

Notice of Decision and Reasons for Decision

Applicant:	AE7
Agency:	Victoria Police
Decision Date:	30 May 2019
Exemptions considered:	Section 31(1)(a), 33(1)
Citation:	<i>AE7 and Victoria Police (Freedom of Information)</i> [2019] VICmr 43 (30 May 2019)

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 documents 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

30 May 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents in relation to an incident at a shopping centre:

The CCTV footage of the man who stolen [sic] my handbag, or a photo of the man.

2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to refuse access to the documents 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 photograph and CCTV footage is captured by the store within the shopping centre where the incident occurred.
5. I have been briefed by OVIC staff, who inspected the documents, 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.¹
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. 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 dated 3 April 2019 and information provided with the Applicant's review application.
8. 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

9. The Agency relies on the exemptions under sections 31(1) and 33(1) to refuse access to the documents in full. The Agency's decision letter sets out the reasons for its decision.

Section 31(1)(a)

10. Section 31(1)(a) provides a document is an exempt document if its disclosure under the FOI Act would, or would be reasonably likely to 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.
11. 'Reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.²

¹ 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.

12. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
13. '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.⁴
14. The Applicant advised in their submission they seek access to the documents so they can be alert if the alleged perpetrator comes into contact with the Applicant and their family again.
15. In its decision letter, the Agency advised the CCTV footage and the photograph of the suspect depict the alleged offender and their actions, and form potential evidence gathered by police during the course of a criminal investigation. The Agency advised disclosure would be reasonably likely to prejudice the police investigation and accordingly, relies on the exemption under section 31(1)(a) to exempt it from release.
16. OVIC staff made enquiries with the Agency, which advised the investigation is not yet finalised and, consequently, the matter remains an open investigation as at the time of this decision.
17. I accept the Agency's advice the CCTV footage comprises evidence relevant to an open police investigation. 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.
18. I accept the Agency's submission and evidence, which I consider is relevant to this matter, that was heard and accepted by the Victorian Civil and Administrative Tribunal (**VCAT**) in the matter of *RFJ v Victoria Police FOI Division*.⁵ In that matter, a sworn police member gave evidence in relation to prejudice in the context of disclosure of information in the context of an ongoing police investigation:

I accept Detective Senior Sergeant AB's evidence about the potential consequences of the release of material such as documents 47 and 57 and the prejudice which may arise in relation to both the investigation of the second fire and the enforcement of the law in respect of that fire. The identified prejudice includes:

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 or 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;...⁶

² *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.

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

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

⁵ [2013] VCAT 1267.

⁶ [2013] VCAT 1267 at [134].

19. Accordingly, I have decided the documents are exempt under section 31(1)(a) for the following reasons:
- (a) I accept the documents relate to an ongoing police investigation of a breach, or possible breach, of the law.
 - (b) I also accept, in matters relating to a police investigation, the Agency can decide whether the release of footage or other information obtained during the course of the investigation, is likely to assist or hinder the 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 FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the image or footage of the Applicant. As the documents could be evidence of a crime, its disclosure under the FOI Act when the investigation remains open could prejudice the Agency's ongoing investigation of the matter.
20. In light of my decision, it is not necessary for me to consider the exemption relied on by the Agency under section 33(1).

Deletion of exempt or irrelevant information

21. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the documents meaningless.

Conclusion

22. On the information available, I am satisfied the documents are exempt under section 31(1).
23. As the Applicant has indicated they do not wish to receive an edited copy of the documents, I have determined to refuse access in full.

Review rights

24. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
27. 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.
28. 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.¹⁰

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).

When this decision takes effect

29. 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.
30. 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.