

Notice of Decision and Reasons for Decision

Applicant:	'AN9'
Agency:	Victorian WorkCover Authority
Decision date:	30 September 2019
Exemption and provision considered:	Sections 33(1), 25
Citation:	'AN9' and Victorian WorkCover Authority (<i>Freedom of Information</i>) [2019] VICmr 126 (30 September 2019)

FREEDOM OF INFORMATION – personal affairs information – unreasonable disclosure – workplace accident – witness statements – CCTV footage

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 in the documents.

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
30 September 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the Occupation Health and Safety Incident investigation notes and reports, field reports, circumstance reports and statements, and prosecution brief regarding a workplace incident involving the Applicant.
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to some of those documents in part and refuse access to other 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 to certain documents.
4. On 5 June 2019, the Applicant agreed to limit the scope of the review to the following documents:
 - (a) six witness statements (**Document 1**);
 - (b) undated document titled 'people present at time of incident' (**Document 7**); and
 - (c) CCTV footage (**Document 9**).
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. In the course of the review, the Agency undertook further consultation with the witnesses and individuals named in Documents 1 and 7. The Agency advised that four of the six individuals, who provided witness statements in Document 1, consented to their witness statements being released to the Applicant. These statements are to be provided directly to the Applicant. As such, my review of Document 1 relates only to two witness statements where the individuals do not consent to their statements being released under freedom of information.
7. I have examined copies of the documents subject to review and considered all communications received from the Agency and the Applicant, including:
 - (a) the Agency decision on the FOI request, dated 25 March 2019; and
 - (b) the Applicant's review application, dated 1 April 2019;
 - (c) advice from the Agency regarding additional consultation undertaken in the course of the review.
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 section 33(1) to refuse access to Documents 1 and 7, and referenced section 25A in its decision to refuse access to Document 9 (which I have interpreted as being a reference to section 25A(5)). 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 are wearing or doing in the footage.⁵

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

Document 1

14. Document 1 contains the names, occupations, employment histories, age, dates of birth, signatures, versions of events relating to the workplace incident and additional information capable of identifying individuals other than the Applicant.
15. I am satisfied Document 1 contains personal affairs information of individuals other than the Applicant.

Document 7

16. Document 7 contains a list of individuals, employees and non-employees who were present at the time of the workplace incident involving the Applicant.
17. I am satisfied that Document 7 contains personal affairs information of individuals other than the Applicant.

¹ Sections 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].

Document 9

18. Document 9 is CCTV footage capturing the front of a site where the incident occurred. The Applicant agreed to narrow the scope of footage sought to a 05:17 period on the date of the incident (the **footage**).
19. Having reviewed the footage, I note the CCTV camera recording is intermittent and depicts the movements of various individuals attending the site, including the Applicant, as well as other staff members and unrelated third parties.
20. 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, clothing and gait. I am satisfied the identities of these individuals, are reasonably capable of being identified by persons with knowledge of or involvement in the incident.
21. Therefore, I am satisfied the footage contains the personal affairs information of individuals other than the Applicant.

Would release of the personal affairs information be unreasonable?

22. The concept of 'unreasonable disclosure' involves determining whether the public interest in the disclosure of official information is outweighed by the personal interest in privacy, in the particular circumstances of a matter.
23. 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:

24. 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:

25. As detailed above, the Agency agreed to consult with the witnesses and individuals named in Documents 1 and 7 during the review. Consultation with four of the six individuals, whose statements appear in Document 1, resulted in them consenting to the statements being disclosed to the Applicant. The Agency was unable to consult with two of the six individuals as they could not be contacted.

Third party consultation

26. The Agency further advised that, in addition to the four individuals consulted regarding Document 1, whose names are included in Document 7, it obtained consent from three additional individuals listed in Document 7 for their names to be disclosed to the Applicant. The Agency did not consult with the individuals captured in the footage as it was unable to ascertain the identity of those individuals.

