

Notice of Decision and Reasons for Decision

Applicant: 'EK9'
Agency: Victoria Police
Decision date: 17 May 2022
Exemptions considered: Sections 31(1)(e), 33(1)

Citation: 'EK9' and Victoria Police (Freedom of Information) [2022] VICmr 127
(17 May 2022)

FREEDOM OF INFORMATION – CCTV footage – police cells – [custody hallway] – safety of police officers – personal affairs information

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 different to the Agency's decision.

I am satisfied Document 6 is exempt under section 31(1)(e). However, I am not satisfied Documents 7 and 8 are exempt under sections 31(1)(e) or 33(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access to Document 6 is refused in full.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

17 May 2022

Reasons for Decision

Background to review

1. The Applicant, via their legal representative, made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant amended the initial request to seek access to:
 1. CCTV footage from Custody Hallway – approx. [number] min
 2. CCTV Footage in [the Applicant's] cell during the period when [named person] and other Officers attended [the Applicant] in the cells and until those Officers leave the cell ([Applicant's] handcuffs were removed at this time - approx. - [number] min)
 3. CCTV Footage from [time] until [time] during which [the Applicant] [event] and after which [named person] and Officers subsequently attended [the Applicant] in the cells and until they left the cell. (There was a physical altercation between [the Applicant] and Officers) – approx.[number] min
 4. LEAP Incident Report
 5. Attendance Summary
 6. LEAP Involvement List
 7. Use of Force Form
 8. LEAP Records Enquiry dated [date]
2. The Agency identified eight documents falling within the terms of the Applicant's request and decided to grant access to one document in full, four documents in part and refused access to three documents in full. The Agency relied on the exemptions under sections 31(1)(e) and 33(1) to refuse access to information in the documents. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant indicated they only seek access to the CCTV footage contained in Documents 6-8. Accordingly, the remainder of the documents are not subject to review.
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. I have considered all communications and submissions received from the parties.
8. 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.
9. 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)(e) – Disclosure would endanger the life or physical safety of a confidential source of information

10. Section 31(1)(e) provides:

31 Law enforcement documents

Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to—

(1)

...

(e) endanger the lives or physical safety of persons engaged in or in connection with law enforcement or persons who have provided confidential information in relation to the enforcement or administration of the law;

11. Section 31(2) describes the exceptions to the application of section 31(1)(e), as follows:

(1) This section does not apply to any document that is—

- (a) a document revealing that the scope of a law enforcement investigation has exceeded the limits imposed by law;
- (b) a document revealing the use of illegal methods or procedures for preventing, detecting, investigating, or dealing with matters arising out of, breaches or evasions of the law;
- (c) a document containing any general outline of the structure of any programme adopted by an agency for investigating breaches of, or enforcing or administering, the law;
- (d) a report on the degree of success achieved in any programme adopted by an agency for investigating breaches of, or enforcing or administering, the law;
- (e) a report prepared in the course of routine law enforcement inspections or investigations by an agency which has the function of enforcing and regulating compliance with a particular law other than the criminal law;
- (f) a report on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation—

if it is in the public interest that access to the document should be granted under this Act.

12. The Agency's decision states Document 6 is exempt under section 31(1)(e) because it:

...shows the layout of an area of the police station which is not visible to the general public and images of police members in the hallway and the cell is such information.

Safety concerns have led [the Agency] to the opinion that release would be reasonably likely to endanger the lives or physical safety of the persons involved.

13. In deciding whether section 31(1)(e) applies to the documents, I have taken the following factors into consideration:

- (a) for disclosure of the documents to be 'reasonably likely' to endanger the lives or physical safety of the relevant persons, there must be a real, rather than a fanciful or remote, chance of that occurring;¹

¹ *Department of Agriculture and Rural Affairs v Binnie* (1989) VR836 at [842].

