

## Notice of Decision and Reasons for Decision

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Applicant:	'AD8'
Agency:	Victoria Police
Decision Date:	24 May 2019
Exemption considered:	Section 33
Citation:	'AD8' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 35 (24 May 2019)

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FREEDOM OF INFORMATION – CCTV footage – personal affairs 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 in that I have decided to refuse access to the document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

24 May 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant amended the scope of the initial request.
2. The amended request was for access to certain reports and notes, which included 'CCTV footage limited to the happening of the incident and say 3 minutes before and after the event'.
3. In its decision, the Agency identified 10 documents falling within the terms of the Applicant's request. It decided to grant access to nine of those documents in part, and refuse access to one document in full, namely the CCTV footage.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant indicated they seek review of the Agency's 'decision to deny access to the extract of the CCTV footage'. Accordingly, this review relates to the CCTV footage to which the Agency refused access in full only (the **document**).
6. I have been briefed by OVIC staff who inspected the document claimed to be exempt under section 31(1).<sup>1</sup>
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) information provided with the Applicant's review application; and
  - (c) communication between OVIC staff, the Applicant's legal representative and the Agency during the review.
9. 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

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

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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.

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

11. 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>2</sup> and
  - (b) such disclosure would be 'unreasonable'.
12. 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>3</sup> Broadly speaking, information relates to a person's personal affairs if it concerns or affects that person as an individual.<sup>4</sup>
13. The Victorian Civil and Administrative Tribunal (**VCAT**) has accepted a document will disclose personal affairs information if the document is capable, either directly or indirectly, of identifying a particular individual whose personal affairs are disclosed. As disclosure under the FOI Act is not subject to restriction or condition, this is to be interpreted by reference to the capacity of any member of the public to potentially identify a third party.<sup>5</sup>
14. VCAT has also noted CCTV footage may disclose the personal affairs of persons other than an FOI applicant even if it does not show the faces of those third parties. An individual may be capable of being identified by what they were wearing, what they were doing or by their voice.<sup>6</sup>
15. I have been briefed by OVIC staff who inspected the footage subject to review. The document shows the individuals involved, including facial features of the alleged offenders, victims, and numerous third party witnesses.
16. I consider the picture quality of the footage sufficiently clear to show identifying features of the individuals captured.
17. I am satisfied the identities and locations of the individuals are reasonably capable of being determined by persons with knowledge of or involvement in the events to which they relate or any other member of the public.
18. Therefore, I am satisfied the document contains the personal affairs information of individuals other than the Applicants.
19. The concept of 'unreasonable disclosure' involves balancing the public interest in the unrestricted unconditional disclosure of official information with the personal interest in privacy, in the particular circumstances of a matter.
20. I am of the view releasing the document would be unreasonable in the circumstances. In making my decision, I have weighed the public interest in disclosure with the personal interest in privacy, with consideration given to:
  - (a) the nature of the personal affairs information;
  - (b) the circumstances in which the information was obtained;

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

<sup>3</sup> Section 33(9).

<sup>4</sup> *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

<sup>5</sup> *O'Sullivan v Department of Health & Community Services (No 2)* [1995] 9 VAR 1 at 14; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

<sup>6</sup> *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

- (c) the Applicant's interest in the information (including the purpose for seeking access to the document);
  - (d) whether the individuals to whom the information relates object or would be likely to object to the release of the information; and
  - (e) the likelihood of further disclosure of the information, if released.
21. I acknowledge the private and legal reasons for which the Applicant seeks the document. While the Applicant has a private interest in the document, I do not consider the public interest would be promoted by the release of the personal affairs information of third parties contained in the document. The Applicant's interest in obtaining the information is only one of the factors I must consider. It does not of itself determine whether disclosure would be reasonable or unreasonable in the circumstances.
  22. The personal affairs information in the document was obtained by the Agency for the purposes of undertaking a criminal investigation. I accept the document was provided in confidence on the understanding it would only be used for the limited purpose of the Agency's investigation and any potential criminal prosecution. This weighs against disclosure under the FOI Act.
  23. The CCTV footage was captured by private businesses for security purposes. While members of the public captured in the footage would reasonably expect the footage could be disclosed to a law enforcement agency to assist its officers with an investigation or prosecution of a criminal offence, I consider the individuals captured would be likely to not expect, nor consent to, it being released to an individual under the FOI Act and for reasons other than law enforcement related purposes.
  24. I have considered the likelihood and potential effect of wider dissemination of the document, if released, given the FOI Act does not place any conditions or restrictions on an applicant's use of a document (including further or public dissemination) obtained under the FOI Act. While there is no evidence to suggest the Applicant would disseminate the document, I am of the view disclosure is contrary to the public interest in the circumstances.
  25. There is no information before me to suggest the public interest would be promoted by the release of personal information of third parties as release of the document would serve the Applicant's private interests only.
  26. I am of the view the greater public interest lies in the Agency preserving the confidentiality of the information provided during the course of its investigation. This ensures the Agency's ability to obtain similar information and cooperation from the public in order to effectively carry out its investigative functions. Therefore, I consider there is a greater public interest in the third parties' information not being released to the Applicant.
  27. On 1 September 2017, changes to the FOI Act introduced section 33(2B), which requires an Agency to consult with individuals whose personal details are captured within a document in order to seek that person's view regarding disclosure. The results of this consultation process should be considered by the Agency prior to determining a document is exempt under section 33(1).
  28. The Agency advised in its decision letter that, in reaching its original decision, the views of those third parties who were consulted about disclosure of the document, were taken into account.
  29. Given the circumstances, I am of the view the third parties, whose personal affairs information is contained in the document, would be reasonably likely to object to the release of their personal affairs information given the circumstances in which it was captured and the unrestricted and unconditional nature of release under the FOI Act.

30. Section 25 requires an agency to grant access to an edited copy of a document containing exempt or irrelevant information if it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
31. I do not consider it would be practicable for the Agency to edit the document due to the nature of the incident captured and given the personal affairs information of the offenders is inextricably intertwined with the personal affairs information of the victims and third party witnesses.
32. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>7</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>8</sup>
33. The Agency in its decision letter stated the following in relation to editing the document:

... both the Media & Corporate Communications Department and the Forensic Services Department of Victoria Police have software which enables the pixilation of video images. However, I am advised that it would take a full day to edit just five minutes of CCTV footage to pixilate the denied information. The process requires that each frame of the footage be edited and re-edited depending on the number of persons who appear in the footage.
34. I have considered the effect of deleting exempt information from the document in accordance with section 25. In my view, it is not practicable for the Agency to delete the exempt information due to the fact editing the exempt information would render the CCTV footage meaningless.
35. I note the Agency also relies on the exemption in section 31(1)(a) to deny access to the document as its investigation remains unresolved in relation to an unidentified offender.
36. In light of my decision the document is exempt under section 33(1), it is not necessary for me to consider the additional exemption relied on by the Agency.

### **Conclusion**

37. On the information available, I am satisfied the document is exempt under section 33(1) and it is not practicable for the Agency to edit the footage in order to delete exempt information.
38. Accordingly, I have determined to refuse access to the document in full under section 33(1).

### **Review rights**

39. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>9</sup>
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>

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<sup>7</sup> *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].

<sup>8</sup> *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].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

42. 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.
43. 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>12</sup>

***When this decision takes effect***

44. 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>12</sup> Sections 50(3F) and (3FA).