Document 1

27. My review of Document 1 only considers the two witness statements in relation to which the Agency was unable to contact the relevant individuals.

28. I accept that when the witnesses gave their statement they would have done so with the expectation the information would only be used for the purpose of the Agency's investigation and any subsequent prosecution and related court process.
29. In the circumstances, and in the absence of their express consent to disclose the witness statements, I consider these witnesses would be reasonably likely to object to the release of their witness statements.

Document 7

30. Notwithstanding the consent received from several individuals for their names, as listed in Document 7, to be released, I consider the four other individuals named in Document 7, one who is listed under the heading 'non-employees', would be reasonably likely to object to the release of their names.

Document 9

31. I consider the individuals, whose images are captured in the footage in Document 9, would be reasonably likely to object to the release of their personal affairs information given the circumstances in which it was captured and the nature of release under the FOI Act, which is unrestricted and unconditional.
32. The footage was captured by a private business for security purposes. I consider the individuals captured in the footage would be reasonably likely to object to it being released in full to the Applicant under the FOI Act.
33. However, having reviewed the footage, I am of the view it can be edited to remove personal affairs information so an edited copy can be provided to the Applicant. The footage could be edited by applying an appropriate pixilation or filter over the footage to protect the personal affairs information of individuals other than the applicant.

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

34. 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 better understand any legal options.
35. I acknowledge the Applicant's strong personal interest in the documents.
36. I consider the four witness statements to be provided to the Applicant by the Agency following the consent obtained during section 33 consultations will provide sufficient detail with respect to the circumstances surrounding the incident. Furthermore, I do not consider release of the remaining two witness statements would significantly assist the Applicant.
37. Document 9 captures only the section of the front entrance to the warehouse and does not capture the workplace incident. In the absence of such footage, the Applicant agreed to receive an edited copy, either pixilated or blurred, of the footage depicting the operation of forklifts at the front of the premises the morning prior to the incident.
38. I consider Document 9, in an edited pixilated or blurred format, may be of assistance to the Applicant in understanding the context and circumstances surrounding operation of forklifts on the factory premises, as indicated during the review.
39. Therefore, I am satisfied disclosure of the personal information in the documents would be unreasonable in the circumstances and determined that the exemption under section 33(1) applies to Documents 7 and 9 in part and Document 1 in full.

Deletion of exempt or irrelevant information

40. 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.
41. Determining what is ‘practicable’ requires consideration of the effort 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
42. I have considered the effect of providing an edited copy of the documents in accordance with section 25, as follows:
- (a) **Document 1:** I have determined it is not practicable for the Agency to provide an edited version of the statements subject to this review with exempt material deleted as the content is so intertwined with personal affairs information that the required deletions would render the document meaningless.
 - (b) **Document 7:** In my view, it would be practicable for the Agency to delete the exempt information in Document 7, namely the four names in relation to which consent was unable to be obtained, as it would not require substantial time and effort, and the edited document would retain meaning.
 - (c) **Document 9:** On 5 June 2019, the Applicant, through their legal representative, agreed to narrow the footage captured to a period between 7:34 to 8:37 am and is agreeable to receiving a pixelated copy, where the operation of forklifts is depicted on the premises where incident occurred. As a result, the remaining footage falls outside the scope of this review.

In my view, the obligation for an agency to disclose an edited copy of a document, where it is practicable do so and the applicant agrees to receive an edited copy, encompasses CCTV footage, which clearly falls within the definition of ‘document’ under section 5(1). This is despite being a document that was unlikely to have existed, or been as prevalent when the FOI Act commenced in 1983 as it is today.

While section 25 concerns the obligation of an agency to grant access to an edited copy of document with exempt or irrelevant information deleted, in the absence of binding legal authority to the contrary,⁸ I consider the object of the FOI Act under section 3 and the requirement to take a purposive approach to statutory interpretation⁹ requires that, in the context of CCTV footage, ‘deletions’ includes pixilation or blurring by an agency applying a filter to CCTV footage using video editing software.

