

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2014234
Decision Ref: D0122017**

Participants:

Seven Network (Operations) Limited
Complainant

- and -

Public Transport Authority
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – CCTV footage – clause 3(1) – personal information – whether CCTV footage contains information about an individual whose identity is apparent or can reasonably be ascertained from the information

Freedom of Information Act 1992 (WA): sections 13(1), 13(3), 15(1), 24, 30, 42, 75(1) and 102(1); Schedule 1, clauses 3(1), 3(3) and 3(6); Glossary

Freedom of Information Act 1982 (Vic): section 33

Information Privacy Act 2009 (Qld): section 12

Brygel v Victoria Police (Review and Regulation) [2014] VCAT 1199

'BZ' and Department of Immigration and Border Protection [2014] AICmr 55

Healy and Australia Post [2016] AICmr 23

Police Force v Ayton [1999] WASCA 233

Re Mallet and Edith Cowan University [2009] WAICmr 31

Re Mallet and City of Perth [2009] WAICmr 32

Re Seven Network (Operations) Limited and City of Perth [2016] WAICmr 12

Re Terrestrial Ecosystems and Department of Environment and Conservation [2013] WAICmr 9

Re West Australian Newspapers Ltd and Department of the Premier and Cabinet [2006] WAICmr 23

Wilner v Department of Economic Development, Jobs, Training and Resources (Review and Regulation) [2015] VCAT 669

Young and Queensland Police Service [2013] QICmr 16

DECISION

The agency's decision is set aside. In substitution, I find that the disputed matter is not exempt under clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992* (WA).

Sven Bluemmel
INFORMATION COMMISSIONER

26 May 2017

REASONS FOR DECISION

1. This complaint arises from a decision made by the Public Transport Authority (**the agency**) to refuse Seven Network (Operations) Limited (**the complainant**) access to documents under the *Freedom of Information Act 1992* (WA) (**the FOI Act**).

BACKGROUND

2. By letter dated 30 May 2014, the complainant applied to the Department of Transport (**the Department**) under the FOI Act for access to documents relating to incidents that had occurred at level crossings or railway stations since January 2012. The complainant specifically sought access to ‘summary documents, plus CCTV relating to any near misses at train stations or level crossings caught on camera since January 1, 2012.’
3. By letter dated 3 June 2014, the Department transferred the application to the agency, in accordance with section 15(1) of the FOI Act. By email dated 12 June 2014, the agency confirmed with the complainant that the scope of its access application was limited to near misses on the urban rail network and not the freight rail network.
4. By notice of decision dated 15 July 2014, the agency identified three documents within the scope of the complainant’s access application. The agency described those documents as follows:
 1. *Spreadsheet: Near miss incidents at level crossings on the urban rail system between 01/01/2012 to 03/06/2014. (Incidents 1 through to 17). [Document 1]*
 2. *Spreadsheet: Near miss incidents at stations on the urban rail system between 01/01/2012 to 03/06/2014. (Incidents 18 through to 86). [Document 2]*
 3. *CCTV footage from Incidents 1-20, 22-69 and 71-86 as outlined in the spreadsheets above. [Document 3]*
5. The agency decided to give the complainant access to an edited copy of Documents 1 and 2 deleting a small amount of information on the basis it is exempt under clause 3(1) of Schedule 1 to the FOI Act. The agency decided to refuse access in full to Document 3 on the basis it is exempt under clause 3(1).
6. On 27 July 2014 the complainant applied for internal review of the agency’s decision to refuse access to Document 3. The complainant confirmed that it wished to be given access to an edited copy of Document 3 ‘in the same way an edited copy was provided in relation to documents 1 and 2.’ In addition, the complainant confirmed that it would be ‘happy to reduce the workload by identifying no more than eight incidents contained in documents 1 and 2 in which [the complainant] would expect edited access to be provided’. By letter dated 8 August 2014, the agency confirmed its initial decision.
7. By letter dated 17 August 2014, the complainant applied to me for external review of the agency’s decision to refuse the complainant access to Document 3.

