

## Notice of Decision and Reasons for Decision

---

|                        |  |
|------------------------|--|
| Applicant:             | 'BN5'  |
| Agency:                | Victoria Police  |
| Decision date:         | 11 May 2020  |
| Exemptions considered: | Sections 31(1)(d), 33(1), 35(1)(b)   |
| Citation:              | 'BN5' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 130 (11 May 2020) |

---

FREEDOM OF INFORMATION – law enforcement documents – police investigation – CCTV footage – witness statements – personal affairs information

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 Documents 4 and 5 are exempt under section 35(1)(b) and Documents 6 and 7 are exempt under section 33(1).

As I am satisfied it is not practicable to delete exempt information from the documents in accordance with section 25, I have determined to refuse access to the documents in full.

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

11 May 2020

## Reasons for Decision

### Background to review

1. The Applicant's legal representative made a request to the Agency for access to the following documents:

Requesting any and all information relating to an incident that occurred on [dates] at [location], of which [the Applicant] was the victim.

This request includes but is not limited to access to any CCTV relating to the incident, any witness statements taken, and the names of other parties involved in the incident.

2. In its decision, the Agency identified seven documents falling within the terms of the Applicant's request and granted access to three documents in part and refused access to four documents in full.
3. The Agency relied on the exemptions in sections 31(1)(d), 33(1) and 35(1)(b) to refuse access to Documents 4 to 7 in full. The Agency's fresh decision letter sets out the reasons for its decision.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On 18 March 2020, the Agency made a fresh decision within the required 28 days under section 49M(2). The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
7. During the review, the Applicant advised they seek review of documents to which the Agency refused access in full. Accordingly, this review relates to Documents 4 to 7 (the **Documents**) only.
8. I have been briefed by OVIC staff, who inspected the Documents.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received, including the Agency's original and fresh decision on the FOI request, and the Applicant's review application.
11. 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 government and other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

### Review of exemptions

#### **Section 35(1)(b)**

12. A document is exempt under section 35(1)(b) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and

- (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.

*Was the information or matter communicated in confidence?*

13. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator, noting confidentiality can be expressed or implied from the circumstances of a matter.<sup>1</sup>
14. Documents 4 and 5 are witness statements provided by persons other than the Applicant (**third parties**). The information in the documents was obtained in the course of an Agency investigation.
15. A document does not need to be marked 'confidential' for its contents to be considered as information communicated in confidence.<sup>2</sup>
16. It is generally accepted, persons who provide statements and information to the police do so with the expectation the information provided to police will be disclosed to the extent necessary to conduct an investigation and deal with criminal charges only.<sup>3</sup>
17. I have considered the content of the documents and the potential views of the third parties who provided the statements. I am satisfied the third parties provided the statements in circumstances in which confidentiality can reasonably be implied, based on the nature and context of the information. I accept, when they gave their statements, they would have had an expectation the information would be used for the purpose of the Agency's investigation and any subsequent court process only. I consider it is reasonably unlikely the third parties would anticipate the information would be released to the Applicant under the FOI Act.
18. Accordingly, I am satisfied disclosure of the documents would divulge information communicated to the Agency in confidence.

*Would disclosure be contrary to the public interest?*

19. The public interest test in section 35(1)(b) is narrow, in that it is directed toward the impact release would have on an agency's ability to obtain the same or similar information in the future. It does not permit me to have regard to other matters, such as any public interest in favour of granting access to the documents.
20. In its fresh decision letter, the Agency states:
- ... documents include witness statements provided to police during the course of the investigation. [...] the statements were provided to [Agency] in confidence for the purpose of the investigation and possible prosecution. [...] the release of the statements would constitute a breach of confidentiality and would be likely to inhibit other people from providing statements to police in the future. This would clearly be contrary to the public interest.
21. I accept the Agency relies on information provided by members of the public in order to effectively perform its investigative functions. If the Agency were to routinely release information in response to an FOI request, particularly information of the kind in Documents 4 and 5, I consider individuals would be less willing to provide information of a similar nature to the Agency, which in turn would impact the Agency's ability to obtain information in the future.

---

<sup>1</sup> *XYZ v Victoria Police* [2010] VCAT 255 at [265].

<sup>2</sup> *Williams v Victoria Police* [2007] VCAT 1194 at [75].

<sup>3</sup> *Akers v Victoria Police* [2003] VCAT 397 at [35].

