

Notice of Decision and Reasons for Decision

Applicant:	'CG4'
Agency:	Victoria Police
Decision date:	30 October 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:	'CG4' and <i>Victoria Police (Freedom of Information)</i> [2020] VICmr 307 (30 October 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

I have conducted a review under section 49F of the Agency's fresh decision to refuse access to documents, being triple zero calls, requested by the Applicant under the FOI Act.

I am satisfied the documents are 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**) and there is no obligation to provide the Applicant with an edited copy of the documents in accordance with section 25.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

30 October 2020

Reasons for Decision

Background to review

1. The Applicant, via their representative, made a request to the Agency for access to documents in relation to the Applicant being detained, questioned and searched by police (the **incident**).
2. In its decision dated [date], the Agency identified five documents falling within the terms of the Applicant's request and granted access to four documents in part and refused access to one document in full, namely 'the DVD of 000 calls'. The Agency relied on the exemptions under sections 33(1) and 35(1)(b) to refuse access to the documents.
3. 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 to the documents.
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 submissions and correspondence received from each party throughout the review.
7. Following inquiries by OVIC staff, the Agency located additional documents relevant to the scope of the Applicant's request.
8. This review is closely related to a review lodged by another third party who [description of association], such that the same documents are subject to review. The Agency sought written consent from both applicants that their personal affairs information could be released to each other, so that the Agency could prepare one version of the documents for release. The applicants' representative consented to this approach.
9. On [date], the Agency made a fresh decision under section 49M and determined to release further information to the Applicant. In making its fresh decision, the Applicant's request was combined with the request of another third party who was involved in the incident.
10. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
11. On [date], the Applicant's representative limited the scope of the review to the recording of a '000' call to which the Agency refused access under section 38 in conjunction with section 33(2) of the ESTA Act.
12. In its fresh decision, the Agency referred to this 'document' as a single call. However, I confirm the document contains two '000' calls. Accordingly, I have considered and referred to each '000' call as a separate document.
13. I have examined a copy of the two documents subject to review, which comprise recordings of telephone conversations between '000' operators and third parties who were seeking assistance from emergency services.

14. 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.
15. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Applicant's submission

16. The Applicant disagrees with the Agency's fresh decision in relation to the '000' calls on six grounds.
17. First, the Applicant submits the Agency's reliance on section 38 in conjunction with section 33 of the ESTA Act is inconsistent with common practice by the Agency of providing '000' calls under the FOI Act with personal affairs information redacted.
18. Second, the Applicant submits the '000' calls do not have the character of confidentiality nor does it attract a duty of secrecy or confidence, as 'it is simply a recorded out-of-court statement by a person, in the course of them calling 000. Their personal details may be private, but their statement is not'. As such, the Applicant submits the document can be released under section 16(2) of the FOI Act even if it is an exempt document.
19. Third, the Applicant submits section 33(1) of the ESTA Act was misread:

In ETSA s33(1), *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.

The information we seek is not communicated *by the Authority to another service*. That definition better describes the information the Authority provides to D-24.

Nor is the 000-information *related to communications by the Authority to an emergency service* organisation. The duty or obligation of confidence within the ETSA attaches (if at all) to the Authority's communications with an emergency service or organisation. The 000 call is not confidential information.

20. Fourth, the Applicant submits section 33(2) of the ESTA Act was misread:

ETSA s33(2) does not apply *to the extent necessary to perform duties under the ETSA*. We argue that providing information under FOI is consistent with the performance of duties under the ETSA. It aligns with the Objectives of the ETSA at s6A, to

promote a culture within the emergency management sector of community focus, interoperability and public value

Accordingly, there is no prohibition against compliance with the FOI Act, and the non-disclosure prohibition under FOI s38 isn't enlivened.

As noted, [the Agency's] putative interpretation of ETSA s33(1) and/or 33(2) would render the Authority and [the Agency] in breach of ETSA s33 whenever they release 000 calls under FOI.

21. Fifth, the Applicant submits the Agency failed to apply section 34 of the ESTA Act. The Applicant states this provision requires the Emergency Services Telecommunications Authority (the **Authority**)¹ to disclose any emergency related information to the Agency that is relevant to the performance of the Agency's functions, at the request of the Agency, whether or not criminal proceedings are on

¹ Section 3 of the ESTA Act defines 'Authority' to mean the Emergency Telecommunication Authority.

foot. The Applicant states that the fact that there are no criminal proceedings on foot does not preclude the bringing of charges against the Applicant at a later date. Therefore:

Given the undertaking of disclosure so far, by the FOI request and the police, providing investigative materials to the applicant, it is disingenuous to now selectively rely on provisions of “secrecy” and/or the fact a criminal proceeding is not currently on foot to avoid disclosure of the material sought. This is even more so given the tension in the evidence which has been disclosed so far.

22. Sixth, the Applicant submits disclosure is in the interest of justice, as follows:

In considering the opposition, and the interests of justice, every investigation carries with it some risk that investigators may depart from the correct procedures. All officers have an obligation to guard against this and to ensure the highest standards of probity are applied to the gathering and disclosure of evidence, including the making and taking of witness statements.

