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Information Commissioner

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## Notice of Decision and Reasons for Decision

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Applicant:	'CB9'
Agency:	Victoria Police
Decision date:	18 September 2020
Exemption considered:	Section 33(1)
Citation:	'CB9' and Victoria Police (Freedom of Information) [2020] VICmr 265 (18 September 2020)

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FREEDOM OF INFORMATION – law enforcement documents – police records – police investigation – investigation documents – date of birth – personal affairs information – disclosure 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 is the same as the Agency's decision.

I am satisfied the document is exempt under section 33(1).

As I am satisfied it is practicable to provide an edited copy of the document with the exempt information deleted in accordance with section 25, I have determined to grant access to the document in part.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

18 September 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to a document containing the date of birth, full name and specific details of a charge in relation to a person charged in a criminal matter involving financial deception (the **person charged**). The Applicant is a victim of the offending.
2. As part of the Applicant's request, they provided a letter from the Agency regarding the outcome of the criminal matter, which was heard in the Magistrates' Court.
3. In its decision, the Agency identified a Charge Sheet falling within the terms of the Applicant's request and determined to exempt certain information in the document under section 33(1).
4. The Agency's decision letter sets out the reason for its decision.

### Review

5. The Applicant, through their representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document in part.
6. I have examined a copy of the document subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all relevant communications and submissions received from the parties.
9. 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.
10. I note Parliament's intention the FOI Act 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)**

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

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

12. 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.<sup>2</sup>

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

13. 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>3</sup>
14. The document contains the full name, telephone number, residential address and Master Names Index number (**MNI**) of the person charged.
15. Accordingly, I am satisfied the document contains the personal affairs information of an individual other than the Applicant.

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

16. 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.
17. 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'.
18. In determining whether disclosure of personal affairs information in the document would be unreasonable, I have considered the following factors:

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

The personal affairs information is the full name, telephone number, email addresses, residential address, bank account details, MNI and version of events of the person charged.

The information was obtained by the Agency in the context of undertaking an investigation into allegations of criminal behaviour made against the person charged.

I consider it is reasonable to expect the information in the document was provided to the Agency on the understanding it would be used for the purpose for which it was obtained only. Namely to investigate the alleged crime and any subsequent prosecution or court proceeding.

(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.<sup>5</sup>

In their request for review, the Applicant states they seek access to the personal affairs information of the person charged to enable them to commence a civil claim against that person.

I acknowledge the Applicant's personal interest in seeking access to the document and the

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<sup>2</sup> Section 33(9).

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

document contains the information sought by the Applicant and would allow them to identify and locate the person charged.

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

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose once it is released.<sup>6</sup>

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

Given the purpose for which the Applicant seeks access to the document, I consider there is a real possibility of it being further disseminated.

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

There is no information before me as to the views of the person charged as to their views on disclosure of their personal affairs information, as the Agency determined it was unreasonable to undertake consultation. I accept consultation in these circumstances is not practicable.

Having regard to the circumstances in which the document was created and its content, I am of the view the person charged would be reasonably likely to object to the release of their personal affairs information in the document under the FOI Act.

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

I consider the public interest lies in the Agency preserving the confidentiality of information provided to it on a voluntary basis during the course of an investigation. This ensures the Agency's ability to obtain similar information and cooperation from the public in order to effectively carry out its investigative and law enforcement functions.

While I acknowledge the Applicant's reasons for seeking access to the information, in the absence of any information to suggest the public interest would be promoted by the release of the personal affairs information of the third party in the document, I consider disclosure of the document 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 person<sup>7</sup>

There is no specific information to satisfy me this is a relevant consideration in this matter.

19. Having considered the above factors, on balance, I am satisfied disclosure of the personal affairs information of the person charged in the document would be unreasonable in the circumstances.

20. Accordingly, I am satisfied the document is exempt in part under section 33(1).

***Deletion of exempt or irrelevant information***

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.

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<sup>6</sup> *Ibid* at [68].

<sup>7</sup> Section 33(2A).

22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>8</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>9</sup>
23. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. I am satisfied it is practicable to do so as the effort involved would not require substantial time and effort, and the edited documents would retain meaning.

### **Conclusion**

24. On the information before me, I am satisfied the document is exempt under section 33(1).
25. As I am satisfied it is practicable to provide an edited copy of the document with the exempt information deleted in accordance with section 25, I have determined to grant access to the document in part.

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

### **Other matters**

31. In an attempt to provide assistance to the Applicant in this matter, I note OVIC staff made inquiries with the Agency about whether there was an alternative means by which the Applicant could seek reimbursement of their money the subject of the offending (or restitution).
32. It was suggested the Applicant contact the Magistrates' Court to discuss whether a cost order could be made by the Court. The Applicant may also wish to seek independent legal advice on this issue.

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<sup>8</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>9</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].

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

<sup>11</sup> Section 52(5).

<sup>12</sup> Section 52(9).

<sup>13</sup> Sections 50(3F) and (3FA).