

## Notice of Decision and Reasons for Decision

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Applicant:	'CK2'
Agency:	Victoria Police
Decision Date:	7 December 2020
Exemption considered:	Section 31(1)(a)
Citation:	'CK2' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 340 (7 December 2020)

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FREEDOM OF INFORMATION – law enforcement documents – police records – police member notes – ongoing Professional Standards Command (PSC) investigation – current court proceeding

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 is the same as the Agency's decision.

I am satisfied the documents are exempt under section 31(1)(a).

As I am satisfied it would not be practicable to provide an edited copy of the documents with exempt information deleted in accordance with section 25, access to the documents is refused in full.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

7 December 2020

## Reasons for Decision

### Background to review

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

All CCTV footage of I, [the Applicant] in custody at [location in Victoria] relating to the date of [date] and [date] and all notes with no redactions made by any persons in contact with me on these dates relating to my time and reason for being in custody and names of all people from Victoria Police who had contact with me on these dates. Also the name to the OIC during the days in custody and the person responsible for my custody.
2. In its decision, the Agency identified 31 pages of police member notes falling within the terms of the Applicant's request and refused access to the documents in full under section 31(1)(a).
3. The Agency did not locate any CCTV footage.
4. The Agency's decision letter sets out the reasons for its decision.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications received from the parties.
9. 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.
10. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and that 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 exemption

#### ***Section 31(1)(a) – Law enforcement documents***

11. Section 31(1)(a) provides:

#### **31 Law enforcement documents**

- (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—
  - (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;

12. The Agency's decision letter states disclosure of the documents would be reasonably likely to prejudice its investigation:

The denied information contains details of the incident and the evidence gathered by police during the investigation. I am advised that the Professional Standards Command [PSC] investigation is current and ongoing. In the circumstances I consider the release of the denied information at this time would be reasonably likely to prejudice the police investigation, pursuant to the provisions of section 31(1)(a) of the [FOI] Act.

13. For the exemption under section 31(1)(a) to apply, three elements must be satisfied:

- (a) the information must relate to an investigation of a breach, or possible breach, of the law in a particular instance;
- (b) the information must be prepared either in the course of, or for the purposes of, that investigation; and
- (c) release of the information would, or would be reasonably likely to, prejudice that investigation.

14. 'Reasonably likely' means there is a real chance of an event occurring and it is not fanciful or remote.<sup>1</sup>

15. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.<sup>2</sup>

16. 'In a particular instance' does not require a single specific investigation and can apply to the enforcement or proper administration of the law more generally. The phrase can encompass specific, identified aspects of the law, the administration of law or investigations of a breach, or potential breach, of law.<sup>3</sup>

17. 'Enforcement of the law' deals with the process of enforcement of the law, whereas the 'proper administration of the law' concerns how the law is administered, for example, regulatory, monitoring and compliance activities.<sup>4</sup>

18. The Applicant has been charged with committing an offence and is awaiting a court hearing. The Applicant states the requested police member notes were not included in the brief of evidence served in their court proceeding.

19. During the review, the Agency confirmed the relevant PSC investigation is ongoing and the police member notes form part of the investigation. The Applicant denies they made a PSC complaint.

20. Having reviewed the document and considered the circumstances of this case, I am satisfied the information sought by the Applicant is exempt under section 31(1)(a) for the following reasons:

- (a) Regardless of whether or not the PSC investigation was initiated by way of a complaint made by the Applicant, I accept the police member notes relate to an ongoing PSC investigation, and current court proceedings in relation to an alleged breach of the law.

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<sup>1</sup> *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.

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

<sup>3</sup> *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

<sup>4</sup> *Cichello v Department of Justice* [2014] VCAT 340 at [23], referring to *JCL v Victoria Police* [2012] VCAT 1060 at [28]; *Croom v Accident Compensation Commission* (1989) 3 VAR 441, affirmed on appeal [1991] 2 VR 322.

- (b) I accept in matters relating to a police investigation, the Agency can decide whether the release of information obtained during the course of an investigation is likely to assist or hinder an investigation.
- (c) The FOI Act does not impose any conditions or restrictions on an applicant's use or further dissemination of documents obtained under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the information. I accept that if police member notes, which form part of the ongoing PSC investigation were to be disclosed under the FOI Act, their disclosure would be reasonably likely to prejudice the Agency's ongoing investigation and, subject to the outcome of the investigation, potentially prejudice the enforcement or proper administration of the law in this instance.

21. Accordingly, I am satisfied the requested documents are exempt under section 31(1)(a).

#### ***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'<sup>5</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>6</sup>
- 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. I am satisfied it is not practicable to do so as the deletion of exempt information would render the documents meaningless.

#### ***Conclusion***

- 25. On the information before me, I am satisfied the documents are exempt under section 31(1)(a).
- 26. As I am satisfied it would not be practicable to provide an edited copy of the documents with exempt information deleted in accordance with section 25, access to the documents is refused in full.

#### ***Review rights***

- 27. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>7</sup>
- 28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
- 29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>

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<sup>5</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>6</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>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

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

30. 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.
31. 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>10</sup>

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<sup>10</sup> Sections 50(3F) and (3FA).