

Notice of Decision and Reasons for Decision

Applicant:	'CD2'
Agency:	Victoria Police
Decision date:	28 September 2020
Exemption and provision considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 30E of the <i>Surveillance Devices Act 1999</i> (Vic)
Citation:	'CD2' and Victoria Police (<i>Freedom of Information</i>) [2020] VICmr 277 (28 September 2020)

FREEDOM OF INFORMATION – law enforcement documents – police documents – body-worn camera footage – secrecy provision

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 a document requested by the Applicant under the FOI Act.

I am satisfied the document is exempt in full under section 38 of the FOI Act in conjunction with section 30E of the *Surveillance Devices Act 1999* (Vic) (**SD Act**).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

28 September 2020

Reasons for Decision

Background to review

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

On [date] was issued with Infringement Notice [notice number] at [time] in [location] by S/Constable [officer name] from [specific highway patrol]. I request the following documents and material:

1. Full copy of [the S/Constable's] Daily Mobile Patrol sheet/Running Sheet
 2. Police copy of the Infringement Notice, the copy that records [the S/Constable's] observations and our record of conversation.
 3. Any video or audio recording that the [the S/Constable] may have of the alleged incident, including our conversation.
 4. Any other notes or documents [the S/Constable] has of the alleged incident.
2. In its decision, the Agency identified three documents falling within the terms of the Applicant's request being a 21 page Electronic Patrol Duty Return (**ePDR**) report, a one page Penalty Infringement Notice (**PIN**) and police body-worn camera footage (**footage**).
 3. The Agency released the PIN in full while access to the ePDR was denied in part under section 33(1) and access to the footage was denied in full under section 38 of the FOI Act in conjunction with section 30E of the SD Act. The Agency's decision letter sets out the reasons for its decision.

Review

4. I have conducted a review under section 49A(1) of the Agency's decision to refuse access to a document requested by the Applicant under the FOI Act.
5. The Applicant advised they do not seek review of the decision to refuse access to the ePDR. Accordingly, this review relates to the footage only, access to which was refused on the basis of section 38 of the FOI Act. I have not reviewed a copy of the footage, however, in the circumstances of this matter, I am satisfied the document is as described by the Agency.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. 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.
8. 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

9. The Agency refused access to the footage in full under section 38 in conjunction with sections 30D and 30E of the SD Act.
10. For the footage to be exempt under section 38 of the FOI Act, the following conditions must be satisfied:
 - (a) the SD Act must be formulated with such precision that it must specify the actual information sought to be withheld;

- (b) the document, as described in the Applicant's request, must contain the specific information prohibited from disclosure under the SD Act; and
- (c) the SD Act must prohibit persons, referred to in that Act from disclosing the specific kind of information (either absolutely or subject to exceptions or qualifications) requested by the Applicant.

Protected information under the Surveillance Devices Act

11. Section 30E of the SD Act provides:

30E Prohibition of use, communication or publication of protected information

- (1) A person is guilty of an offence if –
 - (a) the person intentionally, knowingly or recklessly uses, communicates or publishes any information; and
 - (b) the person knows that, or is reckless as to whether, the information is protected information; and
 - (c) the person that, or is reckless as to whether, the use, communication or publication of the information is not permitted by this Division.

Penalty: in the case of a natural person, level 7 imprisonment (2 years maximum) or a level 7 fine (240 penalty units maximum) or both

12. Section 30D of the SD Act defines 'protected information' in section 30E to mean:

- (ab) any information obtained from the use of a body-worn camera or tablet computer by a police officer or an ambulance officer acting in the course of the officer's duty; or
- (ac) any information obtained from the use of a body-worn camera or a tablet computer by a prescribed person, or a person belonging to a prescribed class of persons, acting in the course of the persons duties in the prescribed circumstances;

...

13. In summary, section 30E of the SD Act prohibits reckless or intentional disclosure of information obtained from the use of body-worn cameras by relevant persons.

Is there an enactment in force?

14. I am satisfied the SD Act is an enactment in force for the purposes of section 38.

Does the SD Act apply specifically to the information in the document?

15. The unauthorised disclosure of such information is an offence and carries penalties under the SD Act. The penalties associated with unauthorised disclosure of such information highlights the legislature's intention that such information should remain protected.

16. I am satisfied section 30E of the SD Act prohibits the disclosure of information obtained from a body-worn camera.

Do any of the exceptions set out in section 30F of the SD Act apply?

