

## Notice of Decision and Reasons for Decision

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Applicant:	'FA1'
Agency:	Victorian WorkCover Authority
Decision date:	21 February 2023
Exemptions considered:	Sections 32(1), 30(1)
Citation:	'FA1' and Victorian WorkCover Authority (Freedom of Information) [2023] VICmr 10 (21 February 2023)

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FREEDOM OF INFORMATION – workplace injury – regulatory investigation – legal professional privilege – witness statements – summary brief and supporting documents – *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 am satisfied certain information in the documents subject to review are exempt from release 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 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  
21 February 2023

## Reasons for Decision

### Background to review

1. The Applicant suffered a workplace injury while [circumstances redacted].
2. The Agency investigated the circumstances of the workplace incident under the *Occupational Health and Safety Act 2004* (VIC (**OHS Act**)).
3. Through their legal representative, the Applicant made a request to the Agency seeking access to documents relating to the investigation and findings in relation to the cause of the accident.
4. The Agency identified certain documents falling within the terms of the Applicant's request, which are listed in the Schedule of Documents in **Annexure 1**. The Agency refused access to certain documents in part and in full under sections 14(1), 33(1), 32(1) and 30(1).

### Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
7. On [date], the Agency made a fresh decision.
8. 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.
9. On [date], the Applicant advised they seek review of documents which the Agency refused access under sections 32(1) and 30(1) only.
10. I have examined a copy of the documents subject to review.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. I have considered all communications and submissions received from the parties.
13. 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.
14. 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**

15. 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'.

16. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>1</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; 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.
17. A document will be subject to client legal privilege where it contains a 'confidential communication'<sup>2</sup> 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;<sup>3</sup> 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.<sup>4</sup>
18. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.
19. In its fresh decision letter, the Agency submits:
- Section 32(1) has been applied to witness statements, legal correspondence, investigation documents, company documents and video footage (exhibits 18 and 20). The incident was investigated by WorkSafe, but not prosecuted. This means a number of documents have been created for the dominant purpose of obtaining legal advice, or for use in litigation. In the context of this investigation, WorkSafe's documents were created for the purpose of seeking legal advice on whether a prosecution should proceed.
20. Witness statements and records of interviews with witnesses and potential witnesses have been held to fall within the exemption under section 32(1).<sup>5</sup>
21. In summary, I am satisfied the relevant documents are subject to legal privilege based on the following matters:
- (a) The documents subject to review comprise a brief of evidence and include a recommendation and exhibits (comprising witness statements, reports and other documents). I accept the brief of evidence was compiled by an investigator within the Agency's Enforcement Group who is responsible for conducting investigations into suspected contraventions of the laws administered by the Agency, including the OHS Act.

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<sup>1</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).

<sup>2</sup> 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.

<sup>3</sup> Section 118 of the *Evidence Act 2008* (Vic).

<sup>4</sup> Section 119 of the *Evidence Act 2008* (Vic).

<sup>5</sup> *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).

- (b) It is the Agency's general practice that, at the conclusion of an investigation, any evidence or material gathered and created during the investigation is sent to its legal team for review for the purpose of deciding whether or not to prosecute a matter.<sup>6</sup>
  - (c) I am satisfied the documents were either created or obtained by an investigator within the Agency for the dominant purpose of submission to the Agency's review panel (comprising subject matter experts including an internal lawyer) to request and obtain legal advice as to whether to commence a prosecution under the OHS Act, which I accept is the general practice of the Agency.
  - (d) In relation to witness statements and expert videos, I am satisfied they were created for the purpose of anticipated legal proceedings. It is also 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.
  - (e) I accept a client-lawyer relationship exists between Agency officers, who investigate and prepare a brief of evidence, and Agency lawyers who receive the brief of evidence.
  - (f) I accept at the time certain documents were created by external third parties, their creation was not for the dominant purpose of being included into a brief of evidence to be submitted to the Agency's lawyers. However, I accept copies of these documents are subject to litigation privilege as they were obtained by Agency officers from third parties for the dominant purpose of submission to the Agency's lawyers in preparing the brief of evidence.
22. Accordingly, I am satisfied the documents subject to review are exempt from release under section 32(1).
23. My decision in relation to the application of section 32(1) is set out in the Schedule of Documents at **Annexure 1**.

***Section 25 – Deletion of exempt or irrelevant information***

24. 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.
25. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>7</sup> 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.<sup>8</sup>
26. 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.

***Section 30(1) – Internal working documents***

27. As I am satisfied Document 1 is exempt from release from release in full under section 32(1), it is not necessary to consider the application of section 30(1) to this document.

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<sup>6</sup> See Agency website at <https://www.worksafe.vic.gov.au/worksafe-investigations>.

<sup>7</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].

<sup>8</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].

