

## Notice of Decision and Reasons for Decision

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Applicant:	AD3
Agency:	Victoria Police
Decision Date:	16 May 2019
Exemptions considered:	Section 31(1)(a)
Citation:	<i>AD3 and Victoria Police (Freedom of Information)</i> [2019] VICmr 30 (16 May 2019)

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FREEDOM OF INFORMATION – CCTV footage – police records – evidence gathered during police investigation – ongoing police investigation – law enforcement documents

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 the document requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision.

My reasons for decision follow.

Joanne Kummrow  
**Public Access Deputy Commissioner**

16 May 2019

## Reasons for Decision

### Background to review

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

CCTV footage from an incident at the [named restaurant/place of business] in [location] on [date and time].
2. In its decision, the Agency identified a document falling within the terms of the Applicant's request. It decided to refuse access to the document in full.

### 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 indicated they do not seek review of information exempted by the Agency under section 33(1). Accordingly, this review relates to the application of section 31(1)(a) to the CCTV footage only (the **document**). The document concerns an alleged assault at a café.
5. The footage contains evidence gathered by the Agency as part of an investigation into the alleged incident.
6. The footage is captured from the street intersection outside the café.
7. I have been briefed by OVIC staff who inspected the document, as section 63D provides documents exempted under section 31(1) may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.<sup>1</sup>
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, including:
  - (a) the Agency's decision on the FOI request; and
  - (b) the Applicant's submission provided by telephone on 5 March 2019 and information provided with the Applicant's review application.
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.

### Review of exemptions

11. The Agency relied on the exemptions under sections 31(1) and 33(1) 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 31(1)(a)**

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

### **31 Law enforcement documents**

1. 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;

13. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.<sup>2</sup>

14. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>3</sup>

15. '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>

16. In its decision letter, the Agency advises the footage contains information relating to the police investigation and would be reasonably likely to prejudice the police investigation if disclosed. Accordingly, it relies on the exemption under section 31(1)(a) to exempt it from release.

17. OVIC staff made enquiries with the Agency, which contacted the Agency officers responsible for the investigation. As a result of these enquiries, the Agency advised the investigation is not yet finalised and, consequently, the matter remains an open investigation.

18. The Agency advises the footage comprises evidence relevant to the Agency's open investigation, which I accept. If this evidence were to be disclosed under the FOI Act, which involves the unconditional and unrestricted release of information, it would be reasonably likely to prejudice the Agency's open investigation and compromise the possible future completion of the case.

19. I agree with the views expressed in *RFJ v Victoria Police FOI Division*,<sup>5</sup> where the Victorian Civil and Administrative Tribunal (VCAT) accepted evidence given by an Agency witness who identified the 'prejudice' to the investigation in that case to include:

- If the documents became known to a person who was responsible for the offence, that person would know the information that the police have obtained. It would make clear what was known to the police and also what evidence, if any, has not yet been uncovered. A person or persons could use that information to avoid being connected with the crime;
- Even seemingly innocuous information could be extremely useful to an offender as that person could modify his or her behaviour to prepare an explanation or alibi in the event they were ever asked about their involvement;
- If an offender or any member of the community had access to information collected during an investigation, the offender would know what evidence a witness could give before a formal interview has been conducted;
- Release of documents could reveal evidence that could be used in laying charges and subsequent prosecutions, prior to the offender being interviewed and charged.

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<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.

<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> [2013] VCAT 1267.

20. The Applicant advised in their review application that they seek access to the footage so they can attempt to take legal action against a third party captured in the footage and for their own personal records.
21. I accept the Applicant does not seek access to any personal information relating to the identity of a person who was involved in the alleged incident. However, from my understanding of the footage, based on a briefing by OVIC staff, any information that includes identifying information is entwined with other information relating to the open investigation.
22. I also accept the Agency's submission on this matter and the evidence presented in *RFJ v Victoria Police FOI Division*, which I consider applies in this matter. Accordingly, I have decided the document is exempt under section 31(1)(a) for the following reasons:
  - (a) I accept the document relates to the Agency's investigation of a breach or possible breach of the law, and the investigation is ongoing.
  - (b) I also accept, in matters relating to its investigations, the Agency can decide whether the release of footage is likely to assist or hinder an investigation.
  - (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. As the footage could be evidence of a crime, its disclosure under the FOI Act, at this time, while the investigation remains open, could prejudice the Agency's ongoing investigation of the matter.

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

23. 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.
24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>6</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>7</sup>
25. 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***

26. On the information before me, I am satisfied the document is exempt under section 31(1)(a).
27. As it is not practicable to edit the document to delete exempt information, I have determined to refuse access to the document in full.

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<sup>6</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>7</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].

## **Review rights**

28. 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>8</sup>
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>9</sup>
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>10</sup>
31. 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.
32. 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>11</sup>

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

33. 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.
34. For that reason, my decision does not take effect until that 60 day period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

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<sup>8</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>9</sup> Section 52(5).

<sup>10</sup> Section 52(9).

<sup>11</sup> Sections 50(3F) and (3FA).