

Notice of Decision and Reasons for Decision

Applicant:	'FF5'
Agency:	Victoria Police
Decision date:	5 June 2023
Exemption and provision considered:	Sections 33(1), 25
Citation:	'FF5' and Victoria Police (Freedom of Information) [2023] VICmr 58 (5 June 2023)

FREEDOM OF INFORMATION – CCTV footage taken in public venue – assault – police investigation – criminal proceedings concluded – third party personal affairs information – disclosure not unreasonable – balancing victim's rights with third party privacy rights – exceptional and personal reasons for disclosure – section 25 – deletion of irrelevant information practicable

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 differs from the Agency's decision in that I am not satisfied the document is exempt from release under section 33(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with irrelevant information deleted in accordance with section 25, access is granted in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to CCTV footage of an assault committed against them at a social venue.
2. In its decision, the Agency identified one document (**CCTV footage**) falling within the terms of the Applicant's request, to which it refused access in full under section 33(1).
3. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the CCTV footage subject to review and considered all communications and submissions received from the parties.
6. 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.
7. 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 33(1) – Documents affecting personal privacy of third parties

8. A document is exempt from release 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**);¹ and
 - (b) such disclosure would be 'unreasonable'.

¹ Sections 33(1) and 33(2).

Does the document contain third party personal affairs information?

9. Information relating to a person'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.²
10. A document will disclose a third party's personal affairs information if it is capable, either directly or indirectly, of identifying that person. 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.³
11. Even where an applicant claims to know the identity of a third party, disclosure of their personal affairs information may still be unreasonable in the circumstances.⁴
12. The Victorian Civil and Administrative Tribunal (**VCAT**) has held CCTV footage may disclose the personal affairs information of a third party even if the footage does not show their face as an individual may be capable of being identified by what they are wearing or what they are doing.⁵
13. The CCTV footage is in full colour and is without audio. It is captured from two angles inside a social venue, shows the images of several individuals and captures an assault committed against the Applicant by an offender who was later charged, with the matter determined by a court. The footage was obtained by the Agency from the social venue as part of a police investigation into the incident.
14. The quality of the footage is clear enough to show identifying features of individuals such as their movements and attire, although it is not of sufficient quality to show the facial features of the individuals captured in the footage. As such, I am satisfied the identities of certain individuals whose images appear in the footage are reasonably capable of being determined by persons who witnessed, had involvement in, or have knowledge of the incident captured by the footage.
15. Accordingly, I am satisfied the footage contains the personal affairs information of individuals other than the Applicant.

Would disclosure of the third party personal affairs information be unreasonable?

16. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of an individual in the particular circumstances.
17. In *Victoria Police v Marke*,⁶ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, 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

² Section 33(9).

³ *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].

⁴ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397 at [41].

⁵ *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

⁶ [2008] VSCA 218 at [76].

from case to case'.⁷ The Court further held, '[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 by a lesser or greater degree'.⁸

18. In its decision letter, the Agency states it would be unreasonable to release the images of the third parties who appear in the CCTV footage as:
- (a) it is unreasonable and not practicable to consult with the third parties concerning the release of their personal affairs information;
 - (b) the likelihood of the third parties objecting to the release of their personal affairs information;
 - (c) the circumstances in which Victoria Police came to possess the information (ie by way of a police investigation);
 - (d) the purpose for which Victoria Police obtained the footage; and
 - (e) the fact that release under FOI imposes no restrictions on further use or dissemination of a document.
19. In determining whether disclosure of the third party personal affairs information would be unreasonable in these circumstances, 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 CCTV footage was obtained by the Agency from a private business as part of a police investigation into an assault against the Applicant and any subsequent criminal prosecution. However, the footage came into existence as part the continuous recording of activities in a public place for security reasons. As such, I do not consider the location where the footage was taken is sensitive in nature. While the nature of the assault which is captured by the footage is sensitive, it involves the Applicant who was the victim of the assault in a public venue. I accept the general public is aware and accept that such social venues have CCTV cameras recording the activities of patrons for safety and security reasons.

In *Evans v Victoria Police*,⁹ VCAT 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'.

I have also had regard to the quality of the images in the footage and do not consider they are sufficiently clear for third party facial features to be identified, which I consider is a relevant factor when determining the sensitivity of the footage.

⁷ Ibid.

⁸ Ibid at [79].

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

(b) The Applicant's interest in the information

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.¹⁰

[Details from the Applicant's submission about their reasons for requesting access to the CCTV footage redacted].

I acknowledge the personal reasons for which the Applicant seeks access to the footage, as outlined in their review application and in correspondence with OVIC. I acknowledge their reasons are significant given they were the victim of the assault and the effect the assault has had on their life.

As the Applicant is a victim of crime, I have also considered the objects in section 4(1) of the *Victim's Charter Act 2006 (Vic) (Charter)*:

- (1) The objects of this Act are—
 - (a) to recognise the impact of crime on the victims of that crime, including the impact on members of victims' families, witnesses to the crime and in some cases, the broader community;
 - (b) to recognise that all persons adversely affected by crime, regardless of whether they report the offence, should be treated with respect by all investigatory agencies, prosecuting agencies and victims' services agencies and should be offered information to enable them to access appropriate services to help with the recovery process;
 - (ba) to recognise that a victim of crime has an inherent interest in the response by the criminal justice system to that crime, giving rise to the rights and entitlements set out in this Act, and to acknowledge the victim's role as a participant, but not a party, in proceedings for criminal offences;
 - (c) to help reduce the likelihood of secondary victimisation by the criminal justice system.

