

Notice of Decision and Reasons for Decision

Applicant:	'FW4'
Agency:	Office of Public Prosecutions
Decision date:	3 June 2025
Exemption considered:	Section 32(1)
Citation:	'FW4' and <i>Office of Public Prosecutions</i> (Freedom of Information) [2025] VICmr 31 (3 June 2025)

FREEDOM OF INFORMATION – documents affecting legal proceedings – legal professional privilege – advice privilege – communication between client and legal practitioners

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.

I am satisfied information in the documents sought is exempt from release under section 32(1). I find it is not practicable to provide the Applicant with an edited copy of the documents with this exempt information deleted in accordance with section 25.

As such, my decision is the same as the Agency's decision and no further information is released under the FOI Act.

Please refer to the end of my decision for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman
Public Access Deputy Commissioner

3 June 2025

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:
 - Regarding [a complaint] against Monash University...
 - All notes of the [Director of Public Prosecutions] (DPP) and/or delegate relating to the decision (not to prosecute Monash University),
 - Any documents or information which justifies the decision not to prosecute,
 - A list of all documents and evidence provided by WorkSafe.
2. The Agency identified two documents falling within the terms of the Applicant's request, which it described in its decision as a bundle of WorkSafe material and internal documents. The Agency refused access to both documents in full under section 32(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. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered relevant communications and submissions received from the parties.
6. 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.
7. 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.

Attempted informal resolution

8. During the review, OVIC staff provided the Applicant with their initial view that the exemption under section 32(1) would likely be upheld for the following reasons:
 - (a) VCAT had considered the application of section 32(1) to similar documents; and
 - (b) OVIC has previously made a decision relating to similar documents, where the former Information Commissioner decided section 32(1) applied and referred to decisions by

VCAT, specifically *Styles v Victorian Workcover Authority* (General) [2010] VCAT 1815 and *Duffy v Victorian Workcover Authority* (Review and Regulation) [2013] VCAT 545.¹

9. The Applicant elected to continue to pursue a formal review of the Agency's decision.

Review of exemption

Section 32(1) – Documents affecting legal proceedings

10. For more information about section 32(1), see the FOI Guidelines.²
11. Section 32(1) exempts documents subject to legal professional privilege or client legal privilege. The principles of legal professional privilege are found in common law (case law). Client legal privilege is codified in sections 118 and 119 of the *Evidence Act 2008* (Vic) (**Evidence Act**).
12. To apply section 32(1), it is generally not necessary to distinguish between legal professional privilege and client legal privilege.
13. Both legal professional privilege and client legal privilege protect confidential communications, and/or documents, between a lawyer and a client:
- (a) made or prepared for the dominant purpose of obtaining or providing legal advice (**advice privilege**); or
 - (b) prepared for the dominant purpose of use in current or anticipated litigation (**litigation privilege**).³
14. The purpose of legal privilege is to promote the public interest in the proper administration of justice. It does this by protecting confidential communications between a lawyer and their client, to allow them to speak freely.⁴
15. A document will not be exempt under section 32(1) if legal privilege has been lost or waived.
16. Privilege can be either expressly waived, or is deemed to have been waived where the client acts inconsistently with the confidentiality of legal privilege (for example, by disclosing the substance of the advice).⁵
17. VCAT has considered the application of section 32(1) to documents referred to the DPP in similar circumstances to the present matter. These matters are discussed further below.

¹ <https://ovic.vic.gov.au/wp-content/uploads/2022/06/DX3-and-Victorian-WorkCover-Authority-Freedom-of-Information-2021-VICmr-333-30-December-2021DX3.pdf>

² <https://ovic.vic.gov.au/freedom-of-information/foi-guidelines/section-32/>.

³ See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67 and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.

⁴ *Grant v Downs* [1976] HCA 63, [19].

⁵ *Mann v Carnell* (1999) 201 CLR 1. Sections 121 to 126 in the *Evidence Act 2008* (Vic) deal with different circumstances in which client legal privilege may be lost.

Styles and Victorian Workcover Authority

18. In *Styles v Victorian Workcover Authority (Styles)*,⁶ a matter was referred to the DPP pursuant to section 131 of the *Occupational Health and Safety Act 2004* (Vic) (**OHS Act**). The DPP considered the matter and advised the respondent that the DPP did not consider a prosecution should be brought. The applicant sought access to various documents, including documents the respondent provided to the DPP, such as the referral letter to the DPP.
19. VCAT found the referral letter was exempt under section 32(1), because it would be privileged from production in legal proceedings on grounds of legal professional privilege, for the following reasons:
 - (a) it contained a confidential communication between the client's agent (the Director, Legal Services and Investigations, Victorian WorkCover Authority) and the client's professional legal adviser (the DPP);
 - (b) that was made for the dominant purpose of obtaining legal advice which was referable to possible pending litigation.⁷
20. In reaching this conclusion, VCAT considered the DPP, in this situation, was the respondent's legal adviser because:

As the then Administrative Appeals Tribunal of Victoria observed in *Re Easdon and Director of Public Prosecutions; Minister for Police and Emergency Services and Victoria Police* (No 1) 2 VAR (1987) 102 at 115,

