

Notice of Decision and Reasons for Decision

Applicant:	'BF2'
Agency:	Victoria Police
Decision date:	10 March 2020
Exemptions and provisions considered:	Sections 31(1)(a), 33(1) 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:	'BF2' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 53 (10 March 2020)

FREEDOM OF INFORMATION – law enforcement documents – police documents – police investigation – surveillance devices – body-worn cameras – evidence gathered during police investigation – Law Enforcement Assistance Program (LEAP) report – secrecy provision

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.

While I am satisfied information in the LEAP report is exempt under section 33(1), I have determined to release certain non-exempt information. As I am satisfied it is practicable to delete exempt and irrelevant information from this document in accordance with section 25, I have determined to release the document in part.

I am satisfied the body-worn camera footage is exempt in full under section 38 of the FOI Act in conjunction with sections 30D and 30E of the *Surveillance Devices Act 1999* (Vic) (**SD Act**).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
10 March 2020

Reasons for Decision

Background to review

1. The Applicant made the following request to the Agency:

Police members from [location] Police Station attended at [address] at approximately [time] on [date] in relation to a civil dispute. A few days later police members completed a family violence report nominating me as respondent. I request a copy of the report along with the body worn camera footage.

2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request and refused access to the documents in full. One document is a Law Enforcement Assistance Program (**LEAP**) report and one document is police body-worn camera footage (**footage**).

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.
4. During the review, the Applicant advised they do not seek access to personal information in the documents as they are aware of all parties present at the incident and agree to those persons' personal affairs information being redacted from the report and the narrative forwarded.
5. I have reviewed a copy of the LEAP report. I have not reviewed a copy of the body-worn camera footage, however in the circumstances of this matter I am satisfied the document is as described by the Agency.
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; and
 - (b) information provided with the Applicant's review application.
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 under sections 31(1)(a) and 33(1) to refuse access to the LEAP report and section 38 to refuse access to the footage. The Agency's decision letter sets out its reasons for decision.

Section 31(1)(a)

10. Section 31(1)(a) provides a document is exempt 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.

11. 'Reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.¹
12. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.²
13. '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.³
14. In its decision letter, the Agency advised information in the documents forms evidence gathered by police during the course of a criminal investigation that is ongoing. As such, disclosure would be reasonably likely to prejudice the police investigation of a breach or possible breach of the law.
15. Having reviewed the document, I do not agree all information in the document is exempt under section 31(1)(a). The fact the document exists is known to the Applicant, and a significant portion of the narrative is information provided by the Applicant to the Agency. I cannot see how this information, a narrative description of events, which does not include the Agency officer's views or potential further action, would prejudice the police investigation.
16. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 31(1)(a).

Section 33(1)

17. 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;⁴ and
 - (b) such disclosure would be 'unreasonable'.
18. 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 such information may be reasonably determined.⁵
19. A third party's opinion or observations about another person's conduct can constitute information related to the third party's personal affairs.⁶
20. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
21. 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, on the information before me, I am not satisfied this to be a relevant factor.

¹ *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.

² *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

³ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁴ Sections 33(1) and (2).

⁵ Section 33(9).

⁶ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police (General)* [2008] VCAT 1343 at [43], *Pritchard v Victoria Police (General)* [2008] VCAT 913 at [24], *Mrs R v Ballarat Health Services (General)* [2007] VCAT 2397 at [13].

⁷ Section 33(2A).

