

## Notice of Decision and Reasons for Decision

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Applicant:	'EP6'
Agency:	Victoria Police
Decision date:	24 June 2022
Exemptions and provisions considered:	Sections 33(1), 35(1)(b)
Citation:	'EP6' and Victoria Police (Freedom of Information) [2022] VICmr 169 (24 June 2022)

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FREEDOM OF INFORMATION – police documents – bank statement – personal affairs information – disclosure unreasonable – information obtained in confidence – allegations of criminal offending

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 the document is exempt from release under sections 33(1) and 35(1)(b).

As I am not 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 document is refused in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
24 June 2022

## Reasons for Decision

### Background to review

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

[Bank name] BSB [number] Account [number] [month] [year] Statement in relation to [type] report [number]
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full. The Agency relied on the exemptions under section 33(1) and 35(1)(b) to refuse access to 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.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

### Review of exemptions

#### ***Section 33(1) – Documents affecting the personal privacy of a third party***

10. 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**);<sup>2</sup> and
  - (b) such disclosure would be 'unreasonable'.

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

<sup>2</sup> Sections 33(1) and 33(2).

*Does the document contain personal affairs information of a third party?*

11. 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.<sup>3</sup>
12. 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 unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>4</sup>
13. The document contains the full names of persons other than the Applicant. This information is the personal affairs information of those individuals.
14. The document also includes BSB and bank account details related the above mentioned third parties. I consider this information is personal affairs information from which a person's identity could be determined.
15. The document also includes dates and financial transaction details which are purely factual and I do not consider this information to be personal affairs information.
16. Accordingly, I am satisfied the document contains some material in the nature of personal affairs information of individuals other than the Applicant.

*Would disclosure of the personal affairs information be unreasonable?*

17. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
18. In *Victoria Police v Marke*,<sup>5</sup> 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'.<sup>6</sup> 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'.<sup>7</sup>
19. 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 and the circumstances in which it was obtained

The full names of the third party individuals are sensitive in that they directly identify those individuals. Similarly, the BSB and bank account details are sensitive in that they are capable of identifying the third party individuals as being the account holders of that bank account.

The personal affairs information was obtained by the Agency in the context of it undertaking an investigation into the third party individuals' alleged involvement in criminal offending.

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<sup>3</sup> Section 33(9).

<sup>4</sup> *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].

<sup>5</sup> [2008] VSCA 218 at [76].

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid* at [79].

On the face of the Applicant's FOI request, it is apparent that the Applicant is already aware of the third parties BSB and bank account details however, this is not a determinative factor in deciding whether release would be unreasonable.

(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).<sup>8</sup>

The Applicant states they seek access to the document to commence a claim against the alleged offenders. I acknowledge the Applicant's personal interest in obtaining access to the document.

Given the document contains the personal affairs information of those associated with the bank account referred to in the FOI request, I consider release of the information would assist the Applicant in identifying those persons.

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

The Applicant's interest in obtaining the information is a matter of private interest.

I do not consider the public interest would be promoted by release of the third party individuals' personal affairs information to the Applicant. I am of the view the greater public interest lies in the Agency preserving the ability of the police to conduct criminal investigations and obtain the cooperation of alleged offenders during an investigation.

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

As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>9</sup>

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.

(e) 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 an FOI request has been received for documents containing their personal information and seek their view on its disclosure.<sup>10</sup> However, this obligation does not arise in certain circumstances, including where it is not practicable to do so.<sup>11</sup>

The Agency determined it was not practicable to consult with the third parties.

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<sup>8</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>9</sup> *Ibid* at [68].

<sup>10</sup> Section 33(2B).

<sup>11</sup> Section 33(2C).

In the circumstances of this matter, I consider it is reasonably likely the third parties would object to the release of their personal affairs information in the documents to the Applicant under the FOI Act.

- (f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person<sup>12</sup>

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.<sup>13</sup>

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

20. Having considered the above factors, I am satisfied disclosure of the personal affairs information would be unreasonable, and is exempt from release under section 33(1).

***Section 35(1)(b) – Information obtained in confidence***

21. I have considered the application of this provision to information that I have determined it is not exempt from release under section 33(1).
22. A document is exempt under section 35(1)(b) if two conditions are satisfied:
- (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
  - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

*Was the information obtained in confidence?*

23. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.<sup>14</sup>
24. It is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>15</sup>
25. The Agency determined that it would be unreasonable to consult with the relevant third parties in relation to release of their personal affairs information.
26. I am satisfied the document was obtained by the Agency in confidence for the purpose of a criminal investigation.
27. The Agency, in its decision letter, noted that the outcome of the investigation was not authorised to proceed before a court and therefore the information was not presented in open court.

*Would disclosure of the information be contrary to the public interest?*

28. The second requirement under section 35(1)(b) requires me to consider whether the Agency would be impaired from obtaining similar information in the future if the confidential information in the document was to be disclosed under the FOI Act. This means, I must be satisfied if the confidential

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<sup>12</sup> Section 33(2A).

<sup>13</sup> Section 33(2A).

<sup>14</sup> *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

information in the document were to be disclosed, others in the position of the communicator would not be likely to provide similar information to the Agency in the future.

29. The public interest test under section 35(1)(b) is narrow. The exemption will not be made out of an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.<sup>16</sup>
30. I consider the Agency's ability to obtain fulsome information in a criminal investigation relies on an assurance that information obtained will only be disclosed in relation to pursuing criminal charges, as opposed to through an FOI process in the event charges are not pursued. In my view, the routine disclosure of such information through the FOI process would be likely to impact the willingness of third parties to provide information for criminal investigations in the future, this in turn is likely to impact the amount and detail of information routinely provided.
31. While I acknowledge the Applicant's personal interest in seeking access to the document, I am satisfied there is a strong public interest in protecting the Agency's ability to obtain information during criminal investigations as to do so is critical to its ability to perform its law enforcement functions efficiently and effectively.
32. Accordingly, I am satisfied disclosure of the transactional information, in the document would be contrary to the public interest as its disclosure under FOI would impair the Agency's ability to obtain similar information in the future. Therefore, I am satisfied this information is exempt from release under section 35(1)(b).

### ***Section 25 – Deletion of exempt or irrelevant information***

33. 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. There is a small amount of information in the document which is administrative in nature, and does not disclose details specific to the third parties or the financial transactions. I consider this information is irrelevant under section 25.
34. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>17</sup> 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.<sup>18</sup>
35. I have considered the effect of deleting exempt and irrelevant information from the document. As I have determined the personal affairs information and transactional details are exempt from release, in my view, it is not practicable for the Agency to delete the exempt and irrelevant information on the basis that doing so would render the document meaningless and would not further the Applicant's interest.

### **Conclusion**

36. On the information before me, I am satisfied the information in the document is exempt from release under sections 33(1) and 35(1)(b).

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<sup>16</sup> *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

<sup>17</sup> *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].

<sup>18</sup> *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].

37. As it is not practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25, access is refused in full.

### **Review rights**

38. 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.<sup>19</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>20</sup>
40. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
41. 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.<sup>21</sup>

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<sup>19</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>20</sup> Section 52(5).

<sup>21</sup> Sections 50(3F) and (3FA).