

Notice of Decision and Reasons for Decision

Applicant:	'BP4'
Agency:	Victorian WorkCover Authority
Decision Date:	29 May 2020
Exemptions considered:	Sections 33(1), 32(1)
Citation:	'BP4' and Victorian WorkCover Authority (<i>Freedom of Information</i>) [2020] VICmr 147 (29 May 2020)

FREEDOM OF INFORMATION – legal professional privilege – summary brief and supporting documents – request for legal advice – *Occupational Health and Safety Act 2004* (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 differs from the Agency's decision in that I have decided to release additional information in the documents.

I am satisfied information in the documents is exempt under sections 32(1) and 33(1). However, I have determined certain personal affairs information in the document is not exempt under section 33(1).

Where I am satisfied it is practicable to delete irrelevant and exempt information from the documents in accordance with section 25, I have determined to grant access to those documents in part.

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

29 May 2020

Reasons for Decision

Background to review

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

Any reports, notes, findings, outcomes, directions etc. of any Worksafe investigation(s) either completed or ongoing involving or including myself during or post my time as an employee of [agency name], including but not limited to any investigation involving myself as either witness or otherwise conducted by [named investigator]
2. During this review, the Applicant advised they are aware the Agency undertook an investigation concerning allegations of bullying and harassment made against the Applicant. The Applicant seeks access to documents to understand the nature of the allegations and outcome of the investigation.
3. The Agency identified 169 documents falling within the terms of the Applicant's request. It refused access to 142 documents in full and 25 documents in part, and released two documents in full.
4. The Agency relied on the exemptions under sections 30(1), 31(1), 32(1), 33(1) and 35(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. On [day] and [day] [month] [year], the Applicant advised they seek review of specific information in certain documents only. Accordingly, this review relates to 12 documents refused in full and 2 documents refused in part.
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;
 - (b) the Applicant's submission dated [date], information provided with the Applicant's review application and further correspondence provided to OVIC during the review; and
 - (c) the Agency's submissions dated [date] and [date].
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

Section 32(1)

11. 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'.
12. 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;
 - (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.
13. In establishing a document is subject to litigation privilege, for a proceeding to be 'anticipated or pending' for the purposes of section 119 of the *Evidence Act 2008* (Vic), there must be more than a mere possibility of litigation. As a general rule, there must be a real prospect of litigation, but it does not have to be more likely than not.²
14. The High Court of Australia has held the purpose of legal professional privilege or client privilege ensures a client can openly and candidly discuss legal matters with their legal representative and seek legal advice:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.³
15. The dominant purpose for which the confidential communication was made will determine whether the exemption applies.⁴
16. Material gathered by a lawyer or client in preparation for litigation is privileged as if it were a confidential communication between the lawyer and the client, even if it is not such a communication.⁵
17. Following my review, I am satisfied the documents were created or obtained for the purpose of gathering evidence to support a prosecution of an alleged breach of the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**) by the Victorian WorkCover Authority.

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.

² *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332.

³ *Grant v Downs* (1976) 135 CLR 674 at [19].

⁴ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

⁵ *Dingle v Commonwealth Development Bank of Australia* (1989) 23 FCR 63 at [66]. This principle was cited with approval by the Victorian and Civil Administrative Tribunal in *Mostafa v Victorian WorkCover Authority* [2013] VCAT 782.

18. I am satisfied the Summary Brief (Documents 1 and 2) were prepared by the Agency's Enforcement Group following its investigation into an alleged breach of the OHS Act. The documents confirm the relevant briefs were submitted to the Agency's Legal Services team for legal advice.
19. Documents 1 and 2 confirm the source of the referral (Document 3) was also submitted to the Legal Services team for legal advice.
20. The Hand up/Summary Brief (Document 4) contains a list of documents provided for the purpose of legal advice. The Agency submits each of the exhibits listed in Document 4 was obtained and compiled by the Agency for the purpose of provision to its Legal Services team for legal advice. This is also evident from Documents 1 and 2.
21. In summary, I am satisfied the documents are subject to legal professional privilege based on the following matters:
 - (a) The Agency was carrying out its functions and powers in accordance with sections 7(1)(c) and 131 of the OHS Act in relation to an alleged breach of that Act.
 - (b) The documents were created or obtained by the Agency for the dominant purpose of contemplated litigation.
 - (c) The documents were created or obtained by Agency officers and submitted to the Agency's Legal Services team for legal advice.
 - (d) At the time the documents were created or obtained by the Agency, I am satisfied the commencement of litigation was reasonably contemplated.

