

Notice of Decision and Reasons for Decision

Applicant:	'EC1'
Agency:	Victorian WorkCover Authority
Decision date:	14 June 2022
Exemptions and provisions considered	Sections 25A(5), 31(1)(a), 32(1)
Citation:	'EC1' and Victorian WorkCover Authority (Freedom of Information) [2022] VICmr 45 (14 June 2022)

FREEDOM OF INFORMATION – investigation documents – workplace incident – prosecution documents – ongoing investigations – completed investigations – refusal to process a request on grounds any documents, should any exist, would be exempt – not satisfied all documents would be exempt

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.

I am not satisfied each of the requirements of section 25A(5) are met.

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

14 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents in relation to a deceased third party:

[T]he full file of the investigation conducted by WorkSafe in relation to the workplace incident that occurred at the above address on [date]. We request all documents pertaining to any safety investigation conducted, any safety improvement notices and any prosecution documents. We also request the full agent/insurer file from [agent] for the above named.

2. The Agency refused the Applicant's request under section 25A(5). In doing so, the Agency was not required to identify any documents relevant to the terms of the request as it was satisfied the documents to which the request relates, should any exist, would be exempt under section 31(1)(a). The Agency also refused access to the agent/insurer file, stating it does not hold the requested documents, and suggested the Applicant can lodge a request directly with the agent under section 9 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (**WIRC Act**).
3. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the request.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. The Agency provided its submission to OVIC in confidence. However, I do not consider the entire submission is sensitive, and in order to adequately explain my reasons for decision as required under section 49P(3), it is necessary to include references to the Agency's submission in my reasons for decision.
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 application of section 25A(5) to refuse to grant access to documents

10. The power under section 25A(5) is carefully circumscribed. In *Knight v Corrections Victoria*,¹ the Supreme Court of Victoria held section 25A(5) will apply to an FOI request where each of the following three elements are met:

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

- (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 any requested documents is 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.

Is the nature of the documents objectively apparent from the face of the Applicant's request?

- 11. The Applicant seeks access to the following categories of documents:
 - (a) an investigation file into a workplace incident;
 - (b) documents pertaining to any safety investigation and safety improvement notices;
 - (c) prosecution documents; and
 - (d) the agent/insurer file in relation to the incident.
- 12. I am satisfied the nature of the requested documents is objectively apparent from the terms of the Applicant's request.

Would the requested documents, as described in the FOI request, be exempt from release?

- 13. In refusing access to the requested documents under section 25A(5), the Agency determined the documents, should any exist, would be exempt under section 31(1)(a). The Agency applied this exemption as it considered disclosure of the requested documents would be reasonably likely to prejudice the investigation of a breach or possible breach of the law or would prejudice the enforcement or proper administration of the law in particular instance.
- 14. At the point in time the Agency's decision was made, there were two ongoing investigations on foot, one being conducted by the Agency and the other by an external agency.
- 15. During the review, the Agency advised it had concluded its investigation and the matter is subject to legal review by its Enforcement Legal Team.
- 16. Accordingly, the Agency now claims the requested documents would be exempt from release under sections 31(1)(a) and 32(1).

Application of section 31(1)(a) – Disclosure of documents that would prejudice an investigation or the enforcement or proper administration of the law

- 17. Section 31(1)(a) provides a document is an exempt document if its disclosure under the FOI Act would or would be reasonably likely to prejudice the investigation of a breach or possible breach of the law, or prejudice the enforcement or proper administration of the law in a particular instance. Section 31(1)(a) is subject to other provisions in section 31.

18. 'Reasonably likely' means there is a real chance of an event occurring; it is not fanciful or remote.²
19. 'Prejudice' means to hinder, impair or undermine and includes actual prejudice as well as impending prejudice.³
20. 'In a particular instance' does not require a single specific investigation. This phrase can encompass specific, identified aspects of law, administration of law or investigations of breaches or potential breaches of law.⁴
21. Section 31(1)(a) may apply in relation to either a particular investigation, or the enforcement or proper administration of the law more generally.
22. The Agency no longer relies on section 31(1)(a) in relation to its investigation documents, as the investigation has concluded. However, it remains of the view the requested documents would be exempt from release under section 31(1)(a) where they relate to an ongoing investigation being conducted by an external agency.
23. The Agency submits disclosure of documents would have serious ramifications on the external agency's ability to prosecute possible offences as evidence would become available prior to charges being issued.
24. I accept the Agency may hold documents that relate to an investigation being conducted by another agency and may be material to the outcome of that agency's investigation. However, that is not sufficient to show release of such documents would prejudice an investigation or potential prosecution. As a search for documents is not required to be undertaken under section 25A(5), I do not have information before me about the nature of the documents to determine with certainty that disclosure of all such documents would prejudice the investigation of the incident.
25. In these circumstances, I am not satisfied all documents requested by the Applicant, should any exist, would be exempt from release under section 31(1)(a).

Application of section 32(1) – Documents affecting legal proceedings

26. As noted above, the Agency submits the requested documents would also be exempt under section 32(1).
27. 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'.

Legal professional privilege

28. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:⁵
 - (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

² *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363 at [65], quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836.

³ *Ibid*, Bergman at [66], referring to *Sobh v Police Force of Victoria* [1994] VicRp 2; [1994] 1 VR 41 at [55].

⁴ *Cichello v Department of Justice (Review and Regulation)* [2014] VCAT 340 at [24].

⁵ *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).

- (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.

