

*This research essay explores the protection of personal information collected during a police investigation. It was written during my internship at the department of Freedom of Information in Victoria Police.*

## ***An analysis of the interaction between subsection 33(1)(b) of the Freedom of Information Act<sup>1</sup> and the increased collection of closed-circuit television footage by Victoria Police***

### *Introduction*

Requests for information under the Freedom of Information Act (the Act)<sup>2</sup> are on the rise. In the 2012-2013 calendar year, 33,546 requests were lodged to Victorian public agencies.<sup>3</sup> Ten years ago, requests totalled 20,063, illustrating a 67% increase in the past decade.<sup>4</sup>

Of these requests, 6147 were denied based on an exemption granted under subsection 33(1)<sup>5</sup>. This exemption is applied in cases where the requested information has been deemed to contain information relating to the personal affairs of individuals (other than the applicant).

Reliance on this exemption to deny access is also on the rise.<sup>6</sup> This could be partly due to the increased presence of surveillance in public places.<sup>7</sup> Many crimes are now captured on closed-circuit television (CCTV), which is collected for evidence by Victoria Police.<sup>8</sup>

As widespread surveillance of public areas is a relatively new phenomenon, the courts have yet to establish a firm stance on the extent to which CCTV footage should be considered an exempt document under section 33. The aim of this report is to predict the path that the Victorian courts will take on this issue.

In doing so, this report will discuss:

- a. The role of subsection 33(1);
- b. The approach of the Victorian courts to cases involving subsection 33(1) and CCTV footage;
- c. The approach of other Australian courts to cases involving equivalent sections and CCTV footage; and

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<sup>1</sup> *Freedom of Information Act 1982 (Vic)*.

<sup>2</sup> *Ibid*.

<sup>3</sup> Freedom of Information Commissioner, State of Victoria, *Annual Report (2012-13)* 45.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid* 50.

<sup>6</sup> *Ibid* 49.

<sup>7</sup> Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010).

<sup>8</sup> Victoria Police, *Community Crime Prevention Program - CCTV information* (19 December 2014) Victoria Police < [http://www.police.vic.gov.au/content.asp?Document\\_ID=32487](http://www.police.vic.gov.au/content.asp?Document_ID=32487)>.

- d. Victorian law reports on issues of privacy and surveillance.

### *Subsection 33(1)*

Subsection 33(1) of the Act states '[a] document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, including a deceased person.'<sup>9</sup>

This subsection contains several terms that should be expanded upon. Firstly, a 'document' can include 'any film in which one or more visual images are embodied so as to be capable of being reproduced therefrom'.<sup>10</sup> Next, the term 'personal affairs' includes information that identifies any person or discloses their address of location, or information from which these details can reasonably be determined.<sup>11</sup> Finally, 'unreasonable disclosure' requires the decision maker to undertake a balancing exercise of interests, by considering all of the circumstances of a particular application or request, including whether disclosure would or may endanger the life or physical safety of any person.<sup>12</sup>

This subsection confers on a decision-maker the power to use their discretion to make an informed decision. The Act, while requiring the decision maker to undertake a balancing exercise, does not restrict their discretion beyond this. It is only when an applicant appeals a decision to court that decision-makers are given further guidance on how to exercise their discretionary power.

### *The approach of the Victorian Courts*

When an Applicant chooses to seek review of an administrative decision made under the Act, it is reviewed by the Freedom of Information Commissioner.<sup>13</sup> If an Applicant is displeased with this second finding, they can then seek review of the decision by the Victorian Civil and Administrative Tribunal (VCAT).<sup>14</sup>

VCAT differs from a traditional court in that it is not bound by precedence; instead, it has the power to hear each case entirely on its merits.<sup>15</sup> However in practice the tribunal does tend to follow previous decisions in relation to exempt documents under the FOI Act.<sup>16</sup>

VCAT commonly applies a two-step test in order to determine whether a document falls under the ss 33(1) exemption clause.<sup>17</sup> Firstly, the Member considers whether disclosure of

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<sup>9</sup> Freedom of Information Act 1982 (Vic) ss 33(1)

<sup>10</sup> Ibid s 5.

<sup>11</sup> Ibid ss 33(6).

<sup>12</sup> Ibid ss 33(2A).

<sup>13</sup> Ibid s 49A.

<sup>14</sup> Ibid s 50.

<sup>15</sup> Fitzroy Legal Service Inc., *Tribunals* (19 December 2014) Fitzroy Legal Service Inc. <<http://www.lawhandbook.org.au/handbook/ch01s02s04.php>>.

<sup>16</sup> Ibid.

