

## /Notice of Decision and Reasons for Decision

---

Applicant: 'ET7'  
Agency: Victorian WorkCover Authority  
Decision date: 26 August 2022  
Provision considered: Section 25A(5)  
Citation: 'ET7' and Victorian WorkCover Authority (Freedom of Information) [2022] VICmr 207 (26 August 2022)

---

FREEDOM OF INFORMATION – regulatory documents – *Occupational Health and Safety Act 2004* (Vic) – workplace investigation – brief of evidence – communications to the Director of Public Prosecution (DPP) – refusal to process request on grounds all documents, should any exist, would be exempt – legal professional privilege

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 the requirements for the application of section 25A(5) are met, and I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

26 August 2022

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
  - The evidence brief from the Section 131 Investigation into [Applicant's former employer] regarding [name]'s complaint.
  - Witness statements and interviews from the Section 131 Investigation into [Applicant's former employer] (Names can be redacted to ensure privacy)
  - Documentation provided to WorkSafe by [Applicant's former employer] on a voluntary or coercive basis from the Section 131 Investigation into [Applicant's former employer].
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 application

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.<sup>1</sup> 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.<sup>2</sup>

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

13. I am satisfied the Applicant's request for the brief of evidence and witness statements clearly identifies distinct documents.
14. While I consider the request for 'documentation' in point 3 of the Applicant's request is broader, I am satisfied it identifies distinct documents given the source of the information and the purpose of production, being documents provided as part of an investigation conducted under section 131 of the *Occupational Health and Safety Act 2004* (Vic).
15. As such, I am satisfied the nature or character of all requested documents, as described in the Applicant's request, is objectively apparent from the specific terms of the request, and the first requirement of section 25A(5) is met.

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

16. 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***

17. 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**

18. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>3</sup>
- (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;

---

<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

<sup>2</sup> *Knight v Corrections Victoria* [2010] VSC 338.

<sup>3</sup> *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

19. 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.
20. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.
21. 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.<sup>4</sup>

22. Material gathered by a lawyer or client in preparation for litigation is privileged as if it were a confidential communication between the lawyer and the client, even if it is not such a communication.<sup>5</sup>
23. The Agency submits:

If processed under the FOI Act, the documents would be exempt under section 32(1) because they form part of confidential communication between a client (WorkSafe itself) and the client's lawyer (a member of WorkSafe's Enforcement Legal Team) for the dominant purpose of:

- giving or receiving legal advice; or
- existing or anticipated litigation.

Should witness statements or records of interviews exist, these would have been obtained or recorded by a WorkSafe investigator. A WorkSafe investigation involves gathering evidence, including witness statements, to be compiled as a brief of evidence that is provided to WorkSafe's Enforcement Legal Team. A lawyer in WorkSafe's Enforcement Legal Team then reviews the brief of evidence and advises the client (WorkSafe itself) whether there is sufficient evidence to establish any offences and, if so, whether it is in the public interest to prosecute such offences.

Any documentation provided to WorkSafe by [Applicants' former employer] on a voluntary or coercive basis as part of the s 131 investigation would only be in WorkSafe's possession for the purpose of seeking legal advice from its lawyers about anticipated legal proceedings (being a prosecution for alleged breaches of the OHS Act). These documents may be contrasted to documents seized by

---

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

<sup>5</sup> *Dingle v Commonwealth Development Bank of Australia* (1989) 23 FCR 63 at [66]. This principle was cited with approval by the Victorian and Civil Administrative Tribunal in *Mostafa v Victorian WorkCover Authority* [2013] VCAT 782.

WorkSafe inspectors prior to a WorkSafe investigation commencing.

24. In summary, I am satisfied the documents are subject to legal privilege based on the following matters:
- (a) The Agency was carrying out its functions and powers in accordance with sections 7(1)(c) and 131 of the OHS Act in relation to an alleged breach of that Act.
  - (b) I am satisfied any information provided as part of an investigation into the OHS Act is made with the expectation the information would only be used for the purpose of the investigation and any subsequent court process, and not subject to disclosure under the FOI Act.
  - (c) The documents were created or obtained by the Agency for the dominant purpose of contemplated litigation, noting the specificity of documents in the Applicant's request.
  - (d) The documents were created or obtained by Agency officers and submitted to the Agency's Legal Services team for legal advice. I am satisfied a client-lawyer relationship exists between these parties for the purposes of establishing legal privilege.
  - (e) At the time the documents were created or obtained by the Agency, I am satisfied the commencement of litigation was reasonably contemplated.
25. I have considered whether searches for documents pursuant to the Applicant's request, if it were processed, would be reasonably likely to include one or more administrative documents that would not be exempt from release under section 32(1). I consider the terms of the Applicant's request relate to substantive investigative documents only, and all such documents would be exempt from release under section 32(1).

