

## Notice of Decision and Reasons for Decision

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Applicant:	'BB9'
Agency:	Victoria Police
Decision Date:	10 February 2020
Exemptions and provisions considered:	Sections 33(1) and 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:	'BB9' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 23 (10 February 2020)

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FREEDOM OF INFORMATION – triple zero call – 000 – welfare check – Electronic Patrol Duty Return (ePDR) form – event chronology – 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.

My decision on the Applicant's request differs from the Agency's decision in that I have determined certain documents are exempt under a different exemption.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
10 February 2020

## Reasons for Decision

### Background to review

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

Documents in any form relating to [the Applicant] which are in the possession of Victoria Police (whether prepared by Victoria Police or any other person) as follows:

- (a) Relating to, leading to, or as a result of, Victoria Police (including members, employees or agents, however described) attending at [the Applicant's] residence at [address] around [date], and/or
  - (b) Reports made, or correspondence received, about [the Applicant] relating to, or leading to, Victoria Police (including members, employees or agents, however described) attending at [the Applicant's] residence at [address] around [date], and /or
  - (c) Relating to actions taken, investigations made, or decisions made by, Victoria Police (including members, employees or agents, however described) subsequent to Victoria Police attending [the Applicant's] residence at [address] around [date].
2. By letter dated 21 November 2019, the Agency notified the Applicant it had identified three documents falling within the terms of the request.
  3. The Agency decided to grant access to two documents in part and refuse access to one document in full.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies of the documents subject to review.
6. I note the Agency in its decision letter refers to 10 pages and one disc, and to 42 pages and one disc. During the review, the Agency confirmed its decision concerned 10 pages and one disc.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications received from the parties, including:
  - (a) the Agency's decision on the FOI request;
  - (b) the information provided with the Applicant's review application; and
  - (c) the information provided by the Agency on 8 January 2020.
9. 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

10. The Agency relied on the exemption under section 33(1) to refuse access to parts of the documents. The Agency's decision letter sets out the reasons for its decision.

11. In undertaking a review under section 49F, section 49P requires that I must make a 'fresh decision'. My review does not involve determining whether the Agency's original decision is correct, but rather requires that my fresh decision is the 'correct or preferable decision'.<sup>1</sup> 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.
12. Having reviewed the documents and relevant provisions in the *Emergency Services Telecommunications Authority Act 2004* (Vic) (**ESTA Act**), I am satisfied the documents subject to review are exempt under section 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act, noting the Agency did not rely on this exemption.

***Section 38 of the FOI Act – Document to which secrecy provisions of enactments apply***

13. 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.

14. For section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

***Section 33 of the ESTA Act – Prohibition on disclosure of 'confidential information'***

15. Section 33(2) of the ESTA Act prohibits the recording, disclosure, communication or use of confidential information received in the course of carrying out duties under the ESTA Act, except to the extent necessary to perform duties under that Act. Unauthorised disclosure of such information is an offence.
16. The penalty associated with unauthorised disclosure highlights Parliament's intention that such information should remain protected.
17. Section 33(1) of the ESTA Act defines 'confidential information' as:

...any information relating to calls received or messages communicated by the Authority [the Emergency Services Telecommunications Authority] in the course of providing a service to an emergency services and other related services organisation.
18. I am satisfied the ESTA Act is an enactment for the purposes of section 38.
19. The Agency is an emergency services organisation. The confidentiality required in relation to emergency calls assists the Authority to act in a manner that promotes trust and open communication in accordance with its legislative obligations.<sup>2</sup>
20. Document 3 is an audio record of a triple zero call. Having reviewed the document, I am satisfied the document constitutes 'confidential information' relating to calls received and messages communicated by the Authority in the course of providing a service to the Agency. Further, I am satisfied the ESTA Act applies specifically to information of a kind contained in Document 3 and prohibits persons from disclosing information of that kind.

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

<sup>2</sup> 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.

21. Finally, having considered the exceptions in section 33(3) of the ESTA Act, I am satisfied none of the exceptions apply in this instance.
22. Therefore, I am satisfied information in Document 3 is 'confidential information' for the purposes of section 33(1) of the ESTA Act and is exempt from disclosure under section 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act.

### ***Section 33(1)***

23. A document is exempt under section 33(1) if two conditions are satisfied:
  - (a) disclosure of the document under the FOI Act would 'involve' the disclosure of information relating to the 'personal affairs' of a person other than the Applicant;<sup>3</sup> and
  - (b) such disclosure would be 'unreasonable'.
24. Information relating to an individual's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.<sup>4</sup>

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

25. Documents 1, 2 and 3 contain names, employee numbers, contact details and statements made to police and other personal information relating to third parties.
26. I am satisfied this information constitutes the personal affairs of individuals other than the Applicant. Therefore, I must consider whether disclosure of such information would be unreasonable in the circumstances.

*Would release of this personal affairs information be unreasonable?*

27. Consideration of whether disclosure of personal affairs information would be unreasonable involves balancing the public interest in the disclosure of official information with the need to protect the personal privacy of a third party in the circumstances of a matter.
28. Having reviewed the documents, I have given weight to the following factors:
  - (a) The nature of the personal affairs information

The nature of the personal affairs information is names, phone numbers and other identifying information, as well as more sensitive information, such as the views of relevant third parties. The information was obtained by the Agency from third parties, who provided it on a voluntary basis, in the context of the Agency undertaking a welfare check on the Applicant. In these circumstances, and noting the Applicant was the subject of the Agency's welfare check, I consider the information is sensitive. This factor weighs against disclosure.