22. 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 an FOI request has been received for documents containing their personal information and seek their views on disclosure unless:⁸
- (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.⁹
23. The Agency did not consult with the third parties in this matter as it determined it was not practicable to do so.
24. As the Applicant does not seek access to personal affairs information in the LEAP report, I consider the names of Agency officers and third party in the document are irrelevant to the request.
25. However, I note the Applicant seeks access to the narrative in the LEAP report. Having reviewed this document, I am satisfied even with the names of individuals removed, the remaining information would allow the Applicant to identify third parties. Accordingly, this information constitutes their personal affairs information and I must consider whether its disclosure is unreasonable in the circumstances.
26. On the information before me, I am satisfied it would be unreasonable to disclose this personal affairs information for the following reasons:
- (a) The nature of the information is sensitive.
 - (b) It was provided to police officers by a third party in circumstances in which that person would reasonably expect it would remain confidential, namely a police investigation into an alleged criminal incident.
 - (c) I consider it is likely the third party would object to release of their personal affairs information.
 - (d) I acknowledge the Applicant's interest in seeking access to information concerning an incident at which they were present. As such, I consider the Applicant has a personal interest in seeking access to the information.
 - (e) I do not consider there is a public interest in disclosure of this information. Rather, I am of the view the public interest lies in such information remaining confidential given its nature and the circumstances in which it was obtained by the Agency.
 - (f) In these circumstances, I consider the interest in protecting the third party's privacy outweighs the Applicant's personal interest in seeking access to their personal affairs information.
27. In light of the above factors, I am satisfied the LEAP report is exempt under section 33(1).
28. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

⁸ Section 33(2B).

⁹ Section 33(2C).

Section 38

29. The Agency relied on section 38, in conjunction with sections 30D and 30E of the SD Act, to exempt the footage.
30. For the footage to be exempt under section 38, the following conditions must be satisfied:
- (a) the SD Act must be an enactment in force for the purposes of section 38;
 - (b) the footage must contain the specific information prohibited from disclosure under sections 30D and 30E of the SD Act; and
 - (c) the SD Act must prohibit persons, referred to in that Act, from disclosing that specific kind of information, either absolutely or subject to exceptions or qualifications.

Application of the confidentiality provisions

31. Section 30D of the SD Act provides:

30D What is protected information?

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.

32. 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

33. In summary, sections 30D and 30E of the SD Act prohibit reckless or intentional disclosure of information obtained from a police body-worn camera.
34. 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 and not be disclosed.

35. I am satisfied sections 30D and 30E of the SD Act prohibit the disclosure of information obtained from a police body-worn camera.
36. 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.
37. As such, I am satisfied the footage is exempt under section 38 of the FOI Act in conjunction with sections 30D and 30E of the SD Act.

Deletion of exempt or irrelevant information

38. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
39. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁰ 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 25.¹¹
40. I have considered the effect of deleting exempt information from the LEAP report. I am satisfied it is practicable to delete exempt information in the document with reasonable effort and the remaining information in the document would retain meaning.
41. As the footage is exempt under section 38 of the FOI Act in conjunction with sections 30D and 30E of the SD Act in full, the obligation under section 25 does not apply to this document.

Conclusion

42. On the information before me, I am satisfied the LEAP report is exempt in part under section 33(1). As I am satisfied it is practicable to delete exempt information from the report in accordance with section 25, I have determined to release this document in part.
43. I am satisfied the footage is exempt in full under section 38 of the FOI Act in conjunction with sections 30D and 30E of the SD Act.

Review rights

44. 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.¹²
45. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³

¹⁰ *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].

¹¹ *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].

¹² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

46. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
47. 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.
48. 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.¹⁵

When this decision takes effect

49. 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.
50. 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.

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision
1.	[date]	LEAP report	3	<p>Refused in full</p> <p>Sections 31(1)(a), 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>This document is to be released except for the following irrelevant information which is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> • all third party names and addresses; • Agency officer names, roles and ID numbers; • the name and details of the first person listed under the heading 'persons involved'; • the first eight words and the following date in the first paragraph under the heading 'additional information' on page 2; and • the second paragraph under the heading 'additional information' on page 2.
2.	[date]	Police body-worn camera footage		<p>Refused in full</p> <p>Section 38 in conjunction with sections 30D and 30E of the SD Act</p>	<p>Refused in full</p> <p>Section 38 in conjunction with sections 30D and 30E of the SD Act</p>