

## Notice of Decision and Reasons for Decision

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Applicant:	'AL2'
Agency:	Victoria Police
Decision Date:	12 September 2019
Exemptions considered:	Sections 31(1)(a), 31(1)(d), 33(1)
Citation:	'AL2' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 101 (12 September 2019)

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FREEDOM OF INFORMATION – criminal investigation – CCTV footage – law enforcement documents – prejudice a fair trial – 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 release the documents in part.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
12 September 2019

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to the following documents:
  - The CCTV footage capturing a theft of a motor vehicle at [a specified time and date] at [a specified location]; and
  - The transcript of a 000 call [at a specified time] in relation to the above.
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to release one document in part and deny access to the other 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. I have examined copies of the documents subject to review and have been briefed by OVIC staff who inspected the documents claimed to be exempt under sections 31(1).<sup>1</sup>
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 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) communications between OVIC staff, the Agency and the Applicant.
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 exemptions under sections 31(1)(a), 31(1)(d) and 33(1) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

#### **Section 31(1)(a)**

9. The Agency advised OVIC that a related investigation is now complete. Accordingly, it no longer relies on the exemption under section 31(1)(a).

#### **Section 31(1)(b)**

10. Given the finalisation of the investigation, the Agency advised OVIC on 4 September 2019 it now seeks to rely on section 31(1)(b) in place of section 31(1)(a) as certain information in the documents may be used as evidence in future legal proceedings.

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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.

11. OVIC advised the Applicant of the new exemption claimed by the Agency and invited the Applicant to provide a response. To date, the Applicant has not provided a response in relation to the Agency's application of section 31(1)(b).
12. On 10 September 2019, the Agency advised it did not seek to apply section 31(1)(b) to certain information in the documents. The Schedule in **Annexure 1** provide further details.
13. Subject to section 31, section 31(1)(b) provides a document is exempt if its disclosure would, or would be reasonably likely to, 'prejudice the fair trial of a person or the impartial adjudication of a particular case'.
14. The exemption in section 31(1)(b) can apply in relation to current as well as contemplated legal proceedings.<sup>2</sup>
15. Section 31(1)(b) has been applied to exempt:
  - (a) information in an Event Chronology relating to actions taken by the Agency in the course of investigating a crime and locating an alleged perpetrator (**Document 1**); and
  - (b) CCTV footage of the crime (**Document 2**).
16. Having carefully reviewed the documents and considered the Agency's submission, I am satisfied the relevant information could be used as evidence in future legal proceedings based on information provided by the Agency that the matter is yet to be heard in open court and information in the documents is not in the public domain.
17. I am of the view the premature disclosure of this information, prior to it being heard and determined by a court, would be reasonably likely to prejudice the fair trial of the alleged offender.
18. Accordingly, I have determined Document 1 is exempt in part and Document 2 is exempt under section 31(1)(b).

### **Section 31(1)(d)**

19. Subject to section 31, section 31(1)(d) provides a document is exempt if its disclosure would, or would be reasonably likely to 'disclose methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law the disclosure of which would, or would be reasonably likely to, prejudice the effectiveness of those methods or procedures'.
20. The Agency's decision letter states:

This information refers to the procedures utilised by police ... the disclosure of which would be likely to prejudice the effectiveness of those procedures.
21. Having reviewed the exempt information, I am satisfied it relates to procedures employed by Agency officers when responding to requests for police assistance and relevant police investigations.
22. The exemption in section 31(1)(d) does not apply to widespread and well-known investigation methods and procedures.<sup>3</sup> On balance, I am satisfied the deleted information is not well known amongst the general public.

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<sup>2</sup> *Mond v Department of Justice* [2005] VCAT 2817 at [42].

<sup>3</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [177].

23. I have considered the likely effects of disclosing the exempt information and I am satisfied its release would be reasonably likely to undermine or comprise the Agency's ability to use the relevant investigation methods and procedures and, therefore, would prejudice the effectiveness of those methods and procedures.
24. I am constrained in providing any further description of the deleted information as to do so may inadvertently disclose information that is subject to the exemption.
25. Accordingly, I am satisfied the relevant information in Document 1 is exempt under section 31(1)(d).

**Section 33(1)**

26. 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>4</sup> and
  - (b) such disclosure would be 'unreasonable'.
27. 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>5</sup>
28. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.

*Does the information relate to the personal affairs information of an individual other than the Applicant?*

29. The exempt information relates to the telephone number and address of an individual other than the Applicant. I am satisfied this information relates to the personal affairs information of an individual other than the Applicant.

