

Notice of Decision and Reasons for Decision

Applicant:	'AJ4'
Agency:	Victorian WorkCover Authority (t/a WorkSafe)
Decision Date:	22 August 2019
Exemption considered:	Section 33(1)
Citation:	'AJ4' and Victorian WorkCover Authority (<i>Freedom of Information</i>) [2019] VICmr 85 (22 August 2019)

FREEDOM OF INFORMATION – CCTV footage – witness statement – photographs – workplace – personal affairs information – unreasonable disclosure

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 decided to release additional information.

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
22 August 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency through their legal representative for access to:

...copies of all documents held by WorkSafe relating to [named company] during the period indicated [i.e. specific date]. Documents subject to this request including but not limited to: WorkSafe entry reports, improvements notices, profile visits, statements, photographs and accident reports.
2. In its decision letter, the Agency identified 20 documents falling within the terms of the Applicant's request. It decided to release 14 documents in part, release one document in full, and refuse five documents 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. On 12 July 2019, the Applicant agreed to limit the scope of the review to the following documents:
 - (a) Victoria Police Initial Action Pad - Witness Statement (**Document 1**);
 - (b) Booklet of images (**Document 19**); and
 - (c) Video footage (**Document 20**).
5. I have examined copies of the three documents subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications received from the parties, including:
 - (a) the Agency's decision on the FOI request, dated 1 May 2019;
 - (b) the Applicant's review application, dated 16 May 2019;
 - (c) correspondence from the Applicant, dated 12 July 2019; and
 - (d) the Agency's submission dated 26 July 2019.
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 exemption under section 33(1) to refuse access to documents. The Agency's decision letter sets out the reasons for its decision.

Section 33(1) – Documents containing personal affairs information

10. 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;¹ and
 - (b) such disclosure would be ‘unreasonable’.
11. Information relates to the ‘personal affairs’ of a person if it is reasonably capable of identifying them, or of disclosing their address or location.² It has also been held information relates to a person’s personal affairs if it ‘concerns or affects that person as an individual’.³
12. The Victorian Civil and Administrative Tribunal (**VCAT**) has held a document will disclose personal affairs information if the document is capable of, either directly or indirectly, identifying a particular individual whose personal affairs are disclosed. As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by the capacity of any member of the public to potentially identify a third party.⁴
13. VCAT has also noted CCTV footage may disclose the personal affairs of persons other than an FOI applicant even if it does not show the faces of those third parties. An individual may be capable of being identified by what they were wearing or what they were doing.⁵

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

Document 1

14. Document 1 contains the names, occupations and additional information capable of identifying individuals other than the Applicant.

Document 19

15. Page 3 contains the images of three individuals other than the Applicant.
16. Page 5 contains product names. I am not satisfied page 5 contains personal affairs information.
17. Page 26 is an image of a business card. It contains the name, email address, occupation and phone number of an individual other than the Applicant.
18. Page 44 contains an image of an individual other than the Applicant.
19. Page 68 contains an image of a real estate sign. It contains the name, phone numbers and email address of an individual other than the Applicant.

Document 20

20. The CCTV footage is captured from a section of the warehouse. It is 20 minutes and 10 seconds in duration. The footage depicts the movements of other individuals, including staff members.

¹ Section 33(1) and (2).

² Section 33(9).

³ *Hanson v Department of Education and Training* [2007] VCAT 123 at [9].

⁴ *O’Sullivan v Department of Health and Community Services (No 2)* [1995] 9 VAR 1 at [14]; *Beauchamp v Department of Education* [2006] VCAT 1653 at [42].

⁵ *Wilner v Department of Economic Development, Jobs, Training and Resources* [2015] VCAT 669 at [17].

21. I consider the quality of the footage is sufficiently clear at various times and to varying degrees to show identifying features of the individuals captured in the footage, such as facial features and gait.
22. I am satisfied the identities of the individuals, whose images appear in the footage, are reasonably capable of being identified by persons with knowledge of or involvement in the events to which they relate, or any other member of the public.
23. Therefore, I am satisfied the CCTV footage contains the personal affairs information of individuals other than the Applicant.

Would release of the personal affairs information be unreasonable?

