

Notice of Decision and Reasons for Decision

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| Applicant: | 'FC2' |
| Agency: | Victoria Police |
| Decision date: | 20 April 2023 |
| Exemptions considered: | Sections 33(1), 35(1)(b) |
| Citation: | 'FC2' and Victoria Police (Freedom of Information) [2023] VICmr 28 (20 April 2023) |

FREEDOM OF INFORMATION – police documents – witness statements – property damage – insurance – personal affairs information – unreasonable disclosure of personal affairs information – information obtained in confidence – disclosure would impair agency's ability to obtain similar information

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 information in the documents under review is exempt from release under sections 33(1) and 35(1)(b).

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

20 April 2023

Reasons for Decision

Background to review

1. The Applicant is an insurance company. It is the insurer of the owner of a commercial property that sustained building damage following a fire.
2. Through its legal representative, the Applicant made a request to the Agency seeking access to the following documents:

I understand that on the above date, a fire at the property caused significant damage leading to an insurance claim with our client. I also understand that the Victoria Police attended the premises to conduct an investigation, during which [description of evidence collected].

Presumably a report was prepared in this regard. I write to request a copy of this report and any other information that Victoria Police possesses in relation to the incident, including the identity of the relevant offender who caused the fire and any witness names contained in these records.

3. Following consultation with the Agency, the Applicant clarified the terms of its initial request to seek access to all reports, statements, records of interview, photographs, videos, drawings and file notes made in relation to the incident.
4. The Agency identified five documents falling within the terms of the Applicant's request, refusing access to four documents in part under section 33(1) and one document in full under sections 33(1) and 35(1)(b).
5. The Agency's decision letter sets out the reasons for its decision.

Review application

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. I have examined a copy of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
11. 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 exemptions

Section 33(1) – Documents affecting personal privacy of third parties

12. 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 (a **third party**);¹ and
- (b) such disclosure would be 'unreasonable'.

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

- 13. 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 such information may be reasonably determined.²
- 14. 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.³
- 15. The documents subject to review contain names, addresses, contact details and other identifying information of a third party. Document 5 is a statement made by a third party to the Agency, which contains their recollection of events.
- 16. I am satisfied such information constitutes personal affairs information for the purposes of section 33.

Would disclosure of the personal affairs information be unreasonable?

- 17. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the particular circumstances.
- 18. In *Victoria Police v Marke*,⁴ 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'.⁵ The Court further held, '[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 by a lesser or greater degree'.⁶
- 19. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:
 - (a) The nature of the personal affairs information

The nature of the personal affairs information is names, addresses, contact details and other identifying information, as well as more sensitive information, such as the views and recollections of a third party.

¹ Sections 33(1) and 33(2).

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

⁵ *Ibid.*

⁶ *Ibid* at [79].

The Applicant submits they are already aware of the personal affairs information of the individual that provided a statement to police, and that disclosure of the statement would not result in disclosure of personal information not already known to them.

I acknowledge some of the personal affairs information in the document may already be known to the Applicant. However, even in circumstances where the personal affairs information of a person named in a document may be known to an applicant, it may still be unreasonable to release such information under the FOI Act.⁷

(b) The circumstances in which the information was obtained

The information was obtained by the Agency in carrying out its law enforcement functions. I am of the view the third party, who provided the information, did so on the assumption their personal affairs information would remain confidential unless required for a subsequent criminal investigation or legal process.

In the circumstances, I am satisfied the third parties would not have reasonably expected the information provided to the Agency as part of a police investigation would be disclosed to the Applicant under the FOI Act.

(c) The Applicant's interest in the information

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 under section 33(1).⁸

The legal representative for the Applicant submits their client is a large international insurer that is seeking to make a recovery of property damage losses pursuant to its right of subrogation. Provision of the requested information will enable its client to recover the money it has paid out on the claim from the parties responsible. I acknowledge the Applicant's personal interest in obtaining access to the documents.

(d) Whether any public interest would be promoted by release of the personal affairs information

I consider there are public interest factors both for and against disclosure in situations such as in this matter.

In principle, I acknowledge there is a public interest in a victim of crime being able to know the identity of the perpetrator of a crime committed against them.⁹

Equally, I accept there is a public interest in the Agency maintaining its ability to receive confidential information on a voluntary basis from third parties and witnesses in order to conduct investigations into alleged breaches or possible breaches of the criminal law.

While I understand the importance to the Applicant in pursuing private civil proceedings, I am not satisfied such matters are of significant public importance or interest to outweigh the competing public interest in the Agency being able to carry out its law enforcement functions which serves the administration of justice.

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁹ *AB v Department of Human Services* [2001] VCAT 2020.

In my view, if information of this type were to be routinely disclosed under the FOI Act, I am satisfied it would jeopardise the Agency's ability to efficiently and effectively carry out its law enforcement functions.

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

In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.¹⁰ However, this obligation does not arise in certain circumstances including where it is not practicable to do so.¹¹

The Agency determined it was not practicable to consult with the third parties. Given the sensitive nature of the information and the circumstances in which it was obtained, I am of the view the individuals whose personal information is contained in the documents would be likely to object to the release of that information.

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

In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹² I do not consider this is a relevant factor in this matter.

