

Notice of Decision and Reasons for Decision

Applicant: 'EI9'
Agency: Victoria Police
Decision date: 24 March 2022
Exemptions considered: Sections 31(1)(a), 33(1)
Citation: 'EI9' and Victoria Police (*Freedom of Information*) [2022] VICmr 109 (24 March 2022)

FREEDOM OF INFORMATION – law enforcement document – police records – recorded interview – ongoing police investigation – evidence gathered during police investigation – personal affairs information of third parties

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 is the same as the Agency's decision.

I am satisfied information in the document, to which the Applicant seeks access, is exempt under sections 31(1)(a) and 33(1).

As I am satisfied it is not practicable to provide an edited copy of the document with the exempt information deleted in accordance with section 25, access to the document is refused in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
24 March 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 terms of their request.
3. The amended request seeks access to the following document:

I would like access to the recorded interview conducted that you have sourced in your preliminary searching.
4. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full relying on the exemptions in sections 31(1)(a) and 33(1). The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all submissions received from the parties.
9. I acknowledge this is a highly personal and sensitive matter for the Applicant, who seeks information concerning serious allegations made about a third party that the Applicant reported to Victoria Police.
10. 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.
11. 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 31(1)(a) – Law enforcement documents

12. Section 31(1)(a) provides a document is an exempt document if its disclosure under the FOI Act would, or would be reasonably likely to 'prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance'.
13. 'Reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.¹

¹ *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

14. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.²
15. 'In a particular instance' does not require a single specific investigation and can apply to the enforcement or proper administration of the law more generally. The phrase can encompass specific, identified aspects of the law, the administration of law or investigations of a breach, or potential breach, of law.³
16. 'Enforcement of the law' deals with the process of enforcement of the law, whereas the 'proper administration of the law' concerns how the law is administered, for example, regulatory, monitoring and compliance activities.⁴
17. The document subject to review is a record of interview. In its decision letter, the Agency advised disclosure of the document would be reasonably likely to prejudice an ongoing police investigation and therefore it exempted the document from release under section 31(1)(a).
18. OVIC staff made enquiries with the Agency, which confirmed its investigation is not yet finalised and, consequently, the matter remains an ongoing investigation at the time of my decision.
19. I note the decision of the Victorian Civil and Administrative Tribunal (**VCAT**) in *RFJ v Victoria Police FOI Division*⁵ where the evidence of a Victoria Police officer was accepted by VCAT in relation to prejudice in the context of disclosure of information in relation to an ongoing police investigation.
20. I consider the current matter involves similar considerations and I accept the current circumstances support non-disclosure in this matter.
21. In the *RFJ v Victoria Police FOI Division*⁶ decision, VCAT identified the prejudice in the following terms:

If the documents became known to a person who was responsible for the offence, that person would know the information that the police have obtained. It would make clear what was known to the police and also what evidence, if any, has not yet been uncovered. A person or persons could use that information to avoid being connected with the crime;

Even seemingly innocuous information could be extremely useful to an offender as that person could modify his or her behaviour or prepare an explanation or alibi in the event they were ever asked about their involvement;

If an offender or any member of the community had access to information collected during an investigation, the offender would know what evidence a witness could give before a formal interview has been conducted;

Release of documents could reveal evidence that could be used in laying charges and subsequent prosecutions, prior to the offender being interviewed and charged...⁷
22. Having reviewed the document and considered the circumstances of this case, I am satisfied the information sought by the Applicant in the document is exempt from release under section 31(1)(a) for the following reasons:

² Ibid, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

³ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁴ *Cichello v Department of Justice* [2014] VCAT 340 at [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 at [28]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] 2 VR 322.

⁵ [2013] VCAT 1267.

⁶ Ibid.

⁷ [2013] VCAT 1267 at [134].

- (a) I accept the document relates to an ongoing police investigation into a breach or possible breach of the law which remains unsolved, as such disclosure of the document may prejudice the investigation and in turn a breach or possible breach of the law.
- (b) I accept if evidence the Agency has obtained in relation to an ongoing investigation into a breach or possible breach of the law were to be disclosed under the FOI Act it would be reasonably likely to prejudice the investigation and, subject to the outcome of the investigation, prejudice the enforcement or proper administration of the law in this instance.
- (c) I also accept, in matters relating to a police investigation, the Agency can determine whether the release of information obtained during the course of an investigation, would be likely to assist or hinder an investigation.
- (d) The FOI Act does not place any restrictions on an applicant's use or dissemination of a document obtained under FOI. Accordingly, I must consider the likelihood and potential effects of further dissemination of the information if disclosed under the FOI Act.

As the document could be relied upon as evidence of an alleged crime in a subsequent court proceeding, its disclosure under the FOI Act prior to the conclusion of the police investigation, and possible prosecution of an offender, could reasonably prejudice the Agency's ongoing investigation and the proper administration of justice.