Client legal privilege

29. A document will be subject to client legal privilege where it contains a 'confidential communication'⁶ 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;⁷ 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.⁸
30. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.
31. 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 within its Enforcement Legal Team.
32. The Agency submits the documents relevant to the request attract legal professional privilege because an investigation conducted by the Agency involves gathering evidence to be compiled as a brief of evidence which is then provided to its Enforcement Legal Team. A lawyer from its Enforcement Legal Team reviews the brief of evidence and advises the client (the Agency) whether there is sufficient evidence to establish any offences and, if so, whether it is in the public interest to prosecute such offences.
33. On the information before me, I am satisfied the requested documents are reasonably likely to contain confidential communications between the Agency's internal lawyers and the Agency that were made for the dominant purpose of obtaining legal advice on whether to prosecute any potential offences.
34. However, having considered the broad terms of the Applicant's request, I am satisfied the requested documents would also be reasonably likely to include one or more administrative documents that would not be exempt from release under section 32(1).
35. In these circumstances, I am not satisfied all documents requested by the Applicant, should any exist, would contain information exempt under sections 32(1).

Application of section 33(1) – personal affairs information of third parties

36. For completeness, I have considered the application of section 33(1).
37. A document is exempt under section 33(1) if two conditions are satisfied:

⁶ 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.

⁷ Section 118 of the *Evidence Act 2008* (Vic).

⁸ Section 119 of the *Evidence Act 2008* (Vic).

- (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 (a **third party**);⁹ and
 - (b) such disclosure would be ‘unreasonable’.
38. The Applicant seeks access to documents concerning a deceased third party. In their FOI request, the Applicant is referred to as the third party’s dependent partner.
39. The term ‘next of kin’ is not defined in the FOI Act.
40. The *Human Tissues Act 1982* (Vic), *Coroners Act 2008* (Vic), *Guardian and Administration Act 2019* (Vic), and the *Administration and Probate Act 1958* (Vic) all offer guidance as to who may be the appropriate next of kin.
41. The next of kin may include a spouse or domestic partner.
42. In the circumstances of this matter, I am satisfied documents are unlikely to be exempt under section 33(1) if the Applicant provides evidence that they are the third party’s next of kin.

Request for agent/insurer file

43. The Agency’s decision letter states it does not hold the requested agent/insurer file requested by the Applicant and suggests the Applicant can request access to the documents pursuant to section 9 of the WIRC Act.
44. The WorkCover scheme is administered by the Agency through private service providers (**agents**) who are authorised by the Agency to provide services to employers and workers within the legislation, standards and procedures set by the Agency.¹⁰
45. Section 9 of the WIRC Act gives a person who makes a workplace injury claim the right to obtain information in relation to their claim for compensation subject to certain exemptions.
46. However, while an FOI applicant can lodge an application under section 9 of the WIRC Act for an agent’s file, they are not precluded from requesting the same information under the FOI Act.
47. In certain circumstances, it may be appropriate to lodge a request under the WIRC Act. For example, where an agency provides notice to an applicant under section 25A(6) that it intends to refuse to process the request on grounds the work involved would be a substantial and unreasonable diversion of its resources.
48. Nevertheless, I am satisfied the FOI Act applies to all documents held by the Agency, including documents to which it has an immediate right to possession, including claims files held by its authorised agents.
49. Whether a document is a ‘document of an agency’ depends on whether the agency is in possession of the document.¹¹ It is accepted that the term ‘possession’ in the context of the FOI Act is not confined to actual or physical possession of a document. A document can be constructively held by an agency, such that it has a right and power to deal with the documents, or an immediate right to possession of the document.¹²

⁹ Sections 33(1) and 33(2).

¹⁰ Victorian WorkCover Authority, *Claims Manual* (2022) at

https://www1.worksafe.vic.gov.au/vwa/claimsmanual/Claims_Manual/1-the-scheme/1-1-overview-of-the-scheme.htm.

¹¹ Section 5.

¹² *Re Guide Dog Owners' and Friends Association and Northern Thanet Pty Ltd v Commissioner for Corporate Affairs* (1988) 2 VAR 405; *Mildenhall v Department of Premier & Cabinet (No 2)* (1995) 8 VAR 478.

50. There is no information before me about the nature of the documents in the agent's file for me to be satisfied each document would be exempt under sections 31(1)(a) and/or 32(1). However, it is reasonably likely that claims-related documents are not held within the brief of evidence submitted to the Enforcement Legal Team.
51. Accordingly, I am not satisfied the requirement under section 25A(5) that all of the requested documents described in the Applicant's request would be exempt has been met.

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

52. 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.
53. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹³ 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 25.¹⁴
54. 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.
55. The Agency submits the Applicant's request specifically asks for access to an investigation file, rather than any documents relating to a specific workplace incident, and it is apparent from the nature of the documents that no obligation would arise under section 25 to grant access to an edited copy of the documents, should any exist.
56. As stated above, I consider the terms of the request are broader than a request for the Agency's investigation file. Given the nature of the requested documents and their likely contents, I am satisfied it would be practicable to grant access to an edited copy of at least one or more of the documents with exempt information deleted in accordance with section 25. I am 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.

Conclusion

57. As stated above, the power for an agency to refuse a requested under section 25A(5) is carefully circumscribed and will apply in a limited category of cases only.
58. Having carefully considered the application of section 25A(5) to the terms of the Applicant's FOI request and for the reasons set out above, I am not satisfied it is apparent from the nature of the requested documents as described in the Applicant's request, should any exist, that all documents would be exempt from release in full.
59. Accordingly, I am not satisfied each requirement of section 25A(5) is met.
60. 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.

¹³ *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].

¹⁴ *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

61. 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.¹⁵
62. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁶
63. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁷
64. 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.
65. 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.¹⁸

When this decision takes effect

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

¹⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁶ Section 52(5).

¹⁷ Section 52(9).

¹⁸ Sections 50(3F) and 50(3FA).