REVIEW BY THE INFORMATION COMMISSIONER

8. Following my receipt of this complaint, the agency produced to me the disputed documents together with its FOI file maintained in respect of the complainant's access application.
9. On 21 January 2015, the parties attended a conciliation conference conducted by my office. The matter was not resolved at the conference and was referred to a case officer for formal external review.
10. As the agency had not identified to either the complainant or my office the particular CCTV footage which comes within the scope of the complainant's access application, it was necessary for my office to view all of the footage contained on the discs as produced to me by the agency in response to my notice of requirement under section 75(1) of the FOI Act.
11. By email dated 26 August 2015, my Investigations Officer wrote to the parties setting out in detail her understanding of the CCTV footage then in dispute. Based on her examination of that particular footage, my officer invited the agency to release certain footage to the complainant and to also provide me with the relevant footage for certain incidents as it did not appear to be contained on the discs as produced to my office.
12. In submissions dated 25 September 2015, the agency confirmed that it accepted my officer's view in relation to pieces of footage as identified by my office and agreed to edit and release that footage to the complainant. The agency confirmed that it maintained its claim for exemption under clause 3(1) for the balance of the disputed footage and provided submissions in support.
13. By email dated 7 October 2015, my officer wrote to the parties informing them that it was the view of the A/Information Commissioner that the balance of the footage then in dispute is exempt under clause 3(1) of Schedule 1 to the FOI Act. By email dated 9 October 2015, the complainant was invited to confirm that it had received the footage released by the agency and whether or not it was satisfied with that access provided.
14. By email dated 15 October 2015, the complainant confirmed it had received the footage but was not satisfied with the access provided and wished to pursue its complaint. The complainant made further submissions on 19 October 2015 and 29 October 2015 claiming that access could be given to an edited copy of the remaining footage.
15. On 11 January 2016, I provided the parties with a letter setting out my preliminary view of this matter. It was my preliminary view, for the reasons given, that the footage then in dispute is exempt under clause 3(1) of Schedule 1 to the FOI Act and that it is not practicable to give access to an edited copy of that footage in accordance with section 24 of the FOI Act.
16. In light of my preliminary view, I invited the complainant to reconsider whether it wished to pursue this complaint or to provide me with further submissions relevant to the matter for my determination. The complainant provided me with further submissions advising that it did not accept my view that it is not practicable to give access to an edited copy of the disputed footage with the exempt matter deleted. In

particular, the complainant claimed that the agency now has the software to perform such editing. The complainant did not dispute my preliminary view that the disputed footage contains exempt matter but contended that the exempt matter can be deleted and access given to an edited copy.

17. After considering the complainant's further submissions, my office made further inquiries with the agency about its editing capabilities. My office subsequently edited the footage relating to three of the incidents then in dispute, utilising a software package possessed by my office, and on 8 March 2016 invited the agency to release the edited footage to the complainant. My office advised the agency that I was of the view that the footage relating to the above three incidents that remained after editing is not personal information, as defined in the FOI Act, as the identities of the individuals in the footage was not apparent nor could they reasonably be ascertained from the footage. My office further advised that I considered that it was practicable for the agency to give access to a copy of the relevant footage by deleting the exempt matter. The agency subsequently released to the complainant the footage relating to one of the incidents and, as a result, that footage is no longer in dispute.
18. My office also advised the agency that if it did not accept my view that it is practicable to edit the footage, the agency was invited to make further submissions as to why it is not practicable to edit the footage in accordance with section 24 of the FOI Act.
19. By letter dated 23 March 2016 the State Solicitor's Office (**the SSO**) made further submissions to me on behalf of the agency, advising that, among other things, the agency did not agree that it is practicable to edit the relevant footage or that the footage which remained after editing for each incident is not personal information.
20. The SSO advised that the agency took the view that the editing then proposed by my office was not sufficient to de-identify the personal information contained in the footage and that the identities of the individuals in the footage remained apparent or could still reasonably be ascertained from that footage. My office invited the SSO to provide me with further submissions, on behalf of the agency, that outline the relevant case law which supports its claims that the identity of the individuals concerned is apparent or can reasonably be ascertained from the edited footage on the grounds claimed.
21. By letter dated 9 June 2016 the SSO provided me with further submissions including the case law relied upon.
22. By letter dated 24 January 2017 I provided the parties with my supplementary preliminary view of this matter (**supplementary preliminary view letter**). It was my supplementary preliminary view, for the reasons given, that the disputed matter, as defined at [28] of this decision, does not consist of personal information and it is not exempt under clause 3(1) of Schedule 1 to the FOI Act.
23. In light of my supplementary preliminary view, I invited the agency to withdraw its claims for exemption and to give the complainant access to a copy of the disputed matter. Alternatively, the agency was invited to provide me with further submissions in support of its exemption claims by 7 February 2017. On 27 January 2017 the agency requested an extension of time to respond to my supplementary preliminary view letter

until 24 February 2017. In the circumstances I agreed to grant the requested extension. By letter dated 23 February 2017, the SSO provided further submissions to my office, on behalf of the agency, as described at [39] below, maintaining its exemption claims.

The agency's notices of decision

24. Section 30 of the FOI Act sets out the details that must be included in an agency's notice of decision given to an access applicant. If an agency decides to refuse access to a document, section 30(f) of the FOI Act provides that the agency's notice of decision has to give details of the reasons for the refusal, the findings on any material questions of fact underlying those reasons and reference to the material on which those findings were based. Section 42 of the FOI Act requires an application for review to be dealt with as if it were an access application.
25. In this case, neither the agency's initial decision nor the internal review decision complied with the requirements of section 30(f). In its initial decision dated 15 July 2014, the agency merely stated that access was refused to Document 3 'in accordance with Schedule 1 Clause 3(1) of the FOI Act as the footage from each incident ... contains clear images of other patrons who were in the vicinity at the time of the incident'. The agency's internal review decision dated 8 August 2014 merely said that the internal review decision-maker 'confirmed that he agrees with the original decision as outlined in [the agency's] letter of 15 July 2014'. Apart from citing the exemption in clause 3(1), neither decision explained how the requirements of the exemption provision was satisfied. A case for exemption is not made out merely by citing an exemption clause.
26. I consider that the agency's notice of decision should have, at the very least, explained to the applicant that the decision-maker considered that the requested footage contains personal information, as that term is defined under the FOI Act, and the reasons for that view; that personal information is prima facie exempt under clause 3(1) of Schedule 1 to the FOI Act; and set out the decision-makers consideration as to whether any of the limits on the exemption in clauses 3(2) to 3(6) applies before concluding that the requested footage is exempt under clause 3.