20. Having weighed the above factors, on balance, I am satisfied disclosure of the third party personal affairs information in the documents would be unreasonable in the circumstances. In particular, I have considered the circumstances in which the information was obtained by the Agency in carrying out its law enforcement functions, and the reasonable likelihood the third parties would not expect nor consent to their personal affairs information being disclosed under the FOI Act.
21. Accordingly, I am satisfied the relevant information should remain exempt from release under section 33(1).

Section 35(1)(b) – Information obtained in confidence

22. A document is exempt under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

¹⁰ Section 33(2B).

¹¹ Section 33(2C).

¹² Section 33(2A).

Was the information obtained in confidence?

23. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹³
24. In doing so, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.¹⁴
25. The document exempted by the Agency under section 35(1)(b) is a witness statement from a third party and was recorded during the Agency's investigation of the property fire.
26. As mentioned above, the Agency determined that it would be unreasonable to consult with the relevant third party in relation to release of their information.
27. I am satisfied the third party provided information to the Agency in circumstances in which confidentiality is reasonably implied. I accept, where people provide statements to police, that they do so with an expectation that the information would remain confidential unless required for a subsequent criminal investigation or legal process.
28. Accordingly, I am satisfied disclosure of Document 5 would divulge information communicated to the Agency in confidence.

Would disclosure of the information be contrary to the public interest?

29. Section 35(1)(b) also requires I consider whether the Agency would be impaired from obtaining similar information in the future if the information were to be disclosed under the FOI Act. This involves considering whether others in the position of the communicator would be likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
30. The public interest test in section 35(1)(b) is narrow, in that it is directed at the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out of an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.¹⁵
31. The Agency's ability to obtain fulsome information in a criminal investigation relies on members of the public feeling comfortable and safe to provide information on a voluntary basis. In my view, the routine disclosure of such information through the FOI process would likely impact the amount of information and level of detail that individuals might be willing to provide the Agency. This would negatively impact on the Agency obtaining similar information in future.
32. While I acknowledge the Applicant's strong personal interest in seeking access to the documents as an affected party, I am satisfied there is a strong public interest in protecting the Agency's ability to obtain information during police investigations as to do so is critical to its ability to perform its law enforcement functions efficiently and effectively.
33. Accordingly, I am satisfied disclosure of the witness statement in Document 5 would be contrary to the public interest as its disclosure under FOI would impact the Agency's ability to obtain similar information in the future. Therefore, I am satisfied this information is exempt from release under section 35(1)(b).

¹³ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹⁴ *XYZ v Victoria Police* [2010] VCAT 255 at [265].

¹⁵ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

Section 25 – Deletion of exempt or irrelevant information

34. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
35. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁶ 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 25.¹⁷
36. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant’s request as it relates to matters or people other than that specified in the request.
37. I am satisfied it was practicable for the Agency to provide edited copies of Documents 1 to 4 with exempt and irrelevant information deleted under section 25, as the documents retained meaning.
38. I am also satisfied it was not practicable for the Agency to provide an edited copy of Document 5 with exempt information deleted, as to do so would render the document meaningless. Therefore, Document 5 is exempt in full.
39. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Conclusion

40. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 33(1) and 35(1)(b).
41. Accordingly, my decision on the Applicant’s request is the same as the Agency’s decision.

Review rights

42. 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.¹⁸
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
45. 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.
46. 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.²¹

¹⁶ *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].

¹⁷ *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].

¹⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁹ Section 52(5).

²⁰ Section 52(9).

²¹ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|--------------------------------------|--------------|-----------------------------------|---|--|
| 1. | [Date] | Incident Fact Sheet | 3 | Released in part Section 33(1) | Release in part Sections 33(1), 25 My decision on the document is the same as the Agency's decision | Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information in the document for the reasons outlined in the Notice of Decision above. Section 25: I am satisfied it was practicable for the Agency to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25. |
| 2. | [Date] | LEAP Incident Report | 2 | Released in part Section 33(1) | Release in part Sections 33(1), 25 My decision on the document is the same as the Agency's decision | Sections 33(1) and 25: See comments for Document 1. |
| 3. | [Date] | Electronic Patrol Duty Return (ePDR) | 39 | Released in part Section 33(1) | Release in part Sections 33(1), 25 My decision on the document is the same as the Agency's decision | Sections 33(1): See comments for Document 1 above. Section 25: I am satisfied the information the Agency deleted from the document as 'not relevant' is irrelevant as it concerns other matters not specified in the Applicant's request. I am satisfied it was practicable for the Agency to provide an edited copy of the document to the Applicant. |

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision | OVIC Comments |
|--------------|------------------|----------------------------|--------------|---|--|---|
| 4. | [Date] | Daybook Notes – [redacted] | 2 | Released in part Section 33(1) | Release in part Sections 33(1), 25 My decision on the document is the same as the Agency's decision the redactions made by the Agency in the document. | Sections 33(1) and 25: See comments for Document 1 above. |
| 5. | [Date] | Witness Statement | 3 | Refused in full Sections 33(1), 35(1)(b) | Refuse in full Sections 33(1), 35(1)(b) My decision on the document is the same as the Agency's decision | Section 35(1)(b): I am satisfied the document is exempt from release under section 35(1)(b) for the reasons provided in the Notice of Decision. Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25 as to do so would render the document meaningless. Accordingly, I am satisfied the document is exempt in full. |