24. The concept of 'unreasonable disclosure' involves determining whether the public interest in disclosure of official information is outweighed by the personal interest in privacy, in the particular circumstances of a matter.
25. In determining whether release of the personal affairs information would be unreasonable, I have considered the following factors:

The circumstances in which the personal information was obtained

26. The information was obtained by the Agency during its investigation into a workplace incident.

Whether the individuals to whom the information relates object, or would be reasonably likely to object to the release of the information

27. The Agency submits it did not consult with the witness named in Document 1. The Agency considered the following factors in deciding not to consult with the witness:
 - (a) the document is the product of an interview conducted by a member of Victoria Police following the incident;
 - (b) the matter did not proceed to prosecution; it is reasonable to assume the witness would expect the document would not be made publicly available; and
 - (c) notifying the witness regarding release of the document would cause undue stress and anxiety to that person.
28. I have considered and accept the views expressed in *Akers v Victoria Police*,⁶ where VCAT accepted the agency's submission in that matter, 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.
29. I accept when the witness gave their statement, they would have done so with the expectation the information would only be used for the purpose of the investigation and any subsequent prosecution and related court process.
30. In the circumstances, I consider it reasonably likely the witness would object to the release of Document 1.
31. There is no information before me with respect to whether the Agency consulted with any of the other third parties whose personal affairs information is contained in the Documents.

⁶ [2003] VCAT 397 at [35].

32. I consider the individuals, whose images are contained in Document 19 at page 3, would be reasonably likely to object to the release of their images.
33. I do not consider the individual, whose personal affairs information is in Document 19 at page 26, would object to the release of the information, noting business cards are created for the very purpose of being distributed to a range of individuals. I have also considered the information is highly likely to already be in the public domain.
34. I consider the individuals, whose images are in Document 19 at page 44, would be reasonably likely to object to the release of their images.
35. I do not consider the individual, whose personal affairs information is in Document 19, at page 68 would object to the release of the information. The real estate sign was erected in public. The information is already in the public domain, and its release in that manner was likely consented to by the relevant individual.
36. The CCTV footage comprising Document 20, was captured by a private business for security purposes. I consider the individuals captured in the footage would be likely to not expect, nor consent to, it being released to an individual under the FOI Act.
37. I am of the view the third parties, whose personal affairs information is contained in Document 20, would be reasonably likely to object to the release of their personal affairs information given the circumstances in which it was captured and the unrestricted and unconditional nature of release of documents under the FOI Act.

The Applicant's interest in the information, and whether their purpose for seeking the information is likely to be achieved

38. The Applicant is reported to have sustained an injury in a workplace incident on a specific date. The Applicant seeks access to the information to seek compensation under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic).
39. I acknowledge the Applicant's strong personal interest in the documents.
40. I do not consider release of Document 1 would assist the Applicant. Having reviewed Document 1, I consider the documents already released to the Applicant by the Agency provide more detail with respect to the context and circumstances surrounding the incident.
41. I do not consider release of the information contained on pages 3 and 44 of Document 19 would assist the Applicant.
42. Document 20 captures only a small section of the warehouse interior, where the incident occurred. Most of the footage captures the roofed outdoor area of the warehouse.
43. The placement of the CCTV camera and a large wall operate to conceal a significant portion of the reported incident, including the moment of impact and injuries sustained by the Applicant.
44. During the review, the Agency confirmed there is no additional footage of the incident.
45. I do not consider release of Document 20 would assist the Applicant in understanding the context and circumstances surrounding how they were injured, as indicated in their application for review. I consider the documents already released to the Applicant by the Agency provide more detail with respect to the context and circumstances surrounding the incident.

Deletion of exempt or irrelevant information

46. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
47. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸
48. I have considered the effect of deleting exempt information from the documents as below:
- (a) **Document 1** – I have determined it is not practicable for the Agency to provide an edited version with the exempt material removed as the content is so intertwined that the required deletions would render the document meaningless.
 - (b) **Document 19** - In my view, it is practicable for the Agency to delete the exempt information in Document 19, because it would not require substantial time and effort, and the edited document would retain meaning.
 - (c) **Document 20** – The Agency submits it does not presently have the technical capability to pixelate the footage. I do not consider this to be sufficient justification alone to deem it impracticable from a resources point of view for the Agency to create an edited version, given there are several commercially available programs available for minimal cost that would enable the Agency to redact or edit CCTV footage.

