

Notice of Decision and Reasons for Decision

Applicant:	'AG9'
Agency:	Victoria Police
Decision Date:	12 July 2019
Exemptions considered:	Section 33(1)
Citation:	'AG9' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 63 (12 July 2019)

FREEDOM OF INFORMATION – CCTV footage – personal affairs information – police records – evidence gathered during police investigation – practicability to edit – section 25

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.

Sven Bluemmel
Information Commissioner

12 July 2019

Reasons for Decision

Background to review

1. The Applicant, through [their] representative, made a request to the Agency for access to the following documents:

Copies of all documents including internal memoranda, file notes, correspondence, investigation reports created or received by [the Agency] and CCTV footages recorded at [location] in respect of two incidents involving [client] at [location] which occurred on [date range].

2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to some of those documents in part and refuse access to one document in full.

Review

3. The Applicant is represented by [their] son, who acts on [their] behalf in a legal capacity.
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 the review relates to access to the CCTV footage that was found as a part of the request. Accordingly, this review relates to the CCTV footage that was denied in full.
6. I have examined the CCTV footage that is subject to review.
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) the Applicant's submission dated 19 February 2019 and information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 1 July 2019.
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 exemption under section 33(1) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Section 33(1) – Documents containing personal affairs information

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;¹ and
 - (b) Such disclosure would be 'unreasonable'.

¹ Sections 33(1) and (2).

12. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.² It has also been held information relates to a person's personal affairs if it 'concerns or affects that person as an individual'.³
13. The Victorian Civil and Administrative Tribunal (**VCAT**) has held a document will disclose personal affairs information if the document is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁴
14. VCAT has determined CCTV footage may disclose the personal affairs of persons other than an applicant even if it does not show their faces. An individual may be capable of being identified by what they were wearing or what they were doing.⁵

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

15. The CCTV footage is captured from inside [a shared] residence. It is 1 hour and 43 minutes long, representing over 3 hours of footage that has been sped-up. The footage depicts residents, staff members and other third parties in a hallway of the residence.
16. I consider the quality of the footage is sufficiently clear at various times and to varying degrees to show identifying features of the individuals captured in the footage, such as facial features, movement, attire and location of residential rooms.
17. I am satisfied the identities of the individuals whose images appear in the footage, are reasonably capable of being determined by persons with knowledge of the location, or involvement in the residence to which this footage relates, or any other member of the public.
18. Therefore, I am satisfied the CCTV footage contains personal affairs information of individuals other than the Applicant.

Would release of the personal affairs information be unreasonable?

19. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
20. I have determined disclosure of the personal affairs information contained in the document would be unreasonable for the following reasons:
 - (a) The nature of the personal affairs information:

The footage contains personal affairs information of persons other than the Applicant, including facial features, movement and attire and location of residential rooms. I am satisfied the personal affairs information of those who are going about their private lives in a residential [setting] is by its nature very personal and inherently private.
 - (b) The circumstances in which the information was obtained:

The Applicant seeks access to CCTV footage acquired by the Agency from the [shared] residence for the purpose of investigating a complaint made to the Agency. The Agency obtained the information as part of its functions in the detection, investigation and prevention of past and future criminal matters. However, from the face of the document, no allegations appear to have proceeded to being tested in open court. This weighs against disclosure.

² Section 33(9).

³ *Hanson v Department of Education and Training* [2007] VCAT 123 at [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 *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

- (c) The extent to which the information is available to the public:
The information contained in the document is not available in the public domain. As stated above, from the face of the document, the allegations do not appear to have been tested in open court. This weighs against disclosure.
- (d) The Applicant's interest in the information being disclosed:
It appears from the Applicant's submissions that they seek the footage for the purpose of investigating an alleged assault that occurred at the residence. I accept this represents a genuine and personal reason for seeking access to the information.
- (e) Whether the applicant's purpose for seeking access to the information is likely to be achieved by granting them access to that information:
As part of discussions held with the Applicant, our office informed the Applicant of the uneventful nature of the footage and that there appeared to be no specific incident regarding the Applicant captured by the footage.

I note that in *Corry*,⁶ VCAT held that where there would be no benefit to the applicant if the information were released, and the person to which it related objected, disclosure would be unreasonable.

- (f) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information:
Given the circumstances in which the Agency obtained the information, I am satisfied the third parties would be reasonably likely to object to its release. This weighs against disclosure.

Deletion of exempt or irrelevant information

21. 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.
22. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸
23. In my view, editing the footage is not practicable, taking into account:
- (a) the movement of the individuals captured by the footage;
 - (b) the attempts made by staff members at OVIC to edit the footage to remove the personal affairs information;
 - (c) the fact that the footage would not be of any assistance to the Applicant;
 - (d) that deleting the exempt information would render the document meaningless; and
 - (e) the fact that the footage, even if extensively edited, would still disclose personal affairs information to any viewer with contextual knowledge of the location, for example residents and visitors.

⁶ *Corry v Victoria Police* [2010] VCAT 282 at [20]-[22].

⁷ *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].

⁸ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

Conclusion

24. On the information available, I am satisfied the exemption in section 33(1) applies to the document. 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

25. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
28. 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.
29. 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.¹²

When this decision takes effect

30. 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.
31. For that reason, my decision does not take effect until that 60 day period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).