<sup>17</sup> See, eg, *Brygel v Victoria Police (Review and Regulation)* [2014] VCAT 1199 (26 September 2014) 38-56; *Duncan v Victoria Police (General)* [2011] VCAT 1000 (31 May 2011); *Gunawan v Department of Education*

the document(s) would involve disclosure of the personal affairs of an individual. If this is the case, the Member then considers whether release of the document(s) would be unreasonable. If these limbs are fulfilled, the Tribunal finds the documents exempt documents under section 33.

In relation to CCTV footage, the first limb is relatively easy to establish. It has been repeatedly found that CCTV footage of an individual counts as personal information.<sup>18</sup> This is due to the understanding that footage of an individual could enable that individual to be identified. Whether or not the person can immediately be identified is inconsequential; the focus is on whether release of the document has the potential to disclose personal information. As it has been firmly established that images of individuals is in itself personal information, it is almost certain that CCTV footage containing individuals other than the applicant is found to contain personal information.<sup>19</sup>

The second limb, which involves determining if release of the document(s) would be unreasonable, involves balancing the right to personal privacy and the object of the Act (that is, extending as far as possible the right of the community to access the information of public agencies). In balancing these interests, the Tribunal considers an array of factors. These include:

- (a) The individual's response as to whether they want their information (present in the footage) to be released;<sup>20</sup>
- (b) The appropriateness of the individual's concerns, should they wish that their information not be released;<sup>21</sup>
- (c) The likelihood of the Applicant disseminating the document to the world at large;<sup>22</sup>
- (d) The interests of the Applicant for obtaining the document;<sup>23</sup>

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(VCAT 15 December 1998); *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012); *Katz v Victoria Police (Review and Regulation)* [2013] VCAT 2046 (3 December 2013); *JCL v Victoria Police (General)* [2012] VCAT 1060 (23 March 2012); *Lonigro v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1003 (14 June 2013); *Victoria Police v Marke* (2008) VR 223.

<sup>18</sup> See, eg, *Brygel v Victoria Police (Review and Regulation)* [2014] VCAT 1199 (26 September 2014) 38-56; *Lonigro v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1003 (14 June 2013).

<sup>19</sup> *Lonigro v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1003 (14 June 2013).

<sup>20</sup> See e.g., *Brygel v Victoria Police (Review and Regulation)* [2014] VCAT 1199 (26 September 2014) 38-56; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012); *JCL v Victoria Police (General)* [2012] VCAT 1060 (23 March 2012).

<sup>21</sup> See, eg, *Brygel v Victoria Police (Review and Regulation)* [2014] VCAT 1199 (26 September 2014) 38-56; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012).

<sup>22</sup> See, eg, *AB v Department of Education and Early Childhood Development* [2001] VCAT 1263; *Duncan v Victoria Police (General)* [2011] VCAT 1000 (31 May 2011); *Gunawan v Department of Education* (VCAT 15 December 1998); *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012), *Lonigro v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1003 (14 June 2013), *Victoria Police v Marke* (2008) VR 223.

<sup>23</sup> See, eg, *AB v Department of Education and Early Childhood Development* [2001] VCAT 1263; *Brygel v Victoria Police (Review and Regulation)* [2014] VCAT 1199 (26 September 2014) 38-56; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012); *Lonigro v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1003 (14 June 2013); *Page v Metropolitan Transport Authority* (1988) 2 VAR 243.

- (e) The circumstances in which the information was obtained, such as circumstances of confidentiality;<sup>24</sup>
- (f) If the individual cannot be contacted, the likelihood that the individual would not wish for their information to be released;<sup>25</sup>
- (g) Any public interest for disclosure;<sup>26</sup>
- (h) The extent to which the information is available to the public;<sup>27</sup>
- (i) Alternative methods in which the Applicant could obtain the document(s) in a more appropriate manner;<sup>28</sup>
- (j) Whether release of the information could lead to stress or anxiety on the part of the individual(s) in the footage;<sup>29</sup> and
- (k) The expense and effort required to alter the document(s) to the extent that no personal information is disclosed.<sup>30</sup>

When the document in question is CCTV footage, the courts often place high importance on matters (a), (c), (f) and (k). Section 53A of the Act strongly implies that an individual's response to the release of their personal information should be considered when making the decision (factor (a)).<sup>31</sup> This is due to the fact that the section requires the decision-maker to notify any individuals in the CCTV footage, and request that they indicate whether they intend to intervene in the decision. The individual's response is consistently given weight in a Tribunal's finding.<sup>32</sup> Likewise, if the individual cannot be notified under s 53A, the court will consider what their likely wishes would be – most likely that of non-disclosure (factor (f)).<sup>33</sup> Factor (c) is also given weight, as CCTV footage can now be effortlessly uploaded onto internet websites, potentially resulting in wide-scale viewing of the document, and embarrassment of the individual.<sup>34</sup> In order to consider whether all of these factors can be avoided, the Tribunal will also consider whether it is reasonable to edit the footage to the extent that no personal information is disclosed (factor (k)). If this involves unreasonable effort or expense, the Tribunal is likely to place a high importance on maintaining the

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<sup>24</sup> See, eg, *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012); *JCL v Victoria Police (General)* [2012] VCAT 1060 (23 March 2012); *Page v Metropolitan Transport Authority* (1988) 2 VAR 243.

