

Notice of Decision and Reasons for Decision

Applicant:	'BP3'
Agency:	Victoria Police
Decision date:	29 May 2020
Exemption and provision considered:	Sections 33(1), 25
Citation:	'BP3' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 146 (29 May 2020)

FREEDOM OF INFORMATION – law enforcement documents – alleged assault – investigation documents – CCTV footage – LEAP report – witness statement – personal injury claim – personal affairs information – confidential 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.

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 to the Applicant.

I am satisfied certain information in the documents is exempt under section 33(1). However, I have determined other information and documents are not exempt under sections 33(1) and 35(1)(b).

Where I am satisfied it is practicable to delete exempt information in accordance with section 25, I have granted access to those documents in part.

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
29 May 2020

Reasons for Decision

Background to review

1. The Applicant alleges they were assaulted and falsely imprisoned by a [description of third party] (the **accused person**) at a shopping centre. Following an investigation, the Agency decided not to prosecute the accused person.
2. The Applicant, through their legal representative, made a request to the Agency for access to:

All police reports, statements, witness statements and CCTV footage relating to an incident involving myself when I was tackled and detained by a [description of third party] at [location and date].
3. The Agency identified five documents falling within the terms of the Applicant's request. It granted access to three documents in part and refused access to two documents in full, relying on the exemptions under sections 33(1) and 35(1)(b) to refuse access. The Agency's 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. I have examined copies of the documents 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;
 - (b) information provided with the Applicant's review application; and
 - (c) communications between the OVIC staff and the Applicant.
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

Section 33(1)

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'.

¹ Sections 33(1) and (2).

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

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 such information may be reasonably determined.²
11. I am satisfied the documents contain the personal affairs information of individuals other than the Applicant (**third parties**), including:
 - (a) the name, date of birth, address and contact details of the accused person and shopping centre staff;
 - (b) statements made by the accused person and shopping centre staff to Agency officers during the police investigation;
 - (c) statements relating to the personal affairs of the accused person and shopping centre staff;
 - (d) a witness statement provided by a third party; and
 - (e) CCTV footage of the incident captures images of the Applicant, the accused person and members of the public.

Would disclosure of this information be unreasonable?

12. 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.
13. In *Victoria Police v Marke*,³ 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'.
14. I have had regard to the following factors in determining whether disclosure of the personal affairs information in the documents would be unreasonable in the circumstances:
 - (a) The nature of the personal affairs information and the circumstances in which it was obtained by the Agency

Information in the documents and the witness statements detailing the personal affairs of the accused person and shopping centre staff is sensitive and personal.

I note various individuals provided statements to the Agency during its investigation, which is now completed. Information exempted by the Agency relates to those individuals' recollection of the incident.

Having reviewed the documents and considered the overall circumstances of the incident, which occurred in a public place, I do not consider the exempt information is particularly sensitive or confidential in nature.

In the context of this matter, I do not consider details of Agency staff, and those of police officers carrying out their ordinary law enforcement duties are particularly sensitive.

These factors weigh in favour of disclosure.

² Section 33(9).

³ [2008] VSCA 218 at [76].

(b) The circumstances in which the information was obtained by the Agency

The third parties provided their statements to the Agency while engaged in their professional capacity, rather than their personal or private lives.

The CCTV footage was taken in a public space and obtained by the Agency as part of its investigation. There does not appear to be any issues of confidentiality arising from the CCTV footage, such as it being recorded in a restricted, regulated or private location.

I consider the individuals captured in the security footage were reasonably likely to be aware they were being filmed.

Further, I consider there is nothing particularly sensitive about the manner in which the information in the documents was obtained by the Agency.

These factors weigh in favour of disclosure.

(c) The Applicant's interest in the information

I acknowledge the Applicant's reason for seeking access to the CCTV footage is to pursue a possible personal injury claim against the accused person. As such, I accept the Applicant has a strong personal interest in obtaining access to the footage. This factor weighs in favour of disclosure.

However, I do not consider footage captured of members of the public in the shopping centre is relevant to the Applicant's stated interest in the footage. This factor weighs in favour of disclosure.