The Director is a lawyer, subject to the discipline of the Supreme Court, and he provided legal advice in his capacity as a lawyer, as a lawyer would. It is clearly established that the doctrine [of legal professional privilege] operates in respect of lawyers in public service so long as they are carrying out a lawyer's function.⁸
21. With respect to whether legal professional privilege had been waived by the Agency in providing a copy of the DPP's advice to the applicant, VCAT decided it had not been waived, as providing the advice to the applicant as required under section 131(5) of the OHS Act was not inconsistent with the respondent retaining legal privilege.⁹

Duffy and Victorian Workcover Authority

22. *Duffy v Victorian Workcover Authority (Duffy)*¹⁰ also concerns a request for documents sent to the DPP from the respondent in accordance with section 131 of the OHS Act, in circumstances which the respondent decided not to prosecute a matter under the OHS Act. The DPP advised the respondent that based on the material provided by it, prosecution against the employer should not be brought. In that matter, the respondent refused access to documents under section 25A(5) as it considered all requested documents would be exempt under section 32(1). Section 25A(5) allows an agency to refuse to process a request, where it is apparent from the nature of the request, that all documents would be exempt and it would not be possible to

⁶ (General) [2010] VCAT 1815.

⁷ Ibid, [59].

⁸ Ibid, [60].

⁹ Ibid.

¹⁰ (Review and Regulation) [2013] VCAT 545.

provide an edited copy of the documents with exempt information deleted.

23. VCAT did not accept the applicant's submission the DPP was engaging in a form of administrative review where a request is referred to the DPP under section 131 of the OHS Act.¹¹ VCAT determined it was apparent the documents would be exempt under section 32(1) because the documents provided to the DPP are analogous to a brief to counsel, and in reference to Styles, the DPP, in this particular situation, was the respondent's professional legal adviser.¹²

Tatchell v Victorian WorkCover Authority (Review and Regulation) [2025] VCAT 316 (**Tatchell**)

24. More recently, VCAT considered whether a Brief of Evidence that had been prepared by WorkSafe and provided to the DPP together with a request for advice, and communications between WorkSafe and the Office of Public Prosecutions (**OPP**) in relation to the DPP's advice on whether to prosecute an employer, were exempt under section 32(1).
25. While the Brief of Evidence had been provided to the DPP, WorkSafe had referred to its privileged status and it was provided to the DPP on the understanding that the DPP had a common interest in receiving the brief.¹³ Therefore, legal professional privilege had not been waived as there was a common interest.¹⁴
26. Further, with respect to communications between WorkSafe and the DPP, VCAT found that the analysis in Duffy and Styles applied.¹⁵ Further, advising the applicant out the outcome of the advice did not constitute a waiver of legal professional privilege.¹⁶

Are the documents subject to this review subject to legal professional privilege?

27. With respect to this review, I am satisfied the relationship between the DPP and WorkSafe, in the circumstances of referrals pursuant to section 131(3) of the OHS Act, is that of a client-lawyer relationship. It follows that the communications between the Agency and the OPP/DPP are confidential communications between a client and legal adviser that were made for the dominant purpose of obtaining legal advice which is referable to possible pending litigation.
28. In accordance with VCAT's decisions in Styles, Duffy and Tatchell, I do not consider legal professional privilege was waived by WorkSafe providing a copy of the DPP's decision to the Applicant in accordance with section 131(4) of the OHS Act.
29. I am also satisfied that the Agency's internal working document is subject to legal professional privilege, as it contains inhouse legal advice.
30. I note the Applicant's strong interest in obtaining access to the documents as expressed in their submissions provided to OVIC, including in response to the initial view provided. I appreciate this is an important matter for the Applicant. However, section 32(1) does not permit me to have regard to other matters, such as the extent to which an applicant's personal interest in

¹¹ Ibid, [42]

¹² Ibid, [35], [38] – [41].

¹³ *Tatchell v Victorian WorkCover Authority (Review and Regulation)* [2025] VCAT 316, [56].

¹⁴ Ibid, [57]–[58].

¹⁵ Ibid, [61]–[63].

¹⁶ Ibid, [66].

the documents would be served by granting access, or any other public interest in favour of release. Rather, the provision is confined to establishing whether the documents would be prohibited from disclosure in legal proceedings on the ground of legal professional privilege.

Section 25 – Deletion of exempt or irrelevant information

31. 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.
32. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹⁷ 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 25.¹⁸
33. I have considered the effect of deleting exempt information from the documents. I am satisfied there is no obligation under section 25 to provide the Applicant with an edited copy of the documents with exempt information deleted, as due to the volume of redactions the documents would not retain any meaning.

Conclusion

34. On the information before me, I am satisfied information in the documents is exempt from release under section 32(1).
35. 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.

Timeframe to seek a review of my decision

36. If the Applicant to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹⁹
37. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²⁰
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 the Applicant applies to VCAT for a review of my decision.²¹

¹⁷ *Mickelburgh 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].

¹⁸ *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], [155].

¹⁹ Section 50(1)(b).

²⁰ Section 52(5).

²¹ Section 50(3FA).