

Notice of Decision and Reasons for Decision

Applicant:	'CO6'
Agency:	Victoria Police
Decision date:	29 January 2021
Exemptions and provisions considered:	Sections 31(1)(b), 33(1), and 38 of the <i>Freedom of Information Act 1982</i> (Vic) (FOI Act) in conjunction with section 30E of the <i>Surveillance Devices Act 1999</i> (Vic)
Citation:	'CO6' and Victoria Police (<i>Freedom of Information</i>) [2021] VICmr 24 (29 January 2021)

FREEDOM OF INFORMATION – police documents – law enforcement documents – CCTV footage – public space – body-worn camera footage – public transport – protective security officers – *Surveillance Devices Act 1999* (Vic) – court proceeding – administration of justice

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 sections 31(1)(b), 33(1), and 38 in conjunction with section 30E of the *Surveillance Devices Act 1999* (Vic).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
29 January 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to any footage in relation to [number of] incidents involving a Protective Security Officer (**PSO**) on specified dates. The Applicant indicated they were willing to receive edited copies of the footage to 'address any privacy-related concerns, such as obscuring the faces of individuals featured in the video-footage including the [PSO]'.
2. The Agency identified two discs of CCTV footage falling within the terms of the Applicant's request, and refused access to the documents in full under sections 33(1) and 31(1)(b).
3. The Agency did not source copies of the body-worn camera footage on the basis it is exempt under section 38 of the FOI Act in conjunction with section 30E of the *Surveillance Devices Act 1999* (Vic) (**SD Act**).
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 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 exemptions

Section 31(1)(b)

11. Section 31(1)(b) provides a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to 'prejudice the fair trial of a person or the impartial adjudication of a particular case'.
12. The exemption can apply in relation to current as well as contemplated legal proceedings.

Would disclosure prejudice, or be reasonably likely to prejudice the fair trial of a person or the impartial adjudication of a particular case?

13. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.¹ The words 'reasonably likely' require a consideration of what may happen if the documents are released to this applicant.²
14. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
15. The phrase 'in a particular case' does not require a single specific investigation. It can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁴
16. It is in the interests of the administration of justice that legal matters, impartially adjudicated by a court, should not be prejudiced, and a party to a proceeding has a right to a fair trial. These important protections underpin the Australian legal system and are reflected by the provision in section 31(1)(b).
17. In determining whether the documents are exempt under section 31(1)(b), I have placed weight on the following factors:
 - (a) FOI provides for the unrestricted and unconditional disclosure of information to an applicant. Therefore, it is open to an applicant to disseminate the disclosed information for any purpose or to any extent they wish.
 - (b) The documents are the subject of a current legal proceeding before the Court.
 - (c) The Applicant is not a party to the court proceeding.
 - (d) Information in the documents is yet to be presented to and tested in open court.
 - (e) Disclosure of the documents to a third party, who is not the accused person, in circumstances where the documents involve evidence relevant to a current legal proceeding, would be reasonably likely to prejudice the fair trial of an accused person or the impartial adjudication of the matter by the Court.
18. The Applicant submits section 31(1) does not apply to the CCTV footage subject to review due to application of sections 31(2)(a) and (b). In support of their contention, the Applicant submits the PSO was charged in relation to the incidents.
19. Section 31(2) provides section 31(1) 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;...

¹ *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.

² *JCL v Victoria Police (General)* [2012] VCAT 1060 at [39].

³ *Ibid*, Bergman at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁴ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

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

20. While I accept there are factors in support of disclosure being in the public interest, to which I have given significant weight and discuss in more detail below with respect to the application of section 33(1), there are also competing factors that do not support disclosure being in the public interest, as outlined in paragraph 17 above.
21. On balance, I consider the public interest lies in the impartial adjudication of the current court proceeding in order to prevent prejudice to the proper administration of justice.
22. I note from the Applicant's review application, they have a genuine interest in seeking access to the requested documents. However, given the nature and content of the documents and the current court proceeding, I am satisfied the legal requirements for the exemption are satisfied and the documents are exempt under section 31(1)(b).

Section 33(1)

23. A document is exempt under section 33(1) if two conditions are satisfied:
 - (a) disclosure of the document would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;⁵ and
 - (a) such disclosure would be 'unreasonable'.

Does the footage contain personal affairs information of persons other than the Applicant?

