

Notice of Decision and Reasons for Decision

Applicant:	'CZ8'
Agency:	Victorian WorkCover Authority
Decision date:	10 May 2021
Provision and exemptions considered:	Sections 25A(5), 33(1), 34(4)(a)(ii), 35(1)(b)
Citation:	'CZ8' and Victorian WorkCover Authority (Freedom of Information) [2021] VICmr 126 (10 May 2021)

FREEDOM OF INFORMATION – recruitment documents – referee reports – disclosure of personal affairs information – information provided in confidence – agency engaged in trade or commerce – refusal to process request on grounds all documents would be exempt – not satisfied all documents would be exempt under section 25A(5)

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 differs from the Agency's decision in that I am not satisfied it is apparent from the nature of the documents, as described in the request, that all documents to which the request relates would be exempt under sections 33(1), 34(4)(a)(ii) and 35(1)(b).

The effect of my decision is the Agency is required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
10 May 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following:

...I had recently applied for [a position at the Agency]. I am seeking the documented recordings that took place between [date range] of the 2 nominated referees [named persons].
2. The Agency refused to grant access to the requested documents in accordance with the Applicant's request under section 25A(5) on grounds all documents, should any exist, would be exempt under sections 33(1), 34(4)(a)(ii) and 35(1)(b).
3. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. During the review the Applicant advised they seek access to the requested documents to ascertain the questions posed to their referees and their responses following a recruitment process involving the Agency. The Applicant confirmed they agreed to receive edited copies of documents, with exempt material deleted, if required.
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 application of section 25A(5) to refuse to grant access to documents

10. Section 25A(5) provides an agency may refuse to grant access to a request for documents, without having identified any or all documents, if it is apparent from the nature of the request that all documents would be exempt in full under the FOI Act, and either there is no obligation for the agency to provide the applicant with an edited copy of the documents or the applicant does not agree to receive an edited copy of the documents.
11. The power to refuse a request under section 25A(5) is 'carefully circumscribed'.¹ In *Knight v Corrections Victoria*,² the Supreme Court of Victoria held section 25A(5) will apply to an FOI request only where the following three elements are met:

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

² *Knight v Corrections Victoria* [2010] VSC 338 (per Bell J).

- (a) First, the exempt nature of the documents sought must be objectively apparent from terms of the applicant's request. The 'nature' of a document refers to their inherent or essential quality or character.
- (b) Second, it must be apparent from the terms of the applicant's request that all documents relevant to the request would be exempt.
- (c) Third it must be apparent from:
 - i. the nature of the documents, as described in an applicant's request, that no obligation would arise under section 25 for an agency to grant access to an edited copy of a document with exempt or irrelevant information deleted; or
 - ii. an applicant's request, or through consultation with the applicant, they do not seek access to an edited copy of a document.

What is the essential character of the documents requested?

- 12. The Applicant applied for a role at the Agency and seeks access to 'documented recordings' involving their two referees for a specific date range. It is apparent from the terms of the Applicant's request 'documented recordings' could refer to, for example, one or more combinations of documents that detail or discuss the responses provided to the Agency by the Applicant's referees.
- 13. I note the Agency did not clarify the terms of the request with the Applicant and accepted the request provided sufficient detail to identify the documents requested.
- 14. Accordingly, I am satisfied the essential quality of the documents, as described in the Applicant's request, should any exist, is objectively apparent from the specific terms of the Applicant's request.
- 15. Accordingly, I am satisfied the first limb of section 25A(5) is met.

Would all of the documents requested, as described by the Applicant in their request, be exempt?

- 16. In refusing access to the requested documents under section 25A(5), the Agency determined each would be exempt under sections 33(1), 34(4)(a)(ii) and 35(1)(b).

Section 35(1)(b) – Documents containing material obtained in confidence

- 17. A document is exempt under section 35(1)(b) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) disclosure would be contrary to the public interest as it would be reasonably likely to impair the ability of an agency or a Minister to obtain similar information in the future.
- 18. When determining whether information was communicated in confidence, it is necessary to consider the position from the perspective of the communicator.³ That perspective may also be inferred from the circumstances.⁴
- 19. In summary, section 35(1)(b) is concerned with protecting the public interest in the free flow of information provided in confidence between an individual and an agency.

