

## Notice of Decision and Reasons for Decision

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Applicant:	'BE8'
Agency:	Victoria Police
Decision Date:	10 March 2020
Exemptions considered:	Sections 30(1), 33(1)
Citation:	'BE8' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 50 (10 March 2020)

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FREEDOM OF INFORMATION – law enforcement documents – video footage – image stills – emails – internal working documents – personal affairs information – unreasonable to release

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 differs from the Agency's decision in that I have decided to release additional information in the documents.

I am satisfied the exemption in section 30(1) applies to Document 8 in its entirety and certain information in Documents 9 and 10. I am also satisfied Documents 1 and 7 are exempt under section 33(1).

As I am not satisfied it is practicable to edit Documents 1, 7 and 8, these documents are exempt in full. However, I am satisfied it is practicable to release Documents 9 and 10 in part with exempt information deleted in accordance with section 25.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

10 March 2020

## Reasons for Decision

### Background to review

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

...for the documents and audio/video held by [the Agency] regarding [the Agency's] investigation into an assault on me (that occurred in [year]).
2. In its decision, the Agency identified 10 documents falling within the terms of the Applicant's request. It decided to grant access to five documents in part and refuse access to five documents 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. The Applicant advised they seek access to documents refused in full only. Accordingly, this review relates to the five documents to which the Agency refused access in full.
5. I have examined copies of the documents subject to review and been briefed by OVIC staff who examined the footage subject to review.
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 received from the parties, including:
  - (a) the Agency's decision on the FOI request, dated [date];
  - (b) information provided with the Applicant's review application; and
  - (c) communications between OVIC staff, the Applicant and the Agency.
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 exemptions in sections 30(1), 33(1) and 35(1)(b) to refuse access to Document 1 and Documents 7–10 (inclusive). The Agency's decision letter sets out the reasons for its decision.

### Section 30(1)

10. The Agency refused access to Documents 8, 9 and 10 under section 30(1). The Documents can be described as a series of emails. Some are between Agency officers, and others are between the Agency and the Applicant.
11. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister; and
- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

12. The exemption does not apply to purely factual material in a document.<sup>1</sup>

*Do the documents contain information in the nature of opinion, advice, recommendation, consultation or deliberation?*

- 13. I am satisfied Document 8, in its entirety, is information in the nature of opinion, advice, recommendation and consultation between two Agency officers. Information exempted by the Agency comprises discussion with respect to the investigation into the Applicant's assault.
- 14. Some information exempted by the Agency from Documents 9 and 10 comprises matter in the nature of opinion, advice, recommendation and consultation between Agency officers regarding the investigation into the Applicant's assault. Other information in the email chain relates to the personal affairs information of the Agency staff. I consider this information under section 33(1) as this exemption was also applied by the Agency.
- 15. However, there are some emails within Documents 9 and 10 that are between the Applicant and the Agency. I consider these exchanges are not internal working documents as they do not represent information in the nature of opinion, advice, recommendation, consultation or deliberation between Agency officers.

*Was the information prepared in the course of, or for the purposes of, the Agency's deliberative processes?*

- 16. The term 'deliberative process' is interpreted broadly and includes deliberation or consideration involved in the functions of an agency, Minister or government.<sup>2</sup>
- 17. Except for the e-mails between the Applicant and the Agency, I am satisfied the information exempted by the Agency was prepared in the course of the Agency's deliberative processes and relates to its investigation into the Applicant's assault.

*Would disclosure of the information be contrary to the public interest?*

- 18. I must also be satisfied releasing this information would not be contrary to the public interest. This requires a 'process of the weighing against each other conflicting merits and demerits'.<sup>3</sup>
- 19. In deciding if release is contrary to the public interest, I must consider all relevant facts and circumstances, remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.
- 20. In deciding whether disclosure of the information exempted by the Agency would be contrary to the public interest, I have given weight to the following relevant factors:<sup>4</sup>

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<sup>1</sup> Section 30(3).

