

Notice of Decision and Reasons for Decision

Applicant: AC3
Agency: Court Services Victoria
Decision Date: 16 April 2019
Exemption considered: Section 31(1)(a)

FREEDOM OF INFORMATION – Agency staff – Agency’s internal processes – proper administration and enforcement of the law – *Court Services Victoria Act 2014* (Vic)

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 is the same as the Agency’s decision in that I have decided to refuse access to the documents.

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

16 April 2019

Reasons for Decision

Background to review

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

... a copy of all files, records, reports, notes and memoranda held by Court Services Victoria with respect to [named individual]'s letter [date provided] (including the allegations contained therein), for the [time period specified].
2. In its decision, the Agency identified 31 pages falling within the terms of the Applicant's request. It decided to release two pages in full and refuse access to 29 pages 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. Staff, who inspected the documents exempt under section 31(1), have briefed me in detail on the contents of the documents.¹
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; and
 - (c) the Agency's submission dated 4 March 2019.
7. I note the Applicant did not make a submission in relation to his review application.
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 exemptions

9. The Agency relied on the exemptions under sections 30(1), 31(1)(e), 33(1) and 35(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision. In its submission, it also claimed the documents were exempt under sections 31(1)(a) and 31(1)(c).

Section 31(1)(a)

10. Section 31(1)(a) provides:

31 Law enforcement documents

- (1) Subject to this section, a document is an exempt document if its disclosure under this Act would, or would be reasonably likely to —

¹ Section 63D provides such documents may only be inspected at an agency's premises and the Information Commissioner is not entitled to take possession of them.

- (a) prejudice the investigation of a breach or possible breach of the law or prejudice the enforcement or proper administration of the law in a particular instance;

11. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.² 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
12. 'In a particular instance' can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁴
13. The Agency advised in its submission:

CSV is a statutory body corporate whose functions include to provide, or arrange for the provision of, the administrative services and facilities necessary to support the performance of the judicial, quasi-judicial and administrative functions of Victoria's courts and tribunals (section 8 of the *Court Services Victoria Act 2014* (Vic) (**CSV Act**)).

As part of its functions, CSV employs staff under Part 3 of the Public Administration Act 2004 (Vic) to work in courts and tribunals (section 36 of the CSV Act), including the Victorian Civil and Administrative Tribunal (**VCAT**). CSV does not employ judicial officers or VCAT members.

...

Under section 9 of the CSV Act, the Agency has the power to do all things necessary or convenient to be done for, or in connection with, or as incidental to, the performance of its function ... CSV's function is to provide the administrative services necessary to support the functions of Victoria's court and tribunals including VCAT.

14. The Agency advised [of its interactions with the Applicant]. Previously, the Applicant called [a department of the Agency] frequently about [particular matters], but also to raise grievances and concerns of a general nature. During such telephone conversations, the Applicant's conduct towards Agency staff was considered to be challenging such that [the Applicant] was placed on 'service restriction'. This means [the Applicant] is now required to communicate with the Agency through [a particular process]. The service restriction was intended to minimise any risk (or perceived risk) to Agency staff by providing a single point of contact with whom the Applicant can communicate with the Agency about [matters].
15. In [their] review application, the Applicant states in relation to, 'Other requirements when contacting you':
- [Submission about the Applicant's personal circumstances and views].
16. Based on a detailed briefing of the documents subject to review, I find the Applicant's behaviour, from the face of the documents, appears to have been a serious cause for concern (or perceived concern) for the Agency. In particular, in the context of its duty to provide a safe and risk-free workplace for its employees under the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**).
17. Section 2(1) of the OHS Act sets out the objects of that Act, which include in part:
- (a) to secure the health, safety and welfare of employees and other persons at work; and

² *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

³ *Ibid*, *Bergman* at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 (Nathan J) at [55].

⁴ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

- (b) to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work; and

...

18. Section 4 of the OHS Act sets out the principles of health and safety protection, which include in part:

- (1) The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
- (2) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.
- (3) Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.

...

19. Accordingly, I accept the Agency's submissions in relation to its functions under the CSV Act and its duties under the OHS Act for the purposes of section 31(1)(a).

20. I accept Agency staff are engaged in various administrative tasks necessary to support the judicial, quasi-judicial and administrative functions of VCAT. This includes the provision of customer-service related operations.

21. The various documents subject to review contain correspondence by Agency staff in relation to concerns expressed by Agency staff, the internal handling of customer service issues involving the Applicant and the Agency's subsequent response which culminated in the Agency's decision to place the Applicant on 'service restriction'.

22. While I accept the Applicant will likely dispute the intent of his communication with Agency staff or its impact upon them, in considering this matter, it is necessary for me to consider the effect of certain statements on the relevant Agency employees rather than the intention (or otherwise) behind the statements made by the Applicant.⁵

23. I am of the view disclosing information in the documents to the Applicant in this instance would prejudice the Agency's enforcement or proper administration of the CSV Act as it would have the likely consequence of:

- (a) deterring staff from reporting sensitive customer-service related issues or stifling open deliberation of the management of such issues in the future; and
- (b) impeding the Agency's ability to perform its administrative functions of Victoria's courts and tribunals under the CSV Act.

24. Further, I consider disclosure of the documents subject to review would prejudice the Agency's enforcement or proper administration of the OHS Act in respect to its duty to provide a safe and healthy workplace for its employees. In this instance, I find disclosure of the documents would reasonably impact upon the Agency's ability (or perceived ability) to protect the occupational health and safety of its staff.

25. In considering the factors listed above, I am satisfied disclosure of the information in the documents would prejudice the Agency's general enforcement and proper administration of the law under the CSV Act and the OHS Act.

⁵ *O'Sullivan v Victoria Police* [2005] VCAT 532 at [18].

Deletion of exempt or irrelevant information

26. 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.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.⁷
28. The Agency interpreted the Applicant's request to be for disclosure of the documents in full without redactions. I have considered the effect of deleting exempt information from the documents. In my view, it would not be practicable for the Agency to delete the exempt information, because the edited documents would not retain meaning in light of the extent of the information that I consider is exempt under section 31(1)(a).

Conclusion

29. Accordingly, I have decided the information exempted in the documents by the Agency is exempt under section 31(1)(a) in full in light of its functions under the CSV Act and duties under the OSH Act.
30. Considering my decision in relation to the application of section 31(1)(a) to the documents subject to review, it is not necessary for me to examine the other exemptions relied on by the Agency.

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.⁸
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
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.¹¹

When this decision takes effect

36. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

⁶ *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].

⁷ *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 [140] and [155].

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).