<sup>25</sup> See, eg, *AB v Department of Education and Early Childhood Development* [2001] VCAT 1263; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012); *Page v Metropolitan Transport Authority* (1988) 2 VAR 243.

<sup>26</sup> See, eg, *JCL v Victoria Police (General)* [2012] VCAT 1060 (23 March 2012).

<sup>27</sup> *Ibid.*

<sup>28</sup> See, eg, *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012).

<sup>29</sup> See, eg, *JCL v Victoria Police (General)* [2012] VCAT 1060 (23 March 2012).

<sup>30</sup> *Lonigro v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1003 (14 June 2013).

<sup>31</sup> Freedom of Information Act 1982 (Vic) s 53A.

<sup>32</sup> See, eg, *Brygel v Victoria Police (Review and Regulation)* [2014] VCAT 1199 (26 September 2014) 38-56, *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012), *JCL v Victoria Police (General)* [2012] VCAT 1060 (23 March 2012).

<sup>33</sup> See e.g. *AB v Department of Education and Early Childhood Development* [2001] VCAT 1263; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012); *Page v Metropolitan Transport Authority* (1988) 2 VAR 243.

<sup>34</sup> Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010).

personal privacy of those caught in the footage, and subsequently find that the document should not be released.<sup>35</sup>

It is likely that factors (a) to (k) will continue to be considered in deciding whether or not to release CCTV footage. Despite the relatively small number of cases involving CCTV, courts have been considering these factors since as early as 1988.<sup>36</sup> There is no indication that these factors will not be considered in the future. Indeed, they have even been incorporated into the Victorian Administrative Law series, which is used by counsel and judges alike.<sup>37</sup>

### *Legislation and cases in other Australian jurisdictions*

It is evident that some legislation in other Australian jurisdictions has changed the way in which personal privacy matters are to be considered. The Commonwealth Freedom of Information Act is an example of this.<sup>38</sup> The Act previously contained a section that declared any document containing ‘personal information’ to be an exempt document.<sup>39</sup> The Freedom of Information Amendment (Reform) Bill 2009 repealed this section and replaced it with s 47F, where it is listed, amongst others, as a conditional exemption. Such a structure differs to the Victorian Freedom of Information Act in that the focus is on the public interest as opposed to personal privacy. Instead of the public interest being a factor in determining whether a document containing personal information is released (as in the Victorian legislation), the Commonwealth legislation considers personal information to be a factor in determining whether the document should be released in the public interest. This may in turn restrict the power of personal privacy as a reason to dismiss an application, as it is now considered alongside other factors that weigh for or against release. The release of personal information is not the main concern; instead it is the public interest.

Despite other Australian jurisdictions having similar legislation to that of the Commonwealth, the court findings have been relatively indifferent to those in Victoria. In general, most Australian jurisdictions have placed a high importance in protecting personal privacy and dismissing applications when personal privacy is involved.

The Queensland case of *Beale and the Department of Community Safety* reflects this sentiment.<sup>40</sup> In deciding whether CCTV footage of physical violence between prisoners should be released, the Office of the Information Commissioner implicitly applied the two-limb test applied in Victoria. In doing so, the Commissioner considered the reasons why the

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<sup>35</sup> See, eg, *AB v Department of Education and Early Childhood Development* [2001] VCAT 1263; *Duncan v Victoria Police (General)* [2011] VCAT 1000 (31 May 2011) ; *Gunawan v Department of Education* (VCAT 15 December 1998); *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012); *Lonigro v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1003 (14 June 2013); *Page v Metropolitan Transport Authority* (1988) 2 VAR 243; *Victoria Police v Marke* (2008) VR 223.

<sup>36</sup> See, eg, *Page v Metropolitan Transport Authority* (1988) 2 VAR 243.

<sup>37</sup> Thomson Reuters, *Victorian Administrative Law*, vol 2 (at service 157) [FOI.33.100].

<sup>38</sup> Freedom of Information Act 1982 (Cth).

<sup>39</sup> *Ibid* s 41.

