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Notice of Decision and Reasons for Decision

Applicant:	'BA6'
Agency:	Victoria Police
Decision Date:	23 January 2020
Exemption considered:	Section 33(1)
Citation:	'BA6' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 10 (23 January 2020)

FREEDOM OF INFORMATION – law enforcement documents – records relating to a deceased person – next of kin – task report – Law Enforcement Assistance Program (LEAP) flag report – LEAP reports

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 differs from the Agency's decision in that I have decided to release additional information in certain documents.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
23 January 2020

Reasons for Decision

Background to review

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

Documents and the investigation report in relation to [a relative] on [date] at [address].
2. In its decision, the Agency identified four documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full under section 33(1).

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant advised they do not seek the names of or identification numbers of Agency officers in the documents. Accordingly, this review relates to the application of section 33(1) to third parties' personal affairs information in the documents.
5. I have examined copies of the documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated [date];
 - (b) the Applicant's submission and review request, dated [date];
 - (c) documents provided with the Applicant's review application; and
 - (d) all communications between OVIC staff, the Applicant and the Agency.
8. 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.

Review of exemptions

Section 33(1)

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;¹ and
 - (b) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and (2).

10. The exemption in section 33(1) applies to the personal affairs information of a deceased person.²
11. When applying the exemption under section 33(1), an agency must:
 - (a) notify the person who is the subject of that information (or if that person is deceased, that person's next of kin) that the agency received a request for access to the document;
 - (b) seek that person's view as to whether disclosure of the document should occur; and
 - (c) provide that person with their review rights.³
12. However, section 33(2C) provides consultation under section 33(2B) is not required in certain circumstances, including if the notification may cause the person undue distress, or if it is not practicable to do so.
13. The term 'next of kin' is not defined in the FOI Act, however, the Victorian Ombudsman's June 2006 Report on the FOI Act recommended the definition in the *Human Tissue Act 1982* (Vic) (Human Tissue Act) be adopted in relation to the FOI Act.
14. Section 3 of the Human Tissue Act defines 'senior available next of kin' as follows:
 - (b) in relation to any other deceased person—
 - (i) where the person, immediately before the person's death, had a spouse or domestic partner and that spouse or domestic partner is available—the spouse or domestic partner;
 - (ii) where the person, immediately before the person's death, did not have a spouse or domestic partner or the spouse or domestic partner is not available—a son or daughter of the person who has attained the age of 18 years and who is available;
 - (iii) where no person referred to in subparagraph (i) or (ii) is available but a parent of the person is available—that parent; or
 - (iv) where no person referred to in subparagraph (i), (ii) or (iii) is available—a brother or sister of the person who has attained the age of eighteen years and is available.
15. The Agency noted in its reasons for decision the Applicant did not provide documentation to evidence [they are] the senior next of kin to the deceased person(s) named in the documents. However, the Applicant provided this information to OVIC, namely their [relative's] death certificate, and the Applicant's birth certificate.
16. Having reviewed this documentation, I am satisfied it evidences the Applicant is a next of kin of their deceased [relative] at the time of my decision.

² Section 33(1).

³ Section 33(2B).

Do the documents contain personal affairs information?

17. 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 this information may be reasonably determined.⁴
18. The exempt information includes names, addresses, contact numbers, relationship descriptors and other personal affairs information of third parties.
19. I am satisfied this information is personal affairs information of people other than the Applicant. Therefore, the first condition of section 33(1) is met.

Would disclosure of the personal information be unreasonable in the circumstances?

20. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a matter.
21. I have considered the following factors in relation to this matter:

(a) The nature of the personal affairs information

The document contains personal sensitive information relating to their involvement with the Agency.

The documents were generated in response to events that occurred over 25 years ago. While I accept the passage of time may decrease the sensitivity of a document in some circumstances, in this matter, I consider the nature of the information in the documents remains sensitive. This factor weighs against disclosure.

(b) The circumstances in which the information was obtained

The information was gathered and recorded by the Agency to assist it in a criminal investigation. I accept individuals who provide information to the Agency in this context do so with the expectation the information will be treated confidentially, subject to any related criminal proceeding in which such information will be relied upon in evidence before a court. As such, I consider it likely such individuals would not anticipate the information they provided to the Agency would be released under the FOI Act. This factor weighs against disclosure.

(c) The Applicant's interest in the information:

I accept the Applicant has a personal interest in the documents, citing they were a child at the time of the relevant events. From their submission, it appears they are seeking to understand events involving their [relative] and what actions the Agency took at the time.

I also note the Applicant provided evidence a relevant third party has died and the Applicant is their senior available next of kin. As the Applicant would be the relevant person to consult in relation to disclosure of the documents, I consider this factor weighs in favour of disclosure of information in Documents 1, 2 and 3.

⁴ Section 33(9).

However, Document 4 does not refer to the Applicant's [relative], but concerns another third party's interaction with the Agency. This factor weighs against disclosure of Document 4.

- (d) Whether the Applicant's purpose for seeking access to the information is likely to be achieved by granting them access to the information:

Whilst it is unlikely all of the Applicant's questions will be answered by them obtaining access to the documents about their [relative], I am satisfied it will give them further information regarding events that occurred within their family when they were a child. This factor weighs in favour of disclosure of Documents 1, 2 and 3.

