



Office of the Victorian
Information Commissioner

t 1300 00 6842
e enquiries@ovic.vic.gov.au
w ovic.vic.gov.au

PO Box 24274
Melbourne Victoria 3001

Notice of Decision and Reasons for Decision

Applicant:	'BZ2'
Agency:	Office of Public Prosecutions
Decision Date:	25 August 2020
Provision considered:	Section 25A(5)
Citation:	'BZ2' and Office of Public Prosecutions (<i>Freedom of Information</i>) [2020] VICmr 240 (25 August 2020)

FREEDOM OF INFORMATION – criminal prosecution – internal deliberations – expert psychiatric evidence

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.

I am satisfied the requirements for the application of section 25A(5) are met.

Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

25 August 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to:

Emails, memos and documents pertaining to the OPP's case of DPP v [Accused] Director of Public Prosecution's documents as to the decision in this case.
2. The Agency refused to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).
3. In refusing to grant access to the documents under section 25A(5), the Agency determined the documents, should any exist, would be exempt under sections 31(1)(a), 31(1)(b), 32(1), 30(1) and 33(1). The Agency's reasons for its decision are set out in its decision letter.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application; and
 - (c) the Agency's submissions and correspondence during this review.
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 section 25A(5) – refusal to grant access to documents

9. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request:
 - (a) if it is apparent from the nature of the request all documents sought would be exempt under the FOI Act; and
 - (b) where it is not possible to provide the applicant with an edited copy of the documents with exempt information deleted, or it is clear the applicant does not seek an edited copy of the documents.

10. The refusal power under section 25A(5) is 'carefully circumscribed'.¹ Therefore, I must be satisfied the following three requirements are met, which limit its application:
- (a) First, the exempt nature of the documents sought must be objectively apparent from the terms of the applicant's request. The 'nature' of documents refers to their inherent or essential quality or character.
 - (b) Second, it must be apparent from the terms of the applicant's request that all documents relevant to the request would be exempt.
 - (c) Third, it must be apparent from:
 - i. the nature of the documents, as described in the applicant's request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document with exempt or irrelevant information deleted; or
 - ii. the applicant's request, or through consultation with the applicant, they do not seek access to an edited copy of a document.
11. Importantly, an agency is not required to identify any or all documents relevant to a request or to specify any relevant exemption under which a document would be exempt.

What is the essential character of the documents requested?

12. In its decision letter, the Agency describes the character of the requested documents as:
- (a) documents recording the internal deliberations leading to a decision made by the Director to accept a [particular defence]; and
 - (b) expert psychiatric evidence as to an accused person's state of mind at the time of an offence.
13. I agree with the Agency's description of the essential character of the documents, which is objectively apparent from the specific terms of the request.
14. Accordingly, I am satisfied the first requirement of section 25A(5) is met.

Would all the documents requested, as described by the Applicant in their request, be exempt?

15. In refusing access to the requested documents under section 25A(5), the Agency determined any documents, should any exist, would be exempt under sections 31(1)(a), 31(1)(b), 32(1), 30(1) and 33(1). The Agency states in its decision letter:

[Context redacted]... the nature of the two categories of documents requested by you relate to documents which, without having to be individually identified and assessed (having regard to s 25A(5) of the Act), are wholly exempt from disclosure on the following grounds:

- disclosure of both categories of documents is reasonably likely to prejudice the proper administration of criminal justice (s 31(1)(a)&(b) of the Act);
- the OPP's internal deliberations are subject to both client legal privilege (s 32) and public interest immunity as defined in s 30 of the Act; and
- disclosure of *at least* the psychiatric evidence would involve an unreasonable disclosure of the accused's personal affairs information (s 33).

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

Section 31(1) – Law enforcement documents

16. Sections 31(1)(a) and 31(1)(b) provide:

31 Law enforcement documents

- (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to –
- (a) prejudice the investigation of a breach or possible breach of the law or prejudice the proper administration of the law in a particular instance;
 - (b) prejudice the fair trial of a person or the impartial adjudication of a particular case;
- ...

17. ‘Reasonably likely’ means there is a real chance of an event occurring; it is not fanciful or remote.²
18. ‘Prejudice’ means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
19. ‘In a particular instance’ does not require a single specific investigation. This phrase can encompass specific, identified aspects of the law, the administration of the law or an investigation of a breach or potential breach of the law.⁴
20. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
21. It is an established principle that ‘enforcement of the law’ deals with the process of enforcing of the law, whereas the ‘proper administration of the law’ concerns how the law is administered, for example, regulatory, monitoring and compliance activities.⁵ In particular, the criminal prosecution of indictable offences is at the core of what is meant by the enforcement and proper administration of the law in a particular instance.⁶
22. The Agency submits:

The disclosure of both the evidence and the internal [Agency] legal analysis of the evidence, poses a significant risk to the impartial adjudication of the case.

In addition, disclosure of the documents would also be reasonably likely to prejudice the accused’s right to a fair trial and amount to a derogation of the proper administration of the criminal law.

