

## Notice of Decision and Reasons for Decision

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Applicant:	'EW8'
Agency:	Victoria Police
Decision date:	17 November 2022
Exemption considered:	Section 33(1)
Citation:	'EW8' and Victoria Police (Freedom of Information) [2022] VICmr 236 (17 November 2022)

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FREEDOM OF INFORMATION – law enforcement documents – police records – Law Enforcement Assistance Program (LEAP) database – LEAP audit – list of agency officers who accessed LEAP database – [ Agency officer names – identification numbers – registered numbers – release of personal affairs information not unreasonable ]

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 differs from the Agency's decision.

I am not satisfied information to which the Agency refused access under section 33(1) is exempt from release. Accordingly, I have determined the document is to be released in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
17 November 2022

## Reasons for Decision

### Background to review

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

I would like to see the names of any police officers that have accessed my LEAP file [the Applicant] and any charges that show up on my LEAP record or have been removed. I would like this reviewed from the [Date] to [Date].
2. The Agency identified three documents falling within the terms of the Applicant's request and granted access to two documents in full and one document in part 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 to one document in part.
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) – Documents affecting personal privacy of third parties***

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**);<sup>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

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

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.<sup>2</sup>
11. 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

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

<sup>2</sup> 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.<sup>3</sup>

12. The document is a two page A3 size table containing the names and user IDs of Agency officers who have accessed information in LEAP database regarding the Applicant, the date and time the information was accessed, 'Reason For Access' input codes and other related data.
13. The document contains the following personal affairs information of sworn police members, their:
  - (a) surnames; and
  - (b) user IDs/registered numbers.
14. I am satisfied the above information constitutes the personal affairs information of persons other than the Applicant.

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

15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the particular circumstances.
16. In *Victoria Police v Marke*,<sup>4</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>5</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>6</sup>
17. 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 the information was obtained

The Victorian Civil and Administrative Tribunal (**VCAT**) has held that there is nothing particularly sensitive about matters occurring or arising in the course of one's official duties and disclosure of this type of information is generally considered not unreasonable.<sup>7</sup>

The nature of the personal affairs information is outlined above. The document contains the names of police members who have accessed the Applicant's LEAP records.

On the information before me, I do not consider it would be unreasonable to release the personal affairs information of Agency officers recorded in the document in the context of these individuals carrying out their official duties in accessing the Applicant's LEAP record.<sup>8</sup>

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<sup>3</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>4</sup> [2008] VSCA 218 at [76].

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* at [79].

<sup>7</sup> See Deputy President Macnamara's comments in *Milthorpe v Mt Alexander Shire Council* [1996] VCAT 368.

<sup>8</sup> *Milthorpe v Mt Alexander Shire Council* (1997) 12 VAR 105.

(b) The Applicant's interest in the information

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>9</sup>

The Applicant provided the following information with respect to their purpose for seeking access to the requested information:

I believe it is a reasonable request that I review the names and service numbers [of] all Victoria Police members that have viewed my LEAP file ... In reference to the Police officer that had no direct involvement with me, I'm even more certain that this scenario needs to be scrutinized, as to why that person needed to review my LEAP file. Therefore it is my firm belief this is also made available to me.

On the information before me, I am satisfied disclosure of the information would satisfy the applicant's request.

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

I acknowledge there is a public interest in ensuring access of LEAP database by Agency officers is done so in accordance with the law and the Agency's policies and procedures.

Providing access to a citizen of such information provides an important mechanism for ensuring the integrity and use of such information, including that it is accessed in connection with legitimate law enforcement and policing functions only.

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

In deciding 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.<sup>10</sup>

The Agency conducted consultation with the relevant Agency officers regarding their views as to the disclosure of their personal affairs information recorded in the document. The Agency consulted with 16 Agency officers, [the majority] of whom did not object to the release of their personal affairs information, [number] objected to the release and one person provided no response to consultation.

I note the reasons provided for objecting to disclosure, including the information set out in the Agency's decision letter, [regarding] not [being] directly involved with the Applicant. However, in the context of accessing a LEAP record, while the level of contact with an Applicant is a relevant factor, it is not determinative. Rather, I consider the factors discussed above, in particular the public interest in ensuring access to the LEAP database by Agency officers is lawful, weighs more in favour of disclosure.

(e) Whether release of this information could lead to the persons to whom it relates suffering stress and anxiety

The Agency released the personal affairs information of [number of] officers who did not object to the release of their personal affairs information.

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<sup>9</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

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

As stated above, [number of] police officers did not provide their consent to the release of their personal affairs information. The context of the personal affairs information is stated above. In my view, the relevant information is not sensitive and is administrative in nature.

As such, I do not accept disclosure of the [number of] police officers' personal affairs information would be reasonably likely to lead to these individuals experiencing stress and anxiety.

(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.<sup>11</sup> I do not consider this is a relevant factor in this matter.

18. Having weighed up the above factors, on balance, I am not satisfied disclosure of the personal affairs information of third parties would be unreasonable in the circumstances where it is recorded in an official document of the Agency in the course of performing their professional duties and responsibilities. Further, I consider there is a public interest in ensuring access to the LEAP database by Agency officers is in connection with legitimate law enforcement and policing functions only.

### **Conclusion**

19. On the information before me, I am not satisfied the document is exempt from release under section 33(1). Accordingly, the document is to be released in full.

### **Review rights**

20. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>12</sup>
21. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
22. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
23. 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.
24. 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>15</sup>

### **Third party review rights**

25. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>16</sup>

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

<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and 50(3FA).

<sup>16</sup> Sections 49P(5), 50(3) and 52(3).

26. In this case, I am satisfied it is practicable to notify the relevant third parties of their review rights (also noting their objection to the release of their personal affairs information) and confirm they will be notified of my decision.

***When this decision takes effect***

27. My decision does not take effect until the third parties' 60 day review period expires.
28. If a review application is made to VCAT, my decision will be subject to any VCAT determination.