

Notice of Decision and Reasons for Decision

Applicant:	'EJ8'
Agency:	Victoria Police
Decision date:	20 April 2022
Exemptions and provision considered:	Sections 31(1)(d), 33(1), 25
Citation:	'EJ8' and Victoria Police (<i>Freedom of Information</i>) [2022] VICmr 117 (20 April 2022)

FREEDOM OF INFORMATION – police records – Law Enforcement Assistance Program (LEAP) – LEAP history – LEAP incident report – incident response – personal affairs information – disclosure unreasonable – law enforcement documents – prejudice proper administration of the law

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 FOI request is the same as the Agency's decision.

I am satisfied the information to which the Agency refused access is either exempt from release under section 31(1)(d) and 33(1) or irrelevant to the terms of the Applicant's request.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
20 April 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to documents of the Agency.
2. Following consultation with the Agency, the Applicant clarified the terms of their request to:

Personal History Report from the Law Enforcement Assistance Program (LEAP) database and the police report from an incident involving [the Applicant] on[date].
3. The Agency identified two documents falling within the terms of the Applicant's request and refused access to the documents in part under sections 31(1)(d) and 33(1). 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. I have examined a copy of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties.
8. 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.
9. 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)(d) – Disclosure of documents that would disclose methods for preventing, detecting, investigating breaches of the law

10. Section 31(1)(d) provides (subject to this section) a document is exempt if its disclosure would, or would be reasonably likely to, 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'.
11. The Agency refused access to two pieces of information in Document 1 under section 31(1)(d).
12. The Agency's decision letter states:

Part of the deleted information comprises details of the methods and procedures used by police during the course of their duties. I am satisfied that the release of this information would be reasonably likely to prejudice the future effective use of those methods and procedures pursuant to the provisions of section 31(1)(d) of the Act.

13. Having reviewed the document, I am satisfied it contains information related to specific procedures and methods employed by Agency officers when responding to requests for police assistance and police investigations. I am constrained in providing a detailed description of the information exempted from release by the Agency as to do so would likely disclose information that is the subject of the exemption.
14. I note the exemption in section 31(1)(d) does not apply to widespread and well known investigation methods and procedures.¹ However, while the existence of the Law Enforcement Assistance Program (**LEAP**) and the associated database is well known to the wider public with LEAP being referenced by both the Agency, the Australian Bureau of Statistics and various published media sources, I am not satisfied the specific methods and procedures that appear in the LEAP record subject to review are publicly known.
15. I have also considered the likely effect of disclosing the information the Agency determined is exempt from release under the FOI Act. I am satisfied its disclosure would be reasonably likely to undermine the use and effectiveness of these methods and procedures by the Agency in carrying out investigations and its law enforcement functions.
16. Section 31(2) outlines the circumstances in which the exemptions under section 31(1) do not apply, including when it would be in the public interest to grant access to a document. In this matter, I consider the public interest weighs against disclosure of the relevant information in the interests of preserving the Agency's ability to effectively carry out its law enforcement functions. Further, I am not satisfied any of the exceptions in section 31(2) apply to the information exempted from release by the Agency.
17. Accordingly, I am satisfied the information exempted from release by the Agency is exempt under section 31(1)(d).

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

18. 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**);² and
 - (b) such disclosure would be 'unreasonable'.

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

19. 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.³
20. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person.
21. The FOI Act does not place any conditions or restrictions on the further disclosure of a document released under the FOI Act.⁴
22. The Agency exempted one sentence in Document 2 under section 33(1).

¹ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

² Sections 33(1) and 33(2).

³ Section 33(9).

⁴ *Victoria Police v Marke* [2008] VSCA 218 at [68].

23. I am satisfied the information exempted from release directly identifies a third party.

Would disclosure of the personal affairs information be unreasonable?

24. 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.

25. In *Victoria Police v Marke*,⁵ 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'.⁶ 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'.⁷

26. 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 and the circumstances in which it was obtained

The information was recorded by the Agency in the course of [interacting with the Applicant]. Having reviewed the information and considered the circumstances of the Agency's interaction with the Applicant, I consider the information is sensitive in nature.

The document records additional information about why police attended to the Applicant and the outcome of their interaction.

I note the Agency released most of the information of this nature to the Applicant where the information does not have a connection to a third party.

