

Notice of Decision and Reasons for Decision

Applicant:	'AV2'
Agency:	Emergency Services Telecommunications Authority
Decision Date:	9 December 2019
Exemptions and provisions 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:	'AV2' and <i>Emergency Services Telecommunications Authority (Freedom of Information)</i> [2019] VICmr 192 (9 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 documents requested by the Applicant under the FOI Act.

I am satisfied the Document is exempt in full under section 38 of the FOI Act in conjunction with the secrecy provision under section 33(2) of the *Emergency Services Telecommunications Authority Act 2004* (Vic).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
9 December 2019

Reasons for Decision

Background to review

1. The Applicant, through their legal representative, made a request to the Agency for access to the following documents:

We make application pursuant to the Freedom of Information Act 1982 in respect of all records and documents held in relation to our client's accident which occurred on [date] including but not limited to, a record of the relevant Triple Zero phone call.

2. In its decision, the Agency identified three documents falling within the terms of the Applicant's request. It decided to refuse access to all documents in full.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant indicated they were seeking a review of the Agency's decision with respect to the triple zero telephone call only.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. 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 Applicant's review application;
 - (c) the Applicant's submission dated 22 November 2019; and
 - (d) the Agency's submission dated 6 December 2019.
7. 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 exemptions

8. The Agency relied on the exemptions under section 33(1) and section 38 in conjunction with section 33(2) of the *Emergency Services Telecommunications Authority Act 2004* (Vic) (**ESTA Act**) to refuse access to the Document.
9. The Agency's decision letter sets out the reasons for its decision.

Section 38 – Document to which a secrecy provision applies

10. Section 38 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.

11. 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).
12. For section 38 to apply, an enactment (i.e. 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

13. 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.

Penalty: 5 penalty units.

- (3) Subsection (2) does not prevent a person from—
 - (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.

14. The phrase ‘emergency telecommunications and other communications services’ is defined in section 3 of the *ESTA Act* to mean:

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

15. 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;

16. 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.
17. The confidentiality required in relation to emergency calls assists the Agency to act in a manner that promotes trust and open communication in accordance with its legislative obligations.¹

Is there an enactment in force?

18. 'Enactment' is defined in section 5 of the FOI Act as meaning an Act or instrument (including rules, regulations, local laws or by-laws) made under an Act.
19. I am satisfied the ESTA Act is an enactment in force for the purposes of section 38 of the FOI Act.

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

20. The Document is an audio recording of a triple zero telephone call made by a person to the Authority seeking an emergency service.
21. I am satisfied the Document constitutes 'confidential information' as it is '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'.
22. 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.
23. 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) – Documents containing personal affairs information

24. As I am satisfied the Document is exempt 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.

Deletion of exempt or irrelevant information

25. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
26. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'² and the effectiveness of the deletions. Where

¹ 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.

² *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.³

27. I have considered the effect of deleting exempt information from the Document. In my view, it is not practicable for the Agency to delete the exempt information as to do so would render the Document meaningless.

Conclusion

28. For the reasons set out above, I am satisfied the Document is exempt under section 38 of the FOI Act in conjunction with the secrecy provision under 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.
29. As such, I am satisfied the document is exempt in full as no obligation arises under section 25 to provide the Applicant with an edited copy of the Document.

Review rights

30. 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.⁴
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁵
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁶
33. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
34. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.⁷

When this decision takes effect

35. 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 *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].

⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁵ Section 52(5).

⁶ Section 52(9).

⁷ Sections 50(3F) and (3FA).