom the information relates object, or would be likely to object, to the release of the information; and

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].

⁵ *Ibid.*

⁶ *Ibid* at [79].

- (g) whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person⁷.
17. 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 a document containing their personal information and seek their view as to whether disclosure of the document should occur.⁸ However, this obligation does not arise if:
- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
 - (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
 - (c) it is not practicable to do so.⁹
18. The Agency advised it consulted with one Agency officer named in the document and they objected to the disclosure of their name.
19. I have decided it would be unreasonable to disclose the following personal affairs information:
- (a) The biographical information of the medical professional that appears on page 1. While not detailed enough to be sensitive personal affairs information, as there is no information before me, including any information provided by the Applicant, to suggest the individual is not properly qualified, I have determined disclosure of this information would be unreasonable in the circumstances. I have made this determination taking into account the majority of the document, including the professional opinion of the medical expert was released by the Agency to the Applicant.
 - (b) The signatures in the document. There is no information before me to indicate the document was not properly executed. In my view, disclosure of this information would be unreasonable in the circumstances, including it would not aid the Applicant in understanding the document.
20. Therefore, I am satisfied the above information is exempt from release under section 33(1).
21. I have determined disclosure of the following information would not be unreasonable:
- (a) The name of the Agency officer to whom the report is addressed. While I note they object to disclosure of their name, this factor is not determinative. In my view, the document relates to the Agency officer's professional role, including their interaction with the Applicant in the exercise of their law enforcement duties, and their name is known to the Applicant. In these circumstances, my view is it would not be unreasonable to release their name.
 - (b) The name of the medical professional who wrote the report. I note this name is known to the Applicant as it forms part of their request. I also note the third party met with the Applicant to conduct their assessment. Therefore, they are known to one another, including the role the third party took in relation to the Applicant's involvement with the Agency. Given the medical professional is responsible for the clinical opinion in the report, I do not consider disclosure would be unreasonable in these circumstances.
22. Therefore, I am satisfied the above information is not exempt from release under section 33(1).

⁷ Section 33(2A).

⁸ Section 33(2B).

⁹ Section 33(2C).

23. My decision in relation to section 33(1) is set out in the Schedule of Documents at **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

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’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
26. I have considered the information the Agency deleted from the document as irrelevant information. I am satisfied it falls outside the scope of the Applicant’s request as it is a reference to the exemption applied and does not relate to the terms of the request.
27. I have considered the effect of deleting irrelevant and exempt information from the document. I am satisfied it is practicable to delete the irrelevant and exempt information as to do so would not require substantial time and effort, and the edited document would retain meaning.

Conclusion

28. On the information before me, I am satisfied certain information in the document is exempt from release under section 33(1).
29. As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.

Review rights

30. 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
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
33. 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.
34. 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

¹⁰ *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].

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].

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 50(3FA).

Third party review rights

35. As I have determined to release information in the document that contains the personal affairs information of a person other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁶
36. The third parties will be notified of my decision and their review rights.

When this decision takes effect

37. My decision does not take effect until the third parties' 60 day review period expires.
38. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁶ Sections 49P(5), 50(3) [for personal affairs information], 50(3A) [for business information], 50(3AB) [for section 35(1)(b) information] and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Confidential Forensic Medical Report	3	Released in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released except for irrelevant and exempt information ,which is to be deleted in accordance with section 25.</p> <p>The following information is exempt under section 33(1):</p> <ul style="list-style-type: none"> the biographical information of the medical professional on page 1; and the signatures on pages 2 and 3. <p>The following information is irrelevant to the request:</p> <ul style="list-style-type: none"> the information identified by the Agency on page 2. 	<p>Section 33(1): I am satisfied disclosure of certain personal affairs information in the document would be unreasonable in the circumstance for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: I am satisfied the information identified by the Agency as irrelevant to the terms of the Applicant’s request is irrelevant information for the purposes of section 25 as it appears to be a marking made on the exemption applied rather than a part of the document.</p> <p>I am also satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.</p>