

## Notice of Decision and Reasons for Decision

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Applicant:	'BC5'
Agency:	Victoria Police
Decision Date:	17 February 2020
Exemption considered:	Section 33(1)
Citation	'BC5' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 28 (17 February 2020)

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FREEDOM OF INFORMATION – footage – police documents – 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 is the same as the Agency's decision.

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

As I am satisfied it is not practicable to delete exempt information in the documents 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  
17 February 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to footage of an assault in relation to which the Applicant was charged.
2. In its decision, the Agency identified one document (**video footage**) falling within the terms of the Applicant's request. It decided to refuse access to the 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. I have examined copy of the documents 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;
  - (b) information provided by the Applicant in support of their application for review and during the review; and
  - (c) information provided by the Agency during the review.
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 document in full. The Agency's decision letter sets out the reasons for its decision.

### **Section 33(1)**

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
  - (a) such disclosure would be 'unreasonable'.

*Do the documents contain personal affairs information of individuals other than the Applicant?*

10. Information relating to an individual's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.<sup>2</sup>

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

11. 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 the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.<sup>3</sup>
12. The footage subject to this review was captured by a third-party witness, with audio. It is recorded, in an outside public area, and captures persons involved in the incident and surrounding properties.
13. I am satisfied the footage discloses personal affairs information of persons other than the Applicant, for the following reasons:
  - (a) I am satisfied the third parties may be capable of being identified by what they were wearing, their actions, where they are standing or by their voice;<sup>4</sup>
  - (b) I consider the quality of the footage is sufficiently clear to show identifying features of the individuals captured by the footage; and
  - (c) I am also satisfied the identities and locations of the individuals are reasonably capable of being determined by persons with knowledge of, or involvement in, the event to which the footage relates or any other member of the public.
14. Accordingly, I am satisfied the document contains personal affairs information of individuals other than the Applicant.

*Would disclosure of the personal affairs information be unreasonable?*

15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of an individual's personal privacy in the circumstances of a matter.
16. In *Victoria Police v Marke*,<sup>5</sup> the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.
17. In support of their application for review, the Applicant states:
  - (a) the identity of certain third parties are known to the Applicant;
  - (b) the identity of certain third parties were published in the police brief; and
  - (c) they seek access to the footage because they have concerns over previous legal representation in relation to the assault charge and seek the footage in support of pursuing future legal proceedings.

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

<sup>3</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>4</sup> *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

<sup>5</sup> [2008] VSCA 218 at [76].

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18. I acknowledge the Applicant may already know the identity of third parties in the footage. However, even where an applicant claims to know the identity of a third party, disclosure of that person's personal affairs information may still be unreasonable in the circumstances.<sup>6</sup>

19. In determining whether disclosure of personal affairs information in the documents would be unreasonable, I have considered the following factors:

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

The footage was captured by a witness of the incident involving the Applicant. The document was obtained by the Agency for the purposes of undertaking a criminal investigation, which resulted in the Applicant being fined without conviction.

As discussed above, I am satisfied the footage is sufficiently clear to show identifying features of third parties captured by the footage, such as their facial features, clothing, voices, vehicles, and locations.

In these circumstances, I consider the nature of the personal affairs information to be sensitive given the nature of the incident. On balance, this factor weighs against disclosure.

(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 was charged with a criminal offence by the Agency and seeks access to the document to determine whether to pursue legal proceedings in relation to the incident. 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

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.<sup>7</sup>

As stated above, the Applicant seeks access to the footage to determine whether to pursue legal proceedings. In the absence of any information to suggest the public interest would be promoted by the release of the 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 relevant third parties on disclosure of their personal information as the Agency determined it would not be practicable to undertake third party consultation in accordance with section 33(2B).

In the circumstances of this matter, I am of the view the third parties would be reasonably likely to object to the release of their personal affairs information given the nature of the

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<sup>6</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>7</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

incident and the circumstances in which their information was obtained. On balance, this factor weighs against disclosure.

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

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.<sup>8</sup>

Accordingly, I have considered the likelihood of the personal affairs information in the document being further disseminated and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

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 content of the footage.

(f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>9</sup>

There is insufficient information to satisfy me this is a relevant consideration in this matter.

20. In weighing up the above factors, I am satisfied protecting the privacy of the third parties captured in the footage outweighs the Applicant's personal interest in obtaining access to the footage in this instance.
21. Accordingly, I am satisfied disclosure of the personal affairs information in the document is unreasonable in the circumstances and the document is exempt under section 33(1).

***Deletion of exempt information***

22. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>10</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>11</sup>
24. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, as to do so would render the document meaningless given the nature of the document.

**Conclusion**

25. On the information before me, I am satisfied the document is exempt under section 33(1).
26. 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.

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<sup>8</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

<sup>10</sup> *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].

<sup>11</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].

## **Review rights**

27. 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>12</sup>
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
30. 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.
31. 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>15</sup>

## **When this decision takes effect**

32. 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>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and (3FA).