A further issue to consider in this case is whether, in the absence of the Agency equipping itself with editing software, it would be practicable for the Agency to make the necessary ‘deletions’ to the footage.

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 at [140] and [155].

⁸ See for example, *Seven Network (Operations) Limited v Victoria Police (Review and Regulation)* [2017] VCAT 878 at [41] where this issue was noted, but not determined.

⁹ Section 35(1)(a) of the *Interpretation of Legislation Act 1984* (Vic), which codifies common law principles of statutory interpretation states ‘...a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object; and ...’.

Having considered the Agency's functions, considerable size and resources, and the annual number of FOI requests its receives,¹⁰ I do not accept its submission that it does not have the technical capability to pixelate the CCTV footage, as it has not equipped itself with editing software, is sufficient to demonstrate that it would not be practicable for the Agency to provide the Applicant with an edited copy of the footage.

In many instances, agencies subject to the FOI Act purchase low-cost software that allows CCTV footage to be edited, for example, to pixelate or blur personal affairs information so as to give effect to an agency's obligation under section 25.¹¹

If the fact an agency declined to equip itself with the technology capability to provide an edited copy of a document, particularly where it involves a small financial outlay in the case of editing software for CCTV footage, I consider this would diminish the agency's ability to meet its statutory obligations under the FOI Act, as requests for access to CCTV footage would be significantly compromised. This would be contrary to the object of the FOI Act under section 3.

Nor does it accord with expectations for the technology capability of government. In this regard, I note the *Victorian Government Information Technology Strategy 2016-2020*¹² and the Special Minister of State's message in relation to the government's action plan, which states:

...

After successfully delivering on the actions in the first year of the Victorian Government, we continue to work towards delivering efficient and cohesive access to government services and information.

Our first 12 months of action laid the foundations in a number of areas: in citizen engagement through the initial work of Service Victoria; in data through the creation of the Victorian Centre for Data Insights; in technology by confirming CenITex's role and setting the underpinning direction for government's major corporate systems and cyber security; and researching and planning for a government-wide IT capability uplift.

...

We all know that technology is developing in ways that we often don't expect, with new opportunities and new threats emerging. The foundations we lay now need to be solid, support good engagement, and provide a cohesive approach to technology, a sophisticated understanding of data and a realistic understanding of the capability we need to develop and maintain.

Victorians can have confidence that the reform and innovation we are working on will continue to focus on delivering a better experience and better outcomes.

43. Finally, I am satisfied applying a filter across the footage requested by the Applicant to pixelate the personal affairs information of third parties would not require substantial time and effort on the part of the Agency, and the edited footage would retain sufficient meaning.
44. Accordingly, I am satisfied it is practicable for the Agency to provide the Applicant with an edited copy of the CCTV footage by applying a filter across the entire footage to pixelate the personal affairs information of third parties in order to provide an edited copy of the document in accordance with section 25.

¹⁰ In 2017-18, the Agency reported it received 56 personal and 1273 non-personal FOI requests.

¹¹ See for example, Camtasia, which retails for less than \$500.

¹² See *Victorian Government Information Technology Strategy 2016-2020* 2017-18 Action Plan at <https://www.vic.gov.au/information-technology-strategy-2017-18-action-plan> <accessed 30 September 2019> at p 1.

Conclusion

45. On the information available:
- (a) I am satisfied the two statements subject to this review in Document 1 are exempt under section 33(1). 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. Accordingly, I have determined to exempt these documents in full.
 - (b) I am satisfied the exemption in section 33(1) applies to certain parts of the Document 7. I consider it would be practicable for the exempt information in this document to be deleted as to do so would not render the documents meaningless. Accordingly, I have determined to provide partial access to Document 7.
 - (c) I am satisfied it is practicable to provide an edited copy of the CCTV footage in Document 9 and have determined to grant partial access to this document in accordance with section 25.
46. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

47. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹³
48. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
49. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
50. 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.
51. 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.¹⁶

When this decision takes effect

52. 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.

