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Notice of Decision and Reasons for Decision

Applicant: 'DA7'
Agency: Victoria Police
Decision date: 17 May 2021
Provision and exemption considered: Sections 25A(5), 33(1)
Citation: 'DA7' and Victoria Police (*Freedom of Information*) [2021] VICmr 134 (17 May 2021)

FREEDOM OF INFORMATION – complaint documents – third party – personal affairs information – unreasonable disclosure – [complaints against police officer]

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 request is the same as the Agency's decision.

I am satisfied the requirements of section 25A(5) are met, and I have refused to grant access to documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

17 May 2021

Reasons for Decision

Background to review

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

I want to know how many complaints are filed and the nature of the complaints on [named individual] badge number [series of numbers] an officer in the Victoria police department.
2. Without having identified any, or all of the documents, the Agency relied on section 25A(5) to refuse access to documents in accordance with the Applicant's request.
3. In its decision, the Agency advised any documents falling within the terms of the Applicant's request, should they exist, would be exempt from release under section 33(1). The Agency's decision letter sets out the reasons for its decision.

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 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 section 25A(5)

9. The power under section 25A(5) is carefully circumscribed.¹ A decision maker must be satisfied of the following three elements, which operate to limit its application:
 - (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all requested documents are exempt.
 - (c) Third, it must be apparent from:
 - (i) the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or

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

- (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.²

10. An agency is not required to identify any or all documents to which the request relates or to specify, in respect of each document, the relevant exemption under which a document is claimed to be exempt.

Is the nature of the documents objectively apparent from the face of the request?

11. The request seeks access to a document or documents that record a complaint or complaint like information regarding an individual who is not the Applicant (the **third party**). I am satisfied the nature of the documents is objectively apparent from the specific terms of the request.

Would all documents, as described in the request, be exempt?

12. In refusing access to the requested documents under section 25A(5), the Agency determined any documents, should any exist, would be exempt under section 33(1).
13. 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; and
 - (b) such disclosure would be 'unreasonable'.
14. Information relating to the 'personal affairs' of a person 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
15. A third party's opinion or observations about another person's conduct can constitute information in relation to the personal affairs of a third party.⁴
16. Accordingly, I accept the Agency's submission that, should any relevant documents exist, they would contain personal affairs information within the meaning of section 33(1).
17. Considering whether disclosure would be unreasonable involves balancing the public interest in the disclosure of official documents with the protection of an individual's personal privacy in the circumstances.
18. This involves having regard to any matter that may 'relevantly, logically, and probatively' bear upon whether disclosure of personal affairs information of any person would be unreasonable in its own context.⁵
19. In determining whether disclosure of the personal information in the documents would be unreasonable, I have considered the following factors in the context of the Applicant's request:
- (a) The nature of the personal affairs information and the circumstances in which it was obtained

A complaint made about a person is a personal and sensitive matter pertaining to that individual. I consider the existence of any such documents would confirm personal and

² *Knight v Corrections Victoria* [2010] VSC 338.

³ Section 33(9).

⁴ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁵ *Ibid* at [98].

sensitive issues about the third party's workplace performance and/or conduct. I also consider that any such information, documents or material would have been disclosed and collected with an expectation the information would be treated in confidence.

Should any documents exist, I am satisfied the nature of the personal affairs information and the circumstances in which such information is obtained is highly sensitive and disclosure limited to investigation purposes only.

- (b) The Applicant's interest in the information and, if appropriate, whether their purpose for seeking access to 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.⁶

There is little information before me as to the Applicant's reasons for seeking access to the requested information. However, where an applicant seeks access to information concerning information regarding the personal affairs of a third party, I consider limited weight should be given as to whether the purpose for which an applicant seeks access to the information is likely to be achieved by disclosure of the information.

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

I am satisfied the personal affairs information in the document is not available to the public or otherwise open to access by the Applicant.

Further, I am not satisfied there is a broader public interest that would be promoted by disclosure of the personal affairs information. Rather, the Applicant's interest in the information would serve a personal interest only.

I am of the view there is a broader public interest in the Agency preserving its ability to obtain information from its officers and other third parties as part of a complaint investigation process without concern the information they provide will be disclosed to a complainant or through FOI.

Accordingly, I am not satisfied the public interest in transparency outweighs the personal privacy of a third party in this case.

- (d) Whether a third party to whom the information relates object, or would likely object, to the release of the information

Given the highly personal and sensitive nature of this type of information and the litigation that the Applicant states he and the individual are involved in, I consider it reasonably likely that the relevant individual would object to disclosure of the requested documents, should they exist.

- (e) Whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person⁷

I do not have any information before me to suggest disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁷ Section 33(2A).

20. On the information before me, I am satisfied the requested documents, should any exist, would be exempt under section 33(1) on grounds the documents would contain the personal affairs information of the third party and disclosure of such information would be unreasonable in the circumstances.

Is it apparent from the nature of the documents, that there is no obligation under section 25 for the agency to grant access to an edited copy of a document?

21. 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.
22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁸ 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 25.⁹
23. Having considered the nature of the documents sought and relevant exemption, I am satisfied if any documents exist, they would be exempt in full under section 33(1) as there would be no obligation on the Agency to provide an edited copy of any document in accordance with section 25.

Conclusion

24. On the information before me, I am satisfied the documents requested by the Applicant, should any exist, would be exempt under section 33(1), and there would be no obligation on the Agency to provide the Applicant with an edited copy of any document in accordance with section 25.
25. Accordingly, I am satisfied the requirements of section 25A(5) are met and I have decided to refuse to grant access to documents in accordance with the Applicant's request under section 25A(5).

Review rights

26. 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.¹⁰
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
29. 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.
30. 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.¹³

⁸ *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].

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).