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

The Applicant stated they are aware of the identities of all third parties. However, even in circumstances where a third party is known to an applicant, it can still be considered unreasonable to release personal affairs information.⁵

In this matter, given the Applicant is a next of kin for their [relative] and the senior available next of kin for a relevant third party, I consider this factor weighs in favour of disclosure of Documents 1, 2 and 3. However, I consider the third party to whom Document 4 relates would be likely to object to the release of their personal affairs information. This factor weighs against disclosure of Document 4.

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

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

22. Having been provided documentation to satisfy that the Applicant is the next of kin to one of the third parties and having balanced the above factors, I am satisfied that it would not be unreasonable to release the personal affairs information of the Applicant's [relative] which appears in Documents 1, 2 and 3.
23. However, I am of the view it would be unreasonable to release the personal affairs information of other third parties which in Documents 1, 2 and 3. Further, I consider it would be unreasonable to release Document 4 as it contains the personal affairs information of another third party and it would be not practicable to provide an edited copy of the document in accordance with section 25.
24. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each document.

Deletion of exempt or irrelevant information

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

⁵ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ and the effectiveness of the deletions. Where deletions would render a document meaningless, editing a document is not 'practicable' and its release is not required under section 25.⁷
27. Given the Applicant stated they do not seek the personal affairs information of Agency officers that appear within the documents, I have determined this information is irrelevant.
28. I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable to delete irrelevant and exempt information from Documents 1, 2 and 3, as to do so would not require substantial time and effort, and the edited documents would retain meaning.
29. However, having considered the effect of deleting irrelevant and exempt information in Document 4, I have determined it would not be practicable as to do so would render the document meaningless.

Conclusion

30. On the information before me, I am satisfied certain information in the documents is exempt under section 33(1). As it is practicable to provide an edit copy of Documents 1, 2 and 3 in accordance with section 25, I have granted access to these documents in part and refused access to Document 4 in full.

Review rights

31. 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.⁸
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
34. 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.
35. 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.¹¹

⁶ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

⁷ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

Other matters

36. Section 49P(5) states if I decide to disclose a document exempted by an agency under section 33(1), if practicable, I must notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
37. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has held:
- The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.
- ... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹²
38. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹³
39. I have decided notifying relevant third parties would be an unnecessary intrusion for the following reasons:
- (a) the nature of the information in the documents;
 - (b) the context in which the information was provided;
 - (c) the passage of time since the documents were created; and
 - (d) the Applicant is a next of kin of their [relative], whose information is to be released.
40. In the circumstances of this matter, I consider notifying a second next of kin would be an unnecessary intrusion and such notification may cause unnecessary distress for that person. Therefore, I am not satisfied it would be practicable to notify the third party's other next of kin regarding my decision to release information in the documents.

When this decision takes effect

41. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹² *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹³ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Task Report	1	Refused in full Section 33(1)	<p>Release in Part</p> <p>Sections 33(1), 25</p> <p>The document is to be released to the Applicant with the following information deleted:</p> <p>Irrelevant under section 25:</p> <ul style="list-style-type: none"> • The Agency officer's name and identifying number in the line 'Reply From'; • The names of the [position title] and [position title] under the heading of 'Notified'; and • The Agency officers' names and identifying numbers in the lines 'Reports' and 'OPR'. <p>Exempt under section 33(1):</p> <ul style="list-style-type: none"> • information listed after the sub-heading 'Reported by:'; and • the sentence underneath the 'Relatives Notified' subheading. 	<p>Section 25: The deleted information comprises the names and identifying numbers of Agency officers. The Applicant advised they do not seek the names of the Agency officers who made the reports. Therefore, I have excluded the 'personal affairs information' of the Agency officers from my review.</p> <p>Section 33(1): Taking into consideration documentation the Applicant provided to this office and for the reasons set out above, I do not consider it would be unreasonable to disclose certain personal affairs information of the Applicant's deceased [relative]. However, I consider it would be unreasonable to disclose other personal affairs information in the document.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
2.	[Date]	LEAP Flag Report	1	Refused in full Section 33(1)	<p>Release in Part</p> <p>Section 25</p> <p>The document should be released with the following irrelevant information in accordance with section 25:</p> <ul style="list-style-type: none"> • the User ID of the Agency officer who has accessed/printed the document as part of processing the Applicant's request; • the Agency officer's identifying number following the words 'Information supplied by'; and • the identifying number for the Agency officer who created the report, following the line 'Created: [date] by'. 	Section 25: See comments for Document 1.
3.	[Date]	LEAP Report [number]	1	Refused in full Section 33(1)	<p>Release in Part</p> <p>Sections 33(1), 25</p>	<p>Section 25: See comments in Document 1.</p> <p>Section 33(1): See comments in Document 1.</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>The document should be released with the following information deleted:</p> <p>Irrelevant information under section 25:</p> <ul style="list-style-type: none"> • the User ID of the Agency Officer who has accessed/printed the document as part of processing the Applicant's request; and • the name and identity number of the Agency Officer listed as 'Reporting Member' and 'Investigating Member'. <p>Exempt information under section 33(1):</p> <ul style="list-style-type: none"> • all personal affairs information (name, sex, age, address and contact number/s) for the 'Perpetrator (FV)'; and • all information under the heading 'Case Progress Narrative'. 	

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency's Decision	OVIC Decision	OVIC Comments
4.	[Date]	LEAP Report [number]	1	Refused in full Section 33(1)	Refuse in full Section 33(1)	<p>Section 33(1): This document contains the 'personal affairs information' of a third party other than the Applicant's deceased [relative]. I consider it would be unreasonable to release this information in the circumstances.</p> <p>Section 25: I consider editing the document to remove exempt information would render it meaningless. Accordingly, the document is exempt in full.</p>