

Notice of Decision and Reasons for Decision

Applicant: 'EN6'
Agency: Victorian WorkCover Authority
Decision date: 3 June 2022
Exemptions considered: Sections 32(1), 33(1)
Citation: 'EN6' and Victorian WorkCover Authority (Freedom of Information) [2022] VICmr 151 (3 June 2022)

FREEDOM OF INFORMATION – regulator documents – workplace injury – investigation – legal privilege – legal proceedings – witness statements – *Occupational Health and Safety Act 2004* (Vic)

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 fresh 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 in that I have decided to refuse access to certain documents in full under section 32(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, 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
3 June 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency through their legal representative seeking access to:

a full copy of the investigation report conducted in relation to our client's injury sustained on [date] at [workplace] of [address].
2. The Agency identified 68 documents falling within the terms of the Applicant's request and granted access to nine documents in full and refused access to six documents in part under section 33(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. On [date], the Applicant advised they only seek review of the six witness statements to which the Agency refused access to in full pursuant to sections 32(1) and 33(1).
5. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
6. On [date], the Agency made a fresh decision to release further information in certain documents and relied on additional exemptions to refuse access to the requested documents.
7. The Applicant did not agree with the Agency's fresh decision and, as required by section 49MA(2), I proceeded with my review on the basis of the fresh decision.
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.

Review of exemptions

Section 32(1) – Documents affecting legal proceedings

13. The Agency's decision regarding section 32(1) applies to Documents 3-8.
14. 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.

15. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹
- (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
 - (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.
16. A document will be subject to client legal privilege where it contains a 'confidential communication'² 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;³ 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.⁴
17. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.
18. The Agency submits the documents, being witness statements, were created for the sole purpose of preparing and assisting in the conduct of actual or anticipated legal proceedings. The Agency advised the documents were obtained by an investigator employed by the Agency conducting an investigation into possible offences under the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**) and appointed under the same Act.
19. Witness statements and records of interviews with witnesses and potential witnesses have been held to fall within the exemption under section 32(1).⁵

Do the documents contain confidential communications?

20. I have considered and accept the views expressed in *Akers v Victoria Police*,⁶ where the Victorian Civil and Administrative Tribunal (**VCAT**) accepted the agency's submission that:
- ... persons who provide statements or other information to the police do so with the expectation that these will only be disclosed to the extent necessary to conduct investigations and deal with criminal charges.
21. Whilst I acknowledge police were not involved in the collection of statements in the present matter, I consider when each of the witnesses gave their statement to the inspector, they would have done

¹ *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

² 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.

³ Section 118 of the *Evidence Act 2008* (Vic).

⁴ Section 119 of the *Evidence Act 2008* (Vic).

⁵ *Re Clifford and Transport Accident Commission* (1997) 12 VAR 120; *Downing v Victorian WorkCover Authority* (unreported, VCAT, Megay SM, 19 September 2002); *Re Halliday and Ministry of Consumer Affairs* (unreported, AAT of Vic, Wilson PM, 20 August 1992).

⁶ [2003] VCAT 397 at [35].

so with the expectation the information would only be used for the purpose of the investigation and any subsequent court process.

What was the dominant purpose of the confidential communications?

22. The dominant purpose for which the confidential communication was made determines whether the exemption applies.⁷ The dominant purpose test applies to both communications for the purpose of obtaining or giving legal advice.
23. The Agency states the witness statements 'were created solely for the purpose of preparing and assisting in the conduct of actual or anticipated legal proceedings. This is the case notwithstanding the fact that, ultimately, a decision was made not to prosecute [named individuals] in relation to the incident. As such, this exemption has been applied, in full, to witness statements.'
24. I note the matter did not proceed to prosecution.
25. In *Australian Competition and Consumer Commission and Australian Safeway Stores Pty. Ltd. & Ors.*,⁸ the Federal Court of Australia stated:

The fact that legal proceedings are anticipated does not mean that every document brought into existence thereafter is subject to a claim for legal professional privilege. It is the purpose for which the document is brought into existence, not its temporal relationship with the proceedings, which is relevant. I am satisfied that notwithstanding Mr. Eva's intention that the witness statements be cast in the form they were for later use in legal proceedings which he thought reasonably likely, another purpose for the creation of the statements was to inform the Commission of the evidence available to it upon which it could make a decision whether, and on what terms, to issue legal proceedings.

26. It is clear on the face of the witness statements that their collection was for the purpose of inquiring into an alleged breach of the OHS Act.
27. I am satisfied the witness statements would be privileged from production in legal proceedings on the grounds they are subject to legal privilege and, therefore, are exempt under section 32(1).

Section 33(1) – Personal affairs information of a third party

28. As I am satisfied the documents are exempt from release under section 32(1), it is not necessary to consider the application of section 33(1).

Section 25 – Deletion of exempt or irrelevant information

29. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
30. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰

⁷ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

⁸ (1998) 153 ALR 393 at [404].

⁹ *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].

¹⁰ *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].

31. I have considered the effect of deleting exempt information from the documents. I am satisfied it is not practicable to delete the exempt information as doing so would render them meaningless.

Conclusion

32. On the information before me, I am satisfied Documents 3-8 are exempt from release under section 32(1).
33. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is refused in full.
34. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

35. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
37. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
38. 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.
39. 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.¹⁴
40. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ 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	OVIC Comments
1.	Various	Workcover claim records and previous injury reports	38	Refuse in part Sections 33(1), 34(1)(b)	Not subject to review	
2.	[date]	Notes to Prosecutor	12	Refuse in part Section 33(1)	Not subject to review	
3.	[date]	Witness Statement	3	Refuse in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	<p>Section 32(1): I am satisfied the document is exempt from release under section 32(1) for the reasons provided in the Notice of Decision above. As I am satisfied the document is exempt in full under section 32(1), it is not necessary to consider the application of section 33(1) to this document.</p> <p>Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25.</p>
4.	[date]	Witness Statement	8	Refuse in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: See comments for Document 3.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
5.	[date]	Witness Statement	4	Refuse in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: See comments for Document 3.
6.	[date]	Witness Statement	3	Refuse in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: See comments for Document 3.
7.	[date]	Witness Statement	3	Refuse in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: See comments for Document 3.
8.	[date]	Witness Statement	10	Refuse in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: See comments for Document 3.