A witness statement is a critical part of the sound administration of justice. If a statement is not a full and complete account of events described by a witness, it may impact upon the reliability or credibility of the witness, or upon specific aspects of the evidence in the legal proceedings. A police officer has a responsibility to take a witness’s account in its entirety and record all the evidence that is potentially relevant.

The statement of this witness, is discoverable and the principles above apply to both criminal and civil proceedings. As such, the matters relied on in opposition during the FOI process, may be the subject of pre-trial discovery.

Section 38 - Documents to which secrecy provisions of enactments apply

23. Section 38 provides:

38 Documents to which secrecy provisions of enactments apply

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.

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

Application of section 33 of the ESTA Act – Prohibition on disclosure of ‘confidential information’

25. Section 33(2) of the ESTA Act provides:

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.

26. The penalty associated with unauthorised disclosure highlights Parliament’s intention that such information should remain protected.

27. Section 33(1) of the ESTA Act defines ‘confidential information’ as:

...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.

28. 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;
29. 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;
30. 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.
31. The confidentiality required in relation to emergency calls assists the Emergency Services Telecommunications Authority (**Authority**)² to act in a manner that promotes trust and open communication in accordance with its legislative obligations.³

Is there an enactment in force?

32. 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?

33. The documents subject to review are audio recordings of ‘000’ calls made by third parties to the Authority for the purpose of seeking assistance from an emergency service.
34. I am satisfied the ‘000’ calls constitute ‘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 relates services organisation’. I am not persuaded by the Applicant’s submission to the contrary.
35. Further, I am satisfied the ESTA Act applies specifically to ‘information of a kind’ in the documents and prohibits persons from disclosing information of that kind.

Do any exceptions to the secrecy provision apply?

36. Section 33(3) provides exceptions to the prohibition in section 33(2), as follows:

² Section 3 of the ESTA Act defines ‘Authority’ to mean the Emergency Telecommunication Authority.

³ 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.

(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.

37. I am satisfied none of the above exceptions apply in this instance.

38. I also note the fourth ground of the Applicant's submission that section 33(2) does not apply 'to the extent necessary to perform duties under the ESTA', as outlined above in paragraph 20.

39. I am not satisfied disclosure of the documents under the FOI Act in accordance with the Applicant's request is necessary in the performance of the Authority's duties under the ESTA Act.

40. Accordingly, I am not persuaded by the fourth ground raised by the Applicant in their submission.

41. Therefore, I am satisfied the documents contain '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.

Other matters – grounds 1, 2, 5 and 6 of the Applicant's submission

42. I acknowledge each of the grounds submitted by the Applicant in support of their application for review of the Agency's fresh decision as outlined above.

43. Grounds 3 and 4 have been addressed in my decision above.

44. My response to the remaining grounds is outlined below.

First ground

45. While the Agency may have released '000' calls in the past, it is not a relevant consideration with respect to the application of section 38 in conjunction with section 33(2) of the ESTA Act in this case.

46. In conducting 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, or a similar previous decision is correct. Rather, I am required to ensure my fresh decision is the 'correct or preferable decision'.⁴

Second ground

47. Section 16(1) requires agencies to administer the FOI Act with a view of making the maximum amount of information available to the public, promptly and inexpensively.

⁴ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

48. Section 16(2) provides agencies with general discretion to provides access to documents, including exempt documents, provided they are not otherwise prohibited from doing so, such as where a secrecy provision applies.
49. I am not satisfied section 16(2) provides for disclosure of the documents in this matter, as the documents are exempt under a secrecy provision to which a penalty for unauthorised disclosure applies.

Fifth ground

50. Section 34 provides:

34 Organisations' rights of access to information

The Authority must disclose to an emergency services and other related services organisation any emergency related information or information in relation to operational communications services under the control of the Authority—

- (a) that is relevant to the performance of that organisation's functions; and
- (b) the disclosure of which is requested by the organisation.

51. In my view, the application of section 34 is not relevant to my review of whether the documents are exempt under section 38, given the documents are in the Agency's possession.

Sixth ground

52. I acknowledge the Applicant's significant interest in obtaining access to the documents in full and agree there is significant importance in police accountability and sound administration of justice.
53. However, in my view, the documents are subject to a secrecy provision which does not provide for any consideration of disclosure being in the 'interest of justice'.

Deletion of exempt or irrelevant information

54. 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.
55. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ 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 25.⁶
56. I have considered whether it is practicable to provide a copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is not practicable as I consider the documents are exempt in full under section 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act.

⁵ *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].

⁶ *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].

Conclusion

57. I am satisfied the documents are exempt in full under section 38 of the FOI Act in conjunction with section 33(2) of the ESTA Act and there is no obligation to provide the Applicant with an edited copy of the documents in accordance with section 25.

Review rights

58. 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.⁷
59. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
60. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
61. 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.
62. 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.¹⁰

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

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).