

Notice of Decision and Reasons for Decision

Applicant:	'EQ4'
Agency:	Victorian WorkCover Authority
Decision date:	27 June 2022
Provision and exemption considered:	Sections 25A(5), 32(1)
Citation:	'EQ4' and Victorian WorkCover Authority (Freedom of Information) [2022] VICmr 176 (27 June 2022)

FREEDOM OF INFORMATION – litigation – subpoena – refusal to process request on grounds all documents, should any exist, would be exempt – legal professional privilege – satisfied all documents 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 is the same as the Agency's decision.

I am satisfied it is apparent from the nature of the documents, as described in the Applicant's request, that all documents to which the request relates would be exempt in full under section 32(1). Accordingly, I am satisfied each of the requirements for section 25A(5) are met.

The effect of my decision is the Agency is not required to search for, identify and assess documents relevant to the terms of the Applicant's request in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
27 June 2022

Reasons for Decision

Background to review

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

Documents (emails, letters, notes, files, CDs and such) on the [discussions] between [third party agency] and [name of Agency's legal representative] about the subpoenaed documents. Notice to Addressee and declaration dated [date].

Plaintiff: [Applicant];

[Named entity], First Defendant:

Victorian Workcover Authority, Second Defendant:

2. The Agency refused the Applicant's request under section 25A(5). In doing so, it 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 32(1). The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties.
6. 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.
7. 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

8. Section 25A(5) provides an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request that all documents would be exempt in full under the FOI Act, and either there is no obligation for the agency to provide the applicant with an edited copy of the documents or the applicant does not agree to receive an edited copy of the documents.
9. The power to refuse a request under section 25A(5) is carefully circumscribed. The Supreme Court of Victoria has held the power to refuse an FOI request under this provision will apply in limited circumstances where each of the following three elements are met:
 - (a) Based on the description of the documents, as requested in the FOI request, the decision maker must work out the inherent or essential quality or character of the requested documents.
 - (b) The decision maker must determine whether the documents, as described by the Applicant, would be exempt.

- (c) From the face of the FOI request or the Applicant's agreement, there must be no scope for the agency to provide an edited copy of any of the documents.¹

What is the essential character of the document requested?

10. I am satisfied the nature or character of the requested documents, as described in the Applicant's request, is apparent from the terms of their request, being documents that comprise communications between [a third party agency] and a named law firm about the subpoenaed documents.

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

11. As stated above, in refusing access to the requested documents under section 25A(5), the Agency submits the documents, should any exist, would be exempt in full under section 32(1).

Section 32(1) – Legal professional privilege

12. 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

13. A document will be subject to legal professional privilege where it contains a confidential communication 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 or is referable to pending or contemplated litigation;
 - (b) the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (c) 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

14. A document will be subject to client legal privilege where it contains a 'confidential communication' 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; 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.
15. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.

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

16. In its decision letter, the Agency advises in relation to the application of section 32(1):

... the documents are of such a nature that they would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege.

...

In this case, the documents sought detail discussions between a lawyer and a third party for the dominant purpose of actual litigation.

17. In this case, the Applicant seeks access to documents recording discussions between a third party subpoenaed on behalf of the Agency (by its legal representative) and the Agency's legal representative in relation to the subpoena.

18. On the information before me, I am satisfied the requested documents are subject to legal privilege on grounds they constitute a confidential communication between the Agency's professional legal advisers and the third party, that was made for the dominant purpose of pending litigation.

Has legal privilege in the requested documents been waived?

19. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client acts in a way that is inconsistent with the maintenance of that confidentiality. For instance, where the substance of the information is disclosed with the client's express or implied consent.²

20. In this case, there is no information before me to suggest legal privilege in the requested documents has been waived.

21. Accordingly, I am satisfied the requested documents, as described in the FOI request, would be exempt under section 32(1).

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

22. 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.

23. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ 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 25.⁴

24. Having considered the circumstances of this matter, I am satisfied there is no scope to provide the Applicant with an edited copy the requested documents, should any exist, with any exempt information deleted in accordance with section 25 as to do so would render the requested documents meaningless.

25. Accordingly, I am satisfied each of the requirements for section 25A(5) are met.

Conclusion

26. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.

² *Mann v Carnell* (1999) 201 CLR.

³ *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].

⁴ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

27. For the reasons set out above, I am satisfied it is apparent from the nature of the documents, as described in the Applicant's request, that all documents to which the request relates would be exempt in full under section 32(1). Accordingly, I am satisfied each of the requirements for section 25A(5) are met.
28. The effect of my decision is the Agency is not required to search for, identify and assess documents relevant to the terms of the Applicant's request in accordance with the FOI Act.

Review rights

29. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.⁵
30. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
31. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
32. 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.
33. 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.⁸

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and 50(3FA).