

Notice of Decision and Reasons for Decision

Applicant:	'AV4'
Agency:	Victoria Police
Decision Date:	12 December 2019
Exemptions considered:	Section 33(1)
Citation:	'AV4' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 194 (12 December 2019)

FREEDOM OF INFORMATION – CCTV footage – personal affairs information – unreasonable disclosure

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 differs from the Agency's decision in that I have decided to release the document in full.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

12 December 2019

Reasons for Decision

Background to review

1. The Applicant, through its legal representative, made a request to the Agency for access to the following documents:
 - CCTV footage of the Incident captured at [venue name] on [date], which was provided to Victoria Police by the [venue];
 - All statements (both signed and unsigned) made to Victoria Police in connection with the incident; and
 - All statements (both signed and unsigned) made by the Victorian Police officers in connection with the incident.
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 the CCTV footage 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 Applicant indicated it did not press its request for access to the statements. Accordingly, this review relates only to one document (the **CCTV footage**) to which the Agency refused access in full.
5. I have examined the document subject to review.
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;
 - (b) the information provided with the Applicant's review application; and
 - (c) correspondence and documents provided by the Agency.
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 relied on the exemption in section 33(1) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Section 33(1)

10. 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'.

11. 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
12. 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

Does the document contain the 'personal affairs information' of individuals other than the Applicant?

13. The CCTV footage is captured from the Applicant's business security cameras, without audio, depicting the outside area of the business as well as the street that it is on.
14. The footage shows staff members of the Applicant, as well as third-party bystanders, patrons of the business, and parties to the incident.
15. I consider the quality of the footage is sufficiently clear at various times and to varying degrees to show identifying features of individuals in the footage, such as facial features, movement, attire and place of employment.
16. I am satisfied the identities of some of the individuals whose images appear in the footage, are reasonably capable of being determined by persons with knowledge of the location or of the incident.
17. In the circumstances of this case, I am satisfied the footage contains personal affairs information of individuals other than the Applicant.

Would the release of the personal affairs information be unreasonable?

18. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy.
19. Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.
20. In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information

¹ Sections 33(1) and (2).

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].

and seek their view as to whether disclosure of the document should occur.⁵ However, this obligation does not arise if:

- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
- (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
- (c) it is not practicable to do so.⁶

21. The Agency determined it was not practicable to consult with the third parties.

22. I have determined disclosure of the personal affairs information contained in the documents would not 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 place of employment. There are many bystanders/members of the public who frequently walk in and out of frame. This weighs against disclosure.

(b) The circumstances in which the information was obtained:

It would have been open to the Applicant to have kept a copy of the footage. Disclosing the footage would merely put the Applicant in the position it was prior to providing the only copy of the footage to the Agency. I consider this is a strong factor in favour of disclosure.

(c) Whether any public interest would be promoted by the release of the information:

The Applicant has stated its interest in obtaining the information is to allow it to pursue legal action. Therefore, I consider the Applicant's interest is primarily of a private nature in the absence of any public interest factors that would be served through disclosure of the information. This weighs against disclosure.

(d) The extent to which the information is available to the public:

The information contained in the document appears to have been shown in the public domain, albeit without any parties' consent. I understand the footage has been aired on national television around the time of the allegations being tested in the Melbourne Magistrates' Court.

The allegations arising from the incident have been tested in open court, resulting in a non-conviction. This supports disclosure.

(e) The Applicant's interest in the information being disclosed:

It appears from the Applicant's request for review, it seeks the footage for the purpose of determining its liability in common law proceedings in the County Court of Victoria. I accept this represents a genuine and personal reason for seeking access to the information. This supports disclosure.

(f) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information:

The Agency consulted with third parties relating to the personal affairs information contained in documents that are not subject to review however the Agency stated that no consultation occurred in relation to the CCTV footage as it was not considered practicable.

⁵ Section 33(2B).

⁶ Section 33(2C).

I note the fact that if a person does not object to disclosure does not necessarily mean section 33 does not apply.⁷

Conclusion

23. Balancing all of the above factors, I have determined to release the CCTV footage containing personal affairs information to the Applicant as it is not unreasonable to do so.

Review rights

24. 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.⁸
25. The Applicant may apply to VCAT for a review up to 60 days from the date it is given this Notice of Decision.⁹
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
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.¹¹

Other matters

29. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
30. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has stated the following:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹²

31. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹³
32. Given the nature of the matter involving the Applicant, there are numerous people who appear in the footage.

⁷ *McNamara v Deakin University* [2011] VCAT 1089 at [49].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).

¹² *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹³ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

33. I have decided notifying the relevant third parties would be an unnecessary intrusion for the following reasons:
- (a) the nature of the information;
 - (b) the context in which the information was provided, being predominantly communicated by the Applicant;
 - (c) the passage of time since the documents were created; and
 - (d) the fact that the footage was apparently shown on national television.
34. On balance, given the intrusion into the lives of the individuals whose personal information appears in the footage, even if they could be identified and located, I am not satisfied it is practicable to notify those individuals of their right of review.

When this decision takes effect

35. 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.