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Various dates between [specified date] and [specified date]	<p>Six Witness Statements</p> <ul style="list-style-type: none"> • Four witness statements to be released directly (not subject to this review) • Two witness statements subject to this review 	<p>24</p> <p>16 pages</p> <p>8 pages</p>	<p>Refused in full</p> <p>Section 33(1)</p>	<p>Refuse in full</p> <p>Section 33(1)</p>	<p>As referenced above, in the course of this review, consent was provided from the authors of four of the six witness statements originally contained in Document 1. These four statements are to be released to the Applicant. My review concerns the remaining two witness statements only (totally 8 pages) where consultation was not conducted.</p> <p>Having considered the exempted information and the context in which the document was provided, I am satisfied it would be unreasonable to release the personal affairs information of the two witnesses in the document.</p> <p>I have determined it would not be practicable for the Agency to provide an edited copy of the document with the exempt material deleted as the content is so intertwined with personal affairs information the required deletions would render the document meaningless.</p> <p>Accordingly, I am satisfied the two witness statements in the document are exempt under section 33(1) in full.</p>
2.	[Date]	[Document name], Part 2	62	Refused in full	Not subject to review	

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		("Exhibit 3")		Section 14		
3.	[Date]	Trust Deed for [specified business] ("Exhibit 19")	60	Refused in full Section 34(1)	Not subject to review	
4.	[Date]	Lease of Real Estate ("Exhibit 20")	3	Refused in full Section 34(1)	Not subject to review	
5.	[Date]	Invoice for ASIC Annual Review ("Exhibit 22")	3	Refused in full Section 34(1)	Not subject to review	
6.	[Date]	ASIC Company Statement ("Exhibit 23")	3	Refused in full Section 34(1)	Not subject to review	
7.	Undated	People present at time of incident ("Exhibit 24")	2	Refused in full Section 33(1)	Release in part Sections 33(1), 25 Cover page with title "Exhibit 24" is to be released in full. The names listed at dot points 5, 7, 9 and 10 on	As referenced above, in the course of this review, consent was provided from several individuals referenced in Document 7 for their personal affairs information to be released. In relation to the remaining personal affairs information listed in Document 7, I am satisfied it would be unreasonable to

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					<p>page 2 are exempt and are to be deleted.</p> <p>The remaining information is to be released.</p>	<p>release this information. Accordingly, it is exempt under section 33(1).</p> <p>I have determined it is practicable for the Agency to delete this exempt information in Document 7, because it would not require substantial time and effort, and the edited document would retain meaning.</p>
8.	Undated	Photocopy of licence ("Exhibit 25")	2	Refused in full Section 33(1)	Not subject to review	
9.	[Date]	CCTV footage ("Exhibit 50")	N/A	Refused in full Section 25A	Release in part Section 33(1), 25	<p>The footage consists of intermittent video recording between 7:34 am and 8:37 am, amounting to a total of five minutes and 17 seconds in length.</p> <p>The footage provided by the Agency does not depict the incident involving the Applicant. However, it depicts vehicles and the movement of a number of individuals performing their employment duties and making deliveries.</p> <p>I am satisfied it would be unreasonable to release the third party personal affairs information in the footage. Accordingly, the information is exempt in part under section 33(1).</p> <p>In my view, editing the footage to remove the exempt information is practicable, primarily taking into account the fact the</p>

Annexure 1 – Schedule of Documents

						<p>footage would be of assistance to the Applicant who has consented to receiving a blurred or pixelated copy of the footage in a way that would still retain meaning.</p> <p>As such, I have determined to release the document in edited format to remove the personal affairs information of the individuals captured in the footage in accordance with section 25.</p>
10.	[Date]	CCTV footage ("Exhibit 72")	N/A	Refused in full Section 25A	Not subject to review	
11.	[Date]	ASIC Current & Historical Extract ("Exhibit 87")	6	Refused in full Section 14	Not subject to review	