*Has legal professional been waived or lost?*

26. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where a client has acted in a way that is inconsistent with the maintenance of that confidentiality. For example, where the substance of the information has been disclosed with the client's express or implied consent.<sup>6</sup>
27. I understand the Applicant is seeking the documents to assist them in making a request for the Agency to re-open the investigation.
28. I also understand they are seeking information to provide to the Independent Broad-based Anti Corruption Commission, the Victorian Ombudsman, or the Victorian Inspectorate as required. These bodies possess powers to request documents from the Agency as part of an investigation.
29. Section 125 of the *Evidence Act 1995* (Vic) (**Evidence Act**) states:

**125 Loss of client legal privilege: misconduct**

- (1) This Division does not prevent the adducing of evidence of—
  - (a) a communication made or the contents of a document prepared by a client or lawyer (or both), or a party who is not represented in the proceeding by a lawyer, in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty, or
  - (b) a communication or the contents of a document that the client or lawyer (or both), or the party, knew or ought reasonably to have known was made or prepared in furtherance of a deliberate abuse of a power.

---

<sup>6</sup> Sections 122(2) and 122(3) of the *Evidence Act 2008* (Vic) (for client legal privilege); *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

- (2) For the purposes of this section, if the commission of the fraud, offence or act, or the abuse of power, is a fact in issue and there are reasonable grounds for finding that--
- (a) the fraud, offence or act, or the abuse of power, was committed, and
  - (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act or the abuse of power,

the court may find that the communication was so made or the document so prepared.

- (3) In this section--

"power" means a power conferred by or under an Australian law.

30. The Applicant submits that their former employer provided incorrect or misleading information to the Agency, which adversely impacted the outcome of the investigation. They have indicated they are seeking copies of the documents requested to assist the Agency in identifying incorrect information provided to them.
31. Any documents which would fall within the scope of the Applicant's request would have been obtained by the Agency for the purpose of seeking legal advice as to whether to pursue a prosecution of the Applicant's former employer. Accordingly, the Agency is the client holding the legal privilege in relation to any documents subject to the Applicant's request, and their conduct is the only thing I may consider in determining whether the privilege has been lost.<sup>7</sup>
32. On the information before me, I am not satisfied the Agency has acted in a manner which would lead to the application of section 125 of the Evidence Act and the loss of legal privilege in the documents subject to the Applicant's request.
33. Under section 131 of the OHS Act, the Agency is required to refer a matter to the Director of Public Prosecutions (**DPP**):
- ...
- (3) If the Authority advises the person that a prosecution will not be brought, or that it has not brought a prosecution within 9 months after receiving the request, the Authority must refer the matter to the Director of Public Prosecutions if the person requests (in writing) that the Authority do so.
  - (4) The Director of Public Prosecutions must consider the matter and advise (in writing) the Authority whether or not the Director considers that a prosecution should be brought.
34. I am satisfied disclosure of the documentation to the DPP under section 131(3) of the OHS Act does not amount to a waiver of legal privilege.

*Conclusion on the application of section 32(1) and the second limb of section 25A(5)*

35. I am satisfied all documents subject to the terms of the Applicant's request would be exempt from release under section 32(1), and the second requirement of section 25A(5) is met.

***Is there scope to provide an edited copy of a requested document under section 25?***

36. 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.
37. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>8</sup> and the effectiveness of the deletions. Where

---

<sup>7</sup> *Duffy v Victorian Workcover Authority (Review and Regulation)* [2013] VCAT 545.

<sup>8</sup> *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>9</sup>

38. 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.
39. Given the nature of the requested documents, as discussed above, I am not satisfied it would be practicable to grant access to an edited copy of the requested documents with exempt information deleted in accordance with section 25, as to do so would render the documents meaningless.
40. As such, I am satisfied the third requirement of section 25A(5) is met.

### **Conclusion**

41. Having 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 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 under section 32(1).
42. Accordingly, I am satisfied each requirement of section 25A(5) is met, and I have decided to refuse to grant access to documents in accordance with the Applicant's FOI request.

### **Review rights**

43. 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.<sup>10</sup>
44. The Applicant may apply to VCAT for a review up to 60 days from the date it is given this Notice of Decision.<sup>11</sup>
45. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
46. 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.

---

<sup>9</sup> *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].

<sup>10</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>11</sup> Section 52(5).