

Notice of Decision and Reasons for Decision

Applicant:	'ES2'
Agency:	Victorian WorkCover Authority
Decision date:	5 August 2022
Our reference:	C/22/00768
Exemption considered:	Section 33(1)
Citation:	'ES2' and Victorian WorkCover Authority (Freedom of Information) [2022] VICmr 193 (5 August 2022)

FREEDOM OF INFORMATION – regulatory documents – workplace investigation documents – notifiable workplace incident – employment records – personal affairs information of third parties – disclosure of personal affairs information

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.

I am satisfied certain personal affairs information in the documents is exempt from release under section 33(1). However, 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 where I am satisfied it is not exempt from release.

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part. Where this is not practicable to do so, access is refused in full.

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

5 August 2022

Reasons for Decision

Background to review

1. The Applicant suffered a workplace injury while operating a [type of equipment] in the course of their work duties at a [type of workplace] (**workplace incident**).
2. The Agency investigated the circumstances of the workplace incident and the company was charged with offences under the *Occupational Health and Safety Act 2004 (Vic)* (**OHS Act**).
3. During the review, the Agency advised OVIC the matter and legal proceedings to which the documents relate was finalised approximately [time period] ago.
4. Through their legal representative, the Applicant made a request to the Agency seeking access to the following documents:

All documents regarding any investigation involving [the Applicant] and the accident which occurred at [workplace in [location]] on [date].

5. The Agency identified 12 documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 33(1) and 34(1). The Agency also relied on section 14 to refuse access to information in the documents. The Agency's decision letter sets out the reasons for its decision.

Review application

6. The Applicant, through their legal representative, sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
7. During the review, the Applicant's legal representative advised the Applicant sought review of the Agency's decision to refuse access to personal affairs information under section 33(1) only. Therefore, this review concerns Documents 1 to 4, 8 to 11 and 13 only.
8. I have examined a copy of the documents subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties.
11. 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.
12. 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.

Preliminary view

13. During the review, the Agency was provided with my preliminary view that the documents are not exempt from release under section 33(1) and was invited to provide a further submission, consult with the relevant third parties or consider making a fresh decision under section 49M.

14. In response, the Agency maintained its view the documents are exempt from release under section 33(1) and provided additional information in support of this view.

Review of exemptions

Section 33(1) – Documents affecting personal privacy of third parties

15. A document is exempt from release 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 (a **third party**);¹ and
 - (b) such disclosure would be ‘unreasonable’.

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

16. Information relating to a person’s ‘personal affairs’ includes information that identifies any person or discloses their address or location. It also includes any information from which this may be reasonably determined.²
17. A document will disclose a third party’s personal affairs information if it is capable, either directly or indirectly, of identifying that person. 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.³
18. The documents comprise workplace training verification documentation including the names and signatures of third parties, a video of a third party taken during workplace training and an investigation report regarding a workplace accident which is the subject of the Applicant’s request.
19. I am satisfied this information constitutes the personal affairs information of third parties for the purpose of section 33(1).

Would disclosure of the personal affairs information be unreasonable?

20. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the particular circumstances.
21. In *Victoria Police v Marke*,⁴ 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’.⁵ The Court further held, ‘[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual’s privacy can be invaded by a lesser or greater degree’.⁶
22. In determining whether disclosure of the personal affairs information would be unreasonable in this case, I have considered the following factors:

¹ Sections 33(1) and 33(2).

² Section 33(9).

³ *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].

⁴ [2008] VSCA 218 at [76].

⁵ *Ibid.*

⁶ *Ibid* at [79].

(a) The nature of the personal affairs information

The workplace training documentation contains the names and signatures of several third parties, including a video of one third party being trained [redacted]. There is a further document which contains a workplace investigation report that includes witness statements provided by third parties following the workplace incident.

I note the Applicant was present at the site of the incident in their professional capacity and likely knows the identity of the relevant third parties, the circumstances of the injury and the identity of other third parties whose information is recorded in the documents. However, even where an applicant claims to know the identity of a third party, disclosure of a third party's personal affairs information under the FOI Act may still be unreasonable in the circumstances.⁷

Generally speaking, I consider an official investigation report into a workplace incident is sensitive in nature.

(b) The circumstances in which the information was obtained by the Agency

The documents, which are exhibits to a brief of evidence, were obtained by the Agency as part of a workplace incident investigation and were also prepared in relation to legal action taken by the Agency in response to the workplace incident under the OHS Act.