However, based on my review of Document 20, I am satisfied editing the footage to remove the exempt personal affairs information would render the document meaningless. This is due to the number and numerous movements of individuals other than the Applicant who are captured in the footage that would require pixilation. Further, the camera position is some distance from the incident and the incident is obscured from the view of the camera. I have also considered that the footage, even if extensively edited, would still disclose the personal affairs information of the third parties featured to any viewer with knowledge of the location and incident.

As such, I am satisfied it would not be practicable for the Agency to delete the exempt information from Document 20 due to the nature of the incident captured and given the personal affairs information of the Applicant is inextricably intertwined with the personal affairs information of third party witnesses.

Conclusion

49. On the information available, I am satisfied Documents 1 and 20 are exempt in full under section 33(1) as I consider it would not be practicable for the exempt information in these documents to be deleted as to do so would render these documents meaningless.
50. In relation to Document 19, I am satisfied the exemption in section 33(1) applies in part and that it would be practicable to produce an edited version removing the exempt information. As such, I have decided to grant access to Document 19 in part.
51. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

⁷ *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].

⁸ *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].

Review rights

52. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁹
53. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
54. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹¹
55. 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.
56. 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.¹²

Other matters

57. Section 49P(5) states that if I decide to disclose a document claimed to be exempt under section 33(1) I must, if practicable, notify any person who has a right to apply to VCAT for a review of my decision of their right to do so.
58. In considering the meaning of 'practicable' in relation to other sections of the FOI Act, VCAT has held the word 'practicable' in the FOI Act 'connotes a legislative intention to apply common sense principles' and 'is not a term of art or a term of precise meaning'. Further, VCAT held:

.... The use of the word indicates there should be imported into the process the exercise of judgment by the agency concerned. It does not allow for the conclusion that because a task is possible, it must, ergo, be undertaken.¹³
59. VCAT also considers the possibility of an unnecessary intrusion into the lives of third parties is relevant when assessing the practicability of notifying them.¹⁴
60. I have determined to release the personal information contained in Document 19 at pages 26 and 68.
61. In this case, I have decided to notify the relevant third parties would be an unnecessary intrusion, given the public nature of the documents in which they are contained. In any case, I am not satisfied it would be practicable to notify those individuals of their review rights.

When this decision takes effect

62. 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.

⁹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁰ Section 52(5).

¹¹ Section 52(9).

¹² Sections 50(3F) and (3FA).

¹³ *Re Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 at [45].

¹⁴ *Coulston v Office of Public Prosecutions Victoria* [2010] VCAT 1234 at [42].

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[Date]	Victoria Police Initial Action Pad (Witness Statement)	4	Refused in full Section 33(1)	Refuse in full Section 33(1)	Having considered the exempted information and given the context in which the document was provided, I am satisfied it would be unreasonable to release the personal affairs information of the witness in the document. Accordingly, the document is exempt under section 33(1) in full as I am satisfied it would not be practicable to delete exempt information in the document in order to provide an edited copy.
19.	Undated	Booklet of incident photographs	68	Released in part Section 33(1)	Release in part Section 33(1) The personal information on page 3 is to remain deleted. The information on page 5 is to be released. The personal information on page 26 is to be released. The personal information on page 44 is to remain deleted.	The Agency relied on section 33(1) to exempt parts of five pages. The remaining 63 pages were released to the Applicant in full. I am satisfied pages 3, 26, 44 and 68 contain personal affairs information of persons other than the Applicant. I have determined it would be unreasonable for this information contained in pages 3 and 44 to be released. I am not satisfied page 5 contains

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					The personal information on page 68 is to be released.	<p>personal affairs information and have determined that the information on this page can be released.</p> <p>I am not satisfied it would be unreasonable for the personal affairs information contained in pages 26 and 68 to be released given I am of the view this information is already in the public domain.</p>
20.	[Date]	Video footage – Camera 4 – 20:10 mins – AVI file	N/A	Refused in full Section 33(1)	Refuse in full Section 33(1)	<p>The Agency confirmed there is no other footage depicting the incident.</p> <p>I am satisfied it would be unreasonable to release the third party personal affairs information in the document. Accordingly, the information is exempt under section 33(1).</p> <p>In my view, editing the footage to remove the exempt information is not practicable, primarily taking into account:</p> <ul style="list-style-type: none"> • the movement of the individuals captured by the footage; • the fact that the footage would not be of any assistance to the Applicant; and • that deleting the exempt

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						<p>information would render the document meaningless.</p> <p>As such, I have determined to refuse access to the document in full.</p>