24. Information relating to an individual'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.⁶
25. A document will disclose personal affairs information if it is capable, either directly or indirectly, of identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁷
26. The image of a person constitutes the personal affairs information of that individual.⁸
27. The Victorian Civil and Administrative Tribunal (**VCAT**) has noted CCTV footage may disclose personal affairs of a person other than an FOI applicant even if it does not show the face of a third party. An individual may be capable of being identified by what they are wearing, what they were doing or by their voice.⁹
28. The CCTV footage subject to review is taken from [number of public transport stations] in Victoria. The CCTV footage comprises four recordings, split into parts, taken from different cameras, in full colour and without audio.
29. The CCTV footage captures the presence of a number of individuals, including PSOs, police officers, and members of the public entering and exiting the [public transport] station and boarding and disembarking [public transport].

⁵ Sections 33(1) and 33(2).

⁶ Section 33(9).

⁷ *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].

⁸ *Lonigro v Victoria Police* [2013] VCAT 1003 at [43]; *Horrocks v Department of Justice* [2012] VCAT 241.

⁹ *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

30. The quality of the footage is sufficiently clear to identify features of the individuals captured in the footage. Further, as the Applicant has requested footage from a specific date and time, I consider disclosure of the footage could lead to the identification of third parties.
31. I am also satisfied the identities and locations of the individuals are reasonably capable of being determined by persons with knowledge of, or involvement in, the event to which the footage relates or any other member of the public.
32. Accordingly, I am satisfied the document contains personal affairs information of individuals other than the Applicant.

Would disclosure involve the unreasonable disclosure of personal affairs information?

33. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of an individual's personal privacy in the circumstances of a matter.
34. In *Victoria Police v Marke*,¹⁰ the Victorian Court of Appeal 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 protection of privacy, which lies at the heart of [section] 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'.¹¹
35. In determining whether disclosure of personal affairs information in the documents would be unreasonable, I have considered the following factors:

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

The nature of the personal affairs information in the footage is described above.

I acknowledge the footage was captured at [public transport] stations, which are public locations where security cameras are prevalent. This is in contrast to a sensitive location, such as a prison or covertly recorded footage.

I also acknowledge the CCTV footage was obtained by the Agency as part of a police investigation into incidents that are subject of a current court proceeding.

In *Evans v Victoria Police*,¹² VCAT recently determined footage taken in a clothing shop was 'sensitive insofar as it ultimately formed part of the evidence in a police prosecution', however, 'it is not inherently sensitive information'.

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

In support of their review application, the Applicant submits they seek access to the CCTV footage for the purpose of disseminating it widely to generate public discussion about 'violence committed by [PSOs]' and 'underlying factors that arguably cause and enable acts of violence committed by [PSOs]' and to promote scrutiny of the expansion of powers of PSOs under the *Police and Emergency Legislation Amendment Bill 2020* (Vic).

¹⁰ [2008] VSCA 218 at [76].

¹¹ [2008] VSCA 218 at [79].

¹² (*Review and Regulation*) [2020] VCAT 426 (9 April 2020) at [72].

As submitted by the Applicant, concerns of corruption and misconduct by transit PSOs was explored in a 2016 report by Independent Broad Based Anti-corruption Commission, which identified three key areas of risk in relation to the conduct of transit PSOs, including:

- assault and excessive use of force
- unauthorised access to and/disclosure of information; and
- predatory behaviour involving members of the public.¹³

Accordingly, I am satisfied there is sufficient public interest and importance in matters concerning alleged misconduct by PSOs.

However, I also consider there to be factors that weigh against disclosure being in the public interest.

The fact CCTV cameras are used to assist in the prevention, detection, investigation, and handling of matters arising out of breaches or evasions of the law is well known. However, I accept what is not well known is the location, number and coverage of CCTV cameras in public spaces. In my view, disclosure would be reasonably likely to prejudice the effectiveness of CCTV cameras within the stations as a means of monitoring, detecting and investigating breaches or possible breaches of the law and assist individuals to evade or limit the effectiveness of such security surveillance, which in my view, is contrary to the public interest.

Further, the documents are the subject of a current legal proceeding before the Court and have not been aired in open Court. As discussed above with respect to the application of section 31(1)(b), I consider it would be contrary to the public interest to disclose documents where disclosure would be reasonably likely to prejudice the fair trial of an accused person or the impartial adjudication of the matter by the Court.

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

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

As noted above, the Applicant seeks access to the documents to promote discussion in the community concerning misconduct by PSOs and scrutiny of the expansion of the powers of PSOs. I consider the Applicant's purpose for seeking access to the documents may be achieved through disclosure of the documents.

