

Notice of Decision and Reasons for Decision

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| Applicant: | 'ES9' |
| Agency: | Medical Panels |
| Decision date: | 18 August 2022 |
| Exemptions considered: | Sections 30(1) |
| Citation: | 'ES9' and Medical Panels (Freedom of Information) [2022] VICmr 200 (18 August 2022) |

FREEDOM OF INFORMATION – Medical Panels – *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) – medical examination – notes of individual medical practitioners – collective decision making – internal working documents – disclosure would be contrary to public interest

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 is the same as the Agency's decision

I am satisfied the documents are exempt from release under section 30(1) and certain information is irrelevant to the terms of the Applicant's request.

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, access to the documents 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
18 August 2022

Reasons for Decision

Background to review

1. The Applicant was injured in a workplace accident and sought compensation under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (**WIRC Act**).
2. A Medical Panel was convened to examine and answer medical questions arising from the Applicant's compensation matter as part of a dispute resolution process conducted under the WIRC Act.
3. In [month year], the Applicant attended an examination conducted by Medical Panels members (**panel members**), who recorded notes during their examination of the Applicant.
4. In [month year], the panel members issued a collective decision, known as an 'Opinion'.
5. In [month year], the Applicant made an FOI request to the Agency seeking access to:
 - ... a copy of each Panel member's notes made on [Date], as well any other notes made between then and [date]
6. The Agency identified three documents falling within the terms of the Applicant's request and refused access to all documents in full under section 30(1). The Agency's decision letter sets out the reasons for its decision.

Review application

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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.

Medical Panels

13. The 'Convenor of Medical Panels' is a government authority established under an Act of Parliament.
14. The requested documents relate to a Medical Panel, which I am satisfied is a 'prescribed authority' for the purposes of section 5(1).

15. The Medical Panels website provides the following information about the role of Medical Panels:

Medical Panels provide expert panels of specialist doctors who come together to resolve medical questions if there is disagreement or uncertainty under the workers' compensation and personal injury legislation.

Each Medical Panel is independent and functions as a tribunal that provides final and legally binding answers to referred questions.¹

...

Workers' compensation cases are often referred to Medical Panels if there's a difference in opinion regarding the injury. Once a referral is made, an appointment will be scheduled for a Medical Panel with a suitable mix of doctors.

Who can make a referral

A workers' compensation referral to Medical Panels can be made by WorkSafe agents, Conciliation Officers from the Accident Compensation Conciliation Service (ACCS), self-insured employers, the Magistrates' Court and the County Court.

...

Appointments involve meeting the Medical Panel, answering questions and often involve a medical examination.²

16. Medical Panels deal with two types of referrals:

- (a) workers compensation referrals under the WIRC Act, *Wrongs Act 1958* (Vic), and the *Accident Compensation Act 1985* (Vic); and
- (b) referrals under the *Wrongs Act 1958* (Vic).

17. In a submission made to OVIC, the Agency submits the following in relation to Medical Panels' decision making processes:

The Medical Panel members work together as a form of tribunal for the purposes of dispute resolution in accordance with the WIRC Act.

A Medical Panel is comprised of a number of doctors from a list of specialists appointed under the legislation. A different Medical Panel is put together for every referral, taking into account the type of injury involved, the complexity of the medical issues and the expertise required of the Medical Panel to form an Opinion.

Medical Panel members are provided with the medical questions prior to examination. They may record notes of their interactions, observations and assessments during the examination of the worker for the purpose of answering the referred questions. Information recorded by Medical Panel members is solely for the purposes of discussion and deliberation amongst the Medical Panel members with a view to producing one legally binding Opinion from the panel.

Medical Panel members need to combine and discuss their findings and opinions, reconcile any differences and write a joint decision document that answers the referred medical questions. Some referrals involve separate physical and psychiatric appointments, with the Medical Panel members later discussing and combining their findings.

¹ Medical Panels, 'About us' at <https://www.medicalpanels.vic.gov.au/about-us>.

² Medical Panels, 'Workers' compensation referrals' at <https://www.medicalpanels.vic.gov.au/workers-compensation-referrals>.

Review of exemptions

Section 30(1) – Internal working documents

18. Section 30(1) has three requirements:

- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
- (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
- (c) disclosure of the matter would be contrary to the public interest.

Is information in the documents purely factual in nature?

19. Section 30(3) provides purely factual information is not exempt from release under section 30(1).

20. I am satisfied the information recorded by the panel members is not purely factual in nature as the notes record the individual views of the panel members in terms of the selected information they record in their notes during an examination of the Applicant.

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

21. For the requirements of section 30(1) to be met, a document must contain matter in the nature of opinion, advice or recommendation prepared by an agency officer, or consultation or deliberation between agency officers.

22. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, the issue is whether release of the document would disclose matter of that nature.³

23. The Agency submits its decision to refuse access to the documents under section 30(1) was based on the following factors:

- Disclose matters of opinion, advice or recommendation used in the course of the deliberation process of a Medical Panel and
- Disclosure was considered contrary to public interest, as the Medical Panel's deliberations are required to be carried out in confidence and
- The notes formed part of the deliberative process and were used to assist the Medical Panel members in discussing and reaching the final agreed Opinion.

24. I accept the Agency's submission and having reviewed the documents subject to review, I am satisfied they record the opinions and views of each panel member based on their individual areas of medical experience and expertise.

³ *Mildenhall v Department of Education* (1998) 14 VAR 87.

Were the documents made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government?

25. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.⁴

26. In *Re Waterford and Department of Treasury (No.2)*,⁵ the former Victorian Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

27. The Agency submits that the Applicant was interviewed by a number of panel members, who are medical practitioners. One examination was conducted by an individual panel member and another examination took place before a Medical Panel attended by three panel members. Further:

... All the panel members needed to combine and discuss their findings before the final decision document was released.

28. I accept the Agency's submission. I am satisfied the panel members' individual assessments of the Applicant were recorded during an examination for the purpose of subsequent deliberation between panel members as a key step in the deliberative process of preparing of a final report or Opinion on behalf of the Medical Panel.

Would disclosure of the documents be contrary to the public interest?

29. In determining if disclosure of the documents would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information.

30. In doing so, I have given weight to the following relevant factors:⁶

- (a) the right of every person to gain access to documents under the FOI Act;
- (b) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
- (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
- (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
- (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;

⁴ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁵ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

⁶ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

- (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
- (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

31. The Agency submits:

The relevant medical history must be agreed by the various Medical Panel members during deliberation and does form part of the Opinion.

...

The Medical Panel members must be able to independently record the information that may or may not be considered relevant in the circumstances.

...

The records of the Medical Panel members were created for the purpose of providing the relevant Opinion, and making recommendations to the Medical Panel only, a necessary part of the deliberative process during this dispute resolution.

...

Disclosure would inhibit frank and independent discussion of every aspect of a referral. It could tend to undermine the final Opinion where there are differences between preliminary comments and the final version, in such circumstances this would no doubt cause unnecessary angst and confusion to the Applicant. The Medical Panel members need to discuss many possible options, some of which will be rejected. And as previously stated the Medical Panel is, in fact, required to provide a comprehensive reasons document setting out the basis for their Opinion – which includes everything that was relevant to the final decision in a transparent way.

32. Having reviewed the documents subject to review, and considered the dispute resolution role of Medical Panels under the WIRC Act and the way in which panel members are required to undertake their decision making role, I am satisfied the documents are exempt from release under section 30(1) for the following reasons:

- (a) The documents reflect the notes of panel members taken at the time of the Applicant's examination. As such, they are taken at an early stage of a decision making process and may not clearly or accurately reflect a final report or Opinion reached by a Medical Panel as a collective decision making body.
- (b) Prior to a Medical Panel issuing an Opinion, I accept panel members use their individual notes as part of a deliberative process through which panel members come together to discuss the medical questions, offer their opinions from the perspective of their medical experience and expertise before collectively reaching a final position and issuing an Opinion.
- (c) The ability of a panel member to record and later discuss information recorded from the perspective of the various medical specialities is a key characteristic of a multi-disciplinary Medical Panel and their dispute resolution role under the WIRC Act.
- (d) There is public interest in persons, who provide their health information as part of a medical examination process and are impacted by a decision resulting from their disclosures, being provide with sufficient information to understand the basis upon which a final decision was made. In this case, however, the Medical Panel's Opinion and written reasons for decision are required to be provided to the Applicant under section 277 of the WIRC Act. Accordingly, I am satisfied the need for transparency as to the Medical Panel's reasons for decision has been satisfied through this process, and the likely involvement of a related court process.

- (e) In these circumstances, I am not satisfied there is a public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative and decision making processes and whether the underlying issues in relation to the Applicant's examination require greater public scrutiny.
- (f) Rather, I consider release of the requested documents would be contrary to the public interest as to do so would undermine the Agency's deliberative and decision making processes which are served by the ability of panel members to freely record their opinions and comments for the purpose of further discussions with panel members so as to be able to issue a collective decision or Opinion.
- (g) Further, while panel members are required to provide their opinions as part of resolving a medical question referred under the WIRC Act, I accept there is a public interest in them being able to quickly and conveniently record their contemporaneous opinions and comments during an examination without concern that their often brief and short form notes will be disclosed under the FOI Act. Therefore, I am satisfied the impact of routinely disclosing documents of this nature would undermine the robustness and integrity of Medical Panels' examination and decision making processes.

33. Accordingly, I am satisfied disclosure of the documents would be contrary to the public interest, and the documents are exempt from release under section 30(1).

Section 25 – Deletion of exempt or irrelevant information

34. 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.

35. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁷ 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 25.⁸

36. I am satisfied pages 1, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 of Document 3 are irrelevant to the terms of the Applicant's request as they do not contain any panel members' notes taken at or in relation to an examination of the Applicant.

37. I have considered the effect of deleting irrelevant information from the documents. I am satisfied it is not practicable to delete such information as to do so would render the documents meaningless.

Conclusion

38. On the information before me, I am satisfied the documents are exempt from release under section 30(1) and certain information is irrelevant to the terms of the Applicant's request.

39. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, access to the documents is refused in full.

40. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

⁷ *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].

⁸ *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

41. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.⁹
42. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁰
43. 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.
44. 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.¹¹

⁹ Section 50(1)(b).

¹⁰ Section 52(5).

¹¹ Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

| Document No. | Date of Document | Document Description | No. of pages | Agency Decision | OVIC Decision |
|---------------------|-------------------------|------------------------------------|---------------------|---|---|
| 1. | [date] | Notes made by Medical Panel member | [number of pages] | Refused in full Section 30(1) | Refused in full Section 30(1) |
| 2. | [date] | Notes made by Medical Panel member | [number of pages] | Refused in full Section 30(1) | Refused in full Section 30(1) |
| 3. | [date] | Notes made by Medical Panel member | [number of pages] | Refused in full Section 30(1) | Refused in full Section 30(1) |