23. In determining whether the documents, should any exist, would be exempt under section 31(1)(a) and 31(1)(b), I have placed weight on the following factors:
- (a) It is in the interests of the administration of justice that the impartial adjudication of criminal matters by a court not be prejudiced, and an accused person be afforded a fair trial. These are important principles and protections that underpin the Australian legal system and are reflected in sections 31(1)(a) and 31(1)(b).

² *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.

³ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁴ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁵ *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.

⁶ *JCL v Victoria Police* [2012] VCAT 1060 at [20]-[21].

- (b) While the Court made a decision with respect to the accused person's plea, which was pending at the time of the Applicant's request and the Agency's decision, I accept there are procedural requirements under the relevant legislation that are yet to be discharged. I also note a hearing is scheduled with respect to those remaining procedural requirements.
 - (c) Further, the accused person may appeal against the current verdict on any ground of appeal, with the leave of the Court. In such circumstances, disclosure of the documents may prejudice the proper administration of justice in relation to potential future proceedings and the accused person's right to a fair trial.
24. I note the Applicant has a genuine interest in obtaining access to the documents. However, it is important to note the exemptions under section 31(1) do not allow me to consider whether the applicant's personal interest would be served by granting access to the documents. Rather, my consideration is confined to whether the legal requirements of the exemption are satisfied.
25. Having considered the above factors, I am satisfied disclosure of the documents to a third party, who is not the accused person, in the circumstances of this matter, would be reasonably likely to prejudice the fair trial of the accused and impartial adjudication of the criminal proceedings by the Court.
26. Accordingly, on the information before me and given the nature of the requested documents, I am satisfied the legal requirements of the exemption are satisfied and the documents would be exempt under sections 31(1)(a) and 31(1)(b).

Section 32(1) – Documents affecting legal proceedings

27. As outlined above, the Agency submits internal deliberations would be exempt under sections 32(1) and 30(1).
28. Section 32(1) provides:
- (a) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege.
 - (b) A document of the kind referred to in section 8(1) is not an exempt document by virtue of subsection (1) of this section by reason only of the inclusion in the document of a matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8(1).
29. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:⁷
- (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation;
 - (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or

⁷ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

- (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.
30. A document will be subject to client legal privilege where it contains a 'confidential communication'⁸ between:
- (a) the client (or their agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice;⁹ or
- (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.¹⁰
31. Whether a document is privileged depends on the intention for which it was made. The purpose for which a document is brought into existence is a question of fact.
32. In determining whether the purpose for which a document was created was the 'dominant purpose', there must be a 'clear and paramountcy' of purpose for privilege to attach.¹¹

Would the documents contain confidential communications for the dominant purpose of obtaining or providing legal advice, or referable to pending or contemplated litigation?

33. The Agency submits:

...the [Agency] relies on sections 118 and 119 of the *Evidence Act 2008* (Vic) (**Evidence Act**). Section 118 creates a 'legal advice privilege' in respect of a confidential communication made between the client and a lawyer for the dominant purpose of the lawyer providing legal advice to the client. Further, section 119 creates a 'litigation privilege' which covers confidential communications prepared for the dominant purpose of the client being provided with professional legal services relating to litigation.

In this instance, the DPP is the client and the OPP staff are the lawyers.

All communications between the lawyers and the DPP recording the internal deliberations leading to the prosecutorial decision made by the Director to accept [a specific defence] in this case would, on their face, be made for the dominant purpose of litigation in prosecuting the criminal charge against the accused.¹²

Having regard to the functions and responsibilities of OPP staff, those communications are also "confidential communications" within the meaning of s117 of the Evidence Act.¹³

34. I accept the Agency's submission that any internal deliberations would contain confidential communications between Agency officers and the Director of Public Prosecutions for the dominant purpose of pending legal proceedings.

Has legal professional privilege been waived?

35. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client acts in a way that is inconsistent with the maintenance of that

⁸ Defined in section 117 of the *Evidence Act 2008* (Vic) to mean communications made in circumstances where the Agency and its professional legal advisers were under an obligation not to disclose their contents.

⁹ Section 118 of the *Evidence Act 2008* (Vic).

¹⁰ Section 119 of the *Evidence Act 2008* (Vic).

¹¹ See *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332; *Commissioner of Taxation v Pratt Holdings* [2005] FCA 1247.

¹² Also see *Director of Public Prosecutions v Smith* [1991] 1 VR 63.

¹³ The statutory functions of OPP staff are set out in the *Public Prosecutions Act 1994* (Vic). The responsibilities of staff, including confidentiality requirements, are set out in various employment policies.

confidentiality. For instance, where the substance of the information has been disclosed with the client's express or implied consent.¹⁴

36. There is no information before me to suggest legal privilege has been waived.
37. Accordingly, I am satisfied documents containing internal deliberations of the Agency concerning the prosecution of the accused person, should any exist, would be subject to legal professional privilege and exempt under section 32(1).

Section 33(1) – Documents affecting personal privacy

38. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;¹⁵ and
 - (b) such disclosure would be 'unreasonable'.