Onus of proof

27. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Accordingly, in this instance, the agency bears the onus of establishing that its decision to refuse the complainant access to the disputed matter was justified.

THE DISPUTED MATTER

28. The disputed matter consists of CCTV footage of three separate incidents at either a level crossing or a railway station.
 - The first piece of footage records an incident at a level crossing in February 2012, referred to as 'Incident 1'. The footage within scope consists of minutes 0:53 to 1:19 (PTA 1).

- The second piece of footage records an incident at a level crossing in November 2013, referred to as ‘Incident 11’. The footage within scope consists of minutes 2:40 to 3:10 (PTA 11).
- The third piece of footage records an incident on the platform at a train station in October 2012, referred to as ‘Incident 39’. The footage within scope consists of minutes 7:37 to 11.35 (PTA 39).

CLAUSE 3(1) – PERSONAL INFORMATION

29. The agency claims that the disputed matter is exempt under clause 3(1) of Schedule 1 to the FOI Act. Clause 3, insofar as is relevant, provides that:

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

...

(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.

30. In the Glossary to the FOI Act the term ‘personal information’ is defined to mean:

information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –

(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or

(b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.

31. In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

32. The definition of personal information in the Glossary to the FOI Act makes it clear that any information about an individual whose identity is apparent or can reasonably be ascertained from the information is personal information about that individual. Information of that kind is exempt under clause 3(1), subject to the application of any of the limits on the exemption in clauses 3(2)-3(6).

33. Accordingly, the preliminary issue for my determination is whether or not the disputed matter contains personal information.

The agency’s submissions

34. The agency’s submissions that the disputed matter consists of personal information, which is prima facie exempt under clause 3(1), are set out in the SSO’s letters to my office dated 25 September 2015, 23 March 2016, 9 June 2016 and 23 February 2017.

35. By its submissions dated 25 September 2015, the SSO relevantly submits as follows:

24. *To be personal information as defined [in the FOI Act], the identity of the individual concerned must be apparent or reasonably ascertainable from the information in question, which in this case consists of CCTV footage.*
25. *[T]he identity of a number of individuals is apparent or reasonably ascertainable from the relevant footage for the following reasons:*
- (a) *[PTA 1]: the man in the foreground of the footage stands in close proximity to the camera and is clearly visible, both from behind and from in front... His face is on occasion clearly visible...*
 - ...
 - (c) *[PTA 11]: the camera zooms in close to a woman standing on the train tracks. She is clearly visible in the footage, both from behind and from in front. It is possible to see [what] she is wearing...and [carrying]... Four transit guards are visible in the footage...*
 - ...
 - (e) *[PTA 39]: [a man] is on the train platform. He is wearing [the clothing described] and when he first appears he carries [the items described].*
26. *The Information Commissioner has previously stated that for CCTV footage to be personal information about an individual, that person's identity must be apparent or be reasonably ascertainable from the footage [citing *Re Mallet and City of Perth* [2009] WAICmr 32].*
27. *The relevant footage contains the images of a number of individuals and that image is their personal information.*
28. *In instances where a person's face is depicted on CCTV footage, such as in respect of [PTA 1 and 11] this is clearly the personal information of the individual concerned as a person's identity is apparent from a picture of his or her face.*
29. *However, a person's identity is not apparent or ascertainable only from an image of that person's face. Where a person's image is captured on CCTV footage (notwithstanding that his or her face may be obscured in some way) the image of that person will nonetheless constitute personal information, that is, information about that individual from which his or her identity is apparent or can reasonably be ascertained, or from which he or she can be identified by reference to other identifying particulars.*
30. *In [Re Mallet and Edith Cowan University [2009] WAICmr 31] the Information Commissioner accepted that the applicant's appearance and actions at a particular location and time as captured on CCTV constituted the applicant's own personal information [footnotes omitted]. The Information Commissioner appeared to accept that, were images of third parties depicted on the CCTV footage within scope, they too would constitute the personal information of those persons.*

