

## Notice of Decision and Reasons for Decision

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Applicant:	'DY8'
Agency:	Department of Education and Training
Decision date:	18 January 2022
Exemption and provision considered:	Section 33(1), 25
Citation:	'DY8' and Department of Education and Training (Freedom of Information) [2022] VICmr 17 (18 January 2022)

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FREEDOM OF INFORMATION – school incident – CCTV footage – personal affairs information – personal affairs of students, teachers and police officers – editing of CCTV footage – section 61B(3)

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 fresh 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.

I am satisfied certain information in the documents is exempt under section 33(1).

As I am satisfied it is practicable to provide the Applicant with edited copies of the relevant documents by deleting exempt and irrelevant information, I have granted access to the documents in part in accordance with section 25.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

**Joanne Kummrow**  
Public Access Deputy Commissioner

18 January 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to certain documents.
2. Following consultation with the Agency, the Applicant clarified the terms of their request to the following documents:
  1. [Named individual] [job description] received a letter from [Applicant] dated [date] requesting the return of items belonging to [Applicant]. I require a copy of this document that [named individual] has used and marked/annotated to indicate which items were returned to [Applicant].
  2. I require CCTV footage of VICTORIA POLICE vehicle/s and/or VICTORIA POLICE personnel in the [school] carpark, [school],[address], Specifically as follows;
    - (a) Footage from the camera that is directed toward the back gate and captures vision of the carpark at the rear of the school [I believe this is 'camera 1', and,
    - (b) Within the timeframe from 11:00, [date] until 14:00, [date].
3. The Agency identified five documents, comprising one page and four video files, falling within the terms of the Applicant's request.
4. In its decision, the Agency relied on sections 31(1)(b) and 33(1) to refuse access to the four video files in full. In subsequent correspondence with this office, the Agency withdrew its reliance on section 31(1)(b).

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document.
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 viewed a copy of the footage files and considered all relevant communications received from the parties in relation to this review.
8. Having viewed the footage, I am satisfied two of the footage files, Documents 2 and 3, are not relevant to the terms of the Applicant's request on the basis they do not record Victoria Police vehicles or personnel. Accordingly, those documents are not subject to review as they fall outside of the scope of the Applicant's request.
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.

### Complaint about Document 1

11. Alongside their review application, the Applicant raised concerns that Document 1 is not the document requested. Specifically, the Applicant seeks a copy of a further annotated version of the document.
12. In accordance with section 61B(3), this concern was addressed as part of this review.

13. OVIC staff made inquiries with the Agency and the Applicant in relation to this complaint.
14. Following those inquiries, I am satisfied the Agency conducted a thorough and diligent document search and the requested document either falls outside of the terms of the Applicant's request or does not exist.

## Review of exemptions

### **Section 33(1) – Personal affairs information**

15. 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>1</sup> and
  - (b) such disclosure would be 'unreasonable'.

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

16. Information relates to the 'personal affairs' of a person if it is reasonably capable of identifying them, or of disclosing their address or location.<sup>2</sup>
17. It has also been held information relates to an individual's personal affairs if it 'concerns or affects that person as an individual'.<sup>3</sup>
18. 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 identify a third party.<sup>4</sup>
19. Documents 4 and 5 comprise of 8:44 minutes of CCTV video footage, featuring footage captured from a stationary camera depicting a carpark and entrance to a school. The footage captures students moving across the foreground within the school, backdropped by the arrival and departure of a police vehicle outside of the school premises, recorded from a distance.
20. I am satisfied the documents contain information capable of identifying persons other than the Applicant (**third parties**) for the purposes of section 33(1), including the facial features, movements and attire of students and school staff. I am also satisfied the identities of police officers are reasonably capable of being determined by persons with knowledge of, or involvement in the events.

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

21. The concept of 'unreasonable disclosure' involves balancing the competing public interest in disclosure of official information with the protection of a third party's personal privacy in the circumstances.
22. In determining whether disclosure would be unreasonable, I adopt the view expressed by the Victorian Court of Appeal in *Victoria Police v Marke*,<sup>5</sup> in which it was held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others', and 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'. Further, '[t]he

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

<sup>2</sup> Section 33(9).