<sup>2</sup> *Borg v Department of Premier and Cabinet* (1993) 3 VAR 201 at [208].

<sup>3</sup> *Sinclair v Maryborough Mining Warden* [1975] HCA 17; (1975) 132 CLR 473 at [485], adopted in *Department of Premier and Cabinet v Hulls* [1999] VSCA 117 at [30].

- (a) the right of every person to gain access to documents under the FOI Act;
  - (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
  - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
  - (d) whether disclosure of the documents would be likely to inhibit communications between agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the agency's functions and other statutory obligations;
  - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the agency would not otherwise be able to explain upon disclosure of the documents;
  - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the agency at the conclusion of a decision or process; and
  - (g) the public interest in the community being better informed about the way in which the agency carries out its functions, including its deliberative, consultative and decision-making processes and whether the underlying issues require greater public scrutiny.
21. I consider the deliberative material in the documents records the Agency officer's opinion, advice, recommendations and consultation with respect to the investigation into the Applicant's assault and is sensitive and confidential to the organisation's investigative processes. This factor weighs against disclosure of the information.
  22. The documents discuss potential avenues of inquiry and directions for the investigation. I am of the view release of this material would offer a part explanation for the course of the investigation, as the documents only relate to part of the investigation only. Further, I consider release of the documents in full may disclose methods or procedures for investigating and dealing with matters arising out of breaches or evasions of the law. This factor weighs against disclosure of the information.
  23. In its decision letter, the Agency stated its officers must be able to freely communicate their professional opinions and thought processes to ensure allegations are thoroughly considered, and any decisions made are subject to careful and thorough deliberation. In my view, release of the Agency officer's deliberations could inhibit other officers from making proper and detailed records of their opinions and observations in future investigations. This factor weighs against disclosure of the information.
  24. Finally, I do not consider there is a public interest in disclosing information that may disclose and prejudice the effectiveness of the Agency's investigative methods and procedures. This factor weighs against disclosure of the information.
  25. Accordingly, I am satisfied certain information in the documents is exempt under section 30(1). However, I am not satisfied emails between the Applicant and the Agency are exempt.
  26. My decision in relation to section 30(1) is set out in **Annexure 1**.

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<sup>4</sup> *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

## Section 33(1)

27. The Agency exempted Document 1 (the footage), Document 7 (images) and Documents 9 and 10 (internal emails) under section 33(1).
28. 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>5</sup> and
  - (b) such disclosure would be ‘unreasonable’.
- Do the documents contain information relating to the ‘personal affairs’ of persons other than the Applicant?*
29. 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.<sup>6</sup>
30. A document will disclose personal affairs information if the document is capable, either directly or indirectly, of identifying the 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.<sup>7</sup>
31. CCTV footage may disclose the personal affairs information of persons other than an FOI applicant (third parties), even if the footage does not show their faces. For example, an individual may be capable of being identified by what they were wearing, what they were doing or by their voice.<sup>8</sup> The footage subject to review is not CCTV footage, however, I am of the view the same principle applies.
32. I am satisfied the footage and images disclose personal affairs information of third parties, for the following reasons:
- (a) The footage is approximately [time period] in length and shows hundreds of individuals present at [an event] including members of the general public, law enforcement officials and emergency services workers.
  - (b) The quality of the footage and images is sufficiently clear to show identifying features of the third parties captured in the footage.
  - (c) I am satisfied that, [redacted – details of the event], the third parties could reasonably be identified by what they are wearing, their mannerisms, where they are standing or their voice.
  - (d) Despite the passage of time since the event, I consider 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.
33. Accordingly, I am satisfied Documents 1 and 7 contain personal affairs information of third parties.

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<sup>5</sup> Sections 33(1) and (2).

<sup>6</sup> Section 33(9).

<sup>7</sup> *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].