31. *The individuals in question will be able to identify themselves from the relevant footage and thus, at least to those individuals concerned their own identity will be apparent. For example... it is almost certain that the man depicted in [PTA 1 and the man in PTA 39] will be able to identify themselves.*
32. *[I]t is possible to ascertain a person's identity from his or her image as a whole, including other than from the image of their face. Identifying features of a person's image might include gait, height, weight, clothing, accessories, demeanour and location...*
33. *Further, the former A/Information Commissioner found that if any person, even if only a person having some additional knowledge, could reasonably ascertain the identity of a particular individual from particular information about that individual, that information will be personal information for the purposes of the FOI Act [citing *Re West Australian Newspapers Limited and Department of Premier and Cabinet* [2006] WAICmr 23 (**KEMH Inquiry**) at [53] and *Re Terrestrial Ecosystems and Department of Environment and Conservation* [2013] WAICmr 9 (**Terrestrial Ecosystems**) at [77]-[79]].*
34. *[I]t is possible that a person or group of persons already having knowledge of a matter could identify the individuals depicted in the CCTV footage such that the person's identity is "reasonably ascertainable" from that information.*
35. *For example, friends and relatives will have additional knowledge to enable them to identify individuals whose images are contained in the relevant footage. That additional knowledge would clearly include familiarity with the individual's external appearance, but also knowledge of their use of public transport and potentially specific knowledge that the individual was present at the events set out in the relevant footage. ... [F]riends and relatives of the woman depicted in [PTA 11, the man in PTA 39 and the man in PTA 1] will be able to identify them.*
36. *[A] number of other individuals such as bystanders, train drivers, train passengers, transit guards will have additional knowledge acquired from being present at the events set out in the relevant footage and that knowledge may be sufficient to allow them to identify the persons whose images are captured on the CCTV footage.*
37. *[T]herefore...the information contained in the relevant footage referred to in paragraph 25 constitutes "personal information" as that term is defined in clause 1 to the Glossary of the FOI Act.*
38. *[B]ecause disclosure of [the] relevant footage would reveal personal information about an individual, the relevant footage is prima facie exempt personal information under clause 3(1) of Schedule 1 to the FOI Act.*

36. By its letter dated 23 March 2016, the SSO submits that the identity of both the woman the subject of the incident recorded in PTA 11 and the transit officers or guards is apparent or reasonably ascertainable from the footage because:

[The woman] remains identifiable because her face is visible, it is possible to make out her clothes, footwear and backpack in some detail, and her gait is visible. In any event, she is capable of being identified by herself, by people who know her and/or people (such as the PTA transit guards) present at the events depicted in the footage;

with regard the transit guards [even if] their faces are obscured by pixilation, they are capable of being identified by themselves, by each other, by people who know them and/or people present at the events depicted in the footage (such as, for example, the train driver).

37. The SSO also submits by letter dated 23 March 2016 that:

[T]he identity of the...man on the train platform [recorded in PTA 39] could reasonably be ascertained...because it remains possible to identify him by his clothes and his accessories. In any event he is capable of being identified by himself, by people who know him and/or people (such as the train driver and other passengers) present at the events depicted in the footage.

38. By letter dated 9 June 2016 the SSO provided me with further submissions including the case law relied upon. In summary, the SSO submits as follows:

- To be personal information, as defined in the FOI Act, the identity of the individual concerned must be apparent or reasonably ascertainable from ‘information’.
- It was accepted in *Young and Queensland Police Service* [2013] QICmr 16 (**Young**) at [18] that the definition of personal information is broad enough to cover a person’s image.
- The definition of personal information includes visually ascertainable traits of a person which are not necessarily limited to a person’s face. This view is supported by some decisions of the Victorian Civil and Administrative Tribunal (**Tribunal**), referring to the decisions in *Brygel v Victoria Police (Review and Regulation)* [2014] VCAT 1199 (**Brygel**) and *Wilner v Department of Economic Development, Jobs, Training and Resources (Review and Regulation)* [2015] VCAT 669 (**Wilner**).
- It is possible to ascertain a person’s identity from his or her image as a whole, including other than from the image of their face and that ‘[i]dentifying features of a person’s image might include gait, height, weight, clothing, accessories, demeanour and location.’
- Referring to [42] – [47] of *KEMH Inquiry*, the former A/Information Commissioner held at [45] that the definition of ‘personal information’ in the FOI Act does not state to whom the identity must be apparent, or by whom it must be

reasonably ascertainable. The A/Information Commissioner expressly recognised at [42] that the ‘patients, the health professionals and others involved in the cases’ could ascertain the identities of the women concerned from the information in the case histories.

- In *Terrestrial Ecosystems I* followed, at [79], the view of the former A/Commissioner at [44] of *KEMH Inquiry* that information is personal information ‘where the access applicant, already having some knowledge of the individual concerned, could reasonably ascertain the identity of that person’. This approach is consistent with the decision of Wheeler J in *Police Force v Ayton* [1999] WASCA 233 at [37]- [38].
- The identities of the individuals depicted in footage PTA 11 and PTA 39 are apparent or reasonably ascertainable even if the only person who could identify the individuals is the person him or herself.
- It is sufficient that the others present at the events depicted in the footage, such as bystanders, train passengers and transit guards, will have additional knowledge acquired from being present at the events set out in the relevant footage and that knowledge may be sufficient to allow them to identify the persons whose images are captured on the CCTV footage.

39. In response to my supplementary preliminary view letter the SSO submits by letter dated 23 February 2017 as follows:

The agency maintains its claim the [disputed matter] is exempt for the reasons set out in its submissions of 25 September 2015 and 9 June 2016.