*Would it be unreasonable to release the person affairs information?*

30. I am of the view release of the information in the document would involve the unreasonable disclosure of personal affairs information of an individual other than the Applicant because:
  - (a) The information was obtained by the Agency in the course of a criminal investigation. It is reasonable to expect the information was provided to the Agency on the understanding it would only be used for the purpose of investigating a reported crime and in any subsequent prosecution of an alleged offender.
  - (b) The contents of the documents have not yet been aired in open court and this information is not in the public domain.
  - (c) The Applicant has advised they seek access to the documents to assist in the investigation of an insurance claim. Having reviewed the documents, I am of the view the personal affairs information of individuals other than the Applicant will not shed light on or assist in the investigation of the insurance claim.
  - (d) The Applicant's interest in obtaining the information is a matter of private interest. I do not consider any public interest would be promoted by disclosure of the third parties' personal affairs information to the Applicant.

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<sup>4</sup> Sections 33(1) and (2).

<sup>5</sup> Section 33(9).

31. Accordingly, I have determined the personal affairs information in Document 1 is exempt under section 33(1).

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

32. 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.
33. 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>
34. I have considered the effect of deleting the exempt information from Document 1. In my view, it is practicable to delete such information, because it would not require substantial time and effort, and the edited document would retain meaning.
35. However, in relation to Document 2, I have determined it would not be practicable to provide an edited copy of the document as any edited copy would not retain meaning. Therefore, I am satisfied this document is exempt in full.

### ***Conclusion***

36. My decision on the Applicant's request is the same as the Agency's decision in that I am satisfied:
- (a) In relation to Document 1, the relevant information is exempt under sections 31(1)(b), 31(1)(d) and 33(1); and
  - (b) In relation to Document 2, the document is exempt in full under section 31(1)(b).
37. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each document.

### ***Review rights***

38. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>8</sup>
39. 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>
40. 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>
41. 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.

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<sup>6</sup> *Mickelburgh 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].

<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).

42. 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***

43. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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

Annexure 1 - Schedule of Documents

Doc	Document Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Event Chronology	2	<p><b>Released in part</b> Sections 33(1), 31(1)(a), 31(1)(d)</p>	<p><b>Release in part</b> Sections 33(1), 31(1)(b), 31(1)(d), 25</p> <p>The document is exempt with the exception of the following information, which is to be released to the Applicant, as agreed by the Agency, and in accordance with section 25:</p> <ul style="list-style-type: none"> <li>- the entry at [specified time] with exception of the last five words which are exempt under section 31(1)(b);</li> <li>- the entry at [specified time];</li> <li>- the entry at [specified time];</li> <li>- the entry at [specified time]; and</li> <li>- the entry at [specified time].</li> </ul>	<p>During the review, the Agency agreed to release certain information to the Applicant that it originally exempted under section 31(1)(a). The Agency now relies on section 31(1)(b) to exempt information it previously exempted under section 31(1)(a) and which it has not agreed to release.</p> <p><b>Section 31(1)(b):</b> I am satisfied the entries at [two specified times] could be used as evidence in future legal proceedings and its disclosure would be reasonably likely to prejudice the fair trial of the alleged offender. Accordingly, the relevant information is exempt under section 31(1)(b).</p> <p><b>Section 31(1)(d):</b> I am satisfied the release of the entry at [specified time] would be reasonably likely to prejudice the effectiveness of the investigation methods and procedures used by the Agency when dealing with matters arising out of breaches or evasions of the law. Accordingly, the relevant information is exempt under section 31(1)(d).</p> <p><b>Section 33(1):</b> I am satisfied the release of the personal affairs information of individuals other than the Applicant would be unreasonable. Accordingly, the relevant information is exempt under section 33(1).</p> <p><b>Section 25:</b> I am satisfied it is practicable to delete exempt information in the document and release an edited copy of the document to the Applicant.</p>

**Annexure 1 - Schedule of Documents**

Doc	Document Description	Pages	Agency's Decision	OVIC Decision	OVIC Comments
2.		1 disc	<p><b>Refused in full</b>                      Sections 33(1), 31(1)(b),                      31(1)(d)</p>	<p><b>Refuse in full</b>                      Sections 31(1)(b)</p>	<p>The Agency now relies on section 31(1)(b), rather than section 31(1)(a), to exempt the document.</p> <p><b>Section 31(1)(b):</b> See comments for Document 1 above.</p>