Would the documents contain personal affairs information of individuals other than the Applicant?

39. Information relating to an individual'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.¹⁶
40. I accept the Agency's submission the documents, should any exist, would contain the personal affairs information of the accused third party for the purposes of section 33(1).

Would disclosure of the documents involve the unreasonable disclosure of personal affairs information?

41. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's right to personal privacy in the circumstances.
42. In *Victoria Police v Marke*,¹⁷ 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'.
43. 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'.¹⁸
44. I accept the Applicant knows the identity of the relevant third party in this matter. However, the release of personal affairs information may still be unreasonable even where the identity of a third party is known to an applicant.¹⁹
45. In determining whether disclosure of personal affairs information would be unreasonable, I have considered the following factors in the context of this matter:

¹⁴ Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for CLP) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for LPP).

¹⁵ Sections 33(1) and 33(2).

¹⁶ Section 33(9).

¹⁷ [2008] VSCA 218 at [76].

¹⁸ [2008] VSCA 218 at [79].

¹⁹ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

(a) The nature of the personal affairs information and the circumstances in which it was obtained

I consider the nature of the personal affairs information, as described by the Agency, to be sensitive and personal in nature given it concerns the criminal prosecution of an accused person.

The personal affairs information was obtained by the Agency for the purpose of the criminal prosecution of the accused person. While such personal information is often discussed in court and judgments and sentencing remarks, I do not consider it would be reasonably contemplated that such information would be available under the FOI Act.

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

In the circumstances of this matter, I am satisfied the relevant third party would be reasonably likely to object to the release of their personal affairs information in the documents under the FOI Act to the Applicant.

(c) 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.²⁰

In their application for review, the Applicant indicates they seek access to the information to understand the Agency's decision in relation to a particular defence in the prosecution of the accused person.

I acknowledge the Applicant has a significant and genuine interest in obtaining access to the documents given [reason redacted].

On the information before me, the Agency provided the Applicant with an explanation for its reasons for consenting to a particular defence in the prosecution of the accused person. In my view, disclosure of the personal affairs information in the documents would not further the Applicant's understanding of the Agency's decision.

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

The nature of disclosure under the FOI Act is unconditional and unrestricted. This means an applicant is free to use or disseminate a document as they choose once it is released, as no conditions or restrictions can be imposed on a document.²¹

Accordingly, I have considered the likelihood of the personal affairs information in the documents being further disseminated or disclosed by the Applicant should access be granted under the FOI Act.

There is no information before me to suggest the Applicant intends to disseminate the documents. However, given the nature of the information and the purpose for which the documents were obtained, I am not satisfied this factor weighs in favour of disclosure under the FOI Act.

²⁰ *Victoria Police v Marke* [2008] VSCA 218 at [104].

²¹ *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

As stated above, I acknowledge the Applicant has a significant and genuine interest in obtaining access to the documents. However, I consider their interest is personal nature.

Having considered the circumstances of this matter and the implications for the administration of justice and the right of the accused person to be afforded a fair trial, as discussed in paragraph 23 above, I am not satisfied the public interest would be promoted by release of the third party's personal affairs information in the documents.

In the absence of any information to suggest the public interest would be promoted by the release of personal affairs information of the accused person, I consider disclosure of the documents would serve the Applicant's personal interests only.

(f) Whether disclosure would, or would be reasonably likely to endanger the life or physical safety of any person²²

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

46. Accordingly, on the information before me and given the nature of the requested documents, I am satisfied the second requirement of section 25A(5) is met.

Would there be any obligation under section 25 for the agency to grant access to an edited copy of the documents with exempt or irrelevant information deleted?

47. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
48. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²³ 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 25.²⁴
49. I have considered whether it would be practicable to provide the Applicant with an edited copy of requested documents, should any exist, with exempt information deleted in accordance with section 25. I am not satisfied it would be practicable to do so, as it would render them meaningless.
50. Accordingly, I am satisfied the third requirement of section 25A(5) is met.

Section 30(1) – Internal working documents

51. The Agency also relied on the exemption under section 30(1). However, as I am satisfied all of the documents, should any exist, would be exempt in full under sections 31(1)(a), 31(1)(b), 32(1) and 33(1), it is not necessary for me to consider the Agency's application of this additional exemption.

Conclusion

52. On the information before me, I am satisfied the requirements for the application of section 25A(5) are met in that:

²² Section 33(2A).

²³ *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].

²⁴ *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].

- (a) all of the documents to which the Applicant's request relates, should any exist, would be exempt under sections 31(1)(a), 31(1)(b), 32(1) and 33(1); and
- (b) there would be not obligation under section 25 for the Agency to grant access to an edited copy of a documents with the exempt information deleted as to do so would render them meaningless.

53. Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

Review rights

54. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.²⁵

55. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁶

56. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁷

57. 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.

58. 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.²⁸

²⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁶ Section 52(5).

²⁷ Section 52(9).

²⁸ Sections 50(3F) and (3FA).