Having considered the Applicant's reasons for seeking access to the footage and the fact that court proceedings have concluded, I accept these reasons represents a genuine personal interest in them seeking access to the footage as a victim of crime and that disclosure may assist the Applicant in their recovery.

Accordingly, I accept the Applicant's interest in the footage in these particular circumstances weighs in favour of disclosure.

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

The Applicant has advised the offender pleaded guilty to the assault and the criminal proceedings relating to the incident are finalised. I am of the view disclosure would serve a broader public interest in the context of this particular matter given the Applicant is the victim of an assault which has left them with [redacted, description of]

¹⁰ *Victoria Police v Marke* [2008] VSCA 218 at [104].

injury and they have no other means of obtaining access to the CCTV footage of the incident.

I consider the Charter provides a basis for disclosure of the footage which outweighs the public interest in protecting the privacy of the offender and other unrelated third parties.

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

There is no information before me as to the views of third parties on disclosure of their personal affairs information to the Applicant as the Agency determined third party consultation with third parties in accordance with section 33(2B) would not be practicable in this case.

As discussed above, the CCTV footage was taken at a public venue. While I consider the members of the public captured in the footage would reasonably expect footage of themselves could be disclosed to police to assist with an investigation or prosecution of an alleged criminal offence, I accept the third parties captured in the footage would likely not expect their images would be released, including under the FOI Act, for reasons other than law enforcement related purposes.

However, I consider such factors must also be balanced with considerations in favour of disclosure where an individual has exceptional and compelling reasons for seeking access to CCTV footage obtained by police as part of an investigation. In this case, the Applicant was a victim of an assault and suffered serious lifelong injuries, and I accept the footage may assist them as a victim in their ongoing treatment and recovery.

Accordingly, I do not accept the views of the third parties outweigh factors in favour of disclosure in this matter.

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

As 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.¹¹ 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 a document is released under the FOI Act.

I have considered the likelihood of the personal affairs information in the document being further disseminated, if disclosed, and the effects broader disclosure of this information would have on the privacy of the relevant third parties. The Applicant has indicated they intend to show the footage to a limited number of individuals to assist with the Applicant's ongoing medical treatment and possible civil proceedings.

Beyond this, I accept the Applicant does not intend to further disseminate the footage and that the risk of broader or public dissemination is low.

¹¹ *Victoria Police v Marke* [2008] VSCA 218 at [68].

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

In determining if the disclosure of third party personal affairs information is unreasonable in the circumstances, I must consider whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹² I do not consider this is a relevant factor in this matter.

However, a related consideration, is whether release of the information could lead to a third party suffering stress or anxiety. As stated above, I do not have information as to the views of the relevant third parties depicted in the footage, specifically, the offender's attitude to possible release of the footage.

While disclosure of the footage may cause stress or anxiety to the offender, I do not accept their views outweigh factors in favour of disclosure in this matter.

20. In weighing up the above factors, I am satisfied disclosure of the CCTV footage would not be unreasonable in the particular circumstances of this matter, and is therefore not exempt from release under section 33(1). In doing so, I have given particular weight to the Applicant as a victim of an assault in circumstances where a criminal prosecution has concluded, who suffered serious lifelong injuries, who seeks access to the footage to assist in their ongoing treatment and recovery, and they have no other means of obtaining access to the CCTV footage of the incident.
21. While I acknowledge in such matters there are competing factors, including protecting the personal privacy of third parties, I do not consider these factors outweigh the exceptional and compelling circumstances in favour of disclosure in this case.

Section 25 – Deletion of exempt or irrelevant information

22. 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.
23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴
24. As explained above, the Applicant seeks footage of the assault committed against them. I have considered whether there is any information in the footage that falls outside these terms. I note the assault occurs at a particular point in the footage and therefore consider footage prior to and following the assault is irrelevant information for the purposes of section 25.

¹² Section 33(2A).

¹³ *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].

¹⁴ *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].

25. I have considered the effect of deleting or editing irrelevant information from the footage. I am satisfied it is practicable to provide the Applicant with an edited copy of the footage to:
- (a) reduce the length of the footage so that it commences at [covers timestamp to timestamp] (a total of 21 seconds); and
 - (b) the remaining irrelevant footage is to be deleted or edited.
26. I do not consider the required time and effort for the Agency to reduce the length of the footage would be substantial, and am satisfied the remaining footage to be released to the Applicant would retain sufficient meaning for the Applicant.
27. Importantly, I consider the above editing to reduce the length of the footage to the 21 seconds strikes a reasonable balance between the right of the Applicant to obtain access to the footage, and the disclosure of third party personal affairs information captured in the footage.

Conclusion

28. On the information before me, I am not satisfied the document is exempt under section 33(1).
29. As I am satisfied it is practicable to provide the Applicant with an edited copy of the footage with irrelevant information deleted in accordance with section 25, access is granted in part.

Review rights

30. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁵
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
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.¹⁸

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and 50(3FA).

Third party review rights

35. As I have determined to release a document that contains information to which the Agency refused access under section 33(1), I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁹
36. In the circumstances, I have decided notifying the relevant third parties of their review rights is not practicable for the following reasons:
- (a) the age of the document, being [number of] years since the footage was taken; and
 - (b) I do not have information before me as to the identities or contact details of the third parties depicted in the footage.

When this decision takes effect

37. My decision does not take effect until the Agency's 14 day review period expires.
38. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁹ Sections 49P(5), 50(3) and 52(3).