<sup>3</sup> *Hanson v Department of Education & Training* [2007] VCAT 123.

<sup>4</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>5</sup> [2008] VSCA 218 at [76].

protections of privacy, which lies at the heart of s 33(1), is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded to a lesser or greater degree'.<sup>6</sup>

23. In determining whether disclosure of the personal affairs information of third parties' would be unreasonable in the circumstances, I have considered the following factors:

(a) The nature of the personal affairs information and the circumstances in which it was obtained

While the CCTV footage depicts and concerns the Applicant, I am satisfied it was obtained by the Agency as part of its regular monitoring and school security obligations.

Given the footage also captures an incident that occurred in a public place, from cameras located within the school, it features numerous third parties, including students and teachers within and police officers outside the school grounds. The nature of the personal affairs information is described above.

In these circumstances, I consider the nature of the personal affairs information to be sensitive, given the nature of the incident, the location of the camera and the fact it captures the movements of students and school staff.

I note the Applicant likely knows the identity of certain third parties who are depicted in the footage, having been employed at the relevant school. Nevertheless, even where an applicant claims to know the identity of a third party, disclosure of the third party's personal affairs information under the FOI Act may still be unreasonable in the circumstances.<sup>7</sup>

(b) The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved by disclosure

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.<sup>8</sup>

The Applicant states they seek access to the documents for the purpose of pursuing legal action against Victoria Police with respect to an incident depicted in the CCTV footage. Accordingly, the Applicant's interest in obtaining access to the documents would serve a personal interest.

Having reviewed the documents, I consider their provision to the Applicant would provide them with the opportunity to seek legal advice regarding the merits or otherwise of taking any legal action in relation to the incident.

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<sup>6</sup> Ibid at [79].

<sup>7</sup> *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

<sup>8</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

(c) Whether any public interest would be promoted by release of the information

As stated above, the Applicant's interest in obtaining the information is to assist them in taking possible legal action. Therefore, I consider the Applicant's interest is of a private nature and no public interest factors would be served through disclosure of the information.

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

I do not have specific information before me as to the views of third parties as the Agency determined it would not be practicable to undertake third party consultation.

I am of the view the student third parties, and their parents or legal guardians, would be reasonably likely to object to the release of their personal affairs information under the FOI Act, noting the nature of disclosure under the FOI Act is unconditional and unrestricted. This means an applicant is free to do as they wish with a document once released.

(e) Whether disclosure of the information would, or would be reasonably likely to endanger the life or physical safety of any person<sup>9</sup>

There is no information before me to suggest this is a relevant factor in this case.

24. Having weighed up the above factors, I am satisfied disclosure of certain third parties' personal affairs information in the documents would be unreasonable, and this information is exempt under section 33(1).
25. Where the information relates to police officers carrying out their professional duties or responsibilities and the nature of their activities is not sensitive in nature, I do not consider it would be unreasonable to release their personal affairs information, including digital images and video footage.
26. Where the information relates to the personal affairs information of school students and staff, this information is exempt under section 33(1).
27. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1).

**Section 25 – Deletion of exempt or irrelevant information**

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 an 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'<sup>10</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>11</sup>
30. In submitting that it is not practicable to provide an edited copy of the footage, the Agency relies on its written submission in *AD1 and Department of Education and Training (Freedom of Information)* [2019] VICMr 28 (13 May 2019) ('**AD1**') which states:

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<sup>9</sup> Section 33(2A).

<sup>10</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>11</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].

I advise the FOI Unit does not have the ability to pixelate the CCTV footage. Further, the ability for the Department's Media Unit to pixelate individuals pursuant to an FOI request is highly limited, subject to their regular workload, operational tasks and resources available. Currently, due to their significant workload supporting the operational requirements of the Department and its 1531 state government schools, the Media Unit does not have the time or resources to pixelate the CCTV footage into a form that would permit release to the Applicants.