23. Accordingly, I am satisfied the document is exempt under section 31(1)(a).

Section 33(1) – Personal affairs information of a third party

24. 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**);⁸ and
- (b) such disclosure would be 'unreasonable'.

Does the requested document contain personal affairs information?

- 25. 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.⁹
- 26. A third party's opinion or observations about a third party's conduct can constitute their personal affairs information.¹⁰
- 27. VCAT has interpreted the scope of 'personal affairs information' broadly to include matters relating to health, private behaviour, home life or personal or family relationships of individuals.¹¹
- 28. The information in the requested document includes names, relationship descriptors and other personal affairs information concerning third parties, as well as personal affairs information of police officers present, including their names, voices, work location and ranks.

⁸ Sections 33(1) and 33(2).

⁹ Section 33(9).

¹⁰ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police* [2008] VCAT 1343 at [43]; *Pritchard v Victoria Police* [2008] VCAT 913 at [24]; *Mrs R v Ballarat Health Services* [2007] VCAT 2397 at [13].

¹¹ *Re F and Health Department* (1988) 2 VAR 458 as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

29. I am satisfied these details constitute the personal affairs information of third parties. I also note the document contains the personal affairs information of the Applicant.

Would release of the personal affairs information of third parties be unreasonable in the circumstances?

30. The concept of 'unreasonable disclosure' involves determining whether the public interest in the disclosure of official information is outweighed by the interest in personal privacy.
31. In determining whether disclosure would be unreasonable, I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,¹² in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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'.
32. Further, '[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 to a lesser or greater degree'.¹³
33. In determining whether disclosure of the personal affairs information in the document 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

I am satisfied the Agency obtained the personal affairs information through a police investigation into serious allegations reported by the Applicant to the Agency. In such circumstances, I consider the personal affairs information of third parties recorded in the document is inherently sensitive in nature.

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

The FOI Act provides a general right of access to documents 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.¹⁴

I accept the Applicant's interest in obtaining the document is for a personal and compelling reason. In the circumstances of this matter, I am not able to determine whether their purpose for seeking the information is likely to be achieved.

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

It is not apparent any public interest would be served by release of the personal affairs information. Rather, given the sensitive nature of the information, I am of the view there is a public interest in preserving the privacy of third parties' personal affairs information provided during a police investigation. In this case, I am not satisfied the public interest in transparency outweighs the interest in protecting the personal privacy of third parties in this case.

As discussed above, I consider the preparedness of a person or a witness to cooperate voluntarily with a police investigation will often be dependent on the assumption any information provided will be held in confidence and used for the purpose of the police investigation and any subsequent criminal prosecution only.

¹² [2008] VSCA 218 at [76].

¹³ [2008] VSCA 218 at [79].

¹⁴ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

I have limited information before me as to whether any relevant third party would object to the release of their personal affairs information. Nonetheless, having considered the sensitive nature of the information and the circumstances in which it was provided to or obtained by the Agency, namely in the context of a police investigation into serious allegations, I am satisfied the third parties would be reasonably likely to object to its release under the FOI Act.

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

The FOI Act does not impose any conditions or restrictions on an applicant's use of a document obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of a third party's personal affairs information if released.

In this case, there is no information before me as to whether the Applicant intends to further disclose or disseminate the personal affairs information.

- (f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁵

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

34. Having considered the above factors, on balance, I am satisfied disclosure of the personal affairs information of the relevant third parties would be unreasonable in the circumstances of this matter.
35. In summary, while I acknowledge the Applicant's genuine and compelling reasons for seeking access to the document, I have determined to refuse access to the personal affairs information of third parties in the document due to:
- (a) the sensitive nature of the information to which the Agency refused access, which arises from an ongoing investigation into serious allegations;
 - (b) the information being provided by the Applicant to assist a police investigation into the serious allegations made concerning a third party;
 - (c) the information in the document has not been aired or tested in open court;
 - (d) the unconditional and unrestricted nature of disclosure under the FOI Act; and
 - (e) I am of the view the public interest in this case lies in preserving the privacy of third parties' personal affairs information provided during a police investigation.

Section 25 – Deletion of exempt or irrelevant information

36. 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.
37. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁶ and the effectiveness of the deletions. Where

¹⁵ Section 33(2A).

¹⁶ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁷

38. 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 do so as it would render the document meaningless.

Conclusion

39. On the information before me, I am satisfied information in the document, to which the Applicant seeks access, is exempt under sections 31(1)(a) and 33(1).

40. As I am satisfied it is not practicable to provide an edited copy of the document with the exempt information deleted in accordance with section 25, access to the document is refused in full.

Review rights

41. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁸

42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹

43. 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.

44. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application is made to VCAT for a review of my decision.²⁰

¹⁷ *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].

¹⁸ Section 50(1)(b).

¹⁹ Section 52(5).

²⁰ Sections 50(3F) and 50(3FA).