Has legal professional privilege been waived?

22. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where a client has acted in a way that is inconsistent with the maintenance of that confidentiality. For example, where the substance of the information has been disclosed with the client's express or implied consent.⁶
23. An implied waiver of privilege occurs when a positive act of a party is inconsistent with maintenance of confidentiality in the communication, irrespective that a waiver of privilege was not the subjective intention of the party.
24. I note the matter to which the documents relate was not prosecuted, therefore, the information was not disclosed in open court.
25. Under section 133 of the OHS Act, the Agency is required to refer a matter to the Director of Public Prosecutions (**DPP**):

...

- (3) If the Authority advises the person that a prosecution will not be brought, or that it has not brought a prosecution within 9 months after receiving the request, the Authority must refer the matter to the Director of Public Prosecutions if the person requests (in writing) that the Authority do so.
- (4) The Director of Public Prosecutions must consider the matter and advise (in writing) the Authority whether or not the Director considers that a prosecution should be brought.

⁶ Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for client legal privilege); *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

26. I am satisfied disclosure of the documentation to the DPP under section 133 of the OHS Act does not amount to a waiver of legal privilege.
27. Accordingly, I am satisfied the documents are subject to legal professional privilege and exempt under section 32(1).
28. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 32(1) and each of the documents.

Section 33(1)

29. Although I am satisfied each of the documents subject to review is exempt under section 32(1), I note the Agency released Documents 146 and 147 in part with certain information exempted under section 33(1). Accordingly, I have considered the application of section 33(1) to these documents.
30. 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;⁷ and
 - (b) such disclosure would be 'unreasonable'.

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

31. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location and any information from which such information may be reasonably determined.⁸ As the nature of disclosure under the FOI Act is unrestricted and unconditional, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.⁹
32. Having viewed the documents, I am satisfied they contain the personal affairs information of persons other than the Applicant (**third parties**), including names, position titles, initials, telephone numbers, email addresses and other information concerning the personal circumstances of third parties.
33. However, I am not satisfied certain information exempted by the Agency constitutes personal affairs information for the purposes of section 33(1), as I consider it is not capable of identifying an individual, either directly or indirectly.
34. Accordingly, I am not satisfied such information is exempt under section 33(1).

Would the disclosure of this information be unreasonable?

35. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the protection of an individual's personal privacy in the circumstances.
36. In *Victoria Police v Marke*,¹⁰ the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.

⁷ Sections 33(1) and (2).

⁸ Section 33(9).

⁹ *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].

¹⁰ [2008] VSCA 218 at [76].

37. I have had regard to the following factors in determining whether disclosure of the personal affairs information in the documents would be unreasonable in the circumstances:

(a) The nature of the personal affairs information and the circumstances in which it was obtained by the Agency

I am satisfied the Agency obtained the information for the purpose of gathering evidence in support of the potential prosecution of offences under the OHS Act. Specifically, it contains information provided to the Agency in accordance with section 100(1)(a) of that Act.

I note most of the personal affairs information concerns Victorian WorkCover Authority officers, including senior officers. It discloses the details of persons who made allegations and persons involved in various aspects of an investigation.

In *Coulson v Department of Premier and Cabinet*,¹¹ the Victorian Civil and Administrative Tribunal (VCAT) held, whether or not an agency staff member's personal affairs information is exempt under section 33(1), must be considered in the context of the particular circumstances of each matter.

Generally, I consider it is not unreasonable to disclose the positions titles of agency staff, regardless of their seniority, where they are merely carrying out their usual professional duties and responsibilities as public servants. However, given the nature of the investigation and circumstances of this matter, I consider the personal affairs information is sensitive.

Further, I consider many of the third parties would have provided their personal affairs information to the Victorian WorkCover Authority on the understanding it would only be used for the purpose of investigating the allegations. As such, I consider it is reasonably likely those persons would not expect their personal affairs information to be disclosed under the FOI Act.

Accordingly, these factors weigh against disclosure.

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

The FOI Act provides a general right of access exercisable by any person, regardless of their reason for seeking access to a document. However, the reason why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable.¹²

In their review application, the Applicant submits they seek 'confirmation that an investigation did or did not take place into allegations made about me' and 'details of the allegations and the result of the investigation'. In summary, the Applicant considers they were denied procedural fairness on grounds they were not provided with the opportunity to participate in the investigation.