(c) The Applicant's interest in the information

The FOI Act provides a general right of access that can be exercised by any person, regardless of their motive or purpose for seeking access to a document. However, the reasons why an applicant seeks access to a document is a relevant consideration in determining whether disclosure would be unreasonable under section 33(1).⁸

I acknowledge the circumstances of the workplace incident and the serious injury sustained by the Applicant. I consider they give rise to a strong personal interest by the Applicant in being able to obtain access to the requested documents, including for the purpose of taking further legal action against their employer following the conclusion of legal proceedings under the OHS Act.

(d) Whether any public interest would be promoted by release of the personal affairs information

I consider there is a public interest in those who have been injured in a workplace accident accessing information relevant to the circumstances surrounding the incident, especially when considering the long-term impact on them and for the purpose of exercising their legal rights.

However, where an applicant seeks access to sensitive personal affairs information under the FOI Act that includes the personal affairs information of persons other than the applicant, it is necessary to balance the public interest in providing access to official information with the interest in protecting the personal privacy of those third parties, particularly where the information is sensitive in nature.

While I acknowledge the serious nature of the workplace incident, when I consider the age of the documents and the fact the legal proceeding to which the documents relate was finalised approximately [time period] ago, this reduces the sensitivity of certain information in the documents.

⁷ *AB v Department of Education and Early Childhood Development* [2011] VCAT 1263 at [58]; *Akers v Victoria Police* [2003] VCAT 397.

⁸ *Victoria Police v Marke* [2008] VSCA 218 at [104].

(e) The likelihood of disclosure of information, if released

The FOI Act does not place restrictions on an applicant's use or dissemination of documents obtained under FOI.⁹

Accordingly, I have considered the likelihood of the personal affairs information being further disseminated, if disclosed, and the effects its broader disclosure would have on the privacy of the relevant third parties.

There is no specific information before me to suggest the documents would be further disseminated by the Applicant other than to obtain legal advice with the view to taking legal action in relation to the personal injuries they sustained.

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

In determining whether disclosure of a document would involve the unreasonable disclosure of a third party's personal affairs information, an agency must notify that person an FOI request has been received for documents containing their personal information and seek their view as to whether disclosure of the document should occur.¹⁰ However, this obligation does not arise in certain limited circumstances, including where it is not practicable to do so.¹¹

During the review, the Agency advised OVIC it did not undertake consultation with the relevant third parties as:

It would be impracticable to consult with the individuals to whom the personal affairs information relates because:

- the likelihood of any of the third parties consenting to disclosure of their information is very low;
- The documents containing the information are now over [number of] years old
- There are [number] individuals to be consulted, of which the Agency has the contact details of [number]; and
- It is unknown if the contact details the Agency does hold are current.

Further, the Agency has concerns about consulting with the individuals who were involved in what was a very distressing incident, in circumstances where:

- The Agency has already investigated the incident, resulting in a prosecution;
- The prosecution concluded nearly one year ago; and
- The individuals would reasonably expect their involvement in the distressing matter to have ended with the prosecution, if not before.

Therefore, in addition to being impracticable, to consult in these circumstances would be likely to cause undue distress to the individuals concerned.

While I consider certain third parties may object to the disclosure of their personal affairs information in the circumstances of this matter, the fact a third party may not agree to the disclosure of their personal affairs information is a relevant consideration, it is not a determinative factor.¹²

⁹ Ibid at [68].

¹⁰ Section 33(2B).

¹¹ Section 33(2C).

¹² *Marke v Victoria Police* (2007) 28 VAR 84; [2007] VSC 522 at [45], *Marke v Victoria Police* [2007] VCAT 747 at [22].

- (g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person¹³

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

23. In weighing up the above factors, on balance, I am satisfied the disclosure of certain personal affairs information that relates to workplace training and induction undertaken at the Applicant's workplace would not be unreasonable where it appears in the context of an individual carrying out their usual work duties as it is not sensitive in nature. Accordingly, I am satisfied this information is not exempt from release under section 33(1).
24. However, I have determined the disclosure of certain information obtained from third parties would be unreasonable where it is more personal and sensitive in nature. Accordingly, this information is exempt from release under section 33(1).
25. The Schedule of Documents in **Annexure 1** outlines my decision in relation to section 33(1).

Section 25 – Deletion of exempt or irrelevant information

26. 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.
27. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁴ 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 25.¹⁵
28. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section. Where I am satisfied it is practicable to do so as the work involved is not unreasonable and the document will retain sufficient meaning, access to the document is granted in part. Where to do so is not practicable, access to the document is refused in full.

Conclusion

29. On the information before me, while I am satisfied certain personal affairs information in the documents is exempt from release under section 33(1), I have determined to release additional personal affairs information to the Applicant where I am satisfied it is not exempt from release.
30. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part. Where this is not practicable to do so, access is refused in full.
31. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

¹³ Section 33(2A).

¹⁴ *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].