<sup>8</sup> *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

34. 'Personal affairs information' is interpreted broadly to include matters related to the health, private behaviour, home life or personal or family relationships of individuals.<sup>9</sup>
35. The information exempted by the Agency from Documents 9 and 10 under section 33(1) details the Agency officer's work shifts and leave. I am satisfied information of this nature constitutes the personal affairs information of the Agency officers.

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

36. 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 matter.
37. In *Victoria Police v Marke*,<sup>10</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'.
38. 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 [third party], which provided the information to the Agency in confidence for the purposes of undertaking a criminal investigation into the reported assault. At the time of this review, the Agency advised the matter remains unsolved.

As discussed above, I am satisfied the footage is sufficiently clear to identify third parties from their facial features, clothing, voices and locations. As are the still images taken from the raw footage.

Whilst I note the passage of time since the assault occurred, given the nature of the [event] and the circumstances in which the Agency obtained the information, I consider the nature of the personal affairs information in the footage and images to be sensitive. This factor weighs against disclosure.

With respect to the personal affairs information of Agency staff in the emails, I consider this information to be sensitive as it relates to the movements of the individual within their personal and professional life. 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 is upset no charges were laid following the investigation of the assault and they seek access to the documents to take legal action against those responsible.

However, on the information before me, I do not consider the Applicant's purpose for seeking access to the requested documents is likely to be achieved by the release of the images and footage. This factor weighs against 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

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<sup>9</sup> *Re F and Health Department* (1988) 2 VAR 458, as quoted in *RFJ v Victoria Police FOI Division* [2013] VCAT 1267 at [103].

<sup>10</sup> [2008] VSCA 218 at [76].

applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.<sup>11</sup>

The Applicant seeks to identify the assailants and with a view to take legal action against them. As such, I consider this is a matter of private rather than public interest. Further, I consider the greater public interest lies in protecting the Agency's ability to obtain information provided in confidence and to protect of the personal privacy of the numerous individuals who appear in the footage and images. This factor weighs against disclosure.

I also do not consider the release of the Agency officer's personal affairs information in Documents 9 and 10 would serve the Applicant's purpose for seeking access to these documents. This factor also 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 accept it was not practicable for the Agency to consult with the numerous third parties captured in the footage and images in accordance with section 33(2B) as to their views on disclosure of their personal information.

In the circumstances, 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 incident. This factor weighs against disclosure.

I am also of the view the Agency officers would object to the release of details where their rosters and shifts can be identified. This factor also 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>12</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 personal 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 and images.

(f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>13</sup>

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

39. In weighing up the above factors, I am satisfied the public interest in 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.
40. 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).
41. My decision in relation to section 33(1) is set out in **Annexure 1**.

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<sup>11</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>12</sup> *Victoria Police v Marke* [2008] VSCA 218 at [68].

<sup>13</sup> Section 33(2A).

42. In light of my decision in relation to sections 30(1) and 33(1), it is not necessary for me to consider the application of section 35(1)(b) to the same documents.

### **Deletion of exempt or irrelevant information**

43. 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.
44. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>14</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release is not required under section 25.<sup>15</sup>
45. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable to delete exempt information from the footage and images given the time and resources that would be required to do so. Further, I consider it is likely the deletion of exempt information would render these documents meaningless.
46. However, I am satisfied it is practical for the Agency to edit the emails (Documents 9 and 10), as to do so would not require substantial time or resources and the release of non-exempt information in these document would retain meaning.

### **Conclusion**

47. On the information before me, I am satisfied the exemption in section 30(1) applies to Document 8 in its entirety and to certain information in Documents 9 and 10. I am also satisfied Documents 1 and 7 are exempt under section 33(1).
48. In relation to providing an edited copy of the documents, I am not satisfied it is practicable to edit Documents 1, 7 and 8 and these documents are exempt in full. However, I am satisfied it is practicable to release Documents 9 and 10 in part with exempt information deleted in accordance with section 25.
49. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

### **Review rights**

50. 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>16</sup>
51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>17</sup>
52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>18</sup>

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<sup>14</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>15</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].