³ Ibid, XYZ at [265].

⁴ Ibid, XYZ at [265].

Would the information or matter have been communicated in confidence to the Agency?

20. The Agency's decision letter states the requested documents would be exempt under this provision as '[they were] communicated in confidence by or on behalf of a person...'
21. As the Agency's decision was made in accordance with section 25A(5), no documents were identified prior to refusing access.
22. The Agency submits the following regarding its process in obtaining comments from referees:

[The Agency] does not notify employment referees that any references they provide will be subject to FOI specifically. However, [the Agency's] People and Culture team does verbally advise referees that the job applicant may be able to access the information provided, and confirms that the referee is ok to proceed.
23. I note the Agency's above comments are general in nature and do not apply specifically to the circumstances of this matter. Therefore, I am unable to conclusively determine whether the Applicant's referees were advised of, or if they asked for, their comments provided to the Agency to be treated as confidential.
24. Given the broad nature of the Applicant's request, I am not satisfied all documents captured by the request would contain information communicated in confidence. For example, I consider it is likely the requested documents, should any exist, would contain information of an administrative nature, including prompts and questions for an Agency officer to use when communicating with a referee during the reference process. Such information is unlikely to meet the requirements of section 35(1)(b) the exemption considered here.
25. In any case, I will consider the second requirement under section 35(1)(b).

Would disclosure be contrary to the public interest as it would be reasonably likely to impair the ability of the Agency to obtain similar information in the future?

26. The second requirement requires that, if the information were to be disclosed under the FOI Act, I am satisfied it would impair the Agency's ability to obtain similar information in the future. For example, others in the position of the communicator or communicators would be reasonably likely to not provide similar information to the Agency in the future.
27. The public interest test in section 35(1)(b) is narrow. It is directed towards the impact release would have on an agency's ability to obtain the same type of information in the future. I note the exemption will not be made out if an agency's impairment goes no further than showing potential communicators of the information may be less candid than they would otherwise have been.⁵
28. Further, the exemption does not permit me to have regard to other matters, such as any public interest in favour of release, or the extent to which an applicant's personal interest in a document may be served by granting access to the document.
29. As stated above, the Agency's decision letter states disclosure of the requested documents 'would be reasonably likely to impair the ability of [the Agency] to obtain similar information in the future'.
30. I acknowledge the Applicant has an interest in obtaining access documents to understand what information may have been provided to the Agency, and to use any such information as a learning opportunity to inform future recruitment processes.

⁵ *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1549, approving *Birnbauer v Inner and Eastern Health Care Network* [1999] 16 VAR 9

31. I accept employers rely on referees to provide detailed information and accurate opinions in response to questions posed by a prospective employer concerning the experience and work performance of a candidate for an advertised role based on their knowledge of a candidate. It is vital referees are not inhibited from discussing sensitive issues where they consider them to be pertinent to a candidate's suitability for employment in a role under consideration.
32. The disclosure of a document under the FOI Act is unconditional and unrestricted, which means an applicant is free to disseminate widely or use a document as they choose.⁶ As such, no conditions or restrictions can be placed on a document released under the FOI Act.
33. Noting this, I consider future referees may be inhibited from providing fulsome referee reports where such information is disclosed routinely under FOI. Disclosure of certain types of information in the document requested may have a potentially detrimental effect on the Agency's ability to assess the suitability of candidates. However, I am of the view this effect could be mitigated or minimised by agencies consulting with referees before any such information is released.
34. Having considered the above factors, I am satisfied certain information in the requested documents, should any exist, would be exempt under section 35(1)(b). However, I am not satisfied all documents captured by the request would contain information exempt under section 35(1)(b).

Section 33(1) – Document affecting personal privacy

35. A document is exempt 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 (**personal affairs information**);⁷ and
 - (b) such disclosure would be 'unreasonable'.

Would any relevant documents, if they exist, contain personal affairs information?

