

Notice of Decision and Reasons for Decision

Applicant:	'CG3'
Agency:	Victoria Police
Decision date:	30 October 2020
Exemption considered:	Section 31(1)(b)
Citation:	'CG3' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 306 (30 October 2020)

FREEDOM OF INFORMATION – CCTV footage – police station – brief of evidence – prejudice current court proceeding – administration of justice

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 documents are exempt under section 31(1)(b).

As it is not practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I have determined the documents are exempt in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 October 2020

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency seeking access to the following documents:
 - Our client's arrest and incarceration at the [Name] Police Station and/or the [Name] Police Station on or about [date], including but not limited to all use of force documentation;
 - Any professional standard or other like investigations resulting from our client's arrest and incarceration at the [Name] Police Station and/or the [Name] Police Station on or about [date], including but not limited to officer [named individual] and officer [named individual];
 - All footage of our client's incarceration at the [Name] Police Station and/or the [Name] Police Station on or about [date] and [date].
2. In consultation with the Agency, the Applicant amended their initial request for access to the following documents:
 - ... limited to solely any video footage of our client at the [Name] Police Station on [date].
3. In its decision, the Agency identified two documents falling within the terms of the Applicant's request. It decided to refuse access to the documents in full relying on the exemptions in sections 31(1)(a), 31(1)(e) and 33(1). 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. During the review, the Agency advised it also seeks to rely on section 31(1)(b) to refuse access to the documents on the grounds the CCTV footage forms part of the brief of evidence for a current [description of] Court proceeding.
8. On 30 September 2020, OVIC staff advised the Applicant's legal representatives of the Agency's application of section 31(1)(b) to the documents. The Applicant was provided with an opportunity to make a further submission in response.
9. I have considered all communications and submissions received from the parties.
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.
11. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of exemptions

Section 31(1)(b)

12. Section 31(1)(b) provides a document is an exempt document if its disclosure would, or would be reasonably likely to, prejudice the fair trial of a person or the impartial adjudication of a particular case.
13. The exemption in section 31(1)(b) can apply in relation to a current as well as a contemplated legal proceeding.

Would disclosure prejudice, or be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case?

14. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.¹ The words 'reasonably likely' require a consideration of what may happen if the documents are released to this applicant.²
15. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
16. It is in the interests of the administration of justice that legal matters, impartially adjudicated by a court, should not be prejudiced, and a party to a proceeding has a right to a fair trial. These important protections underpin the Australian justice system and are reflected in section 31(1)(b).
17. The documents comprise CCTV footage of the Applicant's [relationship descriptor]'s arrest and detainment at a police station. The documents depict clear information regarding a number of locations at the police station.
18. In relation to the application of section 31(1)(b) to the documents, the Agency submitted the following:

The matter is set down for a [description of hearing type] on [date] at [description of] Court. Therefore the footage, which is labelled as Exhibits [specific numbers] of the brief of evidence, should also attract s31(1)(b) of the Act.

Any release of this footage could prejudice the fair trial of the defendant as this will be used as evidence at court.

19. In determining whether the documents are exempt under section 31(1)(b), I have placed weight on the following factors:
 - (a) FOI provides for the unrestricted and unconditional disclosure of information to an applicant. Therefore, it is open to an applicant to disseminate the information for any purpose or to any extent they wish.
 - (b) The documents relate to a current criminal proceeding before the [description of] Court (**Court**).
 - (c) Information in the documents is yet to be presented to and tested in the Court.
 - (d) The Applicant is not a party to the Court proceeding.

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 *JCL v Victoria Police (General)* [2012] VCAT 1060 at [39].

³ *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

- (e) Disclosure of the documents to a third party, who is not the accused person, in circumstances where the documents involve evidence in a current criminal proceeding, would be reasonably likely to prejudice the fair trial of the accused, or the impartial adjudication of the proceeding by the Court.
 - (f) In these circumstances, disclosure would be contrary to the administration of justice.
20. I note from the Applicant's review application, it relates to sensitive matters and they have a strong personal interest in obtaining access to the documents. However, it is important to note the exemptions under section 31(1) do not allow me to consider whether disclosure would serve a public interest. Rather, my consideration is confined to whether the legal requirements of the exemption are satisfied.
21. In light of the nature and content of the documents and the current criminal proceeding, I am satisfied the legal requirements of section 31(1)(b) are met and the document is exempt.

Deletion of exempt or irrelevant information

22. 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.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
24. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. Given the nature of the documents, the current criminal proceedings and the operation of section 31(1)(b), I am satisfied it is not practicable to delete the exempt information. Accordingly, no obligation arises to provide the Applicant with an edited copy of the documents under section 25.

Conclusion

25. On the information before me, I am satisfied the documents are exempt under section 31(1)(b).
26. As it is not practicable to provide the Applicant with an edited copy of the documents in accordance with section 25, I have determined the documents are exempt in full.
27. As I am satisfied the documents are exempt in full under section 31(1)(b), it is not necessary for me to consider the additional exemptions relied upon by the Agency.

Review rights

28. 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.⁶
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷

⁴ *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].

⁵ *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].

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
31. 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.

⁷ Section 52(5).

⁸ Section 52(9).