- (b) the danger to the relevant persons must arise from the disclosure of the documents rather than from other circumstances;²
- (c) the risk may not be from the Applicant themselves; it may be from anyone should the information become generally known;³
- (d) the exemption applies where it would be reasonably likely that there would be a danger to physical safety, not that physical harm will occur;⁴
- (e) physical safety is not just about actual safety; it is 'also about the perception that one is safe';⁵ and
- (f) the focus is on the impact on the relevant persons, not upon the motives of the applicant.⁶

14. The Agency submits:

As the members can be clearly seen and identified, if this footage was disclosed in a public forum, such as social media, there is a risk to the personal safety of the members while not on duty. As you would be aware, there is no restrictions on disseminating footage once released.

Due to the nature of their work, members are continually in contact with the public, including people who may not appreciate the nature of police work. The release of their images etc, could put them in a position of risk when they are off duty but can be recognised.

[...]

15. The Applicant submits:

We deny that images of a hallway could in any way endanger the lives of or safety of law enforcement officers. We do not understand the relevance of whether or not the hallway is visible to the general public. In any case, the layout of hallways within the CCTV footage are seen and known to all members of the public brought into the cells – likely hundreds every year. [the Agency has] failed to make out this section.

We also dispute that release of the CCTV footage would result in any safety risk to police members as alleged. We reject the legal validity of the assertion [by the Agency] that "I have considered the safety of Victoria Police members due to [redacted – description of circumstances]. This has led me to the opinion that release of their images would be unreasonable". [...]

Firstly, our client already has the names of all the officers involved, because their names, (and police numbers and signatures) appear in the police Brief of Evidence. [The Applicant] also has images of almost all the police officers involved, because their photos also appear in the police Brief of Evidence. [The Applicant] has taken no action against them.

The police also give no evidence about our client's behaviour when in custody, so as to justify their assertion that [the Applicant] is so dangerous that release of CCTV footage would constitute a threat to safety. Indeed, our client says the police use excessive force against [them].

We acknowledge our client was charged with [type of] charges over that behaviour, but these are being contested in court.

[...]

² *Lawless v Department, Chief Commissioner of Police & Director of Public Prosecutions* (1985) 1 VAR 42 at 50–51.

³ *Department of Agriculture and Rural Affairs v Binnie* (1989) VR836 at [844].

⁴ *Ibid* at [844].

⁵ *O'Sullivan v Police* (Vic) (2005) 22 VAR 426; [2005] VCAT 532 at [19].

⁶ *Ibid* at [19]

16. As noted above, the documents subject to review contain CCTV footage of the Applicant and Agency officers in two different locations within the [location] Police station.
17. Document 6 contains footage of a custody hallway within the police station and Documents 7 and 8 contain footage of the Applicant in a holding cell. Accordingly, I will assess the two types of footage separately.

CCTV footage of the hallway of police station

18. I accept that the CCTV footage in Document 6 discloses sensitive security information relating to an area of [location] Police Station that is not accessible by the general public.
19. I must consider the impact that release of this footage would have on the police station's security (and therefore the perception of physical safety of those located at the station), given that the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI.
20. I am of the view that if the information in the footage became generally known, there is a real chance that an individual would be able to compromise the security of the police station. For example, an individual would be able to determine the layout of certain parts of the police station and the security methods required to access parts of the station. Further, an individual could try to use information relating to camera angles to avoid detection within the police station.
21. In these circumstances, I am satisfied that if the CCTV footage is released, it could reasonably endanger the physical safety of officers stationed at [location] Police Station.
22. Accordingly, I am satisfied Document 6 is exempt under section 31(1)(e).

