

Notice of Decision and Reasons for Decision

Applicant:	'BE6'
Agency:	Victoria Police
Decision Date:	6 March 2020
Exemptions considered:	Sections 33(1), 25
Citation:	'BE6' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 48 (6 March 2020)

FREEDOM OF INFORMATION – law enforcement documents – CCTV footage – police records – evidence gathered during police investigation – practicability to edit 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.

I am satisfied personal affairs information in the CCTV footage is exempt under section 33(1), and it would not be practicable to edit the footage to remove the exempt information in accordance with section 25.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

6 March 2020

Reasons for Decision

Background to review

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

[Referring to a previous request for footage] ...we request a copy of the surveillance footage relating to the incident on [date]
2. In its decision, the Agency identified a 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 examined a copy of the CCTV footage 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 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) information provided by the Agency on 19 February 2020.
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. The Agency's decision letter sets out the reasons for its decision.

Section 33(1) – Documents containing personal affairs information

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;¹ and
 - (b) such disclosure would be 'unreasonable'
10. 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.²

¹ Sections 33(1) and (2).

² Section 33(9).

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

11. The CCTV footage is taken from inside a social venue. It is six minutes long and depicts the Applicant, venue staff and other third parties in a room at the venue.
12. I consider the footage is sufficiently clear at various times and to varying degrees to show identifying features of individuals captured in the footage, such as their facial features, movement and attire.
13. I am satisfied the third parties, whose images are captured in the footage, are reasonably capable of being identified by any member of the public with a knowledge of or involvement with the venue inside which the footage was taken.
14. Therefore, I am satisfied the CCTV footage contains personal affairs information of individuals other than the Applicant.

Would the disclosure of the personal affairs be unreasonable?

15. Whether it would be unreasonable to disclose a document involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of third parties other than an applicant in the circumstances of a matter.
16. The Agency determined it was not practicable to consult with third parties under section 33(2B) given the number of third parties who appear in the CCTV footage.
17. In *Victoria Police v Marke*,³ the Supreme Court of Victoria Court of Appeal in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and the exemption in 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'.
18. Further, '[t]he protection of privacy, which lies at the heart of section 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.⁴
19. In determining whether disclosure of the personal information in the document would be unreasonable, I have considered the following factors:

(a) The nature of the personal affairs information

The nature of the personal affairs information is the images of third parties including their physical appearance and location.

The CCTV footage captures 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. In the circumstances, I consider this factor neither weighs in favour nor against disclosure.

³ [2008] VSCA 218 at [76].

⁴ [2008] VSCA 218 at [79].

(b) The circumstances in which the information was obtained

The CCTV footage was captured by the venue for security purposes. The document was obtained by the Agency for the purposes of undertaking a criminal investigation, which has been heard in court. Given the CCTV footage is captured in a public place, it features third parties other than the Applicant and has been used by the Agency for law enforcement purposes. This factor weighs against disclosure.

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

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 a document is a relevant consideration in determining whether disclosure would be unreasonable.⁵

The Applicant submits they seek a copy of the footage to potentially commence civil proceedings. Having considered the Applicant's purpose for seeking access to the document, I accept this represents a genuine and personal reason for seeking access to the information. This factor weighs in favour of disclosure.

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

While I acknowledge the Applicant's personal interest in seeking access to the information, there is no information before me to suggest the public interest would be promoted by the release of the personal affairs information of any third parties captured in the footage. This factor weighs against disclosure.

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

The views of a third party consulted about disclosure of their personal affairs information in a document sought under the FOI Act will not necessarily be determinative of whether or not the document is exempt under section 33(1).⁶

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 viewed the footage, I am of the view the third parties 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 and the nature of the information captured. This factor weighs against disclosure.

20. 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.⁷ However, I do not consider this to be a relevant factor in this matter.
21. In balancing the above factors, I am satisfied it would be unreasonable to disclose the personal affairs information of persons other than the Applicant under the FOI Act.

⁵ *Victoria Police v Marke* [2008] VSCA 218 at [104].

⁶ *McNamara v Deakin University* [2011] VCAT 1089 at [49].

⁷ Section 33(2A).

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

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 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'⁸ 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 25.⁹

25. I have considered the effect of deleting exempt information from the documents. I am satisfied it is not practicable to delete the exempt information in the document due to the resources required, and deleting exempt information from the document would render it 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 delete the exempt information in the document in accordance with section 25, I have decided 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 the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.¹⁰

29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹

30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²

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.¹³

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.

⁸ *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].

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).