



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:	'CV6'
Agency:	Victoria Police
Decision date:	1 April 2021
Provision and exemption considered:	Sections 25A(5), 31(1)(d)
Citation:	'CV6' and Victoria Police (<i>Freedom of Information</i>) [2021] VICmr 88 (1 April 2021)

FREEDOM OF INFORMATION – law enforcement documents – ‘anti-lockdown’ protests – police resources – administrative documents – request refused on grounds all documents, should any exist, would be exempt – not satisfied all documents would be exempt

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.

I am not satisfied the requirements of section 25A(5) are met on grounds, it is not apparent from the nature of the documents as described in the Applicant’s request, that all documents to which the request relates would be exempt under section 31(1)(d).

The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant’s request and assess those documents in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

1 April 2021

Reasons for Decision

Background to review

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

Copy of a report or information outlining the number of police resources allocated to the Anti-lockdown protests occurring on [specified dates]. Please include rank, department (e.g. PORT, general duties, prisoner escort unit, airwing, etc.), cost per hour per person/resource and how long each person/resource was rostered on for.

2. The Agency refused to grant access to documents in accordance with the Applicant's request under section 25A(5). In doing so, the Agency was not required to identify any documents relevant to the request on grounds all documents to which the request relates, should any exist, would be exempt under section 31(1)(d).

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 and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties.
6. 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.
7. 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.

Preliminary view provided to Agency

8. On [date], the Agency was provided with a preliminary view that it was not apparent from the nature of the documents, as described on the face of the Applicant's request, that each document would be exempt in full under section 31(1)(d). The Agency was invited to provide a further submission or consider making a fresh decision under section 49M.
9. On [date], the Agency advised it did not agree with the preliminary view and declined to make a fresh decision under section 49M.

Review of application of section 25A(5) to refuse to grant access to documents

10. Section 25A(5) provides an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request that:
 - (a) all documents would be exempt in full under the FOI Act; and
 - (b) either there is no obligation for the agency to provide the applicant with an edited copy of the documents or the applicant does not agree to receive an edited copy of the documents.

11. The power to refuse a request under section 25A(5) is carefully circumscribed. The Supreme Court of Victoria has held the power to refuse an FOI request under this provision will apply in limited circumstances only where each of the following three elements are met:
 - (a) Based on the description of documents in the FOI request, the decision maker must work out the inherent or essential quality or character of the requested documents.
 - (b) The decision maker must determine whether each of the documents, as described by the Applicant, would be exempt. It must be apparent that all documents would be exempt.
 - (c) From the face of the FOI request or the Applicant's agreement, there must be no scope for the agency to provide an edited copy of any of the documents.¹

What is the essential character of the documents requested?

12. I am satisfied the nature or character of the documents, as described in the Applicant's FOI request, is apparent from the terms of their request, being reports relating to police involvement in 'anti-lockdown protests' held in Melbourne on [specified dates].
13. As noted above, the Agency was provided with a preliminary view that the Applicant's request would capture administrative documents and information that would be unlikely to disclose sensitive details disclosing sensitive policing and investigative methods and procedures.
14. In response, the Agency submitted:

... It is not agreed that the Applicant is seeking a "broad range of documents". The FoI Request relates to specific information...
15. I acknowledge the Agency's submission and view. However, I note similar FOI requests have been received by the Agency. In one such matter, the Agency granted partial release to documents titled, 'Post Event Report - Demonstration', relating to the same anti-lockdown protests that were mentioned in the Applicant's FOI request.
16. Accordingly, I am satisfied similar documents would fall within the scope of the Applicant's FOI request. I consider this approach accords with the object and purpose of the FOI Act and the Victorian Parliament's intention the maximum amount of information held by government be disclosed under the FOI Act.

Would each of the requested documents, as described in the FOI request, be exempt?

17. As stated above, in refusing access to the requested documents under section 25A(5), the Agency submits the documents, should any exist, would be exempt under section 31(1)(d).

Application of section 31(1)(d)

18. Section 31(1)(d) provides, subject to section 31, that a document is an exempt document if its disclosure under the FOI Act would, or would be reasonably likely to 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'.
19. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.²

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

20. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
21. The exemption in section 31(1)(d) does not apply to widespread and well known investigation methods and procedures.⁴
22. The Agency submits:

Police have an obvious role to play in relation to large gatherings of people including protests to ensure public safety and that applicable laws are adhered to. It is not uncommon for protests to focus on issues which are divisive, and which attract groups of people who have different points of view leading to clashes occurring between these groups.

In order to manage protests, Police have developed certain methods and procedures which include determining the number, experience and expertise of police members who are required to attend protests.

The documents requested by the Applicant would disclose the rank and number of police members attending the various protests. These matters are determined by a number of factors including the expected number of participants, the various groups that may be involved, any particular intelligence held by police in relation to those groups and the impact that the factors may have on the safety of members participating in the protests, other members of the public and police members themselves.

23. I acknowledge certain information that would likely be contained in the documents would relate to methods and procedures for preventing, detecting, investigating, or dealing with matters arising from protests. Further, I am satisfied the disclosure of this information would be reasonably likely to prejudice the effectiveness of those methods or procedures.
24. However, I consider the reports and other documents that may fall within the scope of this request, would be likely to contain information that would not disclose methods and procedures for dealing with protests and other large gatherings. Having considered previous FOI requests where information has been released to applicants in relation to the same events, I am not satisfied all information in the documents, should any exist, would be exempt under section 31(1)(d).

Would there be scope for the Agency to provide an edited copy of any of the documents?

25. 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.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ 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 25.⁶
27. Having considered the circumstances of this matter, I am satisfied there would likely be scope to provide the Applicant with an edited copy of at least one or more of the requested documents with exempt information deleted in accordance with section 25. I am also satisfied it would be practicable

² *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Department of Agriculture and Rural Affairs v Binnie* [1989] VR 836.

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

⁴ *XYZ v Victoria Police* [2010] VCAT 255 at [177].

⁵ *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].

⁶ *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].

to do so, as to so would likely not require substantial time and effort, and the edited documents would likely retain sufficient meaning.

28. Accordingly, I am not satisfied the requirement under section 25A(5) for there to be no scope to provide the Applicant with edited copies of any of the documents is met in this case.

Conclusion

29. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply in a limited category of cases only.
30. Having carefully considered the application of section 25A(5) to the requested documents and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant's request that all documents relevant to the request would be exempt in full under section 31(1)(d).
31. I am also satisfied it would be practicable to provide an edited copy of one or more documents to the Applicant with any exempt information deleted in accordance with section 25.
32. Accordingly, I am not satisfied each of the requirements of section 25A(5) are met such that the Applicant's request for access to the requested documents can be categorically refused.
33. The effect of my decision is the Agency is required to search for and identify documents relevant to the terms of the Applicant's request and assess those documents in accordance the FOI Act.

Review rights

34. 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.⁷
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
37. 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.
38. 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.¹⁰

When this decision takes effect

39. My decision does not take effect until the Agency's 14 day review period expires.
40. If the Agency does not seek review of my decision, it is required to search for and identify documents relevant to the terms of the Applicant's request and assess those documents in accordance the FOI Act. While the FOI Act does not prescribe a statutory time period for this process, my view is the Agency should make a decision within the requirements of section 21.

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).