For the reasons set out below, the agency disagrees with your conclusions in [my supplementary preliminary view letter] that:

- (a) disclosure of PTA 39 would not disclose personal information about the individuals whose images are recorded in the footage, and that it is therefore not exempt under clause 3(1)...;*
- (b) the image of the woman in PTA 11 does not consist of personal information about her..., that disclosure of the footage would not disclose personal information about her and that PTA 11 is therefore not exempt under clause 3(1)...;*
- (c) the images of the transit guards in PTA 11 do not consist of personal information about them...that disclosure of the footage would not disclose personal information about them and that PTA 11 is therefore not exempt under clause 3(1)...; and*
- (d) disclosure of PTA 1 would not disclose personal information about the individual whose image is recorded in the footage, and that it is therefore not exempt under clause 3(1)... .*

The agency disagrees with your interpretation of the phrase “can reasonably be ascertained” in paragraph (a) of the definition of “personal information” in the Glossary to the FOI Act. The agency submits that the number of persons who might be capable of undertaking the process of ascertaining has no bearing on the reasonableness of that process. Further, there is no evidence for the assumption underlying your reasoning that only a small number of persons in the community would recognise the individuals depicted in the footage.

The agency further submits that, in determining the reasonableness of ascertaining the identity of an individual, it is inappropriate to have regard to the passage of time between the incident depicted in the document the subject of a complaint and your decision with regard the complaint. In this instance, the access application and application for internal review to the agency were made respectively on 30 May 2014 and 27 July 2014, and the complaint to your office was made on 17 August 2014. The agency submits that to have regard to the passage of time would have the unintended consequence of providing decision makers with a disincentive to making decisions as soon as is practicable as to whether the identity of an individual is reasonably ascertainable.

Further, with respect to the application of clause 3(6) to the woman depicted in PTA 11..., you have failed to take into consideration any public interest factors in favour of or against disclosure, including those set out in the agency’s submissions of 25 September 2015. The agency submits that your consideration of the public interest in this respect consists of no more than repeating your views that it is not reasonable that the woman’s identity could be ascertained from the footage.

The complainant’s submissions

40. The complainant has made submissions to me during the course of this external review as to why disclosure of the disputed matter is in the public interest and claiming that access can be given to an edited copy of the disputed matter with any exempt matter deleted in accordance with section 24 of the FOI Act. However, the complainant has not made specific submissions about the question of whether the disputed matter contains personal information.

Consideration

41. As stated at [33], the preliminary issue for my determination is whether or not the disputed matter contains personal information as that term is defined in the Glossary to the FOI Act. That is, does the disputed matter contain information about an individual whose identity is apparent or could reasonably be ascertained from the information? If the disputed matter contains information of that kind, that information is personal information which is prima facie exempt under clause 3(1). If the disputed matter does not contain information of that kind, that information is not personal information and is not prima facie exempt under clause 3(1).
42. I agree with the agency’s submission that the definition of personal information is broad enough to cover a person’s image: see my decision in *Re Seven Network (Operations) Limited and City of Perth* [2016] WAICmr 12. Having read [18] of *Young* to which the agency has referred in support of this view, I note that the

Queensland Information Commissioner merely said that the footage in that case contains images of other individuals and that this was ‘the personal information of those individuals.’ I do acknowledge however that the definition of personal information in section 12 of the *Information Privacy Act 2009* (Qld) is similar to the definition in the Western Australian FOI Act in that it includes information about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.

43. I do not agree with the agency’s submission made at [30] of the SSO’s letter of 25 September 2015. My decision note in *Re Mallet and Edith Cowan University* [2009] WAICmr 31 did not state that I accepted that ‘the applicant’s appearance and actions at a particular location and time as captured on CCTV [in that case] constituted the applicant’s own personal information’ nor that ‘[if the] images of third parties depicted on the CCTV footage [were] within scope, [that] they too would constitute the personal information of those persons’. As the agency correctly submitted at [26] of the SSO’s letter of 25 September 2015, my decision note in *Re Mallet and City of Perth* [2009] WAICmr 32 observed that ‘[i]n order for the CCTV footage [in that case] to [contain] personal information about the complainant [in that case], his identity must be apparent from that footage or be reasonably ascertainable from that information’. I remain of that view.
44. The agency submits that the definition of personal information includes visually ascertainable traits of a person which are not necessarily limited to a person’s face and that this view is supported by decisions of the Tribunal in *Brygel* at [25] and *Wilner* at [17]. The passage referred to by the agency in *Brygel* is as follows:

The authorities clearly recognise that an image of a person does constitute personal affairs. The fact that an image of a person cannot immediately be identified by [the applicant] as relating to a named individual does not prevent that image from being personal information. It is clearly information, which could enable the person to be identified.

45. And in *Wilner*:

[The footage in question] would undoubtedly show images of passengers and what they are wearing, what they are doing and their identities could reasonably be determined from the footage, that is, by their look. Clearly, if somebody did not know the passengers concerned they would not be able to identify them but if somebody did know them or know of them or had seen a picture in the newspaper of such a passenger, then identification would be able to be made.