## Conclusion

28. On the information before me, I am satisfied the documents subject to review are exempt from release under section 32(1).
29. 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.
30. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

## Review rights

31. 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.<sup>9</sup>
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
33. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
34. 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.
35. 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>12</sup>
36. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	Undated	Recommendation	5	Refused in full Sections 32(1), 30(1)	Refuse in full Section 32(1)	Section 32(1): I am satisfied the document is exempt from release under section 32(1) for the reasons outlined in the Notice of Decision above. As I am satisfied the document is exempt in full under section 32(1), it is not necessary for me to consider the application of section 30(1) to the same information.
2.	Undated	Index to Summary Brief	2	Refused in part Section 33(1)	Not subject to review	By email dated 9 December 2022, the Applicant's legal representative advised they do not require a review of this document.
3.	Undated	Cover Sheet - Statements	1	Released in full	Not subject to review	
4.	Various	Witness Statements	12	Refused in full Section 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1.
5.	Undated	Witness Statement (Applicant)	6	Released in full	Not subject to review	
6.	Undated	Cover Sheet (Exhibits)	1	Released in full	Not subject to review	
7.	Undated	Cover Sheet Exhibit 1	1	Released in full	Not subject to review	
8.	[date]	Exhibit 1 ASIC Extract	4	Refused in full Section 14	Not subject to review	See comments for Document 2.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
9.	Undated	Cover Sheet Exhibit 2	1	Released in full	Not subject to review	
10.	[date]	Exhibit 2 ASIC Extract	2	Refused in full Section 14	Not subject to review	See comments for Document 2.
11.	Undated	Cover Sheet Exhibit 3	1	Released in full	Not subject to review	
12.	[date]	Exhibit 3 ASIC Extract	4	Refused in full Section 14	Not subject to review	See comments for Document 2.
13.	Undated	Cover Sheet Exhibit 4	1	Released in full	Not subject to review	
14.	Various	Exhibit 4	19	Refused in full Section 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1.
15.	Undated	Cover Sheet Exhibit 5	1	Released in full	Not subject to review	
16.	[date]	Exhibit 5 Reply to S100	12	Refused in part Sections 14, 32(1)	Refuse in part Section 32(1)	Section 14: See comments for Document 2. Information that meets the requirements of section 14 is not subject to review. Section 32(1): See comments for Document 1.
17.	Undated	Cover Sheet Exhibit 6	1	Released in full	Not subject to review	
18.	[date]	Exhibit 6 Report	13	Refused in full Section 32	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
19.	Undated	Cover Sheet Exhibit 7	1	Released in full	Not subject to review	
20.	[date]	Exhibit 7 [title]	4	Released in full	Not subject to review	
21.	Undated	Cover Sheet Exhibit 8	1	Released in full	Not subject to review	
22.	Undated	Exhibit 8 [title]	6	Released in full	Not subject to review	
23.	Undated	Cover Sheet Exhibit 9	1	Released in full	Not subject to review	
24.	[date]	Exhibit 9 [title]	65	Released in full	Not subject to review	
25.	Undated	Cover Sheet Exhibit 10	1	Released in full	Not subject to review	
26.	[date]	Exhibit 10 Qualification details	7	Released in full	Not subject to review	
27.	Undated	Cover Sheet Exhibit 11	1	Released in full	Not subject to review	
28.	[date]	Exhibit 11 Qualification details	8	Released in full	Not subject to review	
29.	Undated	Cover Sheet Exhibit 12	1	Released in full	Not subject to review	
30.	[date]	Exhibit 12 Inspection Report	3	Refused in part Section 33(1)	Not subject to review	See comments for Document 2.



Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
31.	Undated	Cover Sheet Exhibit 13	1	Released in full	Not subject to review	
32.	[date]	Exhibit 13 Inspection Report	3	Refused in part Section 33(1)	Not subject to review	See comments for Document 2.
33.	Undated	Cover Sheet Exhibit 14	1	Released in full	Not subject to review	
34.	[date]	Exhibit 14 WorkSafe Entry Report	3	Refused in part Section 33(1)	Not subject to review	See comments for Document 2.
35.	Undated	Cover Sheet Exhibit 15	1	Released in full	Not subject to review	
36.	[date]	Exhibit 15 WorkSafe Entry Report	5	Refused in part Section 33(1)	Not subject to review	See comments for Document 2.
37.	Undated	Cover Sheet Exhibit 16	1	Released in full	Not subject to review	
38.	[date]	Exhibit 16 WorkSafe Entry Report	5	Refused in part Section 33(1)	Not subject to review	See comments for Document 2.
39.	Undated	Cover Sheet Exhibit 17	1	Released in full	Not subject to review	
40.	[date]	Exhibit 17 Photographs	47	Refused in part Section 33(1)	Not subject to review	See comments for Document 2.
41.	Undated	Cover Sheet Exhibit 18	1	Released in full	Not subject to review	

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
42.	Undated	Exhibit 18 Video of Scene by WorkSafe	N/A	Refused in full Section 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1.
43.	Undated	Cover Sheet Exhibit 19	1	Released in full	Not subject to review	
44.	Undated	Exhibit 19 Photographs	21	Refused in part Section 33(1)	Not subject to review	See comments for Document 2.
45.	Undated	Cover Sheet Exhibit 20	1	Released in full	Not subject to review	
46.	Undated	Exhibit 20 Video files from Expert	N/A	Refused in full Section 32	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1.
47.	Undated	Back Cover	1	Released in full	Not subject to review	