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

A third party's views in relation to disclosure of their personal affairs information in a document, while a relevant factor, is not determinative in relation to whether disclosure of the information is unreasonable.

I note the Agency did not consult with relevant third parties in accordance with section 33(2B).

In the absence of consultation and given the circumstances of this matter, I am unable to determine their views on disclosure of their personal affairs information to the Applicant.

Accordingly, this factor neither weighs in favour nor against disclosure.

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

Finally, in deciding whether 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.⁴ However, I do not consider this to be a relevant factor in this matter.

15. In balancing the above factors, I am satisfied it would be unreasonable to release the following personal affairs information in the documents:

⁴ Section 33(2A).

- i. personal details of persons other than the Applicant;
 - ii. personal information of persons other than the Applicant; and
 - iii. information and images concerning third parties not involved in the incident, including members of the public.
16. However, I am not satisfied it would be unreasonable to release statements made by individuals for the purposes of the investigation and images of the accused individual in the CCTV footage.
17. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1) and each of the documents.

Section 35(1)(b)

18. The Agency denied access to Document 3, a witness statement, under section 35(1)(b).
19. 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.

Would disclosure of the document divulge information communicated in confidence?

20. Whether information communicated by an individual was communicated in confidence is a question of fact.⁵ When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.⁶ Confidentiality can be express or implied from the circumstances of a matter.⁷
21. In the circumstances of this matter, I am satisfied Document 3 was provided to the Agency in confidence for the purposes of its investigation.

Would disclosure be contrary to the public interest?

22. In deciding whether disclosure would be contrary to the public interest, I must consider whether disclosure of the document would be reasonably likely to impair the Agency's ability to obtain similar information in the future.
23. While disclosure of a witness statement may generally be considered to impair the Agency's ability from obtain cooperation or similar information from witnesses and other individuals who provide confidential information on a voluntary basis, having reviewed Document 3, I consider it merely describes the nature of evidentiary material provided to the Agency.
24. I also note information exempted by the Agency in Document 3 was released to the Applicant in other documents.

⁵ *Ryder v Booth* [1985] VR 869 at 883; *XYZ v Victoria Police* [2010] VCAT 255 at [264].

⁶ *Ibid*, XYZ at [265].

⁷ *Ibid*.

25. With the exception of the name and signature of the witness in Document 3, which I have determined is exempt under section 33(1), I am satisfied disclosure of this document would not be likely to impair the Agency's ability to obtain similar information in the future. Accordingly, Document 3 is not exempt under section 35(1)(b).
26. The Schedule of Documents in Annexure 1 sets out my decision in relation to section 35(1)(b) and Document 3.

Deletion of exempt or irrelevant information

27. 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.
28. 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 the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁹
29. The Applicant agreed to accept an edited copy of the documents, including the CCTV footage, with exempt information deleted in accordance with section 25.
30. However, the Agency determined it was not practicable to edit the CCTV footage as doing so would render the remaining footage meaningless and devoid of any context.
31. I have considered the effect of editing exempt information from the documents and CCTV footage in accordance with section 25. I am satisfied it is practicable to edit the exempt information from the documents and CCTV footage as to do so would not require substantial time and effort, and the edited documents would retain meaning.
32. Specifically, in relation to the CCTV footage, this will involve editing the footage so as to release those parts that show the alleged assault without capturing any unrelated third parties present in the shopping centre when the incident occurred.

Conclusion

33. On the information before me I am satisfied certain information in the documents is exempt under section 33(1). However, I have determined other information and documents are not exempt under sections 33(1) and 35(1)(b).
34. Where I am satisfied it is practicable to delete exempt information in accordance with section 25, I have granted access to those documents in part.
35. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

36. 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

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).

37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
39. 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.
40. 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
41. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Other matters

42. If I decide to disclose a document claimed to be exempt under section 33(1), if practicable, I must notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.¹⁴
43. VCAT has considered the meaning of 'practicable' in relation to other sections of the FOI Act:

The use of the word 'practicable' in the legislation to my mind connotes a legislative intention to apply common sense principles. 'Practicable' is not a term of art or a term of precise meaning.

... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹⁵

44. In the circumstances of this matter, I consider it is practicable to notify certain third parties, however, I have determined it is not practicable to notifying shopping centre staff due to the passage of time since the documents were created and the limited information within the documents that would enable OVIC to contact these individuals to advise them of their review rights.
45. The relevant third parties will be notified of my decision¹⁶ and their right to apply to VCAT for a review within 60 days from the date they are given notice of my decision.¹⁷

When this decision takes effect

46. My decision does not take effect until the 60 day review period for third parties expires.

¹¹ Section 52(5).

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).

¹⁴ Section 49P(5).

¹⁵ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁶ Section 49P(5).

¹⁷ Section 50(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	-	LEAP Incident Report	7	Release in part Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released except for the following information, which is exempt under section 33(1) and it is to be deleted in accordance with section 25:</p> <ul style="list-style-type: none"> - Page 1, information relating to the accused person under, 'Persons Involved'; - Page 2, information under 'Accused details'; - Page 3, information relating to the accused person under 'Persons Involved'; - Page 4, information under 'Accused details' and the accused person's name and date of birth under 'Case Progress Narrative'; - Page 6, <ul style="list-style-type: none"> ○ the name and date of birth of the staff member; ○ the name of the manager; ○ the sentence relating to the staff member following '[redacted]' 	<p>Section 33(1): For the reasons set out in the Notice of Decision above, I am satisfied disclosure of the personal affairs information of the accused person and shopping centre staff would be unreasonable. Accordingly, this information is exempt under section 33(1).</p> <p>Section 25: I am satisfied it is practicable to delete exempt information in the document in accordance with section 25, as to do so would not require substantial time and effort, and the edited document would retain meaning.</p>

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<ul style="list-style-type: none"> ○ the sentence relating to the staff member following '[redacted]' ○ the sentence relating to the staff member following '[redacted]' ○ name of the accused person; and ○ the sentence relating to the accused person following '[redacted]'. <p>- Page 7, name of accused person.</p>	
2		Statement from Witness	1	<p>Refuse in full Sections 33(1) and 35(1)(b)</p>	<p>Release in part Section 33(1)</p> <p>The document is to be released except for the name and signature of the witness, which is exempt under section 33(1) and it is to be deleted in accordance with section 25.</p>	<p>Section 35(1)(b): I am not satisfied disclosure of this document would be likely to impair the Agency's ability to obtain similar information in the future. Accordingly, this document is not exempt under section 35(1)(b).</p> <p>Section 33(1): For the reasons set out in the Notice of Decision above, I am satisfied disclosure of the personal affairs information of Agency staff would not be unreasonable. Accordingly, this information is exempt under section 33(1).</p>

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						<p>However, I am satisfied disclosure of the name and signature of the witness would be unreasonable. Accordingly this information is exempt under section 33(1).</p> <p>Section 25: See comments for Document 1.</p>
3		CCTV Footage	1 DVD	Refuse in full Section 33(1)	<p>Release in part Sections 33(1), 25</p> <p>The document is to be released except for the footage of unrelated third parties, which is exempt under section 33(1) and it is to be deleted in accordance with section 25.</p>	<p>Section 33(1): I am satisfied disclosure of the footage that captures unrelated third parties, who were not involved in the incident, would be unreasonable. Accordingly, this information is exempt under section 35(1)(b).</p> <p>However, I am satisfied disclosure of the footage that captures the accused person, including the alleged assault, would not be unreasonable. Accordingly, this information is not exempt under section 35(1)(b).</p> <p>Section 25: Given the alleged assault is confined to the middle top section of the frame in the CCTV footage, I am satisfied it is</p>

Annexure 1 – Schedule of Documents

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						practicable to apply an editing tool to delete the personal affairs information of unrelated third parties. Accordingly, such information is to be deleted in accordance with section 25.
4	[date]	Memorandum from [location] Police Station	2	Release in part Section 33(1)	Release in full	Section 33(1): See comments for Document 1.
5	[date]	Memorandum from [location] Police Station	2	Release in part Section 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the name and date of birth of the accused person, which is exempt under section 33(1) and it is to be deleted in accordance with section 25.	Sections 33(1) and 25: See comments for Document 1.