36. Personal affairs information includes any information that identifies any person or discloses their address or location. It includes any information from which such information may be reasonably determined.⁸
37. A third party's opinion or observations about another person's conduct can constitute the personal affairs of the third party.⁹
38. I am satisfied the nature of the requested documents, should any exist, would concern the personal affairs information of third parties. I accept the nature of the requested documents would also contain information relating to the Applicant's personal affairs. However, I consider this information would be intertwined with the personal affairs information of the third parties.

Would the release of third party personal affairs information be unreasonable in the circumstances?

39. Determining whether disclosure of a document would be unreasonable in the circumstances involves balancing the public interest in the disclosure of official information held by a government agency with the interest in protecting an individual's personal privacy in the circumstances.¹⁰

⁶ *Victoria Police v Marke* [2008] VSCA 218 at [68].

⁷ Sections 33(1) and (2).

⁸ Section 33(9).

⁹ *Richardson v Business Licensing Authority* [2003] VCAT 1053, cited in *Davis v Victoria Police* [2008] VCAT 1343 at [43]; *Pritchard v Victoria Police* [2008] VCAT 913 at [24]; *Mrs R v Ballarat Health Services* [2007] VCAT 2397 at [13].

¹⁰ *Re Page v Metropolitan Transit Authority* (1988) 2 VAR 243 at 245-6.

40. As previously stated, the nature of disclosure of a document under the FOI Act is unconditional and unrestricted.
41. The proper application of section 33(1) involves consideration of 'all matters relevant, logical and probative to the existence of conditions upon which the section is made to depend'.¹¹
42. In determining whether disclosure of a third party's personal affairs information would be unreasonable in the circumstances, I have given weight to the following factors:¹²

(a) The nature of the personal affairs information

Having considered the nature of the Applicant's request, I am satisfied the information sought is personal and sensitive given the context in which it was provided as part of the Agency's recruitment process.

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

I consider any documents that fall within the scope of the Applicant's request would contain information obtained by the Agency in the course of obtaining references as part of a recruitment process. I am satisfied such information would be used to evaluate the suitability of a candidate for employment with the Agency.

(c) The Applicant's interest in the information and whether their purpose for seeking the information is likely to be achieved

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 in the circumstances.¹³

The Applicant advises the requested documents, should any exist, may be used to determine if any adverse comments were made about them by one or more of their referees, to better understand the Agency's decision not to recruit the Applicant to the advertised role and as a learning opportunity to inform their participation in recruitment processes.

Given the Agency's decision to refuse the Applicant's request under section 25A(5) and not to identify any relevant documents, it is not possible to determine if the Applicant's purpose for seeking access to the requested documents would be likely to be achieved.

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

I have considered whether any public interest would be promoted by release of the requested documents, should any exist, based on the Applicant's stated purpose for seeking access to the documents.

I accept the Applicant has a personal interest in seeking access to the requested documents. I acknowledge they feel aggrieved by the Agency's recruitment process and consider comments made by one or more of their referees may have contributed to the Agency's decision not to recruit the Applicant to the advertised role.

¹¹ [2008] VSCA 218 at [104].

¹² *Ibid.*

¹³ *Victoria Police v Marke* [2008] VSCA 218 at [104].

Based on the information before me, I am not persuaded the public interest would be promoted by the release of any personal affairs information in the requested documents, should any exist, under the FOI Act.

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

Given the Agency's decision to refuse the Applicant's request under section 25A(5) and not to identify any relevant documents, it is not possible to determine whether the Applicant's referees would object to the release of their personal affairs information under the FOI Act.

- (f) The likelihood of further disclosure of the information if released

As stated above, the FOI Act does not impose any conditions or restrictions on an applicant's use of documents disclosed under the FOI Act. Accordingly, I must consider the likelihood and potential effects of further dissemination of the third party's personal affairs information in the documents, if released.

Given the Agency's decision to refuse the Applicant's request under section 25A(5) and not to identify any relevant documents, it is not possible to determine whether the Applicant would be likely to further disclose information in the documents.

- (g) The likelihood of further disclosure of the information if released

In deciding whether disclosure of a document under the FOI Act would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account, in addition to any other matters, whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person.¹⁴ However, there is no information before me to suggest this is a relevant factor in this matter.

43. Having considered the above factors, on balance, I am satisfied certain information in the requested documents, should any exist, would be exempt under section 33(1). However, I am not satisfied all documents captured by the request would contain information exempt under section 33(1).

