

Notice of Decision and Reasons for Decision

Applicant:	'BL3'
Agency:	Victoria Police
Decision Date:	8 April 2020
Exemption considered:	Section 33(1)
Citation:	'BL3' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 109 (8 April 2020)

FREEDOM OF INFORMATION – law enforcement documents – police documents – CCTV footage – potential civil proceedings – personal affairs information of third parties – disclosure unreasonable

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

8 April 2020

Reasons for Decision

Background to review

1. The Applicant's representative made a request to the Agency for access to:
CCTV footage from [name of licensed premises and address] at [time] on [date].
2. In its decision, the Agency identified one document (**CCTV footage**) falling within the terms of the Applicant's request. It decided to refuse access to the CCTV footage in full.
3. The Agency relied on the exemption under section 33(1) to refuse access to the CCTV footage in full. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant, through their representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. By letter dated [date], the Applicant's representative indicated the Applicant is willing to narrow the scope of this review to '2 minutes prior to the [description of incident involving the Applicant] and the following involvement with Police'.
6. Having viewed the CCTV footage, I am satisfied it only contains footage relevant to the above scope.
7. I have examined a copy of the CCTV footage subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. 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 during this review.
10. 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

Section 33(1)

11. 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
 - (a) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and (2).

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

12. 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.²
13. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. 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.³
14. The Victorian Civil and Administrative Tribunal (**VCAT**) has noted CCTV footage may disclose personal affairs of a person other than an FOI applicant even if it does not show the face of a third party. An individual may be capable of being identified by what they are wearing, what they were doing or by their voice.⁴
15. The CCTV footage is captured from four security cameras located internally and externally to the licensed premises. It is colour footage, without audio, with a combined duration of approximately [specified number of hours and minutes], covering a period of [specified number of] minutes.
16. The internal CCTV footage captures the [description of the incident occurring at the licensed premises]. Multiple staff and patrons are visible throughout the footage.
17. The external CCTV footage captures any interactions that occurred between the Applicant, the third party and security officers on a street outside the licensed premises. The footage does not directly capture any interactions that may have occurred between the Applicant and police officers. Given the external CCTV footage captures a public place, it features numerous third parties other than the Applicant who do not appear to be involved in the incident.
18. I am satisfied the CCTV footage discloses personal affairs information of persons other than an 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, and where they are standing.⁵
 - (b) I consider the quality of the footage is sufficiently clear to show identifying features of the individuals captured by the footage to varying degrees.
 - (c) I am also satisfied the identities of individuals are reasonably capable of being determined by persons who witnessed, had in involvement in, or with knowledge of the incident captured by the footage.
19. 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?

20. 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.

² Section 33(9).

³ *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].

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

⁵ *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

21. In *Victoria Police v Marke*,⁶ 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'.

22. The Applicant submits the following regarding their view disclosure would not be unreasonable:

...There is no unreasonable disclosure of personal information considering the incident which occurred took place in a public place... Considering this incident occurred in a public place where there is no reasonable expectation of privacy the CCTV footage should not be considered an exempt document under the Act.

By not allowing the CCTV footage to be released it is prejudicing our client in being able to bring proceedings for serious injuries suffered as a result of this [incident].

Victoria Police in reaching their decision noted relevant factors which were considered, including that 'the matter was proven and dismissed and there was no further police action, accordingly the 'personal information' has not been fully presented in court'.

It is evident that some of the 'personal information' has been presented in court. As this was a public proceeding, the 'documents affecting personal privacy' including 'personal information' are already in the public domain and should not be considered exempt documents.

Balancing the rights of third parties which may appear briefly in the CCTV footage in a public space it would be in line with the objects of the Act under section 3(1) to provide the footage requested...

23. 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 CCTV footage relates to an incident involving the Applicant.

I am satisfied it was obtained by the Agency for the purposes of undertaking an investigation, which resulted in a court proceeding. I note charges against the Applicant were dismissed under section 76 of the *Sentencing Act 1991* (Vic) (**Sentencing Act**), which provides:

76 Unconditional dismissal

A court, on being satisfied that a person is guilty of an offence, may (without recording a conviction) dismiss the charge.

The Applicant was also issued with a Penalty Infringement Notice.

Given the circumstances, I accept the CCTV footage was provided to the Agency on the understanding it would be used for the limited purpose of the Agency's investigation into the incident any potential criminal prosecution only.

Given the footage also captures an incident in a public place, it features numerous third parties other than the Applicant. The nature of the personal affairs information is described above in paragraphs 15 to 18.

In these circumstances, I consider the nature of the personal affairs information of the third parties to be sensitive given the nature of the incident.

⁶ [2008] VSCA 218 at [76].

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 seeks access to the CCTV footage for the purpose of pursuing legal proceedings on the basis that they sustained 'serious injuries as a result of [description of incident]'. Accordingly, I consider the Applicant's purpose for seeking the information is likely to be achieved if released.

On balance, this factor 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.⁷

As stated above, the Applicant seeks access to the footage for the purpose of bringing civil proceedings for alleged injuries suffered.

I am of the view the public interest lies in the Agency preserving the confidentiality of the information provided to it on a voluntary basis during the course of its investigation. This ensures the Agency's ability to obtain similar information and cooperation from the public in order to effectively carry out its investigative and law enforcement functions.

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.

On balance, this factor 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).

The CCTV footage was captured by a private business for security purposes. While members of the public captured in the footage would reasonably expect the footage could be disclosed to a law enforcement agency to assist in an investigation or prosecution of a criminal offence, I consider the individuals captured would be reasonably likely to not expect, nor consent to, it being released to an individual under the FOI Act and for reasons other than law enforcement related purposes.

On balance, this factor weighs against disclosure.

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

⁷ *Victoria Police v Marke* [2008] VSCA 218 at [104].

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 once a document is released.⁸

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 – in particular those persons who were not involved in the incident.

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

(f) The extent to which the information is available to the public

In its decision letter, the Agency states ‘the matter was proven and dismissed and there was no further police action, accordingly the ‘personal information’ has not been fully tested in court’. On the information before me, there is no conclusive evidence regarding the extent to which the CCTV footage was presented in open court.

Accordingly, this factor does not weigh in favour or against release.

(g) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person⁹

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

24. In weighing up the above factors, I am satisfied the interest in protecting the privacy of the third parties captured in the CCTV footage outweighs the Applicant’s personal interest in obtaining access to the footage.
25. 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 or irrelevant information

26. 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.
27. 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
28. I have considered the effect of deleting exempt information from the CCTV footage in accordance with section 25. In my view, it is not practicable to provide the Applicant with an edited copy of the document (for example, a pixelated copy), as to do so would render the footage meaningless.

Conclusion

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁹ Section 33(2A).

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].

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

Review rights

31. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹²
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹³
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁴
34. 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.
35. 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

36. 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.

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

¹³ Section 52(5).

¹⁴ Section 52(9).

¹⁵ Sections 50(3F) and (3FA).