While disclosure of the documents in full would provide the Applicant with access to personal affairs information, having reviewed the documents, it is not evident the Applicant's purpose for seeking the documents would be achieved by disclosure of this information.

On balance, I consider this factor weighs against disclosure.

¹¹ *Coulson v Department of Premier and Cabinet (Review and Regulation)* [2018] VCAT 229.

¹² *Victoria Police v Marke* [2008] VSCA 218 at [104].

- (c) Whether the individuals to whom the information relates object, or would be likely to object to the release of the information

While I do not have information before me as to the views of the third parties on the release of their personal affairs information, on the information before me, I consider it is reasonably likely they would not consent to the release of their personal affairs information in the circumstances of this matter. On balance, I consider this factor weighs against disclosure in the circumstances of this matter.

- (d) The likelihood of further disclosure of information, if released

The nature of disclosure under the FOI Act is unconditional and unrestricted, which means an applicant is free to use or disseminate a document as they choose once it is released.¹³

Accordingly, I have considered the likelihood of the personal affairs information in the documents being further disseminated, if disclosed to the Applicant.

Although there is no information before me to suggest the Applicant would publicly disseminate the document, on balance, I am of the view this factor weighs against disclosure when considered in the context of the sensitive nature of the personal affairs information in the documents.

- (e) Whether any public interest would be promoted by release of the information

While I acknowledge the Applicant's concerns regarding procedural fairness and the impact the allegations have had on their professional and personal life, having reviewed the documents, I am satisfied the public interest would not be promoted by disclosure of the personal affairs information of third parties to the Applicant.

Accordingly, I consider this factor weighs against disclosure in the circumstances of this matter.

- (f) Whether the disclosure of information would, or would be reasonably likely to endanger the life or physical safety of any person¹⁴

There is no information before me to suggest this is a relevant factor in this matter.

38. Having weighed up the above factors, I am satisfied disclosure of the personal affairs information of third parties in the documents would be unreasonable in the circumstances.
39. Accordingly, I am satisfied this information is exempt under section 33(1).
40. The Schedule of Documents in **Annexure 1** sets out my decision in relation to section 33(1) and each of the documents.

Deletion of exempt or irrelevant information

41. 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.
42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁵ and the effectiveness of the deletions. Where

¹³ *Victoria Police v Marke* [2008] VSCA 218 at [68].

¹⁴ Section 33(2A).

¹⁵ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁶

43. I have considered the effect of deleting irrelevant and exempt information from the documents in accordance with section 25.
44. I am satisfied it is not practicable to delete information exempted under section 32(1) as the edited documents would not retain meaning. However, I am satisfied it is practicable to provide an edited copy of Documents 146 and 147, as to do so would not require substantial time and effort and the documents would retain meaning.

Conclusion

45. On the information before me, I am satisfied information in the documents is exempt under sections 32(1) and 33(1). However, I have determined certain personal affairs information in the document is not exempt under section 33(1).
46. Where I am satisfied it is practicable to delete irrelevant and exempt information from the documents in accordance with section 25, I have determined to grant access to those documents in part.
47. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

48. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁷
49. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁸
50. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁹
51. 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.
52. 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.²⁰

When this decision takes effect

53. My decision does not take effect until the Agency's 14 day review period expires.
54. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁶ *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].

¹⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁸ Section 52(5).

¹⁹ Section 52(9).

²⁰ 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.	N/A	Incident Investigation	5	Refused in full Section 32(1)	Refused in full Section 32(1)	<p>Section 32(1): I am satisfied this document is exempt under section 32(1) for the reasons outlined in the Notice of Decision above.</p> <p>Section 25: I am satisfied it would not be practicable to delete exempt information in the document in accordance with section 25. Accordingly, the document is exempt in full under section 32(1).</p>
2.	[Date]	Incident Investigation Summary Brief	5	Refused in full Section 32(1)	Refused in full Section 32(1)	<p>Section 32(1): See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>
3.	[Date]	Referral for Comprehensive Investigation	4	Refused in full Section 32(1)	Refused in full Section 32(1)	<p>32(1): I am satisfied this document forms part of the Brief submitted to the Agency's Legal Services team for the purpose of obtaining legal advice in relation to contemplated litigation. Accordingly, I am satisfied this document is exempt under section 32(1).</p> <p>Section 25: See comments for Document 1.</p>
4.	N/A	Index to Hand up/summary brief	17	Refused in full Section 32(1)	Refused in full Section 32(1)	<p>Section 32: See comments for Document 1.</p> <p>Section 25: See comments for Document 1.</p>
14.	[Date]	Exhibit 1	2	Refused in full	Refused in full	Section 32(1): See comments for Document

