

## Notice of Decision and Reasons for Decision

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Applicant:	'FF2'
Agency:	Victoria Police
Decision date:	9 June 2023
Exemption considered:	Section 33(1)
Citation:	'FF2' and Victoria Police (Freedom of Information) [2023] VICmr 55 (9 June 2023)

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FREEDOM OF INFORMATION – video footage – altercation – police investigation – personal affairs information of a third party – disclosure unreasonable

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 video footage to which the Agency refused access under section 33(1) is exempt from release.

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

My reasons for decision follow.

Joanne Kummrow  
**Public Access Deputy Commissioner**

9 June 2023

## Reasons for Decision

### Background to review

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

Case Number [reference number] and/or CASE [reference number] – Video and or photographic evidence taken on [date] supplied by [third party] to [the Agency] in the beforementioned case/s.
2. The Agency identified one document, comprising video footage, falling within the terms of the Applicant's request and refused access to the video footage in full under section 33(1). 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 and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have examined a copy of the video 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.
8. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

### Review of exemption

#### ***Section 33(1) – Documents affecting a third party's personal privacy***

9. A document is exempt from release under section 33(1) if two conditions are satisfied:

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

- (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**);<sup>2</sup> and
- (b) such disclosure would be 'unreasonable'.

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

- 10. 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.<sup>3</sup>
- 11. 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.<sup>4</sup>
- 12. 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.<sup>5</sup>
- 13. The document is video footage with audio that was captured by a third party witness, regarding an altercation involving the Applicant and another person. The footage was taken [description of location]. The footage was captured in close proximity to the altercation, to visually identify both the Applicant and the other person. It also captures the voice of the Applicant, the other person and third party witness.
- 14. I am satisfied the footage discloses the personal affairs information of the Applicant as well as the personal affairs information of both third parties as:
  - (a) the quality of the footage is sufficiently clear to show identifying features of the third party captured by the footage.
  - (b) the third parties are capable of being identified by their voice, physical features, clothing and physical movements.<sup>6</sup>

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

- 15. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting an individual's personal privacy in the particular circumstances.
- 16. The Agency's decision letter states:

In reaching my decision I have taken the following into account:

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

<sup>3</sup> Section 33(9).

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

<sup>6</sup> *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

- the purpose for which [the Agency] obtained the personal information
- the likelihood that the parties involved would object to the release of their personal information
- the likelihood of further disclosure of the personal information, should it be released
- the fact that a release under FOI imposes no restrictions on further use or dissemination
- the fact that disclosure of such personal information would be likely to cause stress, anxiety or embarrassment
- in these circumstances it is unreasonable to consult with the parties involved regarding the release of their personal information to you
- on the information available to me, I do not consider there to be any public interest promoted by further release of the personal affairs information to you

17. In *Victoria Police v Marke*,<sup>7</sup> 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 from case to case'.<sup>8</sup> 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'.<sup>9</sup>

18. In determining whether disclosure of the personal affairs information of a third party 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

The more sensitive the information, the more likely its disclosure would be unreasonable, and conversely, the more innocuous the information, the less likely disclosure would be unreasonable.<sup>10</sup>

The footage was captured by a third party witness and provided to the Agency for the purpose of the police conducting an investigation into a reported incident.

I consider when individuals provide such information to police, they do so under the assumption any information they provide will be held in confidence and used for the purpose of police investigating an alleged incident or crime or any subsequent criminal prosecution. In such circumstances, I consider information obtained from third parties during and in relation to police investigation is sensitive and confidential in nature.

(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

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<sup>7</sup> [2008] VSCA 218 at [76].

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid* at [79].

<sup>10</sup> *Page v Metropolitan Transit Authority (1988) 2 VAR 243.*

reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable under section 33(1).<sup>11</sup>

The Applicant's review application sets out their reasons for seeking access to the video footage. I note they seek the footage for the purpose of pursuing civil action against the person involved in the incident.

As such, I acknowledge the Applicant's reasons for seeking access to the footage would serve a private interest.

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

I accept there is a public interest in the Agency, which is a law enforcement agency, maintaining and preserving the ability to receive information from third parties and witnesses in order to conduct investigations into alleged breaches or possible breaches of the criminal law. In such circumstances, I consider they would have a reasonable expectation that the information provided would be disclosed in limited circumstances only, including for example, the prosecution of alleged offences.

I understand the incident captured in the footage was reported to police and was subsequently dealt with by a court.

While I understand the Applicant's interest in obtaining access to the requested information, I am not satisfied the public interest would be promoted by disclosing the footage under the FOI Act. Rather, I consider disclosure would serve the Applicant's private interest only and this factor does not outweigh the competing public interest in the Agency being able to receive confidential information from third parties in order to carry out its law enforcement functions.

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

In deciding whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.<sup>12</sup> However, this obligation does not arise if:

- (a) the notification would be reasonably likely to endanger the life or physical safety of a person, or cause them undue distress, or is otherwise unreasonable in the circumstances;
- (b) the notification would be reasonably likely to increase the risk to the safety of a person experiencing family violence; or
- (c) it is not practicable to do so.<sup>13</sup>

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<sup>11</sup> *Victoria Police v Marke* [2008] VSCA 218 at [104].

<sup>12</sup> Section 33(2B).

<sup>13</sup> Section 33(2C).

The Agency determined it was not practicable to consult with the relevant third parties. Nonetheless, having considered the nature of the document, it is reasonable to assume the third parties would be likely to object to the release of their personal affairs information, in particular, the other person involved in the incident.

- (e) The likelihood of disclosure of information, if released and the effects broader disclosure of this information would have on the privacy of the relevant third parties.

There are no restrictions that can be placed on a document regarding its future use or dissemination once it is disclosed under the FOI Act.

The relevant footage captures an altercation between the Applicant and another person and the identity of that person is clear from the footage. As such, I consider it is necessary to consider the impact wider disclosure of the footage would have on the other person.

As stated above, the Applicant has advised of their intended uses for the document. I consider it is likely the Applicant will disseminate the footage if it is disclosed under the FOI Act.

Given the matter was investigated by police and dealt with by a court, I accept the personal privacy rights of the other person involved in the altercation would be impacted by the dissemination of the document beyond the court process. As such, I consider its further use and dissemination beyond the investigation and judicial process would be reasonably likely to cause an unreasonable level of stress and anxiety to the other person.

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

In determining whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, 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.<sup>14</sup>

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

19. In weighing the above factors, I am satisfied disclosure of the third party personal affairs information in the footage is unreasonable in the circumstances and the document is exempt under section 33(1).

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

20. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
21. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>15</sup> and the effectiveness of the deletions.

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<sup>14</sup> Section 33(2A).

<sup>15</sup> *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].

Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>16</sup>

22. I have considered the effect of deleting exempt information from the document. In my view, I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, as to do so would render the document meaningless, particularly noting the purpose for which the Applicant seeks access to the document.

### **Conclusion**

23. On the information before me, I am satisfied the requested video footage is exempt from release under section 33(1).
24. As I am not satisfied it is practicable to provide the Applicant with an edited copy of the footage with exempt information deleted in accordance with section 25, access is refused in full.

### **Review rights**

25. 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>17</sup>
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
28. 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.
29. 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>20</sup>

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<sup>16</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].

<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</sup> Sections 50(3F) and 50(3FA).