CCTV footage of the Applicant's cell

23. I consider that disclosure of footage of the Applicant in a holding cell does not present the same danger as the footage of the police station hallway. The footage of the interior of the cell only reveals the layout of that particular cell and knowledge of the cell's layout could not reasonably likely be used by individuals to compromise the security of the police station.
24. The Agency's submissions focus on the impact that release would have on the officers involved in the incident. Its concerns relate to the risk that officers face whilst they are off duty, such as if they are recognised by persons who disapprove of police.
25. As stated above, for a document to be exempt under section 31(1)(e), there must be a real chance that disclosure would be reasonably likely to endanger the lives or safety of individuals, rather than a fanciful or remote chance.
26. As part of their professional duties, I consider police officers are often required to physically restrain individuals both in public and in private areas, such as a police station.
27. Police officers deal with members of the public face to face and their images are regularly broadcast in public forums as part of their professional roles.
28. Further, the police officers depicted in the CCTV footage are engaging in their regular professional duties.
29. While I acknowledge the Agency's concern for the safety of police officers, I consider there is only a remote chance that disclosure would result in the outcome described by the Agency.

30. For these reasons, I am not satisfied that the release of the footage would be reasonably likely to endanger the physical safety or lives of those individuals.
31. Accordingly, I am not satisfied the CCTV footage in Documents 7 and 8 is exempt under section 31(1)(e).
32. My decision in relation to section 31(1)(e) is contained in the Schedule of Documents in Annexure 1.

Section 33(1) – Documents affecting personal privacy of third parties

33. I have only considered the application of section 33(1) to Documents 7 and 8, as I am satisfied Document 6 is exempt in full under section 31(1)(e).
34. 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 (a **third party**);⁷ and
 - (b) such disclosure would be ‘unreasonable’.

Do the documents contain the personal affairs information of third parties?

35. Information relating to a third party’s ‘personal affairs’ includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.⁸
36. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person. Given that the FOI Act does not place any restrictions on an applicant’s use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁹
37. As noted above, the CCTV footage contains images of the Applicant and Agency staff. The quality of the footage is clear and I consider that, at various times and to varying degrees, the individuals whose images appear in the footage are capable of being identified.
38. Although the Agency officers in the footage are wearing masks over their faces, I am of the view that those officers could be identified by the Applicant or others who were present or have knowledge of the incident.
39. Therefore, I am satisfied the CCTV footage contains the personal affairs information of third parties for the purposes of section 33(1).

Would the disclosure of personal affairs information be unreasonable?

40. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the interest in protecting an individual’s right to personal privacy in the circumstances.
41. Whether or not an agency officer’s personal affairs information is exempt under section 33(1) must be considered in the context of the particular circumstances of each matter.¹⁰

⁷ Sections 33(1) and (2).

⁸ Section 33(9).

⁹ *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].

¹⁰ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

42. The proper application of section 33(1) involves consideration of ‘all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend’.¹¹

43. 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 the information was obtained by the Agency

It has been held in a number of Victorian Civil and Administrative Tribunal (**VCAT**) decisions that there is nothing particularly sensitive about matters occurring or arising in the course of one’s official duties and disclosure of this type of information is generally considered not unreasonable.¹²

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

I consider the actions of Agency officers captured in the CCTV footage were within the scope of those officers’ professional duties. As noted above, the nature of a police officer’s role may require them to physically restrain individuals. Considered in this context, there is nothing particularly sensitive or confidential about the incident captured in the documents.

I note the Applicant likely knows the identity of certain third parties who are depicted in the footage. 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.¹³

(b) The Applicant’s interest in the information and whether their purpose for seeking the information is likely to be achieved by its 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.¹⁴

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 predominantly serve a personal interest.

Having reviewed the documents, I consider disclosure to the Applicant would provide them with the opportunity to review the footage and determine the merits or otherwise of taking any legal action in relation to the incident.

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

There is also a public interest in transparency and accountability in relation to the treatment of care of persons within police custody. However, as stated above, the Applicant’s interest in obtaining the information is to assist them in determining whether to pursue legal action. Therefore, I consider the Applicant’s interest in obtaining access to the footage under FOI predominantly fulfils a private interest.

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [104].

¹² See Deputy President Macnamara’s comments in *Milthorpe v Mt Alexander Shire Council* [1996] VCAT 368.

¹³ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

¹⁴ *Victoria Police v Marke* [2008] VSCA 218 at [104].

- (d) Whether any individuals 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. Given that the documents contain CCTV footage, I am satisfied that the relevant individuals whose images appear in the footage would be reasonably likely object to its release.

