

Notice of Decision and Reasons for Decision

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| Applicant: | Mitchell Shire Council |
| Agency: | Victoria Police |
| Decision date: | 3 March 2022 |
| Exemption considered: | Section 33(1) |
| Citation: | <i>Mitchell Shire Council and Victoria Police (Freedom of Information)</i> [2022] VICmr 75 (3 March 2022) |

FREEDOM OF INFORMATION – police records – Law Enforcement Assistance Program (LEAP) – incident report – police investigation – alleged offence – personal affairs information of third party – unreasonable disclosure of personal affairs information

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 am satisfied certain information in document is exempt 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 to the document is granted in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
3 March 2022

Reasons for Decision

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

Police incident report relating to the removal of trees from the nature strip at [Location] in [date] (LEAP incident number [number]).
2. The Agency identified one document totalling six pages that falls within the terms of the Applicant's request and refused access to certain information in the document under section 33(1). 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) – Personal affairs information of a third party

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 the personal affairs information of a third party?

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 such information may be reasonably determined.²
11. The document under review contains the following personal affairs information of third parties:
 - (a) individual names;
 - (b) addresses;

¹ Sections 33(1) and 33(2).

² Section 33(9).

(c) telephone numbers; and

(d) dates of birth.

12. Having reviewed the document, I am satisfied the information above constitutes the personal affairs information of third parties for the purposes of section 33(1).

Would release of the personal affairs information be unreasonable?

13. The concept of 'unreasonable disclosure' involves balancing the competing public interest in the disclosure of official information with the protection of an individual's personal privacy in the circumstances.

14. In considering whether disclosure of third parties' personal affairs information would be unreasonable in this case, I have given consideration to the following factors:

(a) The nature of the information to be disclosed

The information relates to a police investigation conducted by the Agency. Given this context and in the absence of any charges being laid or a person being convicted by a court, I consider the nature of information concerning certain individuals the subject of the investigation is sensitive in nature.

(b) The circumstances in which the information was obtained

The information was obtained by the Agency in the course of a police investigation. It is reasonable to expect the information was provided to the Agency in its capacity as a law enforcement agency on the understanding or expectation it would be used for the purpose of investigating the alleged offending and in any subsequent prosecution of an alleged offender only.

(c) The extent to which the information is available to the public

The investigative information obtained and recorded by the investigating police officers in the document is not publicly available.

I also note the investigation was ceased by police and no criminal charges or prosecution occurred. Accordingly, information in the document has not been tested in open court.

(d) The Applicant's interest in the information being disclosed

The Applicant [contextual information redacted] advises their FOI request is for the purpose of progressing a [Council] investigation into the alleged unlawful removal of trees from a nature strip in contravention of local laws. If an alleged offender who removed the trees can be identified and investigated by the [Council], they may be subject to prosecution under local laws.

As such, the Applicant seeks access to the information despite Victoria Police not proceeding to charge any person it investigated on grounds the Council does not need to establish criminal intent in order to prove an offence under the local laws.

I acknowledge the Applicant's interest in seeking to obtain access to the requested information for law enforcement purposes on behalf of the Council. I also note the Agency released a substantial amount of information in the LEAP report to the Agency, which I assume reflects the Council's interest in and legitimate purpose for seeking to obtain access to the information.

However, I am of the view the FOI Act, which provides for the unrestricted and unconditional release of information to an applicant, is not an appropriate means for one law enforcement agency to obtain access to law enforcement information of this nature from another law enforcement agency.

Rather, access to such information is often permitted to be shared or exchanged between law enforcement agencies under a legislative scheme or other permitted arrangement. The absence of such an information sharing scheme does not mean the personal affairs information should necessarily be sought and disclosed under the FOI Act.

Accordingly, any public interest that would be promoted by disclosure of the third parties' personal affairs information by means of disclosure under the FOI Act, in my view, is outweighed by the public interest in the Agency preserving the confidentiality of information it obtains about potential offenders and witnesses in the exercise of its law enforcement powers. This confidentiality serves to preserve the ability of police to conduct criminal investigations and obtain the cooperation of alleged offenders or witnesses during an investigation subject to its future use by police or in a criminal prosecution arising from a police investigation.

- (e) Whether the individuals whose personal affairs information are included in the documents would be likely to object to the release of their personal affairs information

Given the nature of the information in the document and the purpose for which it was obtained, I am satisfied the relevant individuals would be reasonably likely to object to the release of their personal affairs information in the document under the FOI Act.

- (f) Whether disclosure of the personal affairs information would, or would likely to, endanger the life or physical safety of any person

In determining whether 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 disclosure of the information would, or would likely to, endanger the life or physical safety of any person.³ However, I do not consider this is a relevant factor in this matter.

15. Having considered the above factors, I am satisfied disclosure of the personal affairs information in the document exempted by the Agency would involve the unreasonable disclosure of third parties' personal affairs of individuals in the circumstances.
16. Accordingly, I am satisfied certain information in the document is exempt 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'⁴ 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 25.⁵

³ Section 33(2A)

⁴ *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].

⁵ *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].

19. I am satisfied that the information deemed irrelevant by the Agency is not relevant to the terms of the Applicant's request.
20. I have considered the effect of deleting irrelevant and exempt information from the document. In my view, it is practicable for the Agency to delete the irrelevant and exempt information, where the remaining document would retain meaning.

Conclusion

21. On the information before me, I am satisfied certain information in the document is exempt under section 33(1).
22. 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 to the document is granted in part.
23. Accordingly, my decision is the same as the Agency's decision.

Review rights

24. 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.⁶
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
26. 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.
27. 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.⁸

When this decision takes effect

28. My decision does not take effect until the Agency's 14 day review period expires.
29. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Sections 50(3F) and 50(3FA).