17. Section 30F sets out circumstances in which the prohibition under section 30E does not apply:

30F Permitted use of local protected information

- (1) Local protected information may be used, communicated or published if it is necessary to do so for any of the following purposes—
 - (a) the investigation of an offence;
 - (b) the making of a decision whether or not to bring a relevant proceeding in respect of an offence;
 - (c) a relevant proceeding in respect of an offence;
 - (d) an investigation of a complaint against, or the conduct of, a public officer within the meaning of this Act or a public officer within the meaning of a corresponding law;
- (2) In this section—local protected information means—
 - (a) any information obtained from the use of a surveillance device under a warrant or emergency authorisation; or
 - (d) any information obtained from the use of a body-worn camera or a tablet computer by a prescribed person, or a person belonging to a prescribed class of persons, acting in the course of the person's duties in the prescribed circumstances.

18. The Applicant submits:

The information I requested fall under the definition of **Local** Protected Information as per section 30F (4 - a & d) of the Act, not Protected Information as per Section 30D of the Act.

I also require the local protected information for a number of reasons as permitted in Section 30F (1 – a, c & d).

...

I believe as I am only seeking a copy of my own conversation with the police member and that information is classified as **local protected information** and is required for court so I should be afforded a copy or transcript per Section 30F.

[emphasis in the original]

19. I acknowledge the Applicant is of the view the information falls into the permitted uses of 'local protected information', as defined in sections 30F(1)(a), (c) and (d) of the SD Act and, therefore, the information is not subject to section 38.
20. However, the Applicant is not being prosecuted for a driving offence, but rather is personally disputing a traffic speeding fine, which does not align with the permitted purposes for use of 'local protected information', as described under sections 30F(1)(a) and (c).
21. I acknowledge the Applicant appears concerned about the conduct of the Agency officer who issued the traffic infringement. However, this does not equate to an 'investigation of a complaint against, or the conduct of, a public officer', as described in section 30F(1)(d) of the SD Act.
22. Further, I have considered sections 30F(1A)(b) and (1B)(b) of the SD Act which, in summary, state that 'local protected information' obtained from the use of a body-worn camera may be used, communicated or published for 'any prescribed purpose'. I do not consider any prescribed purposes set out in Regulation 11 of the *Surveillance Devices Regulations 2016 (Regulations)*, as below, are made out in these circumstances.

Prescribed purposes for the use, communication or publication of local protected information

- (1) For the purposes of section 30F(1A)(b) of the Act, the following purposes are prescribed where the local protected information is obtained from the use of a body-worn camera or a tablet computer by a police officer—
 - (a) a proceeding for a family violence intervention order under the Family Violence Protection Act 2008 ;
 - (b) an investigation or inquest carried out under the Coroners Act 2008 ;
 - (c) assisting in locating any person reported missing to Victoria Police.
- (2) For the purposes of section 30F(1B)(b) of the Act, the following purposes are prescribed—
 - (a) where the local protected information is obtained from the use of a body-worn camera or a tablet computer by a protective services officer within the meaning of the Victoria Police Act 2013 —
 - (i) a proceeding for a family violence intervention order under the Family Violence Protection Act 2008 ;
 - (ii) an investigation or inquest carried out under the Coroners Act 2008 ;
 - (iii) assisting in locating any person reported missing to Victoria Police;
 - (b) in any other case, an investigation or inquest carried out under the Coroners Act 2008 .

23. While body-worn camera footage is captured by the definition of “local protected information”, obtaining a speeding fine is not a “prescribed purpose” under the Regulations, nor does it fit the definition of “relevant proceeding” or “relevant offence” in the SD Act and the Regulations.

24. Therefore, I am not satisfied an exception in section 30F applies to the footage in this matter.

Does the SD Act prohibit persons referred to in the enactment from disclosing that specific kind of information?

25. I am satisfied the SD Act prohibits the Agency from disclosing the specific kind of information the subject of the Applicant’s request, being body-worn camera footage.

26. Accordingly, I am satisfied:

- (a) the SD Act is an enactment in force, for the purposes of section 38;
- (b) the footage, as described in the Applicant’s request, would contain the specific information prohibited from disclosure by section 30E of the SD Act;
- (c) the SD Act prohibits persons from disclosing information that would fall in the terms of the Applicant’s request; and
- (d) the prohibition is absolute, in that disclosure in the circumstances of this matter is not subject to exceptions or qualifications.

27. For the above reasons, I am satisfied the footage is exempt under section 38 in conjunction with section 30E of the SD Act

Is there scope to provide an edited copy of the requested document?

28. 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.

29. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹ 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 25.²
30. As the footage is exempt under section 38 of the FOI Act in conjunction with section 30E of the SD Act in full, the obligation under section 25 does not apply to this document.

Conclusion

31. I am satisfied the footage is exempt in full under section 38 of the FOI Act in conjunction with section 30E of the SD Act.
32. Accordingly, my decision is the same as the Agency's decision.

Review rights

33. If the Applicant is not satisfied with my decision, they may apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.³ Any such application must be made within 60 days from the date the Applicant receives this Notice of Decision.⁴
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 an application to VCAT for a review of my decision is made.⁵

¹ *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].

² *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].

³ Section 50(1)(b).

⁴ Section 52(5).