

## Notice of Decision and Reasons for Decision

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Applicant: AA7  
Agency: Victoria Police  
Decision Date: 21 March 2019  
Exemptions considered: Sections 31(1)(a) and 33(1)

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FREEDOM OF INFORMATION – police records – image of an offender relating to an incident – photograph of an offender – law enforcement documents – ongoing police investigation – documents affecting a third party’s personal privacy

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 on the Applicant’s request is the same as the Agency’s decision in that I have decided to deny access to the document.

My reasons for decision follow.

**Joanne Kummrow**  
Acting Public Access Deputy Commissioner

21 March 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the image of an offender involving an incident reported to the Agency by the Applicant on [date].
2. In its decision, the Agency identified a document falling within the terms of the Applicant's request. It decided to deny access to the document.

### Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have been briefed by OVIC staff who inspected the document claimed to be exempt under section 31(1).<sup>1</sup>
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications received from the parties, including:
  - (a) the Agency's decision on the FOI request; and
  - (b) the Applicant's review application.
7. 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

8. The Agency relied on the exemptions in sections 31(1) and 33(1) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

### **Section 31(1)(a)**

9. Section 31(1)(a) provides:

31 Law enforcement documents

Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

- (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;

10. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>2</sup> 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending

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<sup>1</sup> Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

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

prejudice.<sup>3</sup> 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.<sup>4</sup>

11. In its letter of decision, the Agency advised its investigation into the incident reported by the Applicant remains active and it is awaiting further intelligence regarding the identity of a suspect. The Agency advised the release of the image would be reasonably likely to prejudice its ongoing investigation of the matter.
12. In his review application, the Applicant advised he is requesting the image so it can be posted on the 'Crime Stoppers' website. He also referred to two Crime Stoppers posters featuring images of suspects to demonstrate images of other offenders are released.
13. I accept the Agency's submission on this matter, and have decided the document is exempt under section 31(1)(a) for the following reasons:
  - (a) I accept the information provided by the Agency, that the document relates to the investigation of a breach or possible breach of the law, and the Agency's investigation is ongoing;
  - (b) I also accept, in matters relating to its investigations, the Agency can decide whether the release of images is likely to assist or hinder its investigations;
  - (c) the FOI Act does not impose any conditions or restrictions on an applicant's use or further dissemination of documents obtained under the Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the image by the Applicant; and
  - (d) as the image could be evidence of a crime, its disclosure under the FOI Act at this time could prejudice the Agency's ongoing investigation of the matter.

### **Section 33(1)**

14. 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;<sup>5</sup> and
  - (b) such disclosure would be 'unreasonable'.
15. 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.<sup>6</sup>
16. 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.
17. The Victorian Civil and Administrative Tribunal has held it is not in the public interest to release the names of suspects unless charges have been laid against such suspects.<sup>7</sup>

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<sup>3</sup> Ibid, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

<sup>4</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

<sup>5</sup> Sections 33(1) and (2).

<sup>6</sup> Section 33(9).

<sup>7</sup> *Williams v Victoria Police (General)* [2007] VCAT 1194 at [33] (per Bowen J, VCAT President).

18. The Agency advised it was not practicable to consult with the relevant third party to seek that party's views on disclosure of their personal affairs information to the Applicant. I agree with the Agency's decision in light of the circumstances of this matter.
19. The Agency applied this exemption to the image of a person other than the Applicant. The image is the personal affairs of that person.
20. I have decided it would be unreasonable to release the third party's personal affairs information for the following reasons:
  - (a) the information is sensitive personal information, being a person's image at a particular point in time;
  - (b) the personal information is that of a suspect who has not yet been charged with an offence;
  - (c) the information was obtained in the course of a police investigation;
  - (d) release of the information would hinder the Agency's ongoing investigation into the incident and any possible prosecution should charges be laid against an alleged offender; and
  - (e) the information is not available to the public;
  - (f) while I acknowledge the Applicant's personal interest in disclosure of the document, I am not satisfied any possible public interest in the release of the document outweighs the personal privacy rights of the relevant third party; and
  - (g) there is a public interest in the information remaining confidential as it was obtained and forms part of an ongoing police investigation.
21. Therefore, I am satisfied the document is also exempt under section 33(1).

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

22. 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.
23. 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 the document meaningless they are not 'practicable' and release of the document is not required under section 25.<sup>9</sup>
24. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the document meaningless.

#### ***Conclusion***

25. On the information available, I am satisfied the document is exempt under sections 31(1)(a) and 33(1).

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<sup>8</sup> *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 [82].

<sup>9</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

26. As it is not practicable to edit the document to delete exempt information, I have determined to refuse access to the document in full.

### **Review rights**

27. 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>
28. The Applicant may apply to VCAT for a review up to 60 days from the date he is given this Notice of Decision.<sup>11</sup>
29. 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>
30. 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.
31. 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>

### ***When this decision takes effect***

32. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

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<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).