- (b) The circumstances in which the information was obtained

Information provided during the course of carrying out law enforcement duties is ordinarily communicated to the Agency on a voluntary basis and with the expectation it will remain confidential, unless required for a subsequent legal proceeding or criminal prosecution. Having reviewed the documents, I am of the view the third parties, who provided the information to

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<sup>3</sup> Sections 33(1) and (2).

<sup>4</sup> Section 33(9).

the Agency, would not reasonably expect it would be disclosed to the Applicant under the FOI Act. This factor weighs against disclosure.

(c) Whether there is a public interest in disclosure

There is no information before me as to whether the public interest would be served by disclosure of the documents to the Applicant.

As stated above, I consider third parties, who provide information to the Agency, do so on a confidential basis and would not reasonably expect their personal affairs information would be disclosed under the FOI Act. Further, if such information were to be released, it would be reasonably likely to jeopardise the ability of the Agency to carry out its investigative and law enforcement functions.

In these circumstances, I am of the view there is a strong public interest in the Agency preserving its ability to carry out its law enforcement functions, a significant aspect of which involves obtaining information from third parties on a voluntary and confidential basis.

I acknowledge the Applicant may have a personal interest in obtaining access to information where it concerns them. However, in this case, I consider the public interest would not be served by disclosure of the documents to the Applicant. This factor weighs against disclosure.

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

While the Agency did not consult with the relevant individuals as to their views on disclosure of their personal affairs information, I am of the view those persons would be likely to object to its release in light of the circumstances discussed above. This factor weighs against disclosure.

(e) Whether the information would, or would be reasonably likely to endanger the life or physical safety of any person

Section 33(2A) requires, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in this matter.

29. Accordingly, I am satisfied disclosure of the personal affairs information of third parties in the document would be unreasonable in the circumstances and the relevant information in the documents is exempt under section 33(1).

***Deletion of exempt or irrelevant information***

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>5</sup> and the effectiveness of the deletions. Where

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<sup>5</sup> *Mickelburgh v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>6</sup>

32. I have considered the information the Agency deleted from the documents as irrelevant. I agree it falls outside the scope of the Applicant's request because it relates to matters or third parties other than those specified in the request.
33. In relation to Documents 1 and 2, I have considered the effect of deleting irrelevant and exempt information from the documents. In my view, it is practicable to delete such information as to do so would not require substantial time and effort, and the edited documents would retain meaning.
34. However, in relation to Document 3, I am satisfied it is not practicable to delete information exempt under sections 33(1), and 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act given all information in the document is exempt.

### **Conclusion**

35. On the information before me, I am satisfied the documents are exempt under sections 33(1) and/or 38 in conjunction with section 33(2) of the ESTA Act.
36. As I am satisfied it is practicable to delete exempt information in Documents 1 and 2 in accordance with section 25, I have decided to grant access to these documents in part and refuse access to Document 3 in full.
37. The Schedule of Documents in **Annexure 1** sets out my decision with respect to each document.

### **Review rights**

38. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>7</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
41. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
42. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>10</sup>

### **When this decision takes effect**

43. 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.

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<sup>6</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

<sup>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

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

<sup>10</sup> Sections 50(3F) and (3FA).

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Electronic Patrol Duty Return (ePDR)  [number]	9	Released in part  Sections 33(1), 25	<b>Release in part</b>  Sections 33(1), 25  The document is to be released with the deletions made by the Agency in accordance with section 25 to remain deleted.	<b>Section 33(1):</b> I am satisfied disclosure of the personal affairs information in this document would be unreasonable in the circumstances. Accordingly, I am satisfied it is exempt under section 33(1).  <b>Section 25:</b> I am satisfied the document contains information irrelevant to the Applicant's request, and it is practicable to provide an edited copy of the document with the irrelevant and exempt information deleted in accordance with section 25.
2.	[date]	Event Chronology	1	Released in part  Sections 33(1), 25	<b>Release in part</b>  Sections 33(1), 25  The document is to be released with the deletions made by the Agency in accordance with section 25 to remain deleted.	<b>Section 33(1):</b> See comments for Document 1.  <b>Section 25:</b> See comments for Document 1.
3.	[date]	000 call recording	N/A	Refused in full  Section 33(1)	<b>Refuse in full</b>  Sections 38, 33(1)	<b>Section 38:</b> I am satisfied information in this document is exempt as:  <ul style="list-style-type: none"> <li>it contains specific information which is prohibited from disclosure under section 33(2) of the ESTA Act;</li> <li>Agency officers are prohibited from</li> </ul>

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						<p>disclosing the information; and</p> <ul style="list-style-type: none"> <li>• none of the exceptions under section 33(3) and 34 of the ESTA Act authorising disclosure apply.</li> </ul> <p>Accordingly, the document is exempt under section 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act.</p> <p><b>Section 33(1):</b> See comments for Document 1.</p>