<sup>16</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>17</sup> Section 52(5).

<sup>18</sup> Section 52(9).



53. 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.
54. 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>19</sup>

#### **Notification of third party review rights**

55. As I have decided to disclose a document the Agency determined is exempt under section 33(1), if practicable, I must notify any third party who has a right to apply to VCAT for a review of my decision of their right to do so.<sup>20</sup>
56. In these circumstances I consider it is practicable to notify the relevant third party of their review rights.
57. Accordingly, the relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.

#### **When this decision takes effect**

58. For the above reason, my decision does not take effect until the agency and third party's review periods expire, or if an application to VCAT is made, until the VCAT proceeding is concluded.

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<sup>19</sup> Sections 50(3F) and (3FA).

<sup>20</sup> Section 49P(5).

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Footage	N/A	Refused in full  Sections 33(1), 35(1)(b)	Refuse in full  Section 33(1)	<b>Section 33(1):</b> For the reasons set out in the Notice of Decision, I am satisfied it is unreasonable to release the footage which contains the personal affairs information of [description of number] of individuals other than the Applicant.
2.	[date]	Law Enforcement Assistance Program (LEAP) Report	4	<b>Outside scope of review</b>		
3.	[date]	Briefing	1	<b>Outside scope of review</b>		
4.	[date]	Memorandum/attachment	2	<b>Outside scope of review</b>		
5.	[date]	Incident Field Report	4	<b>Outside scope of review</b>		
6.	[date]	Notes	2	<b>Outside scope of review</b>		
7.	[date]	Images	5	Refused in full  Sections 33(1), 35(1)(b)	Refuse in full  Section 33(1)	<b>Section 33(1):</b> For the reasons set out in the Notice of Decision, I am satisfied it is unreasonable to release the still images which contain the personal affairs information of individuals other than the Applicant.
8.	[date]	Email	1	Refused in full	Refuse in full	<b>Section 30(1):</b> For the reasons set out in the Notice of Decision, I am satisfied

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Sections 30(1), 35(1)(b)	Section 30(1)	that the email contains information in the nature of opinion, advice, recommendation and consultation between [specified number of] Agency officers in the course of the Agency's deliberative process of investigating the Applicant's assault. I am also satisfied that it would be contrary to public interest to release the exempted information.
9.	[date]	Emails	6	<b>Refused in full</b> Sections 30(1), 33(1)	<b>Release in part</b> Sections 25, 30(1), 33(1)  Exempt information is to remain deleted except for the followings emails between the Applicant and the Agency:  (a) Email on page 5, dated [date], timestamp [time]  (b) Email on page 6, dated [date], timestamp [time]	<b>Section 25:</b> I am satisfied it is practicable to delete exempt information in the document in accordance with section 25.  <b>Section 30(1):</b> For the reasons set out in the Notice of Decision, I am satisfied the email contains information in the nature of opinion, advice, recommendation and consultation between [specified number of] Agency officers in the course of the Agency's deliberative process of investigating the Applicant's assault. I am also satisfied it would be contrary to public interest to release this information. However, I do not consider emails between the Applicant and the Agency are exempt under section 30(1).  <b>Section 33(1):</b> For the reasons set out in

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						the Notice of Decision, I am satisfied it is unreasonable to release the personal affairs information of the Agency officers in the emails. However, I am not satisfied it would be unreasonable to release emails between the Applicant and the Agency.
10.	[date]	Emails	6	Refused in full  Sections 30(1), 33(1)	Release in part  Sections 25, 30(1), 33(1)  Exempt information is to remain deleted except for the followings emails between the Applicant and the Agency:  (a) Email on page 5, dated [date], timestamp [time]; and  (b) Email on page 5 (continued to page 6), dated [date], timestamp [time].	See comments for Document 9.