- (e) The likelihood of further disclosure of information, if released

As stated above, the FOI Act does not impose any conditions or restrictions on an applicant's use of documents disclosed under the Act. Accordingly, it is necessary to consider the likelihood and potential effects of further dissemination of a third party's personal affairs information if a document is released.

I have considered the likelihood of the documents being further disseminated by the Applicant, and the effects such disclosure would have on the privacy of the third parties given the nature of the documents and their content.

While there is no information before me to suggest that the personal affairs information would be further distributed, I acknowledge that the privacy of third parties may be affected following the disclosure of the footage.

- (f) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person

I must also consider whether disclosure of the personal affairs information would or would be reasonably likely to endanger the life or physical safety of any person.¹⁵ The term 'any person' is broad and extends to any relevant endangerment involving the safety of an applicant, a related third party or any other person. However, I do not consider this to be a relevant factor in the circumstances of this matter.

44. On balance of the above factors, I am not satisfied the Documents 7 and 8 are exempt under section 33(1).
45. My decision in relation to section 33(1) is contained in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

46. 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.
47. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁶ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹⁷

¹⁵ Section 33(2A).

¹⁶ *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁷ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

48. I have considered the effect of deleting exempt information from Document 6. In my view, it is not practicable for the Agency to delete the exempt information, because deleting the exempt information would render the documents meaningless. Accordingly, access to Document 6 is refused in full.

Conclusion

49. On the information before me, I am satisfied Document 6 is exempt under section 31(1)(e) and I am not satisfied Documents 7 and 8 are exempt under section 31(1)(e) and 33(1).
50. As I am satisfied it is not practicable to provide the Applicant with an edited copy of Document 6 with exempt information deleted in accordance with section 25, access is refused to Document 6 in full.

Review rights

51. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁸
52. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁹
53. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁰
54. 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.
55. 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.²¹

Third party review rights

56. 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.²²
57. I am satisfied it is practicable to notify individuals of their review rights. The relevant third parties will be notified of my decision and their right to apply to VCAT for a review within 60 days from the date they are given notice.

When this decision takes effect

58. My decision does not take effect until the third parties' 60 day review period expires.
59. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁹ Section 52(5).

²⁰ Section 52(9).

²¹ Sections 50(3F) and (3FA).

²² Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	LEAP incident report	11	Released in part Section 33(1)	Not subject to review	
2.	[date]	Attendance Summary	2	Released in full	Not subject to review	
3.	[date] to [date]	LEAP Master Name Involvement List	1	Released in part Section 31(1)(d)	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	[date] to [date]	LEAP [document]	1	Released in part Section 31(1)(d)	Not subject to review	
5.	[date]	Use of Force Form	3	Released in part Section 33(1)	Not subject to review	
6.	[date]	CCTV footage from Custody Hallway	[number] minutes	Refused in full Sections 31(1)(e), 33(1)	Refused in full Section 31(1)(e)	<p>Section 31(1)(e): For the reasons outlined in the Notice of Decision, I am satisfied this document is exempt under section 31(1)(e).</p> <p>Section 33(1): As I am satisfied the document is exempt under section 31(1)(e), I have not considered the application of section 33(1).</p> <p>Section 25: I am not satisfied it is practicable to provide an edited copy of this document with exempt information deleted in accordance with section 25. Accordingly, access is refused in full.</p>
7.	[date]	CCTV footage from inside a holding cell	[number] minutes	Refused in full	Release in full	<p>Section 31(1)(e): For the reasons outlined in the Notice of Decision, I</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
				Sections 31(1)(e), 33(1)		am not satisfied this document is exempt under section 31(1)(e). Section 33(1): For the reasons outlined in the Notice of Decision, I am not satisfied this document is exempt under section 33(1).
8.	[date]	CCTV footage from inside a holding cell	[number] minutes	Refused in full Sections 31(1)(e), 33(1)	Release in full	Section 31(1)(e): See comments for Document 7. Section 33(1): See comments for Document 7.