

## Notice of Decision and Reasons for Decision

---

Applicant:	'BJ6'
Agency:	Victoria Police
Decision date:	27 March 2020
Exemption and provision 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:	'BJ6' and Victoria Police ( <i>Freedom of Information</i> ) [2020] VICmr 93 (27 March 2020)

---

FREEDOM OF INFORMATION – emergency services documents – 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

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 Applicant with an edited copy of the document in accordance with section 25.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

27 March 2020

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency for access to a triple zero ('000') call made by their [family member] on [date] at [time] (the **Caller**).
2. In its decision dated 3 September 2019, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to this document in full.
3. The Agency relied on the exemption under section 33(1) of the FOI Act to refuse access to the Document in full. The Agency's decision letter sets out the reasons for its decision.

### Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The document subject to review is an audio recording of the caller making a telephone call to '000' (the **Document**).
6. I have been briefed by OVIC staff on the content of the Document, which comprises a conversation between the Caller and a '000' call operator.
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 communication 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 and during the review; and
  - (c) information provided by the Agency.
9. I acknowledge the Applicant's genuine and personal interest in obtaining access to this Document and am aware the Applicant was given a written transcript of the content of the Document.
10. [Redacted – personal background to the Applicant's request].
11. I note, in the course of this review, OVIC staff provided the Applicant with information about the prohibitions on the release of '000' audio recordings and offered assistance in obtaining access to other information from the Agency outside the FOI Act.
12. 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

13. 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.

14. While I am of the view the Document, or parts of the Document, may also be exempt under section 33(1) of the FOI Act, as claimed by the Agency, I consider where a secrecy or confidential 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.
15. Having considered the content of the Document and relevant provisions in the *Emergency Services Telecommunications Authority Act 2004* (Vic) (**ESTA Act**), I have determined it is exempt in full 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.
16. My reasons for this decision follow.

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

17. 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.

18. 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'***

19. 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.
20. The penalty associated with unauthorised disclosure highlights Parliament's intention that such information should remain protected.
21. 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.
22. 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;

---

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

23. 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;
24. Victoria Police is an emergency services organisation and is listed under the definition of ‘emergency services and other related services organisation’ in section 3 of the ESTA Act. The confidentiality required in relation to emergency calls assists the Emergency Services Telecommunications Authority (the **Authority**) to act in a manner that promotes trust and open communication in accordance with its legislative obligations.<sup>2</sup>

*Is there an enactment in force?*

25. 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?*

26. As referenced above, the Document is an audio recording of a ‘000’ call between the Caller and the Authority. Having reviewed the Document, I am satisfied it constitutes ‘confidential information’ relating to a call received and message 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 the Document and prohibits persons from disclosing information of that kind.
27. Further, having considered the exceptions in section 33(3) of the ESTA Act, I am satisfied none of the exceptions apply in this instance.
28. Therefore, I am satisfied the Document contains ‘confidential information’ for the purposes of section 33(1) of the ESTA Act and is exempt under section 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act.

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

29. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
30. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>3</sup> and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’, and release of the document is not required under section 25.<sup>4</sup>

---

<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.

<sup>3</sup> *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].

<sup>4</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].

31. I have considered whether the document can be released in part with exempt information deleted in accordance with section 25. I am satisfied it is not practicable for the Agency to delete the exempt information as to do so would mean any edited copy of the document would be without meaning.
32. In addition, I have considered the effect of deleting exempt information from the document to which the Agency refused access in full. I am satisfied it is not practicable to delete the exempt information as to do so would result in the document being rendered meaningless as any remaining information would be minimal and insubstantial.
33. Accordingly, 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.

***Section 33(1) – Personal affairs exemption***

34. As I have determined the Document is exempt in full, it is not necessary to also consider the application of section 33(1) of the FOI Act to the Document.

***Conclusion***

35. While I am sympathetic to the personal reasons for which the Applicant seeks access to the Document, 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.

***Review rights***

36. 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>5</sup>
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>6</sup>
38. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>7</sup>
39. 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.
40. 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>8</sup>

***When this decision takes effect***

41. 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].

---

<sup>5</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>6</sup> Section 52(5).

<sup>7</sup> Section 52(9).

<sup>8</sup> Sections 50(3F) and (3FA).