

Notice of Decision and Reasons for Decision

Applicant:	'EJ3'
Agency:	Victoria Police
Decision date:	1 April 2022
Exemptions and provision considered:	Section 25A(5) in conjunction with section 38 under the <i>Freedom of Information Act 1982</i> (Vic) and section 30E(1) of the <i>Surveillance Devices Act 1999</i> (Vic)
Citation:	'EJ3' and Victoria Police (Freedom of Information) [2022] VICmr 112 (1 April 2022)

FREEDOM OF INFORMATION – police records – refusal to process an FOI request – body-worn camera footage – secrecy provision – *Surveillance Devices Act 1999* (Vic)

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.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the requirements for the application of section 25A(5) are met as I am satisfied the requested body-worn camera footage would be exempt in full under section 38 of the FOI Act in conjunction with section 30E(1) of the *Surveillance Devices Act 1999* (Vic) (**SD Act**).

Accordingly, I have refused access to the requested documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

1 April 2022

Reasons for Decision

Background to review

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

...Body camera of [third party] from [location] police station who attended my home on [date] at around [time]. The address was: [address].
2. The Agency refused to grant access to the requested document in accordance with the Applicant's request under section 25A(5).
3. In refusing to grant access to the document under section 25A(5), the Agency relied on the exemption under section 38 of the FOI Act in conjunction with section 30E(1) of the SD Act which prohibits the Agency from disclosing body-worn camera footage.
4. As permitted under section 25A(5), the Agency did not identify or locate the requested document the subject of the Applicant's FOI request. As such, the existence of the requested document is not confirmed and references to the document in this decision should not be taken as confirmation of its existence.

Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. While I have not viewed a copy of the footage, I am satisfied the document, as described by the Applicant in their FOI request and as described by the Agency in its decision letter, constitutes video and audio footage captured by a police officer's body-worn camera.
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 and submissions 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 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 application of section 25A(5)

11. The refusal power under section 25A(5) is 'carefully circumscribed'.¹ In *Knight v Corrections Victoria*,² the Supreme Court of Victoria held section 25A(5) will apply to an FOI request only where the following three requirements are met:

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

² *Knight v Corrections Victoria* [2010] VSC 338.

- (a) First, the exempt nature of the documents sought must be objectively apparent from terms of the applicant's request. The 'nature' of a document refers to their inherent or essential quality or character.
- (b) Second, it must be apparent from the terms of the applicant's request that all documents relevant to the request would be exempt.
- (c) Third, it must be apparent from:
 - i. the nature of the documents, as described in an applicant's request, that no obligation would arise under section 25 for an agency to grant access to an edited copy of a document with exempt or irrelevant information deleted; or
 - ii. an applicant's request, or through consultation with the applicant, they do not seek access to an edited copy of a document.

What is the essential character of the requested document?

- 12. As described in the Applicant's request, the requested document constitutes body-worn camera footage taken by police officers in relation to the exercise of the Agency's law enforcement functions.
- 13. I am satisfied the essential quality of the requested document is objectively apparent from the terms of the Applicant's request.
- 14. Accordingly, I am satisfied the first requirement of section 25A(5) is met.

Would the requested document, as described in the Applicant's their request, be exempt?

- 15. In refusing access to the requested document under section 25A(5), the Agency submits any such document would be exempt under section 38 of the FOI Act and section 30D of the SD Act.

Section 38 – Documents to which a secrecy provision applies

- 16. Section 38 provides a document is an exempt document 'if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications'.
- 17. For section 38 to apply, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Application of the SD Act – Prohibition on disclosure of 'protected information'

- 18. 'Protected information' is defined in section 30D of the SD Act 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.

19. Section 30E(1) 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.

20. In summary, section 30E(1) of the SD Act prohibits the reckless or intentional disclosure of information obtained from a police body-worn camera.

21. The unauthorised disclosure of such information is an offence and carries penalties under the SD Act. The penalties associated with disclosure, namely a fine and/or imprisonment, highlights the Legislature's intention that such information should remain protected and not be disclosed.

22. I am satisfied section 30E(1) of the SD Act operates to prohibit the disclosure of information obtained from a police body-worn camera, including the disclosure of the document requested by the Applicant.

23. Accordingly, I am satisfied:

- (a) the SD Act is an enactment in force, for the purpose of section 38;
- (b) the document, as described in the Applicant's request, would contain the specific information prohibited from disclosure under section 30E(1) of the SD Act;
- (c) the enactment prohibits persons from disclosing information that would fall within the terms of the Applicant's request; and
- (d) the prohibition is absolute, in that disclosure of the requested documents is not subject to any exceptions or qualifications under the SD Act.

24. Accordingly, I am satisfied the second requirement of section 25A(5) is met.

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

25. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.

26. Given the nature of the requested documents and their likely contents, as discussed above, I am satisfied the requested body-worn camera footage would be exempt in full under section 38 of the FOI Act in conjunction with section 30E(1) of the SD Act.

27. As such, there would be no obligation under section 25 for the Agency to provide the Applicant with an edited copy of the document.

28. As such, I am satisfied the third requirement of section 25A(5) is met.

Conclusion

29. On the information before me, I am satisfied the requirements for the application of section 25A(5) are met, in that I am satisfied the requested body-worn camera footage would be exempt in full under section 38 of the FOI Act in conjunction with section 30E(1) of the SD Act.
30. Accordingly, I have refused access to the requested documents in accordance with the Applicant's request under section 25A(5).

Review rights

31. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.³
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
33. 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.
34. 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.⁵

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

⁴ Section 52(5).

⁵ Sections 50(3F) and 50(3FA).