

## Notice of Decision and Reasons for Decision

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Applicant:	'AK5'
Agency:	Victoria Police
Decision Date:	5 September 2019
Exemption considered:	Section 33(1)
Citation:	'AK5' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 95 (5 September 2019)

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FREEDOM OF INFORMATION – personal affairs information – CCTV footage – police station – unreasonable disclosure of personal affairs information of third parties

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

5 September 2019

## Reasons for Decision

### Background to review

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

... copies of all CCTV and photographs taken and obtained, relating to my client on [date]...

First incident:

- CCTV footage or photographs taken or obtained of an interaction/arrest between [named persons] and my client between [time period] at [location].

Second incident:

- All CCTV footage of my client at the [location] Police Station from [time] in the Sally Port/police cells/station – involving police members (including): [named officers].

2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to grant access to one document in full and refuse access to the second document, which is CCTV footage, in full.

### Review

3. The Applicant, through their legal representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the CCTV footage.
4. I have examined a copy of the CCTV footage subject to review.
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, dated 4 June 2019;
  - (b) information provided with the Applicant's review application dated 4 July 2019; and
  - (c) correspondence received from the Applicant's legal representative on 30 July, 13 August and 28 August 2019.
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 exemption under section 33(1) to refuse access to the CCTV footage. The Agency's decision letter sets out the reasons for its decision.

### **Section 33(1) – Documents containing personal affairs information**

9. 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>1</sup> and
  - (b) such disclosure would be unreasonable.

#### *Does the document contain personal affairs information?*

10. Information will relate to the ‘personal affairs’ of a person if it is reasonably capable of identifying them, or of disclosing their address or location.<sup>2</sup> It has also been held that information will relate to someone’s personal affairs if it ‘concerns or affects that person as an individual’.<sup>3</sup>
11. The Victorian Civil and Administrative Tribunal (VCAT) has held a document will disclose personal affairs information if it 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 the capacity of any member of the public to potentially identify a third party.<sup>4</sup>
12. The CCTV footage is captured from a single security camera located inside the sally port of a police station. The colour footage is approximately 15 minutes in duration and does not contain audio. It depicts a physical altercation between the Applicant and several police officers.
13. I consider the quality of the footage is sufficiently clear at various times and to varying degrees to show identifying features of individuals captured, including facial features of the Applicant and police officers. I am satisfied their identities are reasonably capable of being identified by persons with knowledge of or involvement in the events to which they relate, or any other member of the public.
14. Accordingly, I am satisfied the CCTV footage contains personal affairs information of persons other than the Applicant.

#### *Would release of the personal affairs information be unreasonable?*

15. The concept of ‘unreasonable disclosure’ involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
16. I am satisfied disclosure of the personal affairs information in the CCTV footage would be unreasonable for the following reasons:

(a) The nature of the personal affairs information

The footage contains personal affairs information of third parties other than the Applicant, namely various police officers.

I note it has been held there is nothing particularly sensitive about matters occurring or arising in the course of an agency officer’s official duties, and disclosure of this type of information is generally considered to not be unreasonable.<sup>5</sup>

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

<sup>2</sup> Section 33(9).

<sup>3</sup> *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

<sup>4</sup> *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].

<sup>5</sup> See *Milthorpe v Mt Alexander Shire Council* [1996] VCAT 368.

I consider the actions of Agency staff captured in the CCTV footage depict them carrying out their professional or official duties. However, I am informed the footage formed part of investigations into the conduct of the Agency staff and was the subject of legal proceedings.

Therefore, I do not consider the context in which the police officers are captured in the footage represents them undertaking their usual or ordinary duties such that disclosure of their personal affairs information would be reasonable. I consider this factor neither weighs for or against release of the footage.

Further, having reviewed the footage and in light of the circumstances surrounding the CCTV footage, I consider it is sensitive in nature in that it relates to matters that are the subject of formal investigations and litigation. I consider this factor weighs against release of the footage.

