

Notice of Decision and Reasons for Decision

Applicant:	'FF9'
Agency:	Office of Public Prosecutions
Decision date:	23 June 2023
Exemptions considered:	Sections 33(1), 35(1)(b)
Citation:	'FF9' and Office of Public Prosecutions (Freedom of Information) [2023] VICmr 62 (23 June 2023)

FREEDOM OF INFORMATION – witness statements – criminal proceedings

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 documents are exempt from release under sections 33(1) and 35(1)(b).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

23 June 2023

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to a witness statement of a third party arising from a prosecution of another third party.
2. The Applicant subsequently expanded the scope of their FOI request to seek access to two further witness statements for the same prosecution.
3. Prior to making a decision on the request, the Agency sought confirmation from the Applicant whether [they] would consent to the deletion of 'personal affairs information'. The Applicant advised the Agency that [they] did not consent to the deletion of the names of third parties.
4. On [date], the Agency made a decision to refuse access to three witness statements in full under sections 33(1) and 35(1)(b) (**first decision**). As part of its decision, the Agency provided the Applicant with an option to apply for an internal review of the decision, in addition to the right to seek a review by the Information Commissioner.
5. On [date], the Applicant sought an internal review of the Agency's first decision and raised concern with the Agency that it had not provided [them] with a sufficient explanation of the meaning of personal affairs information for [them] to have made an informed decision in response to the Agency's enquiry if [they] would consent to deletion of such information.
6. This resulted in the Agency clarifying the meaning of 'personal affairs information' and the Applicant subsequently provided the Agency with consent to redact personal affairs information in the documents.
7. On [date], the Agency made a new decision on the Applicant's FOI request, where it again decided to refuse access to three witness statements under sections 33(1) and 35(1)(b) (**second decision**). The Agency's decision letter sets out the reasons for its decision.

Review application

8. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the requested documents.
9. I have examined a copy of the documents subject to review.
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties.
12. 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.
13. 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.

Internal FOI reviews

14. First, I will address the Agency's process of conducting internal reviews of FOI decisions.
15. Prior to amendment in 2012, section 51 of the FOI Act allowed applicants to apply to the principal officer of an agency for an internal review of a FOI decision.
16. In 2012, section 51 of the FOI Act was repealed and provided applicants with the right to make an application for review by the former Freedom of Information Commissioner (**FOIC**). In its second reading speech, the Minister made the following comments:

The most significant function of the FOI Commissioner will be to conduct reviews of government agencies' decisions to refuse access to documents, which will replace the current internal review process undertaken by agencies.¹

17. In 2017, a further amendment was made to section 49A of the FOI Act to provide applicants with the right to apply to the Information Commissioner for a review.
18. While the FOI Act does not specifically state that the principal officer of an agency cannot conduct an internal review of its own FOI decisions, I consider the changes made to the FOI Act in 2012, which include the repeal of the internal agency review provisions in section 51 and the creation of the FOIC with jurisdiction to review agency decisions prior to any rights to apply to VCAT for review, created a scheme whereby review in the first instance is to be undertaken by OVIC (as the successor to FOIC) and not the agency.
19. Irrespective of the above, as the Applicant has exercised [their] right to apply for a review following the Agency's second decision, I have conducted a review of that decision, noting both decisions refused access to the documents in full under sections 33(1) and 35(1)(b).

Review of exemptions

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

20. 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**);² and
 - (b) such disclosure would be 'unreasonable'.

Do the documents contain personal affairs information of individuals other than the Applicant?

¹ Victoria, *Second reading speech*, Legislative Assembly, 8 December 2011, p. 6298 (The Hon. A. J. McIntosh, MP), available at https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2011/Assembly_Daily_Extract_Thursday_8_December_2011_from_Book_20.pdf

² Sections 33(1) and 33(2).

21. 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 may be reasonably determined.³
22. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person.⁴ 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.
23. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁵
24. The documents are three witness statements from third parties that were provided to Victoria Police as part of its investigation into an offence.
25. I am satisfied the witness statements comprise of the personal affairs information of third parties, as they identify the third parties and contain their recollection of events.

Would disclosure of the personal affairs information be unreasonable?

26. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
27. In *Victoria Police v Marke*,⁶ 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'.⁷ 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'.⁸
28. 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

As noted above, the documents are three witness statements made by third parties.

The documents are sensitive in nature, having considered the context in which they were created and obtained by the Agency, and the sensitive content of the information.

(b) The circumstances in which the information was obtained

³ Section 33(9).

⁴ *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].

⁵ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

⁶ [2008] VSCA 218 at [76].

⁷ *Ibid.*

⁸ *Ibid* at [79].

The witness statements were obtained by Victoria Police during its investigation into a criminal offence, and were subsequently obtained by the Agency as part of its prosecution of the offence, and provided to the County Court for the prosecution.

The Agency submits that while the County Court made general references to some of the information in the witness statements, it did not make public the information contained in the statements.

I am of the view third parties, who provided the information to Victoria Police as part of its investigation, did so on the assumption the information would remain confidential unless required for a subsequent criminal investigation or legal process. In the circumstances, I am satisfied the third parties would have reasonably expected the information they provided as part of a police investigation would not be disclosed to the Applicant under the FOI Act.

(c) 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 under section 33(1).⁹

I note the Applicant is the victim of the criminal offence to which the prosecution relates and seeks access to the documents for personal reasons.