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
				Section 33(1)	Section 32(1)	1. Section 25: See comments for Document 1. Section 33(1): As I am satisfied the document is exempt under section 32(1), it is not necessary for me to consider the application of section 33(1) to this document.
15.	[Date]	Exhibit 2	3	Refused in full Section 33(1)	Refused in full Section 32(1)	Section 32(1): See comments for Document 14. Section 33(1): See comments for Document 14. Section 25: See comments for Document 1.
27.	[Date]	Exhibit 14	3	Refused in full Section 32	Refused in full Section 32(1)	Section 32(1): See comments for Document 14. Section 25: See comments for Document 1.
33.	[Date]	Exhibit 22	7	Refused in full Section 32	Refused in full Section 32(1)	Section 32(1): See comments for Document 14. Section 25: See comments for Document 1.
146.	[Date]	Exhibit 25	5	Released in Part Section 33(1)	Released in Part Sections 33(1), 25	Section 33(1): On [date], the Applicant advised they seek review of information exempted by the Agency in the section 1,

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
					<p>Information exempted by the Agency under section 33(1) is to remain deleted under section 25, except for the following information which is not exempt under section 33(1) and is to be released:</p> <p>(a) Information deleted by the Agency under, 'Observations and Actions of the Inspector', point 1.2, the words following "[redacted]".</p>	<p>paragraph 2, which states '[redacted]...' only.</p> <p>I am not satisfied information exempted by the Agency under section 33(1) is personal affairs information, as it is not capable of directly or indirectly identifying a person. Accordingly, this information is not exempt under section 33(1).</p> <p>Section 25: The remainder of the information deleted by the Agency is not subject to review. I am satisfied it is practicable to delete this irrelevant information in accordance with section 25.</p>
147.	[Date]	Exhibit 26	8	<p>Refused in part</p> <p>Sections 33(1), 32(1)</p>	<p>Released in Part</p> <p>Sections 33(1), 25</p> <p>Personal affairs information deleted by the Agency is to remain deleted, except for the following information which is not personal affairs information for the purposes of section 33(1) and is to be released:</p>	<p>By email dated [date], the Applicant advised they only seek review of the letter and the following information redacted in the document index:</p> <ul style="list-style-type: none"> • [date] • [date] • [date] • [date]

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency’s Decision	OVIC Decision	OVIC Comments
					<p>(a) signature and reference number on bottom of page 2; and</p> <p>(b) entry dated [date]: the last 13 words of text in column titled, ‘Description’ following the hyphen; and</p> <p>(c) entry dated [date]: the last eight words of text in the column ‘Description’ following the hyphen.</p>	<ul style="list-style-type: none"> • [dates] • [date] <p>as well as:</p> <ul style="list-style-type: none"> • the names of third parties who provided witness statements on [date], [date] and [date]; • the name of the third party who authored the letter dated [date] under ‘Category 8’; and • information redacted in relation to handwritten diary notes dated [date] and [date] under ‘Category’ 10. <p>Section 32(1): The Applicant does not seek review of information exempted under section 32(1). Accordingly, this information is out of the scope of this review and is to be deleted in accordance with section 25.</p> <p>Section 33(1): I am satisfied it would be unreasonable to disclose the personal affairs information for reasons outlined above in the Notice of Decision.</p> <p>However, I am not satisfied certain other information is personal affairs information for the purposes of section 33(1) as it is not</p>

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						capable of directly or indirectly identifying a person. Section 25: I am satisfied it is practicable to edit the document to remove exempt information under section 25.
60.	[Date]	Exhibit 31.2	10	Refused in full Section 32(1)	Refused in full Section 32(1)	Section 32(1): See comments for Document 14. Section 25: See comments for Document 1.
68.	[Date]	Exhibit 31.10	21	Refused in full Section 33(1)	Refused in full Section 32(1)	Section 32(1): See comments for Document 14. Section 33(1): See comments for Document 14. Section 25: See comments for Document 1.
75.	[Date]	Exhibit 34.9	4	Refused in full Section 32(1)	Refused in full Section 32(1)	Section 32(1): See comments for Document 14. Section 25: See comments for Document 1.
78.	[Date]	Exhibit 37	33	Refused in full Section 32(1)	Refused in full Section 32(1)	Section 32(1): See comments for Document 14. Section 25: See comments for Document 1.