46. The equivalent provisions in the Victorian FOI legislation are different to the Western Australian legislation. Section 33(1) of the *Freedom of Information Act 1982* (Vic) (**Vic FOI Act**) provides that a document is an exempt document if its disclosure under that Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (my emphasis). Section 33(9) provides that information relating to the personal affairs of any person includes information that identifies any person or discloses their address or location or from which any person’s identity, address or location can reasonably be determined. I agree with the view of the then Acting Australian Information Commissioner, expressed at [39] of *Healy and Australia*

Post [2016] AICmr 23 (*Healy*), when he referred to two decisions made under the Vic FOI Act, that ‘the law about the equivalent exemption concerning personal information is sufficiently different in each jurisdiction that those cases are of limited relevance’.

47. The question for determination in the Western Australian jurisdiction is whether an image of an individual recorded in CCTV footage consists of information about an individual whose identity is apparent or can *reasonably* be ascertained from the information. That is, the question is not merely whether an individual’s identity can be ascertained *from the information* but whether an individual’s identity can *reasonably* be ascertained *from the information* (my emphasis).
48. Accordingly, while the agency submits that *it is possible* to ascertain a person’s identity from his or her image as a whole including other than from the image of their face, in my view, the mere possibility that a person’s identity could be ascertained is not sufficient – the question is whether the individual’s identity can *reasonably* be ascertained *from the information* (my emphasis).
49. The agency has referred me to *KEMH Inquiry* and the A/Commissioner’s observation at [45] of that decision that the definition of personal information in the Glossary to the FOI Act does not state to whom the identity of the individual must be apparent or by whom it must be reasonably ascertainable. As noted in the extract of *KEMH Inquiry* included at [11] of the agency’s submissions dated 9 June 2016, the A/Commissioner also said at [45] that she tended to agree with the relevant agency’s submission in that case that the definition itself contemplates identification by people with special knowledge in some circumstances. I agree with that view.
50. I consider that the special, additional or necessary knowledge that is required is either actual knowledge of the identity of the individual concerned or possession of other linking information which enables them to ascertain the identity of the individual. As the agency submits, the A/Commissioner expressly recognised at [42] of *KEMH Inquiry* that ‘the patients, the health professionals and others involved in the cases’ could ascertain the identities of the women concerned from the information in the case histories. In my view, that is because those people already knew the identities of the women concerned.
51. I am of the view that the question to ask is not by whom the identity of an individual must be reasonably ascertainable, as suggested at [45] of *KEMH Inquiry*, but simply, as noted above, whether an individual’s identity can reasonably be ascertained from the information in question. Determining that question of fact requires an analysis of the circumstances of the particular case. This may include, among other things, the number of steps required to ascertain the individual’s identity and the number of people who have the necessary knowledge or contextual information to ascertain the individual’s identity. Accordingly, I do not accept the agency’s submission that ‘the number of persons who might be capable of undertaking the process of ascertaining has no bearing on the reasonableness of that process’.
52. The agency also submits that at [79] of *Terrestrial Ecosystems*, I followed the view of the former A/Commissioner at [44] of *KEMH Inquiry* that information is personal information ‘where the access applicant, already having some knowledge of the individual concerned, could reasonably ascertain the identity of that person’. However,

the view with which I agreed at [79] of *Terrestrial Ecosystems* was the view of the former A/Commissioner at [53] of *KEMH Inquiry*, where she said that she was inclined to the view that if any person, even if only a person having some additional knowledge, could reasonably ascertain the identity of a particular individual from particular information about that individual, that information will be personal information for the purposes of the FOI Act.

53. Having given this issue further consideration, I am now inclined to the view that, if only one other person or only a small group of people could possibly or potentially ascertain an individual's identity in an image recorded in CCTV footage from the contextual information known or available to them, that *of itself* does not mean that the individual's identity can *reasonably* be ascertained *from the footage*. Exceptions to this may be in circumstances where the identity of the individual could be ascertained by the access applicant, who already has knowledge of the individual's identity, or where an access application is framed in such a way that the identity of an individual could be ascertained from the context of the access application.
54. In my view, much will turn on the quality of the footage in each case. I consider that the quality of footage is determined by factors such as the size and resolution of the image, the position of the individual to the camera and the degree to which the individual's face and other identifying characteristics are visible.
55. If the quality of footage is such that an individual's face or other identifying characteristics in an image are clear or visible in CCTV footage, I accept that the image will usually consist of personal information. I also accept that those identifying characteristics or features may include gait, height, weight, clothing, accessories, demeanour and location. When an individual's face is clear in an image, it seems to me uncontroversial that the disclosure of the individual's face will clearly disclose personal information because an individual's identity is apparent or can reasonably be ascertained from their face.
56. The situation is less straightforward when an individual's face is not clear in footage but other identifying features or characteristics such as their clothing or accessories are. In those cases, a judgement has to be made by an agency's decision-maker, or by me on external review, as to whether the visible features or characteristics of the individual viewed as a whole – including their location at a particular place at a particular point in time – are such that the identity of the individual concerned can reasonably be ascertained from the information. As I have stated above, I consider that the question of reasonableness requires an analysis of the circumstances of each particular case. This may include factors such as the number of steps required to ascertain the individual's identity and the number of people who have the necessary knowledge or contextual information to ascertain the individual's identity.
57. In cases where the quality of the footage is such that neither an individual's face nor their identifying features are clear in an image - or when that individual's image is pixelated, obscured or blurred - I do not accept that disclosure of that footage would necessarily disclose personal information about that individual. Decisions in other jurisdictions seem to accept that if an individual's image in footage is pixelated the disclosure of that footage will not disclose personal information about that individual:

see for example *Healy* and '*BZ*' and *Department of Immigration and Border Protection* [2014] AICmr 55.