Section 34(4)(a)(ii) – Documents relating to trade secrets etc.

44. A document is exempt under section 34(4)(a)(ii) if:

- (a) the agency is engaged in trade or commerce;
- (b) the information is of a business, commercial or financial nature; and
- (c) the disclosure of which would be likely to expose the agency unreasonably to disadvantage.

Is the Agency engaged in trade and commerce?

45. The Agency's decision letter does not explain the basis upon which it considers it is engaged in trade or commerce for the purpose of section 34(4).
46. Whether an agency is engaged in trade or commerce depends on the facts and circumstances of each case.¹⁵

¹⁴ Section 33(2A).

¹⁵ *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45 at [41].

47. In *Re Ku-ring-gai Co-operative Building Society (No 12) Ltd*, the Federal Court of Australia held, '[t]he terms "trade" and "commerce" are not terms of art. They are expressions of fact and terms of common knowledge'¹⁶ and are terms 'of the widest import'.¹⁷
48. An agency may be regarded as being engaged in trade or commerce, even if the amount of trade or commerce engaged in is insignificant and incidental to the agency's other functions.¹⁸ Further, an agency may be engaged in trade or commerce, even if profit is not one of its express statutory objectives.¹⁹
49. The fact an agency's predominant activities may be described as 'governmental' does not preclude it from relying on the exemption under section 34(4)(a)(ii).²⁰
50. While the phrase 'trade and commerce' may be interpreted broadly,²¹ it has been held trade and commerce activities must 'of their nature, bear a trading or commercial character'.²²
51. In this instance, the requested documents relate to a recruitment process to source a suitable candidate for a position within the Agency.
52. I am not satisfied the Agency is engaged in trade and commerce when conducting a recruitment process for new staff as it is not an activity that is inherently commercial in nature as it relates to the Agency's ordinary recruitment and resourcing functions as a public sector organisation.
53. For the above reasons, I am not satisfied the requested documents, should any exist, would be exempt under section 34(4)(a)(ii).

Section 25 – Would there be an obligation for the Agency to provide an edited copy of one or more documents with exempt or irrelevant information deleted?

54. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
55. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'²³ 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 25.²⁴
56. Having considered the circumstances of this matter, I am satisfied there would be an obligation on the Agency to provide the Applicant with an edited copy of at least one or more of the requested documents, should any exist, with exempt information deleted in accordance with section 25. I am also satisfied it would be practicable to do so as it would likely not require substantial time and effort, and the edited documents would likely retain sufficient meaning.

¹⁶ [1978] FCA 50; (1978) 22 ALR 621 at 648.

¹⁷ *Ibid* at 649.

¹⁸ *Marple v Department of Agriculture* (1995) 9 VAR 29 at [47].

¹⁹ *Thwaites v Metropolitan Ambulance Services* (1996) 9 VAR at [473].

²⁰ *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 at [41]; *Fyfe v Department of Primary Industries* [2010] VCAT 240 at [23].

²¹ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50; (1978) 36 FLR 134.

²² *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 690 and *Gibson v Latrobe City Council* [2008] VCAT 1340 at [35].

²³ *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].

²⁴ *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].

57. Accordingly, I am not satisfied the requirement under section 25A(5) for there to be no scope to provide the Applicant with edited copies of any of the documents is met in this case.

Conclusion

58. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.
59. Having carefully considered the application of section 25A(5) to the requested documents and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant's request that all documents relevant to the request would be exempt in full under sections 33(1), 34(4)(a)(ii) or 35(1)(b).
60. I am also satisfied it would be practicable for the Agency to provide an edited copy of one or more documents to the Applicant with any exempt information deleted in accordance with section 25.
61. Accordingly, I am not satisfied each of the requirements of section 25A(5) are met such that the Applicant's request for access to the requested documents can be categorically refused.
62. The effect of my decision is the Agency is required to search for and identify documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act.

Review rights

63. 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.²⁵
64. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁶
65. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²⁷
66. 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.
67. 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.²⁸
68. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²⁶ Section 52(5).

²⁷ Section 52(9).

²⁸ Sections 50(3F) and (3FA).