(b) The Applicant's interest in the information

The FOI Act provides a general right of access to information held by government that can be exercised by any person. However, the reasons why an applicant seeks to access a document is a relevant consideration in determining whether disclosure would be unreasonable.<sup>6</sup>

In their request for review, the Applicant's legal representative states the Applicant is seeking access to the CCTV footage for their 'personal records'. However, the Applicant's legal representative advised during the review the CCTV footage was previously obtained by the Applicant through disclosure in litigation proceedings, and confirmed the Applicant currently has access to the footage.

I note disclosure of the footage through litigation proceedings is likely to be accompanied by restrictions over the Applicant's use of the footage for purposes other than the relevant litigation. In contrast, disclosure under the FOI Act is unrestricted and unconditional, which means an applicant may use a document or further disseminate it as they see fit. I consider this factor weighs against release of the footage.

(c) The extent to which the Applicant is likely to disclose the information requested if access were granted

I have considered the decision of the Victorian Supreme Court of Appeal in *Victoria Police v Marke*:<sup>7</sup>

...The extent of possible dissemination of the material containing the information relating to the personal affairs of a person is capable, in an appropriate case such as the present, of being an important consideration bearing upon the resolution of that issue. For instance, information splashed across the front-page of a tabloid newspaper, which relates to a person's personal affairs, will present a far greater assault on that person's right to privacy than would be the case if the same information were to be disclosed to an individual, who promised to confine its use to the resolution of a discrete task, the aims of which were consistent with the objects of the FOI Act.

Given the Applicant already has access to a copy of the CCTV footage, and noting the Applicant's stated reasons for seeking access to a copy under the FOI Act, I consider there is a reasonable chance the Applicant will further disclose or disseminate the footage if disclosed under the FOI Act. I consider this factor weighs against release of the footage.

(d) Whether the person to whom the information relates object, or would be likely to object, to the release of the information

I consider the views of a person whose personal affairs information is contained in [the] document is a relevant factor, but not necessarily determinative.

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<sup>6</sup> *Victoria Police v Marke* (2008) 23 VR 223; 30 VAR 212; [2008] VSCA 2018 at [88].

<sup>7</sup> (2008) 23 VR 223; 30 VAR 212; [2008] VSCA 2018 at [88].

The Agency submits it attempted to consult with the police officers captured in the CCTV footage. The relevant individuals did not respond to consultation. Accordingly, I do not have any information before me as to the views of the third parties to whom the information relates. I consider this factor neither weighs for or against release of the footage.

- (e) Whether release of the information could lead the persons to whom it relates suffering stress and anxiety

Having considered the nature of the CCTV footage and the fact it relates to matters that were the subject of formal investigations and litigation now concluded, I consider release of the information and the likelihood of the Applicant further disclosing or disseminating the footage would be reasonably likely to cause stress and anxiety to the third parties captured in the footage. This is further supported in my view by the fact the footage captures an incident that occurred more than eight years ago. I consider these factors weigh against release of the footage.

- (f) Whether the disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>8</sup>

There is no information before me to suggest this is a relevant factor in this matter.

### **Conclusion**

17. On the information available before me and in light of the factors set out below, I am satisfied disclosure of the personal affairs information of third parties in the CCTV footage under the FOI Act would be unreasonable, on grounds:

- (a) the CCTV footage is sensitive in nature as it involves a physical altercation between the Applicant and police officers;
- (b) the Applicant has access to the CCTV footage, but seeks access to the footage under the FOI Act for '[their] personal records';
- (c) the Applicant has raised concerns about the conduct of the police officers captured in the footage that were investigated and the subject of legal proceedings, both of which are now concluded;
- (d) the FOI Act provides for the unrestricted and unconditional disclosure of documents which means a document may be further disclosed or broadly disseminated;
- (e) I consider there is a reasonable chance the Applicant will further disclose or disseminate the footage if disclosed under the FOI Act; and
- (f) further disclosing or disseminating the footage would be reasonably likely to cause stress and anxiety to the third parties captured in the footage given an investigation and legal proceedings concerning their conduct are now concluded.

18. Accordingly, I have determined the CCTV footage is exempt under section 33(1).

19. As the Applicant has indicated they do not wish to receive an edited copy of the document, access to the CCTV footage is refused in full.

### **Review rights**

20. 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>

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<sup>8</sup> Section 33(2A).

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

21. 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>
22. 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>
23. 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.
24. 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***

25. 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> Section 52(5).

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

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