58. In cases where the only person who could identify the individual depicted in an image recorded in CCTV footage is the individual themselves, I do not accept the agency's contention that disclosure of that footage would reveal personal information about that individual. I have not identified any decisions in other jurisdictions where such a submission has been accepted. If that argument were correct, the extension of it would mean that it would never be possible for access to be given to an edited copy of footage with an individual's image pixelated or obscured because the footage would still disclose personal information on the basis the individual themselves would know, or may know, that it is their image that has been pixelated.
59. The agency also claims that others present at an event depicted in footage will have additional knowledge acquired from being present at the event and that knowledge *may* be sufficient to allow them to identify the persons whose images are captured on the CCTV footage (my emphasis). I am not persuaded by this argument. In my view, a person's presence at an event or incident, or recollection of the event or incident or a person involved in the incident, does not necessarily lead to the conclusion that a person's identity can reasonably be ascertained from the footage. It will depend on the particular circumstances.

PTA 1

60. I have examined the footage comprising PTA 1. PTA 1 records an incident at a level crossing in February 2012. It contains an image of an individual on the railway platform - a man - who is not related to the incident, and the incident at the level crossing is in the distance.
61. In my view, the identity of the individual whose image is recorded in the footage is not apparent. Accordingly, I must consider whether the identity of that individual could reasonably be ascertained, such that disclosure of the footage would reveal personal information about that individual.
62. I consider that the length of time that has passed since the incident recorded in the footage took place, being more than five years ago, is relevant to the question of whether the identity of the person whose image is recorded in the footage can reasonably be ascertained from the footage.
63. Based on the quality, age and the contents of the footage, I am not persuaded that the individual's identity can reasonably be ascertained from the footage, apart from potentially by the man himself. For the reasons already noted at [58], even if the identity of the man is apparent to or can reasonably be ascertained by the man himself, I do not accept that this necessarily means his image in the footage constitutes personal information about him.
64. For the above reasons, I am not persuaded that the image of the man consists of personal information about him.

65. Based on my examination of PTA 1, for the above reasons, I am not persuaded that PTA 1 contains personal information as that term is defined in the FOI Act. Consequently, I do not accept that disclosure of that footage would reveal personal information about the individual whose image is recorded in the footage. As a result, I find that PTA 1 is not exempt under clause 3(1).

PTA 11

66. I have examined the footage comprising PTA 11. PTA 11 records an incident at a level crossing at a train station in November 2013. The footage records images of a woman the subject of the incident as well as transit officers. In my view, the identities of none of the individuals whose images are recorded in the footage is apparent. Accordingly, I must consider whether the identities of any of those individuals could reasonably be ascertained, such that disclosure of the footage would reveal personal information about any of those individuals.
67. I consider that the length of time that has passed since the incident recorded in the footage took place, being more than three years ago, is relevant to the question of whether the identities of the people whose images are recorded in the footage can reasonably be ascertained from the footage.
68. In relation to the woman the subject of the incident, the image of her face is not clear. While her clothing, footwear, backpack and gait are all visible, based on the quality of the footage, I am not persuaded that her identity can reasonably be ascertained from the footage, apart from potentially by the woman herself. For the reasons already noted at [58], even if the identity of the woman is apparent to or could be ascertained by the woman herself, I do not accept that this necessarily means her image in the footage constitutes personal information about her.
69. In relation to the agency's submission that the identity of the woman could be ascertained by people present at the incident depicted in the footage, there is nothing before me to suggest that any of those people know the identity of the woman, or that there is other information available to those people which would result in the identity of the woman being reasonably ascertainable by them.
70. For the above reasons, I am not persuaded that the image of the woman consists of personal information about her.
71. Based on my examination of PTA 11, I am also of the view that the quality of the footage is such that the identities of the transit officers could not reasonably be ascertained from the footage. Neither the faces of the transit officers or any other identifying characteristics are sufficiently clear that their identities can reasonably be ascertained. For the reasons set out above, I do not accept the agency's submission that the images of the transit officers consist of their personal information based on the agency's contention that they 'are capable of being identified by themselves, by each other, by people who know them and/or people present at the events depicted in the footage...'. Consequently, I am of the view that the images of the transit officers do not consist of personal information.