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

As stated above, I accept CCTV footage at public transport locations is obtained for the purpose of maintaining a safe environment for the public. While I consider members of the public captured in the footage would reasonably expect it could be disclosed to a law enforcement agency to assist its officers with an investigation or prosecution of a criminal offence, I consider the individuals captured would be likely to not expect or consent to it being released to an individual under the FOI Act for reasons other than law enforcement related

¹³ <https://www.ibac.vic.gov.au/publications-and-resources/article/transit-protective-services-officers>.

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

purposes. In reaching this view, I note the nature of disclosure under the FOI Act is unrestricted and unconditional. This means I am not permitted to place any restrictions or conditions on the future use of a document by an applicant (or other person) once the document is released under the FOI Act.¹⁵

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

As noted above, the nature of disclosure under the FOI Act is unconditional and unrestricted. This means an applicant is free to use or disseminate a document disclosed under the FOI Act as they choose.¹⁶

(f) The extent to which the information is available to the public

I accept certain details concerning the CCTV footage is in the public domain. However, the footage is not publicly available and has not been presented or tested in open court.

(g) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁷

There is insufficient information before me to indicate this is a relevant consideration in this matter.

36. Having weighed up the above factors, on balance, I am satisfied the CCTV footage is exempt under section 33(1).

Section 38

37. With respect to body-worn camera footage, the decision letter states the Agency did not obtain the footage as it considered it to be exempt under section 38 in conjunction with section 30E of the SD Act.¹⁸

38. 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.

39. Accordingly, for body-worn camera footage to be exempt under section 38, 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.

¹⁵ *Victoria Police v Marke* [2008] VSCA 218 at [99].

¹⁶ *Victoria Police v Marke* [2008] VSCA 218 at [68].

¹⁷ Section 33(2A).

¹⁸ I note the Agency's decision letter referred to section 30 of the *Crimes Act 1958* (Vic), however, I am satisfied the intended reference is to section 30E of the SD Act.

Protected information under the Surveillance Devices Act

40. 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 knows 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;

In the case of a body corporate, 1200 penalty units.

...

41. '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;

...

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

Is there an enactment in force?

43. 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?

44. 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.

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

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

46. 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.

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

47. Section 30F sets out circumstances in which the prohibition under section 30E does not apply. I am not satisfied an exception in section 30F applies to the footage in this matter.

Summary of section 38

48. 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.
49. For the above reasons, I am satisfied body-worn camera footage is exempt under section 38 in conjunction with section 30E of the SD Act.

Deletion of exempt or irrelevant information

50. 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.
51. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁹ 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 25.²⁰
52. I note the Applicant agreed to receive an edited copy of the CCTV footage with any identifying information deleted. Accordingly, I have considered whether it is practicable to provide the Applicant with an edited copy of the CCTV footage with exempt information deleted or edited in accordance with section 25, such as by pixilation of the footage, the application of a filter or the removal of frames of footage.
53. I consider it would be practicable to remove frames of CCTV footage from both locations that do not contain footage of the alleged incidents.
54. With respect to the CCTV footage taken from [location of] station, I am not satisfied it would be practicable to apply a filter or pixelate individuals to obscure their image so that they are no longer identifiable, given the number of individuals in the frame throughout the alleged incident and the movement of those individuals. I also consider there would be a possibility of individuals being still identified by persons with knowledge of the incident, or through publication of information concerning the current court proceedings, even if their image is deleted or edited in accordance with section 25.
55. With respect to the CCTV footage taken from [location of] station, there are [number of] individuals in the frame during the alleged incident, who are in proximity throughout, with relatively minimal movement. Nevertheless, even if a filter or pixilation were applied, I am satisfied the individuals may

¹⁹ *Mickelburgh 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].

²⁰ *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].

nevertheless be identifiable by persons with knowledge of the incident or publication of information relating to the current court proceedings.

56. As such, I am satisfied it would not be practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25.

Conclusion

57. On the information before me, I am satisfied the CCTV footage is exempt under sections 31(1)(b) and 33(1), and the body-worn camera footage is exempt under section 38 in conjunction with section 30E of the SD Act.
58. As I am not satisfied it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, I have determined to refuse access to the documents in full.
59. Accordingly, my decision on the Applicant's request is the same as the Agency's decision.

Review rights

60. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²¹
61. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²²
62. 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.
63. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application is made to VCAT for a review of my decision.²³
64. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²¹ Section 50(1)(b).

²² Section 52(5).

²³ Sections 50(3F) and (3FA).