

Notice of Decision and Reasons for Decision

Applicant:	'DJ2'
Agency:	Victorian WorkCover Authority
Decision date:	30 June 2021
Provision and exemption considered:	Sections 25A(5), 32(1)
Citation:	'DJ2' and Victorian WorkCover Authority (<i>Freedom of Information</i>) [2021] VICmr 210 (30 June 2021)

FREEDOM OF INFORMATION – request to process request on grounds all document, should any exist, would be exempt – whether prosecution should be brought under the *Occupational Health and Safety Act 2004* (Vic) – communications to the Director of Public Prosecution (DPP) – section 131 of the *Occupational Health and Safety Act 2004* (Vic)

All reference 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.

I am not satisfied it is apparent from the nature of the documents, as described in the request, that all documents to which the request relates would be exempt under section 32(1).

The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 June 2021

Reasons for Decision

Background to review

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

...all written documents or electronic communications involving [named Agency officer and their position title] and [named Agency officer and their position title] and the [Office of Public Prosecutions]. Involving [the Applicant] v [a company]. I am not satisfied with investigation undertaken by WorkSafe Victoria for various reasons (See attached correspondence). I am acting in public interest due to the inherent failure by WorkSafe Victoria to fulfil its statutory function. It is a betrayal of public trust and confidence.
2. Without having identified any, or all documents, the Agency refused access to documents in accordance with the Applicant's request under section 25A(5).
3. In its decision, the Agency advised documents falling within the terms of the Applicant's request, should any exist, would be exempt from release under section 32(1).
4. 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. 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 and submissions received from the parties.
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.
9. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

Review of section 25A(5)

10. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request:
 - (a) if it is apparent from the nature of the request all documents sought would be exempt under the FOI Act; and
 - (b) where it is not possible to provide the applicant with an edited copy of the documents with exempt information deleted, or it is clear the applicant does not seek an edited copy of the documents.
11. Importantly, an agency is not required to identify any or all documents relevant to a request or to specify any relevant exemption under which a particular document would be exempt.

12. The power under section 25A(5) is carefully circumscribed.¹ A decision maker must be satisfied of the following three elements, which operate to limit its application:
- (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent all requested documents are exempt.
 - (c) Third, it must be apparent from:
 - i. the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
 - ii. the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.²

Is the nature of the documents objectively apparent from the face of the request?

13. On the information before me, I accept the only documents that would be relevant to the terms of the Applicant's request are those created, sent and received by the Agency [officers] named in the Applicant's request, and those created, sent and received by staff at the Office of Public Prosecutions (OPP), regarding the Agency's decision not to prosecute the [company] for alleged breaches of the *Occupational Health and Safety Act 2004* (Vic) (OHS Act).
14. Accordingly, I am satisfied the nature or character of the requested documents, as described by the Applicant in their request, is objectively apparent from the specific terms of the request.

Would all documents, as described in the request, be exempt?

15. In refusing access to the requested documents under section 25A(5), the Agency determined, should any exist, they would be exempt under section 32(1).

Application of section 32(1) – Documents subject to legal privilege

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:³
- (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

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

² *Knight v Corrections Victoria* [2010] VSC 338.

³ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

- (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.

18. The High Court of Australia has held legal 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.⁴

19. Legal privilege exists to protect the confidentiality of communications between a client and their lawyer. In this case, the requisite client/lawyer relationship would be between the Agency and its inhouse legal advisers named in the Applicant's request.
20. Section 131(1) of the OHS Act provides if a person considers the occurrence of an act, matter or thing constitutes an offence against the OHS Act or the regulations, and no prosecution has been brought in respect of the occurrence of the act, matter or thing within six months of the occurrence, the person may request in writing that the Agency bring a prosecution.
21. Under section 131(3) of the OHS Act, if the Agency advises a person that a prosecution will not be brought, or that it has not brought a prosecution within nine months after receiving the request, the Agency must refer the matter to the Director of Public Prosecutions (DPP) if the person requests (in writing) that the Agency does so. I accept the documents sought by the Applicant concern a matter referred to the DPP under section 131(3) of the OHS Act.
22. Under section 131(4) of the OHS Act, the DPP must consider the matter and advise the Agency (in writing) whether or not the Director considers a prosecution should be brought.
23. I accept the documents sought by the Applicant concern the Agency's decision not to prosecute [a company] for alleged breaches of the OHS Act which was subsequently referred to the DPP in accordance with section 131(3) of the OHS Act. As at the time of my review, I understand the DPP has made a decision under section 131(4) of the OHS Act that the [company] will not be prosecuted.
24. I accept the DPP is required to consider all material prepared by the Agency concerning its decision not to prosecute the [company], which I accept would have been subject to internal legal review.
25. Having considered the circumstances of this matter, I am satisfied documents that would fall within the terms of the Applicant's request, should any exist, would involve confidential communications between the Agency's legal advisers (the Agency's inhouse lawyers) and third parties (lawyers of the OPP), that was made for the dominant purpose of pending or contemplated litigation under the OHS Act.
26. However, section 131(5) of the OHS Act provides the Agency must ensure a copy of the DPP's advice is sent to the person who made the request and, if it declines to follow the advice from the DPP to bring proceedings, the Agency must give the person written reasons for its decision.
27. Accordingly, the Agency was required to ensure a copy of the DPP's advice was sent to the Applicant in accordance with section 131(5) of the OHS Act. I consider a copy of the DPP's advice would fall within the terms of the Applicant's request and would not be exempt under section 32(1).

⁴ *Grant v Downs* (1976) 135 CLR 674 at [19].

28. While I am satisfied the requested documents, should any exist, would contain information that would be privileged from production in legal proceedings on the grounds of legal professional privilege, and would be exempt under section 32(1), I am not satisfied all documents the subject of the Applicant's request would exempt under section 32(1).
29. Further, having considered the broad terms of the Applicant's request, I am satisfied the requested documents, should any exist, would be reasonably likely to include one or more administrative documents that would not be exempt from release under section 32(1).
30. As such, I am not satisfied the second requirement of section 25A(5) is met.

Section 25 – Is there scope to provide an edited copy of the documents requested?

31. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
32. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁵ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁶
33. I have considered whether it would be practicable to provide the Applicant with an edited copy of one or more of the requested documents, should any exist.
34. Given the nature of the requested documents and their likely contents, as discussed above, I am satisfied it would be practicable to grant access to an edited copy of one or more of the documents, with exempt information deleted in accordance with section 25. I am also satisfied it would be practicable to do so as the work involved would not require substantial time and effort, and the edited documents would retain sufficient meaning for the Applicant.
35. As such, I am not satisfied the third requirement of section 25A(5) is met.

Conclusion

36. On the information before me, I am not satisfied it is apparent from the nature of the documents, as described in the request, that all documents to which the request relates would be exempt under section 32(1).
37. The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

Review rights

38. If either party to this review is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁷

⁵ *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].

⁶ *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].

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
41. 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. 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.¹⁰

When this decision takes effect

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

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).