

Notice of Decision and Reasons for Decision

Applicant:	'EH2'
Agency:	Victoria Police
Decision date:	4 February 2022
Exemption considered:	Section 33(1)
Citation:	'EH2' and Victoria Police (Freedom of Information) [2022] VICmr 93 (4 February 2022)

FREEDOM OF INFORMATION – law enforcement documents – police documents – third party personal affairs information – deceased person – disclosure unreasonable – 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 documents 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 personal affairs information in the documents is exempt from release under section 33(1).

Where I am satisfied it is practicable to delete exempt and irrelevant information from a document in accordance with section 25, access to the document is granted in part. Where it is not practicable to do so, access is refused in full.

My decision in relation to each document is set out in the Schedule of Documents in **Annexure 1**.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
4 February 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant amended the initial request and sought access to.

LEAP incident report [number]

Incident Fact Sheet

Running sheet – [named person] and [named person]

Interview notes – [named person]

Diary entries – [named person]

Interpose report

3. The Agency identified 12 documents falling within the terms of the Applicant's request and granted access to six documents in part and refused access to six documents in full under sections 33(1) and 38. 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.
5. During the review, the Applicant advised they seek access to documents concerning [certain information]. Accordingly, this review relates to two documents to which the Agency granted access in part and two documents to which the Agency refused access in full under section 33(1).

Review of exemptions

Section 33(1) – Documents affecting personal privacy of third parties

6. 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 (including a deceased person) other than the Applicant (a **third party**);¹ and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of a third party?

7. 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.²
8. 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

¹ Sections 33(1) and 33(2).

² Section 33(9).

unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.³

9. The documents subject to review contain the personal affairs information of third parties, including their medical and coronial review information.
10. One of the third party's mentioned in the documents is a deceased person. The Applicant was [description of Applicant's connection to this third party].
11. I am satisfied this information constitutes the personal affairs information of third parties.

Would disclosure of the personal affairs information be unreasonable?

12. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a person's privacy in the particular circumstances.
13. 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 s33(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
14. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances of this matter, I have considered the following factors:

(a) The nature of the personal affairs information

As stated above, a third party mentioned in the documents is a deceased person. The Applicant was [description of Applicant's connection to the third party].

Having regard to the content and context of the personal affairs information, I consider the information is sensitive, personal, and confidential in nature.⁷ This factor weighs against disclosure.

(b) The circumstances in which the information was obtained by the Agency

The third party was the victim of a serious crime [redacted]. The information was obtained by the Agency from third parties in the context of the Agency undertaking a criminal investigation, prosecution and Coronial brief following a serious crime.

It is reasonable to expect the information in the documents was provided to the Agency on the understanding it would be used for the purpose of a criminal investigation and in the prosecution of the offender only. This factor weighs against disclosure.

(c) 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

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].

⁷ *Page v Metropolitan Transit Authority* [1988] 2 VAR 243 at [246].

seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable under section 33(1).⁸

In their application for review, the Applicant states:

[Reasons for seeking documents redacted]..

...

I do not seek the information in order to harm or embarrass anyone out of some personal crusade. I wish to resolve what I consider to be an ambiguity in [information sought].

While I acknowledge the Applicant's personal interest in seeking access to the requested documents, given the sensitive and personal in nature and my findings in relation to other the factors considered, I have not given significant weight to this factor.

(d) Whether any public interest would be promoted by release of the personal affairs information

The Agency holds the information in its capacity as a law enforcement agency.

I consider the information was provided to or obtained by the Agency in connection with a criminal investigation and in the exercise of the Agency's law enforcement functions.

In the circumstances, I am not satisfied the public interest would be promoted by release of the sensitive personal affairs information of third parties under the FOI Act.

(e) The likelihood of 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 it is released.⁹

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties and, in the case of the deceased person, their family.

While I acknowledge the Applicant's submission that they do not wish to cause harm or embarrassment by disseminating the information, the legal procedural matters underlying their request would reasonably involve further disclosure beyond the Applicant themselves.

Given the highly sensitive nature of the documents and the context of this matter, on balance, I am not satisfied this factor weighs in favour of unconditional disclosure of the information under the FOI Act.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁹ *Ibid* at [68].

- (f) 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 (or their next of kin, if deceased) 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.¹⁰ 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.¹¹

The Agency determined it was not practicable to consult with third parties or the deceased person's next of kin due to the serious nature of the incident. I agree with this decision in the circumstances and any such notification would be reasonably likely to cause the relevant third parties and the next of kin undue distress.

- (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹²

There is no information before me to suggest this is a relevant factor in this case.

- 15. Having considered the factors set out above, I have determined disclosure of the personal affairs information of third parties in the documents would be unreasonable in the circumstances.
- 16. Accordingly, I am satisfied this information is exempt from release under section 33(1).

Section 25 – Deletion of exempt or irrelevant information

- 17. 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.
- 18. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴
- 19. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request as the information concerns matters other than the transport of a third party between hospitals.
- 20. I have considered the effect of deleting irrelevant and exempt information from the documents in accordance with section 25. I am satisfied it is practicable to delete exempt information from

¹⁰ Section 33(2B).

¹¹ Section 33(2C).

¹² Section 33(2A).

¹³ *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].

¹⁴ *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].

Documents 1 and 2 as it would not require substantial time and effort and the documents would retain meaning. However, in relation to Documents 3 and 4, I am satisfied it is not practicable as to do so would render the documents meaningless. Accordingly, I have determined to grant access to Documents 1 and 2 in part and refuse access to Documents 3 and 4 in full.

Conclusion

21. On the information before me, I am satisfied personal affairs information in the documents is exempt from released under section 33(1).
22. Where I am satisfied it is practicable to delete exempt and irrelevant information from a document in accordance with section 25, access to the document is granted in part. Where it is not practicable to do so, access is refused in full.
23. My decision in relation to each document is set out in the Schedule of Documents in **Annexure 1**.

Review rights

24. 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.¹⁵
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
27. 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.
28. 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.¹⁸

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Incident report	3	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25 Information exempted by the Agency under section 33(1) is exempt and is to remain deleted in accordance with section 25.	Section 33(1): I am satisfied disclosure of the personal affairs information of a third party in this document is exempt from release under section 33(1) for the reasons outlined in the Notice of Decision, above. Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt and/or irrelevant information deleted in accordance with section 25.
2.	[date]	LEAP Incident report	7	Released in part Sections 33(1), 25	Release in part Sections 33(1), 25 Information exempted by the Agency under section 33(1) is exempt and is to remain deleted in accordance with section 25.	Section 33(1): See comments for Document 1. Section 25: See comments for Document 1.
3.	[date]	Medical document of a deceased third party	25	Refused in full Section 33(1)	Refuse in full Section 33(1)	Section 33(1): I am satisfied disclosure of the personal affairs information of a third party in this document is exempt from release under section 33(1) for the reasons

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						outlined in the Notice of Decision, above. Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt and/or irrelevant information deleted in accordance with section 25.
4.	[date]	Medical document of a deceased third party	17	Refuse in full Section 33(1)	Refuse in full Section 33(1)	Section 33(1): See comments for Document 3. Section 25: See comments for Document 3.