<sup>40</sup> *Beale and Department of Community Safety* [2-12] QICmr 15 (11 May 2012)

Applicant would possibly want the footage. They came to the conclusion that it may assist the Applicant in identifying some of the attackers and potentially encourage retaliation. The finding that the footage be kept confidential, despite contrary public interests, illustrates the strong weight given to protecting personal privacy – even if it is just one of many factors considered.

The decision by the NSW Commission in *Garry Miller and Sydney Trains* also shows the extent to which personal privacy is protected.<sup>41</sup> In this case, the Commissioner applied a different two-limb approach, instead considering whether the personal information would be revealed if it were to be disclosed under the Act, as opposed to whether it would be reasonable to release it under the Act. It was established that, had the agency consulted with the individuals in the footage and they expressed a wish for the footage to be withheld, this would have been sufficient to withhold its release. Such findings are common in Victoria.<sup>42</sup>

One of a sparse number of cases that have allowed the release of personal information is in that of *Nine Network Australia Pty Ltd and Fair Work Commission*.<sup>43</sup> In this case, the Applicant requests video footage that captures, among other things, the actions of Mr. X. The agency that made the original decision decided not to disclose the footage, as Mr. X expressed wishes that the footage be kept confidential – he worried that he would face embarrassment and financial harm if the footage became available to the public. The Commissioner only released the footage due to the fact that it has already been shown in open court in a Fair Work Commission hearing. He noted that Fair Work Australia took no steps during the hearing to suppress the material or protect the material from disclosure – unlike many other courts. The Commissioner hinted that this should be changed so as to protect personal privacy. This suggests that, had Fair Work Australia had more suitable procedures in place, and had the footage not previously been shown in public, that it would have been withheld.

### *Secondary sources on privacy and surveillance*

Two significant reports have been published which may encourage fierce protection of personal privacy under the law. Firstly, the *Surveillance in Public Places Report*, prepared by the Victorian Law Reform Commission, may place pressure on the legislature to further prescribe the importance to be placed on the protection of personal information.<sup>44</sup> In this report, the Commission emphasises the vagueness and uncertainty of the term ‘personal information’, as there is no concrete understanding of the circumstances under which a person’s identity can (or cannot) be ascertained. This is relevant to Victorian Freedom of

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<sup>41</sup> *Garry Miller and Sydney Trains* [2014] Information and Privacy Commission (30 September 2014)

<sup>42</sup> See e.g.

<sup>43</sup> *Nine Network Australia Pty Ltd and Fair Work Commission* [2014] AICmr 43

<sup>44</sup> Victorian Law Reform Commission, *Surveillance in Public Places*, Report No 18 (2010).

Information legislation in that a definition or test for ‘personal information’ may be inserted into the Act.

Another report titled ‘NSW Government Policy Statement and Guidelines for the Establishment and Implementation of Closed Circuit Television (CCTV) in Public Places’ also emphasises the importance of protecting personal information when capturing CCTV footage.<sup>45</sup> It states that government agencies should only collect personal information if the information is reasonably necessary in relation to a function of that agency. For example, a local council should be able to demonstrate that filming all people in a certain area is reasonably necessary to prevent crime and that prevention of crime is a key function of that local council. Such a recommendation further reinforces Australian legislatures’ stance on limiting and protecting personal information collected by government. These recommendations could also be used to further strengthen the public interest to withhold personal information.

### *Conclusion*

It can be concluded that subsection 33(1) of the Freedom of Information Act will continue to assist VCAT in protecting personal information of third-party individuals. The fact that several matters, listed (a) to (k) above, are almost constantly referred to in decisions, suggest that CCTV footage will always be carefully assessed and scrutinised before being released to an applicant.

This is reinforced by the fact that Australian courts in other jurisdictions are also reluctant to release personal information. Despite Commonwealth, Queensland and New South Wales courts considering personal information only as a facet of the public interest test, they too give much weight to personal privacy in their decisions.

Finally, it is even possible that recent government reports will lead to a greater emphasis on the protection of personal information. This may result in revised legislation, in which more direction is given to terms such as ‘personal information’, in order for more documents to be covered. Tribunals may also consider reports such as these in their findings; possibly taking them into consideration when deciding the reasonableness of releasing personal information.

Due to these factors, it is likely that tribunals will continue to, and even increase, personal privacy considerations in s33(1)(b) matters. This is particularly relevant, considering the ever-increasing use of CCTV in public places, and its use by law enforcement agencies in investigating crime. It is only a matter of time until the courts, and potentially even legislation, will reflect this privacy-driven incentive in relation to CCTV.

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<sup>45</sup> NSW Attorney General’s Department, *NSW Government Policy Statement and Guidelines for the Establishment and Implementation of Closed Circuit Television (CCTV) in Public Places* (2000).

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