31. My decision that it was not practicable to delete exempt information from footage in 'AD1' was made on the basis the edited footage would not be of any assistance to the applicants in that matter, and taking into account the movement of individuals captured by the footage, rather than the Agency's capacity to edit the 26 minutes of footage subject to [that] review.
32. Having reviewed the footage in this matter, I am satisfied it is practicable to grant access to an edited copy of the footage, as the document will retain sufficient meaning and the effort involved in editing the document will not be onerous from a resources point of view.
33. I also note that since my decision in 'AD1', the Professional Standards came into effect on 2 December 2019. Professional Standard 9.1 requires a principal officer ensure their agency has the necessary resources and procedures in place to be able to meet their agency's statutory obligations under the Act. This may include software or systems to enable agency officers to edit CCTV footage requested as part of an FOI request.
34. Therefore, I am satisfied it is practicable to release an edited copy of the documents with exempt information deleted in accordance with section 25, such as by means of filter, pixilation or other video footage editing tool.

## Conclusion

35. On the information before me, I am satisfied the CCTV footage contains the personal affairs information of third parties. However, I have determined to release additional information in the documents, namely video footage of police officers carrying out their professional duties or responsibilities.
36. As I am satisfied it is practicable to delete exempt personal affairs information from the documents in accordance with section 25, I have determined to grant access to the relevant CCTV footage in part.

## Review rights

37. 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.<sup>12</sup>
38. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>13</sup>
39. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>14</sup>
40. 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.
41. 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>15</sup>

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<sup>12</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>13</sup> Section 52(5).

<sup>14</sup> Section 52(9).

<sup>15</sup> Sections 50(3F) and (3FA).

***Third party review rights***

42. As I have determined to release documents that contain the personal affairs information of third parties, if practicable, I am required to notify the relevant individuals of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>16</sup>
43. In this case, I am satisfied it is practicable to notify the business undertakings of their third party review rights and confirm they will be notified of my decision on the date of decision.

***When this decision takes effect***

44. Accordingly, my decision does not take effect until the third parties' 60 days review period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

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<sup>16</sup> Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents – C/22/00322

Document No.	Date of Document	Document Description	No. of pages/ duration of footage	Agency Decision	OVIC Decision	OVIC Comment
1.	Undated	List	1	Released in full	Not subject to review	
2.	[date]	CCTV Clip 1	02:01 minutes	Refuse in full Sections 31(1)(b), 33(1)	Refuse in full Section 25	Section 25: For the reasons provided in the Notice of Decision above, I am satisfied this document does not fall within the terms of the Applicant's request as it does not depict police or a police vehicle.
3.	[date]	CCTV Clip 2	01:02 minutes	Refuse in full Sections 31(1)(b), 33(1)	Refuse in full Section 25	Section 25: See comments for Document 2.
4.	[date]	CCTV Clip 3	07:42 minutes	Refuse in full Sections 31(1)(b), 33(1)	Release in part Sections 33(1), 25 The document is to be released except for the following information, which is exempt under section 33(1), and is to be deleted in accordance with section 25: <ul style="list-style-type: none"><li>identifiable features of students and school staff in footage foreground is to be edited out, through the use of a filter, pixilation or</li></ul>	Section 33(1): The document contains personal affairs information of third parties. I am satisfied disclosure of some of this information would be unreasonable for the reasons outlined in the Notice of Decision above.  Section 25: I am satisfied it is practicable to edit the document to delete exempt information in accordance with section 25.



Document No.	Date of Document	Document Description	No. of pages/ duration of footage	Agency Decision	OVIC Decision	OVIC Comment
					other video footage editing tool.	
5.	[date]	CCTV Clip 4	01:02 minutes	<b>Refuse in full</b> Sections 31(1)(b), 33(1)	<b>Release in part</b> Sections 33(1), 25 The document is to be released except for the following information, which is exempt under section 33(1), and is to be deleted in accordance with section 25:  <ul style="list-style-type: none"> <li>identifiable features of students and school staff in footage foreground is to be edited out, through use of a filter, pixilation or other video footage editing tool .</li> </ul>	<b>Section 33(1):</b> See comments for Document 4.  <b>Section 25:</b> See comments for Document 4.