

Notice of Decision and Reasons for Decision

Applicants:	'AU6'
Agency:	Victoria Police
Decision Date:	5 December 2019
Exemptions considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 33(2) of the <i>Emergency Services Telecommunications Authority Act 2004</i> (Vic)
Citation:	'AU6' and <i>Victoria Police (Freedom of Information)</i> [2019] VICmr 187 (5 December 2019)

FREEDOM OF INFORMATION – 000 call – triple zero call – confidential information – secrecy provision

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 Applicants under the FOI Act.

My decision differs from the Agency's decision in that I have determined the document is exempt in full under a different exemption.

I am satisfied the Document is exempt in full under section 38 of the FOI Act in conjunction with section 33(2) of the *Emergency Services Telecommunications Authority Act 2004* (Vic) and there is no obligation to provide the Applicants with an edited copy of the Document in accordance with section 25.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
5 December 2019

Reasons for Decision

Background to review

1. The Applicants made a request to the Agency for access to the following documents:
 1. A copy of a Triple 000 call for police on [day] [date] about [time]. My [relationship descriptor] [name] made the call, I then initially took over the call. The call came from our landline phone at [address]. The call is in relation to a domestic violence incident taking place in [their] home.
 2. Any documentation showing the pleading guilty or charge of [named person] [date of birth] at [location] Magistrates' Court. In relation to breaching an intervention order. This occurred around [date]. I [name] reported this [offence] with photograph to officer [name] of [location] police station...
2. In its decision, the Agency identified two documents falling within the terms of the Applicants' request. It decided to release one document in full, and one document in part.

Review

3. The Applicants sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The document subject to review is an audio recording of one of the Applicants making a telephone call to 'triple zero' (000) (the **Document**).
5. I have listened to a copy of the Document.
6. The Applicants and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicants' review application; and
 - (c) information provided by the Agency.
8. 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.

Review of exemption

9. The Agency relied on the exemption under section 33(1) of the FOI Act to refuse access to parts of the Document. The Agency's decision letter sets out the reasons for its decision.
10. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable

decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.

11. While I note the Agency exempted the Document under section 33(1) of the FOI Act, having listened to the Document, I have determined it is exempt in full under section 38 of the FOI Act in conjunction with section 33(2) of the *Emergency Services Telecommunications Authority Act 2004* (Vic) (**ESTA Act**).
12. While the Document, or parts of the Document, may also be exempt under section 33(1) of the FOI Act, I consider where a secrecy or confidentiality provision prohibits disclosure of a document (or information in a document), it is correct and preferable to first consider the application of that provision to ascertain the extent to which it applies.
13. My reasons for decision follow.

Section 38 – Secrecy exemption

14. Section 38 of the FOI Act provides:

A document is an exempt document if there is in force an enactment applying specifically to information of a kind contained in the document and prohibiting persons referred to in the enactment from disclosing information of that kind, whether the prohibition is absolute or is subject to exceptions or qualifications.

15. Therefore, for a document to be exempt under section 38, three conditions must be satisfied:
 - (a) there must be an enactment in force;
 - (b) the prohibition against disclosure in the enactment must apply specifically to the kind of information in the document; and
 - (c) the enactment must prohibit persons referred to in the enactment from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
16. For section 38 to apply, an enactment (ie the applicable law or legislation) must be formulated with such precision that it specifies the actual information prohibited from disclosure.

Section 33 of the ESTA Act

17. Section 33 of the ESTA Act provides:

33 Secrecy

- (1) In this section confidential information means any information relating to calls received or messages communicated by the Authority in the course of providing a service to an emergency services and other related services organisation.
- (2) A person who has confidential information that he or she has received in the course of carrying out duties under this Act must not, except to the extent necessary to perform duties under this Act, record, disclose, communicate or make use of that information.
[emphasis added]

Penalty: 5 penalty units.
- (3) Subsection (2) does not prevent a person from—

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

- (a) giving evidence or producing a document to a court in the course of criminal proceedings or proceedings under this Act, even though the evidence or document contains confidential information; or
- (b) disclosing or communicating confidential information in accordance with the written authority of the Minister or the person to whom the information relates; or
- (c) disclosing or communicating confidential information to an Ombudsman officer (within the meaning of the Ombudsman Act 1973); or
- (d) disclosing confidential information to the extent specifically authorised by another Act.

18. The phrase 'emergency telecommunications and other communications services' is defined in section 3 of the ESTA Act and means either or both of the following:

- (a) call taking and dispatch services; and
- (b) operational communications services;

19. The phrase 'call taking and dispatch services' is defined in section 3 of the ESTA Act and means the services of:

- (a) taking, listening to and recording calls from the public or a member of an emergency services and other related services organisation, being calls in which assistance is sought of an emergency services and other related services organisation; and
- (b) communicating the information given in such calls to the persons in emergency services and other related services organisations that are designated to respond to the calls and recording any such communication of information;

20. Victoria Police is listed under the definition of 'emergency services and other related services organisation' in section 3 of the ESTA Act.

21. As set out above, unauthorised disclosure of 'confidential information' is an offence under the ESTA Act. The penalty associated with unauthorised disclosure highlights Parliament's intention that such information should remain protected.

22. The confidentiality required in relation to emergency calls assists the Emergency Services Telecommunications Authority (**Authority**) to act in a manner that promotes trust and open communication in accordance with its legislative obligations.²

Is there an enactment in force?

23. I am satisfied the ESTA Act is an enactment for the purposes of the secrecy exemption under section 38 of the FOI Act.

Does the prohibition against disclosure in the enactment apply specifically to the kind of information in the document?

24. The Document is an audio recording of a triple zero call. I am satisfied the Document constitutes 'confidential information' namely, it is an audio recording of a call made by a person (one of the Applicants) to the Authority seeking an emergency service.

² Section 28(2)(a) of the ESTA Act provides the Authority and all persons, to whom any emergency telecommunications and other communications services are provided, must ensure that, in the course of the provision of any such services, they act in a manner that promotes trust and open communication.

25. As such, I am satisfied the Document constitutes 'confidential information' as it is 'information relating to calls received or messages communicated by the [Emergency Services Telecommunications Authority] in the course of providing a service to an emergency services and other related services organisation'.
26. Further, I do not consider any of the exceptions to the prohibition on disclosure of 'confidential information' in section 33(3) of the ESTA Act apply in this instance.
27. Therefore, I am satisfied the Document constitutes 'confidential information' for the purposes of section 33(1) of the ESTA Act. Accordingly, I am satisfied the prohibition against disclosure under section 33(2) of the ESTA Act applies specifically to the Document.

Section 33(1) – Personal affairs exemption

28. As I have determined the Document is exempt in full under section 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act, I do not consider it is necessary for me to also consider the application of section 33(1) of the FOI Act to the Document.

Conclusion

29. For the reasons set out above, I am satisfied the Document is exempt in full under section 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act as all information in the Document is 'confidential information' within the meaning of section 33(1) of the ESTA Act.
30. As such, I am satisfied there is no obligation to provide the Applicants with an edited copy of the Document in accordance with section 25.

Review rights

31. 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.³
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁴
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁵
34. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
35. 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.⁶

When this decision takes effect

36. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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

⁴ Section 52(5).

⁵ Section 52(9).

⁶ Sections 50(3F) and (3FA).