72. I accept that it may be possible (but unlikely) that someone who knows the woman or the transit officers whose images are recorded in PTA 11 – such as a family member or a friend – or at most a small group of people who know those individuals, could potentially ascertain the identity of those individuals from the contextual information known to them. However, I consider this falls short of the requirement that the identities of those individuals can reasonably be ascertained from the footage.
73. Based on my examination of PTA 11, for the above reasons, I am not persuaded that PTA 11 contains personal information as that term is defined in the FOI Act. Consequently, I do not accept that disclosure of that footage would reveal personal information about the individuals whose images are recorded in the footage. As a result, I find that PTA 11 is not exempt under clause 3(1).

PTA 39

74. I have examined the footage comprising PTA 39. PTA 39 records an incident on the platform at a train station in October 2012. The footage records images of a man the subject of the incident as well as bystanders on the train platform. In my view, the identities of none of the individuals whose images are recorded in the footage is apparent. Accordingly, I must consider whether the identities of any of those individuals could reasonably be ascertained from the footage, such that disclosure of the footage would reveal personal information about any of those individuals.
75. I consider that the length of time that has passed since the incident recorded in the footage took place, being more than four years ago, is relevant to the question of whether the identities of the people whose images are recorded in the footage can reasonably be ascertained from the footage.
76. In relation to the man the subject of the incident, the image of his face is not clear. While his clothing and accessories may be visible, based on the quality of the footage, I am not persuaded that his identity can reasonably be ascertained from the footage, apart from potentially by the man himself. For the reasons already noted at [58], even if the identity of the man is apparent to, or could be ascertained by, the man himself, I do not accept that this necessarily means his image in the footage constitutes personal information about him.
77. In relation to the agency's submission that the identity of the man could be ascertained by people present at the incident depicted in the footage, there is nothing before me to suggest that any of those people know the identity of the man, or that there is other information available to those people which would result in the identity of the man being reasonably ascertainable by them.
78. For the above reasons, I am not persuaded that the image of the man consists of personal information about him.
79. My above comments apply equally to the bystanders on the train platform. None of their faces or other identifying features are clear. In my view, the identities of any of the bystanders cannot reasonably be ascertained from the footage.

80. I accept that it may be possible (but unlikely) that someone who knows the man or the bystanders whose images are recorded in PTA 39 - such as a family member or a friend – or at most a small group of people who know those individuals, could potentially ascertain the identity of those individuals from the contextual information known to them. However, I consider this falls short of the requirement that the identities of those individuals can reasonably be ascertained from the footage.
81. Based on my examination of PTA 39, for the above reasons, I am not persuaded that PTA 39 contains personal information as that term is defined in the FOI Act. Consequently, I do not accept that disclosure of that footage would reveal personal information about the individuals whose images are recorded in the footage. As a result, I find that PTA 39 is not exempt under clause 3(1).
82. The agency submits that ‘there is no evidence for the assumption underlying [my] reasoning that only a small number of persons in the community would recognise the individuals depicted in the footage’. I understand the agency to be contending that there is no basis for me to assume or conclude that no more than a small number of people would recognise the individuals depicted in the footage. However, I have not assumed or concluded that anybody *would* in fact recognise the individuals depicted in the footage. Rather, as stated at [72] and [80], I accept that it may be possible but unlikely, based on the quality of the footage, that someone who knows the individuals whose images are recorded in PTA 11 or PTA 39, or at most a small group of people who know those individuals, *could potentially* ascertain the identity of the individuals from the contextual information known to them. However, as stated, I consider this falls short of the requirement that the identities of those individuals can reasonably be ascertained from the footage.
83. The agency also submits that ‘in determining the reasonableness of ascertaining the identity of an individual, it is inappropriate to have regard to the passage of time between the incident depicted in the document the subject of a complaint and [my] decision with regard [to] the complaint.’ The agency contends that having regard to the passage of time will have the unintended consequence of providing decision makers with ‘a disincentive to making decisions as soon as is practicable as to whether the identity of an individual is reasonably ascertainable’. However, the time frames in which agencies are required to make decisions on access applications are prescribed in the FOI Act. In particular, section 13(1) provides that an agency has to deal with an access application as soon as is practicable and, in any event, before the end of the permitted period, as that term is defined in section 13(3). Further, I consider that agency decision-makers will continue to act with integrity when performing their duties under the FOI Act. Consequently, I do not consider the agency’s submissions in this regard to be persuasive.
84. In light of my finding that none of the disputed matter is prima facie exempt under clause 3(1), the question of whether any of the limits on the exemption in clauses 3(2) to 3(6) apply does not arise for my consideration. Consequently, although the agency submits that ‘with respect to the application of clause 3(6) to the woman depicted in PTA 11...[I] have failed to take into consideration any public interest factors in favour of or against disclosure’, it is unnecessary for me to do so in light of my finding that the image of the woman does not consist of personal information that is prima facie exempt under clause 3(1).

85. Similarly, in light of my finding that the disputed matter is not exempt under clause 3(1), the issue of whether it is practicable for the agency to provide access to an edited copy of the disputed matter in accordance with section 24 of the FOI Act does not arise for my consideration.

CONCLUSION

86. The agency's decision is set aside. In substitution, I find that the disputed matter is not exempt under clause 3(1) of Schedule 1 to the FOI Act.