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

I am of the view there is a public interest in law enforcement and prosecution agencies maintaining their ability to receive confidential information on a voluntary basis from members of the public in order to conduct investigations and prosecute alleged criminal offences. If information of this type were to be routinely disclosed under the FOI Act, I am satisfied it would jeopardise the ability of law enforcement and prosecution agencies, such as the Agency and Victoria Police, to carry out its investigative and law enforcement functions.

(e) The likelihood of disclosure of information, if released.

I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

There is no information before me to suggest the Applicant intends to widely disseminate the documents, other than for personal use. Nevertheless, I consider it is reasonably likely the personal privacy of the third parties would be detrimentally impacted should their personal affairs information in the documents be disclosed under the FOI Act.

⁹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

- (f) 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.¹¹

I note the Agency invited the third parties to provide their views on disclosure of their personal affairs information. Only one third party responded and objected to disclosure of their personal affairs information.

I do not have any information before me concerning the views of the remaining third parties to whom the information relates. However, having considered the sensitive nature of the information in the documents and the circumstances in which it was obtained, I am of the view the individuals concerned would be reasonably likely to object to the release of their personal affairs information under the FOI Act.

- (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹²

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.¹³

There is not information before me to suggest this is a relevant factor in this matter.

29. On balance, I am satisfied it would be unreasonable to release the personal affairs information in the documents.
30. Accordingly, I am satisfied the documents are exempt from release under section 33(1).
31. My decision is set out in the Schedule of Documents in **Annexure 1**.

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

32. 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
 - (a) 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).

¹³ Section 33(2A).

Was the information obtained in confidence?

33. Whether information communicated by an individual to an agency was communicated in confidence is a question of fact.¹⁴
34. 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.¹⁵
35. As noted above, the documents are witness statements that third parties provided to Victoria Police as part of its investigation into a criminal offence. I accept the Agency would have obtained these documents as part of its role in prosecuting the offence.
36. There is nothing on the face of the documents to indicate the information was communicated in confidence. However, for the purposes of section 35(1)(b), a document need not be marked 'confidential' for the content to be considered information communicated in confidence.¹⁶
37. I consider the third parties who made statements to Victoria Police as part of the police investigation did so with the expectation the information they provided would remain confidential unless required for a subsequent criminal investigation or legal process.
38. Accordingly, I am satisfied disclosure of the documents would divulge information that was communicated in confidence.

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

39. 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 reasonably likely to be inhibited or deterred from providing similar information to the Agency in the future should the information be disclosed.
40. The public interest test in section 35(1)(b) is narrow, in that it is directed toward 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 if an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.¹⁷
41. I note the Agency submits, amongst other things:

The [Agency] is responsible for prosecuting the most egregious crimes in Victoria. It relies on engagement and cooperation with witnesses to conduct efficient and effective prosecutions. Routine disclosure of the kind of information requested by the Applicant, or similar, would impact the willingness of witnesses to provide information and the amount of information and level of detail provided. This reluctance goes further than mere disinclination as to candidness because witnesses may be discouraged from open and transparent communication with the

¹⁴ *Ryder v Booth* [1985] VR 869 at [883]; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

¹⁵ *XYZ v Victoria Police* [2010] VCAT 255 at [265], referring to *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

¹⁶ *Williams v Victoria Police* [2007] VCAT 1194 at [75].

¹⁷ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549 at [69], approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9.

[Agency] out of concern that the information they provided would be disclosed under the FOI Act. This would impact the ability of the [Agency] to obtain similar information in the future.

42. Law enforcement and prosecution agencies, such as the Agency and Victoria Police, rely on members of the public being able to provide confidential information to investigate and prosecute alleged offences.
43. I note the views of the Victorian Civil and Administrative Tribunal (**VCAT**) in *Williams v Victoria Police*¹⁸ and *RFJ v Victoria Police FOI Division*,¹⁹ where it was accepted that persons would be less likely to make statements to Victoria Police if they were of the view the making of such statements was not confidential.
44. I consider there is a strong public interest in the Agency and Victoria Police maintaining their ability to obtain information from third parties for the purposes of investigating or prosecuting criminal offences. I accept if such information were to be released under FOI, it would hinder the Agency's ability to prosecute criminal offences.
45. Accordingly, I am satisfied the witness statements are exempt from release under section 35(1)(b).
46. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 35(1)(b).

Section 25 – Deletion of exempt or irrelevant information

47. 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.
48. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²⁰ 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 25.²¹
49. I am satisfied the exemptions under sections 33(1) and 35(1)(b) apply to the documents in full. Accordingly, it is not practicable to delete exempt information from the documents.

Conclusion

50. On the information before me, I am satisfied the documents are exempt from release under sections 33(1) and 35(1)(b).
51. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.

¹⁸ [2007] VCAT 1194 at [73]

¹⁹ [2013] VCAT 1267 at [170].

²⁰ *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].

²¹ *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], [155].

Review rights

52. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²²
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²³
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁴
55. 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.
56. 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.²⁵

When this decision takes effect

57. My decision does not take effect until the Agency's 14 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²³ Section 52(5).

²⁴ Section 52(9).

²⁵ 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]	Witness Statement	4	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Sections 33(1), 35(1)(b)	<p>Section 33(1): I am satisfied the document is exempt from release under section 33(1) for the reasons provided in the Notice of Decision, above.</p> <p>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, above.</p> <p>Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>
2.	[Date]	Witness Statement	2	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Sections 33(1), 35(1)(b)	See comments for Document 1.
3.	[Date]	Witness Statement	10	Refused in full Sections 33(1), 35(1)(b)	Refuse in full Sections 33(1), 35(1)(b)	See comments for Document 1.