¹⁵ *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

32. 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.¹⁶
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁷
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁸
35. 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.
36. 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.¹⁹

Third party review rights

37. As I have determined to release documents that contain the personal affairs information of persons other than the Applicant, if practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.²⁰
38. I am satisfied, where a third party individual's contact details are available, it is practicable to notify the relevant third party of their review rights and confirm they will be notified of my decision.
39. Where a third party's contact details are not available, I am satisfied it is not practicable to notify them of their review rights.

When this decision takes effect

40. My decision does not take effect until the third parties' 60 day review period expires.
41. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁷ Section 52(5).

¹⁸ Section 52(9).

¹⁹ Sections 50(3F) and 50(3FA).

²⁰ Sections 49P(5), 50(3) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated	Video footage	NA	Refused in full Section 33(1)	Release in full Section 33(1)	Section 33(1): For the reasons outlined in the Notice of Decision above, I am satisfied disclosure of the video footage would not be unreasonable in the circumstances of this matter. Accordingly, I am satisfied this document is not exempt from release under section 33(1) and is to be released in full.
2.	[date]	Exhibit 4 – Induction Form [named third party]	9	Refused in full Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the following exempt information deleted in accordance with section 25: <ul style="list-style-type: none"> the signatures of third parties. 	Section 33(1): I am satisfied disclosure of the signatures of third parties would be unreasonable for the reasons outlined in the Notice of Decision above. However, I am satisfied the remaining personal affairs information, being the names of employees and training induction conducted is less sensitive and its disclosure would not be unreasonable in the circumstances of this matter. Accordingly, this information is not exempt from release under section 33(1). Section 25: I am satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.
3.	[date]	Exhibit 5 – Training record – [equipment type] [named third party]	1	Refused in full Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the following exempt	Section 33(1): See comments for Document 2. Section 25: See comments for Document 2.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the signatures of third parties. 	
4.	[date]	Exhibit 6 – Change over & [equipment type] training record [named third party]	1	<p>Refused in full</p> <p>Section 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with the following exempt information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the signatures of third parties. 	<p>Section 33(1): See comments for Document 2.</p> <p>Section 25: See comments for Document 2.</p>
5.	[date]	Exhibit 7 – TMP – Work Instruction – change over and [equipment type]	1	<p>Refused in full</p> <p>Section 34(1)</p>	Not subject to review	
6.	[date]	Exhibit 7 – TMP – Work Instruction – change	1	<p>Refused in full</p> <p>Section 34(1)</p>	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
		over and [equipment type]				
7.	[date]	Exhibit 21 – Deed of trust for the [named business]	48	Refused in full Section 34(1)	Not subject to review	
8.	[date]	Exhibit 41 – Change over & [equipment type] training record [named third party]	1	Refused in full Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the following exempt information deleted in accordance with section 25: <ul style="list-style-type: none"> the signatures of third parties. 	Section 33(1): See comments for Document 2. Section 25: See comments for Document 2.
9.	[date]	Exhibit 42 – Training record – [equipment type] [named third party]	1	Refused in full Section 33(1)	Release in part Sections 33(1), 25 The document is to be released with the following exempt information deleted in accordance with	Section 33(1): See comments for Document 2. Section 25: See comments for Document 2.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					<p>section 25:</p> <ul style="list-style-type: none"> the signature of third parties. 	
10.	[date]	Exhibit 43 – Training record – [equipment type] [named third party]	1	<p>Refused in full</p> <p>Section 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with the following exempt information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the signatures of a third parties. 	<p>Section 33(1): See comments for Document 2.</p> <p>Section 25: See comments for Document 2.</p>
11.	[date]	Exhibit 44 – [Type of] training record [named third party]	1	<p>Refused in full</p> <p>Section 33(1)</p>	<p>Release in part</p> <p>Sections 33(1), 25</p> <p>The document is to be released with the following exempt information deleted in accordance with section 25:</p> <ul style="list-style-type: none"> the signatures of 	<p>Section 33(1): See comments for Document 2.</p> <p>Section 25: See comments for Document 2.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					third parties.	
12.	[date]	Exhibit 51 – Tax invoice for electrical works	1	Refused in full Section 34(1)	Not subject to review	
13.	[date]	Exhibit 52 – Accident investigation document including witness report	4	Refused in full Section 33(1)	Refuse in full Sections 33(1), 25	<p>Section 33(1): I am satisfied for the reasons outlined in the Notice of Decision above that the personal affairs information would be unreasonable to release in the circumstances. Accordingly, I am satisfied this information is exempt from release under section 33(1).</p> <p>Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of this document with exempt information deleted, as to do so would render the remaining information devoid of meaning. Accordingly, access to the document is refused in full.</p>
14.	[date]	Exhibit 55 – ASIC company extract	7	Refused in full Section 14	Not subject to review	