22. This is consistent with evidence given in *Williams v Victoria Police*<sup>4</sup> and *RFJ v Victoria Police FOI Division*,<sup>5</sup> in which the Victorian Civil and Administrative Tribunal (**VCAT**) accepted persons would be less likely to make statements to Victoria Police if they were of the view the making of such statements would not be treated as confidential.
23. Having reviewed the content and context in which the information was provided to the Agency, I am satisfied the public interest lies in the Agency preserving the confidentiality of witness statements provided by third parties during a police investigation. Further, it would be contrary to the public interest if third parties were not able to communicate openly and transparently with the Agency out of concern information they provided would be disclosed under the FOI Act.
24. Accordingly, I am satisfied Documents 4 and 5 are exempt under section 35(1)(b) as disclosure would be likely to impair the Agency's ability to obtain similar information in the future.
25. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to section 35(1)(b).

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

26. 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>6</sup> and
  - (b) such disclosure would be 'unreasonable'.
27. 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>7</sup> It has also been held information relates to a person's personal affairs if it 'concerns or affects that person as an individual'.<sup>8</sup>
28. VCAT has held a document will disclose personal affairs information if the document is capable of, either directly or indirectly, 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 the capacity of any member of the public to potentially identify a third party.<sup>9</sup>
29. VCAT has also noted CCTV footage may disclose the personal affairs of persons other than an FOI applicant, even if it does not show the faces of those third parties. An individual may be capable of being identified by what they are wearing or doing in the footage.<sup>10</sup>

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

30. Document 6 contains copies of identification documents of a third party individual, and contains information such as their full name, date of birth, residential addresses, photographs and signature.
31. Document 7 is CCTV footage capturing the individuals involved in an incident, including facial features of those involved and numerous third party witnesses (the **footage**).

---

<sup>4</sup> [2007] VCAT 1194 at [73].

<sup>5</sup> [2013] VCAT 1267 at 170.

<sup>6</sup> Sections 33(1) and (2).

<sup>7</sup> Section 33(9).

<sup>8</sup> *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

<sup>9</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>10</sup> *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

32. Having been briefed on the footage, I note it depicts various individuals and unrelated third parties. I consider the picture quality of the footage sufficiently clear to show identifying features of the individuals captured in the footage. I am satisfied the identities and locations of the individuals are reasonably capable of being determined by persons with knowledge of or involvement in the events to which they relate or any other member of the public.
33. Therefore, I am satisfied the documents contain personal affairs information of individuals other than the Applicant.

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

34. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of a third party's right to personal privacy in the circumstances.
35. I am of the view disclosure of the documents would be unreasonable in the circumstances.
36. In making my decision, I have given consideration to the following factors:
  - (a) the nature of the personal affairs information;
  - (b) the circumstances in which the information was obtained;
  - (c) the Applicant's interest in the information (including their purpose for seeking access to the document);
  - (d) whether any individuals to whom the personal affairs information relates object or would be likely to object to the release of the information; and
  - (e) the likelihood of further disclosure of the information by the Applicant, if released.
37. I acknowledge the personal reasons for which the Applicant seeks access to the document. However, I do not consider the public interest would be promoted by the release of the personal affairs information of third parties in the documents. The Applicant's interest in obtaining access is only one factor to consider and is not determinative. Therefore, this factor weighs against disclosure.
38. The personal affairs information in the documents was obtained by the Agency for the purpose of a criminal investigation. I accept the document was provided to the Agency in confidence on the understanding it would only be used for the limited purpose of the Agency's investigation and any potential prosecution only. This factor weighs against disclosure.
39. The 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 with an investigation or a criminal prosecution, I consider the individuals captured by the footage would not reasonably expect, nor consent to, it being disclosed under the FOI Act and other than for law enforcement related purposes. This factor weighs against disclosure.
40. I have considered the likelihood and potential effect of wider dissemination of the document, if released, given the FOI Act does not place any conditions or restrictions on an applicant's use of a document obtained under the FOI Act, including further or public dissemination. While there is no evidence to suggest the Applicant would disseminate the document, I am of the view disclosure would be contrary to the public interest in the circumstances.

41. There is no information before me to suggest the public interest would be promoted by the release of personal affairs information of the third parties. Rather, disclosure of the documents would serve the Applicant's private interests only.
42. I am of the view the greater public interest lies in the Agency preserving the confidentiality of the information provided 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 functions. Therefore, I consider there is a greater public interest in the third parties' information not being released to the Applicant.
43. Section 33(2A) requires that, 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. However, there is no information before me to suggest that this is a relevant factor in the circumstances.
44. 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 (or their next of kin, if deceased) an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.<sup>11</sup> However, this obligation does not arise if:
  - (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.<sup>12</sup>
45. The Agency determined it was not practicable to consult with the third parties, as required under section 33(1).
46. Given the circumstances, I am of the view the third parties, whose personal affairs information is contained in the documents, would be reasonably likely to object to the release of their personal affairs information given the circumstances in which it was captured and the unrestricted and unconditional nature of release under the FOI Act.
47. Accordingly, I am satisfied Documents 6 and 7 are exempt under section 33(1).
48. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to section 33(1).

