

Notice of Decision and Reasons for Decision

Applicant:	'AT5'
Agency:	Victoria Police
Decision date:	28 November 2019
Exemption considered:	Section 33(1)
Citation:	'AT5' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 177 (28 November 2019)

FREEDOM OF INFORMATION – CCTV footage – law enforcement documents – 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.

I am satisfied the document is exempt under section 33(1).

As I am satisfied it is not practicable to edit the document to delete exempt information in accordance with section 25, I have determined to refuse access to the document in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
28 November 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

Footage taken at [name] Station on [date] from approximately [time]. I am wanting the footage from prior to being approached by the PSOs until I was taken to the ambulance. Please include any footage available including when I was in the PSO's holding room.
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to the 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 been briefed by OVIC staff who inspected the document exempted by the Agency under section 31(1).¹
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 October 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 in section 31(1)(a) to refuse access to the document in full. The Agency's decision letter sets out the reasons for its decision.
9. I note during the review, the Agency sought to also rely on the exemption in section 33(1) to the document in full. OVIC advised the Applicant of the additional exemption relied on by the Agency and invited the Applicant to make a submission. To date, the Applicant has not provided a response.

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;² and
 - (b) such disclosure would be 'unreasonable'.

¹ 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.

² Sections 33(1) and (2).

Does the document contain personal affairs information?

11. 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.³
12. A document will disclose personal affairs information if the document 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 reference to the capacity of any member of the public to potentially identify a third party.⁴
13. CCTV footage may disclose the personal affairs of persons other than an FOI applicant even if it does not show the faces of those third parties. An individual may be capable of being identified by what they were wearing, what they were doing or by their voice.⁵
14. I have been briefed by OVIC staff who inspected the CCTV footage subject to review. The footage shows the individuals involved, including features of numerous third party witnesses, including Agency officers and members of the public.
15. I consider the picture quality of the CCTV footage is sufficiently clear to show identifying features of the individuals captured.
16. I am satisfied the identities and locations of the individuals are reasonably capable of being determined by persons with knowledge of, or involvement in, the events to which they relate or any other member of the public.
17. Therefore, I am satisfied the document contains the personal affairs information of individuals other than the Applicant.

Would release of the personal affairs information be unreasonable?

18. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the circumstances of a particular matter.
19. In determining whether disclosure of the personal affairs information in the document under the FOI Act would be unreasonable in the circumstances, I have given weight to the following factors:

- (a) The nature of the personal affairs information and the circumstances in which the information was obtained

The CCTV footage was captured by the train station for security purposes. The document was obtained by the Agency for the purposes of undertaking a criminal investigation, which has resulted in the Applicant being charged with a criminal offence.

Given the CCTV footage is captured in a public place, it features a number of third parties other than the Applicant, including members of the public, Agency officers and Protective Service Officers.

The CCTV footage relates to an incident involving the Applicant. In these circumstances, I consider the nature of the personal affairs information of third parties to be sensitive given the nature of the incident. On balance, this factor weighs against disclosure.

³ Section 33(9).

⁴ *O'Sullivan v Department of Health & 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].

- (b) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

I acknowledge the Applicant has been charged with a criminal offence by the Agency and seeks access to the document for the purpose of attending a forthcoming court hearing. I accept the Applicant has a strong personal interest in obtaining access to the documents in relation to forthcoming legal proceedings. Accordingly, I consider the Applicant's purpose for seeking the information is likely to be achieved if released. This weighs in favour of disclosure.

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

As stated above, the Applicant seeks access to the document for a forthcoming court hearing. As such, I consider this is a private matter rather than one in which disclosure of the document would promote the public interest.

In the absence of any information to suggest the public interest would be promoted by the release of personal affairs information of third parties in the document, I consider disclosure of the document would serve the Applicant's personal interests only. This weighs against disclosure.

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

I do not have specific information before me as to the views of the third party individuals in the CCTV footage to whom the personal affairs information relates, as the Agency determined it would not be practicable to undertake third party consultation.

Having been briefed on the sensitive content of the CCTV footage, I am of the view the third party individuals featured would be reasonably likely to object to the release of their personal affairs information under the FOI Act noting the nature of disclosure under the FOI Act is unconditional and unrestricted. This means an applicant is free to do as they wish with a document once released. On balance, this factor weighs against disclosure.

- (e) The likelihood of further disclosure of the information, if released

I have considered the likelihood and potential effect of wider dissemination of the document, if released, given the FOI Act does not place any conditions or restrictions on an applicant's use of a document (including further or public dissemination).

While there is no evidence to suggest the Applicant would publicly disseminate the document, on balance, I am of the view this factor weighs against disclosure given the sensitive content of the footage.

20. 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. There is insufficient information before to satisfy me this is a relevant consideration in this matter.
21. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information in the documents would be unreasonable in the circumstances. Accordingly, I am satisfied the document is exempt under section 33(1).

Application of section 31(1)(a)

22. The Agency also relies on the exemption under section 31(1)(a). However, as I am satisfied the document is exempt in full under section 33(1), it is not necessary for me to consider the Agency's application of this exemption to the document.

Deletion of exempt or irrelevant information

23. 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.
24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ 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 25.⁷
25. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to provide the Applicant with an edited copy of the document in accordance with section 25 (for example, a pixilated copy) as to do so would render the document meaningless.

Conclusion

26. On the information before me, I am satisfied the document is exempt under section 33(1).
27. As I am satisfied it is not practicable to edit the document to delete exempt information in accordance with section 25, I have determined to refuse access to the document in full.

Review rights

28. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁸
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
31. 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.
32. 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

When this decision takes effect

33. 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.

Other matters

34. While not relevant to my decision under the FOI Act, the Applicant may wish to obtain legal advice about accessing the CCTV footage through the Magistrates' Court. Information about available legal services is available at <https://www.mcv.vic.gov.au/find-support/legal-help>.

⁶ *Mickelborough 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].

⁷ *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].

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).