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

The Applicant has indicated they seek full access to the document to determine whether any third parties provided inaccurate information about them to the Agency. The Applicant intends to use the information to assist them in relation to [court proceedings]

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

I acknowledge there is a public interest in ensuring transparency in the way in which the Agency carries out its law enforcement functions to ensure police officers and other Agency officers are exercising their significant powers within the boundaries of the law.

In this case, given the amount of information already disclosed to the Applicant by the Agency, I do not consider disclosure of the remaining personal affairs information would promote the

⁵ [2008] VSCA 218 at [76].

⁶ Ibid.

⁷ Ibid at [79].

⁸ Ibid at [104].

public interest in ensuring transparency and accountability of police conduct. Rather, the Applicant's interest in obtaining full access to the document would serve a private interest only.

Further, given the nature and circumstances in which the third party's personal affairs information was obtained by the Agency, I consider there is public interest in protecting the personal privacy of the third party.

(d) The likelihood of disclosure of information, if released under FOI

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant may disseminate widely or use the document once disclosed.⁹ Accordingly I have considered the likelihood of the personal affairs information in the document being further disseminated if released under FOI and the effects disclosure would have on the privacy of the third party.

Given the nature and context of the document, I have given weight to the impact on the third party's personal privacy should the document be released in full under the FOI Act and is further disseminated by the Applicant.

(e) Whether the third party 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.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 elected not to consult with the third party to seek their views on disclosure of their personal affairs information in the document.

Given the sensitive circumstances of this matter, I consider the third party would be reasonably likely to object to disclosure of their personal affairs information.

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

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.¹²

Having carefully considered the content of the document, I am satisfied this is a relevant factor to consider in this matter.

⁹ Ibid at [68].

¹⁰ Section 33(2B).

¹¹ Section 33(2C).

¹² Section 33(2A).

(g) Whether disclosure would increase the risk to a primary person's safety from family violence¹³

In determining whether disclosure of information relating to the personal affairs of any person in a document would be unreasonable, section 33(2AB) requires if:

- (a) the request is made to an agency that is an information sharing entity or an authorised Hub entity, or to a Minister for access to an official document of an agency that is an information sharing entity or an authorised Hub entity; and
- (b) the document contains information relating to the personal affairs of the person making the request; and
- (c) the person making the request is a person of concern, or a person who is alleged to pose a risk of committing family violence—

in deciding whether the disclosure would involve the unreasonable disclosure of information relating to the personal affairs of any person, the agency or Minister must also take into account whether the disclosure would increase the risk to a primary person's safety from family violence.

Accordingly, I must consider whether disclosure of the relevant documents would increase the risk to the safety of a 'primary person'¹⁴ from family violence.

The Agency is an 'information sharing entity' for the purposes of section 33(2AB).

I am satisfied the considerations under section 33(2AB) are relevant factors in this matter.

- 27. Having considered the content and context of the personal affairs information exempted from release by the Agency under section 33(1), I am satisfied its disclosure would be unreasonable in the circumstances of this matter.
- 28. Accordingly, I am satisfied the third party's personal affairs information, to which the Agency refused access under section 33(1), is exempt from release.

Section 25 – Deletion of exempt or irrelevant information

- 29. 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.
- 30. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ 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 25.¹⁶
- 31. 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 it records Agency ID numbers that do not provide further information relevant to the Applicant's request.
- 32. I have considered the effect of deleting irrelevant and exempt information from the documents. I am satisfied it is practicable to delete the irrelevant and exempt information as do so it would not require

¹³ Section 33(2AB).

¹⁴ Section 33(9) provides 'primary person' has the meaning given in section 144E of the *Family Violence Protection Act 2008* (Vic). Section 144E of the *Family Violence Protection Act 2008* (Vic) provides that 'a person is a *primary person* if an information sharing entity reasonably believes that the person may be subjected to family violence'.

¹⁵ *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].

¹⁶ *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].

substantial time and effort and the documents would retain meaning. Accordingly, access to the documents is granted in part.

Conclusion

33. On the information before me, I am satisfied the information to which the Agency refused access is either exempt from release under section 31(1)(d) and 33(1) or irrelevant to the terms of the Applicant's request.
34. As it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access is granted in part.

Review rights

35. 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.¹⁷
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
37. 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.
38. 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.¹⁹

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Sections 50(3F) and 50(3FA).