#### ***Section 31(1)(d)***

49. The Agency also relied on the exemption in section 31(1)(d) to deny access to the four documents. However, in light of my decision in relation to sections 33(1) and 35(1)(b), it is not necessary for me to consider this additional exemption.

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

50. 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.

---

<sup>11</sup> Section 33(2B).

<sup>12</sup> Section 33(2C).

51. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>13</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>14</sup>
52. I have considered the effect of deleting exempt information from Documents 4 to 7 in accordance with section 25. I am satisfied it is not practicable to delete the exempt information as to do so would render the documents, including the footage, meaningless.

### **Conclusion**

53. On the information before me, I am satisfied Documents 4 and 5 are exempt under section 35(1)(b) and Documents 6 and 7 are exempt under section 33(1).
54. As I am satisfied it is not practicable to delete exempt information from the documents in accordance with section 25, I have determined to refuse access to the documents in full.
55. The Schedule of Documents in **Annexure 1** contains a summary of my decision with respect to each document.

### **Review rights**

56. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.<sup>15</sup>
57. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>16</sup>
58. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>17</sup>
59. 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.
60. 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>18</sup>

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

61. My decision does not take effect until the relevant review periods (stated above) expire. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

---

<sup>13</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>14</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>15</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>16</sup> Section 52(5).

<sup>17</sup> Section 52(9).

<sup>18</sup> 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                      | OVIC Comments  |
|--------------|------------------|---|-----------------|--|------------------------------------|--|
| 1.           | [date]           | Law Enforcement Assistance Program (LEAP) database Incident Report Number [reference] | 9               | Released in part<br>Sections 31(1)(a), 33(1), 25           | Not subject to review              |  |
| 2.           | [date range]     | Electronic Patrol Duty Return (ePDR) Form [named] Police Station                      | 36              | Released in part<br>Sections 31(1)(a), 31(1)(d), 33(1), 25 | Not subject to review              |  |
| 3.           | [date]           | Attending Members Notes   | 4               | Released in part<br>Sections 31(1)(a), 33(1)               | Not subject to review              |  |
| 4.           | Various          | Brief of Evidence (including Witness Statements)                                      | 23              | Refused in full<br>Sections 31(1)(d), 33(1), 35(1)(b)      | Refuse in full<br>Section 35(1)(b) | Section 35(1)(b): I am satisfied the information in the document would have been provided with the expectation it would only be used for the purpose of the Agency's investigation and disclosure of the document would be contrary to the public interest as it would impair the Agency's ability to obtain similar information in the future. Accordingly, the document is exempt under section 35(1)(b). As it is not practicable to delete the exempt information in accordance with section 25, the document is exempt in full. |



Annexure 1 – Schedule of Documents

| Document No. | Date of Document | Document Description                  | Number of Pages | Agency's Decision                                     | OVIC Decision                      | OVIC Comments   |
|--------------|------------------|---------------------------------------|-----------------|---|------------------------------------|---|
| 5.           | Various          | Documents from [named] Police Station | 6               | Refused in full<br>Sections 31(1)(d), 33(1), 35(1)(b) | Refuse in full<br>Section 35(1)(b) | Section 35(1)(b): See comments for Document 4 above.  |
| 6.           | Undated          | Alleged Offender Documents            | 3               | Refused in full<br>Sections 31(1)(d), 33(1), 35(1)(b) | Refuse in full<br>Section 33(1)    | Section 33(1): The document contains copies of various forms of identification for a third party individual. For the reasons set out in the Notice of Decision above, I am satisfied it would be unreasonable to release the personal affairs information of the third party. Accordingly, the document is exempt under section 33(1). As it is not practicable to delete the exempt information in accordance with section 25, the document is exempt in full. |
| 7.           | [date]           | CCTV Footage                          | 1               | Refused in full<br>Sections 31(1)(d), 33(1), 35(1)(b) | Refuse in full<br>Section 33(1)    | Section 33(1): For the reasons set out above, I am satisfied it would be unreasonable to release the personal affairs information of third parties in the document. Accordingly, the document is exempt under section 33(1). As it is not practicable to delete the exempt information in accordance with section 25, the document is exempt in full.   |