

Notice of Decision and Reasons for Decision

Applicant:	'AK7'
Agency:	Victorian WorkCover Authority (WorkSafe)
Decision Date:	5 September 2019
Exemption considered:	Section 32(1)
Citation:	'AK7' and Victorian WorkCover Authority (<i>Freedom of Information</i>) [2019] VICmr 97 (5 September 2019)

FREEDOM OF INFORMATION – documents affecting legal proceedings – witness statements – deletion of exempt or irrelevant material

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 certain documents in full.

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

5 September 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. A full copy of an investigation file/prosecution file of a complaint raised by [the Applicant] against [company name] for the alleged breaches of sec 76 [Occupational Health and Safety] OHS Act 2004, Vic]
 2. A copy of all the documents seized during workplace visit at [company name] visit no [identification number] on [date]
 3. Full copies of all the statements obtained during the course of the investigation by [named person] into [Applicant's] complaint relating to breaches of sec 76 of the OHS Act 2004 Vic.
2. The Applicant subsequently limited the scope of the request to all documents on the prosecution file which were not provided to the Agency by the Applicant.
3. In its decision letter dated 21 May 2019, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to refuse access to some of those documents in part and other documents 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. The Applicant indicated they are not seeking access to:
 - (a) any personal affairs information;
 - (b) email correspondence sent by the Applicant;
 - (c) email correspondence the Applicant was included in; and
 - (d) the Applicant's own witness statement.
6. Accordingly, this review does not consider documents refused by the Agency which fall within the above categories.
7. I have examined copies of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated 21 May 2019;
 - (b) information provided with the Applicant's review application;
 - (c) the Applicant's submission dated 5 July 2019; and
 - (d) the Agency's submission dated 1 August 2019.

10. 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

11. The Agency relied on the exemption under section 32(1) to refuse access to witness statements. The Agency's decision letter sets out the reasons for its decision.

12. In its decision letter, the Agency indicated it relied on section 25 to refuse access to certain documents. The Agency indicated:

In this instance, it is simply not practical for WorkSafe to provide you with a redacted version of certain exhibits, because the significant amount of redactions would effectively render the document useless. This exemption has been applied to Exhibits 61.4, 64, 68.3, 68.4 and 68.6.

13. In its submission, the Agency stated:

In the alternative [to section 25], we submit that, considering the nature of the documents and their content (namely, allegations of [behaviour]), it is not possible to separate the factual content from the personal information contained. Given this, we would seek to redact these documents in full under s 33(1).

14. On the information before me, it is apparent the Agency applied section 25 to certain documents in place of an exemption.

15. I am satisfied the exemption under section 33(1) applies to the documents the Agency deemed impracticable to edit under section 25.

Section 32(1) – Documents affecting legal proceedings

16. Section 32(1) provides a document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege.

17. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹

- (a) between the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice or is referable to pending or contemplated litigation; or
- (b) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
- (c) between the client (or the client's agent) and third parties that was made for the purpose of obtaining information to be submitted to the client's professional legal advisers for the dominant purpose of obtaining advice on pending or contemplated litigation.

¹ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

18. A document will be subject to client legal privilege where it contains a 'confidential communication'² between:
- (a) the client (or the client's agent) and the client's professional legal advisers, that was made for the dominant purpose of obtaining or providing legal advice;³ or
 - (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.⁴
19. I have considered witness statements and records of interviews with witnesses and potential witnesses have been held to fall within the exemption under section 32.⁵

Do the documents contain confidential communications?

20. The Agency exempted witness statements under section 32(1). The witness statements were made to an inspector who was employed by the Agency and appointed under the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**).
21. I have considered and accept the views expressed in *Akers v Victoria Police*,⁶ where the Victorian Civil and Administrative Tribunal (**VCAT**) accepted the agency's submission that:
- ... persons who provide statements or other information to the police do so with the expectation that these will only be disclosed to the extent necessary to conduct investigations and deal with criminal charges.
22. Whilst I acknowledge police were not involved in the collection of statements in the present matter, I consider when each of the witnesses gave their statement to the inspector, they would have done so with the expectation the information would only be used for the purpose of the investigation and any subsequent court process.

