

## Notice of Decision and Reasons for Decision

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Applicant:	'AL1'
Agency:	Victoria Police
Decision Date:	10 September 2019
Exemptions considered:	Section 31(1)(a) and 38 under the <i>Freedom of Information Act 1982</i> (Vic) and sections 30D and 30E of the <i>Surveillance Devices Act 1999</i> (Vic)
Citation:	'AL1' and Victoria Police ( <i>Freedom of Information</i> ) [2019] VICmr 100 (10 September 2019)

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FREEDOM OF INFORMATION – secrecy provision - *Surveillance Devices Act 1999* – body-worn cameras – evidence gathered during 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.

Sven Bluemmel  
**Information Commissioner**

10 September 2019

## Reasons for Decision

### Background to review

1. The Applicant through their representative made a request to the Agency for access to documents relating to contact the Applicant had with the Agency on a specified date.
2. In its decision, the Agency identified seven documents falling within the terms of the Applicant's request. It decided to release three documents in full, refuse access to three documents in part and refuse access to one 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 in full to Document 7 - body-worn camera footage and in part to Documents 1 – LEAP incident report, 3- Notes of attending member and 4 – Use of force form.
4. 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> I have been briefed by OVIC staff, who inspected the documents.
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) the information provided with the Applicant's review application; and
  - (c) the Agency's submission dated 3 June 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 sections 31(1)(a) to refuse access in part to Documents 1, 3 and 4 and in full to Document 7. The Agency further applied the exemption under section 38 to Document 7. The Agency's decision letter sets out the reasons for its decision.

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

9. 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.
10. 'Reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.<sup>2</sup>

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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.

<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.

11. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>3</sup>
12. '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>
13. The Applicant advised in their application for review, that they intend to make a complaint to the Police Conduct Unit.
14. In its decision letter, the Agency advised information contained in the documents forms evidence gathered by police during the course of a criminal investigation. According to the Agency, disclosure would be reasonably likely to prejudice the police investigation and accordingly it relies on the exemption under section 31(1)(a) to exempt the information from release.
15. OVIC staff made enquiries with the Agency, which stated the investigation is pending appropriate conclusion and outcomes as at the time of this decision.
16. I accept the Agency's advice that the information redacted from the documents comprises of evidence relevant to a police investigation. I am satisfied that 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 investigation and compromise the possible future completion of the case.
17. Having considered the relevant exemption, I have determined the Agency have correctly applied the exemption in section 31(1)(a) to the information contained in the documents subject to this review.

### **Section 38**

18. The Agency relies on section 38 in conjunction with sections 30D and 30E of the *Surveillance Devices Act 1999* (Vic) (**SD Act**) to exempt Document 7 - body-worn camera footage in full.
19. For a document to be exempt under section 38, the following conditions must be satisfied:
  - (a) the SD Act is an enactment in force, for the purposes of section 38;
  - (b) the document, as described in the Applicant's request, would contain the specific information prohibited from disclosure by sections 30D and 30E of the SD Act;
  - (c) the enactment prohibits persons from disclosing information that would fall in the terms of the Applicant's request; and
  - (d) the enactments must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
20. For section 38 to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

### *Application of the confidentiality provisions*

21. Section 30D of the SD Act provides:

#### **30D What is protected information?**

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<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].

In this Division –

“protected information” means –

...

(ab) any information obtained from the use of a body-worn camera or tablet computer by a police officer or an ambulance officer acting in the course of the officer’s duty; or

(ac) any information obtained from the use of a body-worn camera or a tablet computer by a prescribed person, or a person belonging to a prescribed class of persons, acting in the course of the persons duties in the prescribed circumstances;

22. Section 30E of the SD Act provides:

**30E Prohibition of use, communication or publication of protected information**

(1) A person is guilty of an offence if –

(a) the person intentionally, knowingly or recklessly uses, communicates or publishes any information; and

(b) the person knows that, or is reckless as to whether, the information is protected information; and

(c) the person that, or is reckless as to whether, the use, communication or publication of the information is not permitted by this Division.

Penalty: in the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both

23. In summary, sections 30D and 30E of the SD Act prohibit reckless or intentional disclosure of information obtained from a body-worn camera.

24. Unauthorised disclosure of such information is an offence and carries penalties under the SD Act. The financial penalty and potential imprisonment penalty associated with disclosure highlights the legislature’s intention that such information should remain protected.

25. I am satisfied the relevant sections of the SD Act prohibit the disclosure of information obtained from a body-worn camera.

26. Accordingly, I am satisfied:

(a) the SD Act is an enactment in force, for the purposes of section 38;

(b) Document 7, as described in the Applicant’s request, would contain the specific information prohibited from disclosure by sections 30D and 30E of the SD Act;

(c) the enactment prohibits persons from disclosing information that would fall in the terms of the Applicant’s request; and

(d) the prohibition is absolute, in that disclosure is not subject to exceptions or qualifications.

27. As such, I am satisfied Document 7 is exempt in full under section 38 in conjunction with sections 30D and 30E of the SD Act.

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

28. 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.
29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>5</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>6</sup>
30. I have considered the information the Agency deleted from Documents 1 and 3 as irrelevant. This content includes the employee numbers of Agency staff who performed the administrative function of printing the documents and information about other police matters which do not involve the Agency's investigation into the Applicant's matter. I am satisfied that this information falls outside the scope of the Applicant's request and I have determined it should remain deleted.
31. I have also considered the effect of deleting exempt information from Documents 1, 3, 4 and 7. I am of the view it is practicable to edit Document 1, 3 and 4 to remove the exempt material and am satisfied the Agency has done this appropriately. I consider it to be not practicable for the Agency to delete the exempt information in Document 7, because deleting the exempt information would render the document meaningless.

### **Conclusion**

32. My decision is the same as the Agency's decision.
33. On the information available, I am satisfied the exemptions in section 31(1) and section 38 apply to the documents.

### **Review rights**

34. 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>7</sup>
35. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
36. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
37. 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.
38. 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>10</sup>

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<sup>5</sup> *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].

<sup>6</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140], [155].

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

<sup>8</sup> Section 52(5).

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

<sup>10</sup> Sections 50(3F) and (3FA).

**When this decision takes effect**

39. 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.
40. 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.