What was the dominant purpose of the confidential communications?

23. The dominant purpose for which the confidential communication was made determines whether the exemption applies.⁷
24. The Agency submits the witness statements 'were brought into existence... for the purpose of a prosecution in the Victorian Magistrates' Court'.
25. I note the matter did not proceed to prosecution.
26. In *Australian Competition and Consumer Commission and Australian Safeway Stores Pty. Ltd. & Ors.*,⁸ the Federal Court of Australia stated:

The fact that legal proceedings are anticipated does not mean that every document brought into existence thereafter is subject to a claim for legal professional privilege. It is the purpose for which the document is brought into existence, not its temporal relationship with the proceedings, which is

² Defined in section 117 of the *Evidence Act 2008* (Vic) to mean communications made in circumstances where the Agency and its professional legal advisers were under an obligation not to disclose their contents.

³ Section 118 of the *Evidence Act 2008* (Vic).

⁴ Section 119 of the *Evidence Act 2008* (Vic).

⁵ *Re Clifford and Transport Accident Commission* (1997) 12 VAR 120; *Downing v Victorian WorkCover Authority* (unreported, VCAT, Megay SM, 19 September 2002); *Re Halliday and Ministry of Consumer Affairs* (unreported, AAT of Vic, Wilson PM, 20 August 1992).

⁶ [2003] VCAT 397 at [35].

⁷ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

⁸ (1998) 153 ALR 393 at [404].

relevant. I am satisfied that notwithstanding Mr. Eva's intention that the witness statements be cast in the form they were for later use in legal proceedings which he thought reasonably likely, another purpose for the creation of the statements was to inform the Commission of the evidence available to it upon which it could make a decision whether, and on what terms, to issue legal proceedings.

27. It is clear on the face of the witness statements that their collection was for the purpose of inquiring into an alleged breach of the OHS Act.
28. I am satisfied the witness statements would be privileged from production in legal proceedings on the ground of legal professional privilege and are exempt under section 32(1).

Section 25 – 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 for the agency or Minister 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'⁹ 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 25.¹⁰
31. I have considered the effect of deleting exempt information from the documents. In my view, it is not practicable to delete the exempt information as doing so would render the documents meaningless.

Conclusion

32. On the information before me, I am satisfied Documents 4, 5, 6, 7 and 8 are exempt under section 32(1). As I have determined it is not practicable to edit these documents to delete exempt information, I have decided to refuse access to the documents in full.

Review rights

33. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
36. 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.
37. 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.¹⁴

⁹ *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].

¹⁰ *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].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).

When this decision takes effect

38. 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.

Annexure 1– Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	N/A	Index to brief	8	Release in part Section 33(1)	Not subject to review	As the Applicant has advised they are not seeking personal affairs information, this document is not subject to review.
2.	[Date]	Statement of [Applicant]	32	Refuse in full Section 32(1)	Not subject to review	As the Applicant has advised they are not seeking copies of their own witness statements, this document is not subject to review.
3.	[Date]	Statement of [Applicant]	32	Refuse in full Section 32(1)	Not subject to review	See comments regarding Document 2.
4.	[Date]	Statement of [named person]	5	Refuse in full Section 32(1)	Refuse in full Section 32(1)	I am satisfied this document would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I am satisfied it is exempt under section 32(1).
5.	[Date]	Statement of [named person]	3	Refuse in full Section 32(1)	Refuse in full Section 32(1)	See comments regarding Document 4.
6.	[Date]	Statement of [named person]	13	Refuse in full Section 32(1)	Refuse in full Section 32(1)	See comments regarding Document 4.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
7.	[Date]	Statement of [named person]	5	Refuse in full Section 32(1)	Refuse in full Section 32	See comments regarding Document 4.
8.	[Date]	Statement of [named person]	7	Refuse in full Section 32(1)	Refuse in full Section 32	See comments regarding Document 4.
9 to 23.	Various	Exhibit 50 to Exhibit 61.2	65	Release in part Section 33(1)	Not subject to review	See comments regarding Document 1.
24.	[Date]	Exhibit 61.4 – Letter [named person] to [named person]	2	Refuse in full Section 25	Not subject to review	<p>Having reviewed the document, I am satisfied it contains the personal affairs information of third parties other than the Applicant, as defined in section 33(9) of the FOI Act.</p> <p>As the Applicant advised during the review that [they did] not seek access to personal affairs information of third parties, I am satisfied the Applicant has excluded this type of information from review.</p> <p>I am satisfied the document is impracticable to edit under section 25, as it would not retain meaning.</p>

Annexure 1– Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
36.	[Date]	Exhibit 68.3 – Letter, “Letter regarding professional misconduct”	2	Refuse in full Section 25	Not subject to review	See comments regarding Document 24.
37.	Various	Exhibit 68.4 – Cover letter, emails and letters	19			
37.1	Various	Email chain	2	Refuse in full Section 25	Not subject to review	<p>The Applicant has advised they are not seeking email correspondence they were included in.</p> <p>The Applicant was a recipient of part of this document.</p> <p>Further, the Applicant has advised they are not seeking personal affairs information.</p> <p>Having reviewed the document, I am satisfied the part of the document the Applicant was not included in contains the personal affairs information of third parties other than the Applicant, as defined in section 33(9) of the FOI Act.</p> <p>I am satisfied the Applicant has excluded this type of information from review.</p> <p>I am satisfied the document is impracticable to edit under section 25, as it would not retain meaning.</p>

Annexure 1– Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
37.2	[Date]	Email and attachment	2	Refuse in full Section 25	Not subject to review	The Applicant has advised they are not seeking email correspondence they were included in. The Applicant was a recipient of this document. Accordingly, this document is not subject to review.
37.3	[Date]	Email chain	2	Refuse in full Section 25	Not subject to review	See comments regarding Document 37.2.
37.4	[Date]	Email	1	Refuse in full Section 25	Not subject to review	See comments regarding Document 37.2.
37.5	[Date]	Email	2	Refuse in full Section 25	Not subject to review	See comments regarding Document 37.1.
37.6	[Date]	Email	2	Refuse in full Section 25	Not subject to review	Having reviewed the document, I am satisfied it contains the personal affairs information of third parties other than the Applicant, as defined in section 33(9) of the FOI Act.

Annexure 1– Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						<p>I am satisfied the document is impracticable to edit under section 25, as it would not retain meaning.</p> <p>As the Applicant advised during the review that [they did] not seek access to personal affairs information of third parties, I am satisfied the Applicant has excluded this type of information from review</p>
37.7	[Date]	Email	1	Refuse in full Section 25	Not subject to review	See comments regarding Document 37.1.
37.8	[Date]	Email	3	Refuse in full Section 25	Not subject to review	See comments regarding Document 37.2.
37.9	[Date]	Email chain	1	Refuse in full Section 25	Not subject to review	See comments regarding Document 24.
37.10	[Date]	Email chain	1	Refuse in full Section 25	Not subject to review	See comments regarding Document 37.2.
37.11	[Date]	Letter on [company name] letter head	1	Refuse in full Section 25	Not subject to review	See comments regarding Document 24.

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
39.	[Date]	Exhibit 68.6 – Letter, [named person] to [named person]	2	Refuse in full Section 25	Not subject to review	See comments regarding Document 24.
40.	[Date]	Exhibit 69 – Certificate of appointment [named person]	2	Release in part Section 33(1)	Not subject to review	See comments regarding Document 1.
41.	[Date]	Exhibit 70 – Entry Report [report number]	4	Release in part Section 33(1)	Not subject to review	See comments regarding Document 1.
42.	[Date]	Exhibit 71 – ASIC Current and Historical Extract	12	Refuse in full Section 14	Not subject to review	Public access subject to a fee.