

Notice of Decision and Reasons for Decision

Applicant:	'FY3'
Agency:	Victorian WorkCover Authority
Decision date:	31 March 2025
Exemption considered:	Section 31(1)(a)
Citation:	'FY3' and Victorian WorkCover Authority (Freedom of Information) [2025] VICmr 48 (31 March 2025)

FREEDOM OF INFORMATION – workplace incidents – investigations documents – inspection reports – *Occupational Health and Safety Act 2004* (Vic) – *Dangerous Goods Act 1985* (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 decision to refuse access to information in documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision and no further information is to be released. I am satisfied certain information in the documents is exempt under section 31(1)(a).

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

31 March 2025

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents, which was subsequently narrowed to:

all entry/inspection reports issued by WorkSafe to [a third party] between [dates].
2. The Applicant did not seek access to personal affairs information.
3. The Agency identified 29 documents in response to the Applicant's request and released them in part under sections 25 and 31(1)(a). The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined a copy of the documents subject to review.
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 relevant 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 exemption

Section 31(1)(a) – Disclosure of documents that would prejudice the enforcement or proper administration of the law

10. Section 31(1)(a) exempts documents where disclosure would be reasonably likely to prejudice, in a particular instance:
 - (a) the investigation of a breach or possible breach of the law; or
 - (b) enforcement or proper administration of the law.
11. The words 'in a particular instance' qualify the words 'investigation of a breach of the law', 'proper administration' and 'enforcement'. This narrows the scope of this exemption to a

specific:

- (a) instance of a breach or possible breach of the law;¹ or
 - (b) aspect of investigations of breaches of the law or possible breaches of the law;² or
 - (c) instance or aspect of the law being enforced or administered.³
12. To be a 'particular instance' the circumstances of the investigation or enforcement of the law may need to be current and relevant at the time of the decision.⁴
 13. 'Prejudice' means to hinder, impair or undermine. This includes both actual prejudice as well as impending prejudice.⁵
 14. 'Would' is a high threshold and means that a result or effect will almost certainly come about.
 15. 'Would be reasonably likely to' requires the chance to be real, but not fanciful or remote.⁶
 16. The Agency considers disclosure of certain information in the documents would both prejudice the Agency's investigations and the proper enforcement of the *Occupational Health and Safety Act 2004* (Vic) and *Dangerous Goods Act 1985* (Vic).
 17. The Agency's decision letter states:

The information within the documents to which section 31(1)(a) has been applied is directly relevant to WorkSafe's current investigation of breaches or possible breaches of the law. Disclosure of this information would prejudice the work being performed by WorkSafe in response to incidents at the site identified in your request and any enforcement steps WorkSafe may wish to pursue.
 18. In relation to a law enforcement investigation, a document is exempt under section 31(1)(a) if three conditions are satisfied:
 - (a) the information relates to an investigation of a breach or possible breach of the law in a particular instance; and
 - (b) the information was prepared either during, or for the purposes of, that investigation;⁷ and
 - (c) release of the information would or would be reasonably likely to prejudice that investigation.

¹ *O'Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 175–176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283.

² *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363, [69].

³ *O'Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 175–176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283; *Bergman v Department of Justice Freedom of Information Officer* [2012] VCAT 363, [69].

⁴ *Re Coleman and Director-General, Local Government Department, Pentland* (1985) 1 VAR 9, 12; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283, 309–310.

⁵ *Bergman v Department of Justice* [2012] VCAT 363, [66], referring to *Sobh v Police Force of Victoria* [1994] 1 VR 41, 55.

⁶ *Akers v Victoria Police* [2022] VCAT 979 [26] quoting *Binnie v Department of Agriculture and Rural Affairs* [1989] VR 836; *Tucker v Commissioner of State Revenue* [2019] VCAT 2018 [113(b)].

⁷ *Shulver v Victoria Police Force* (1995) 9 VAR 71, 76.

19. The investigation must be an actual investigation about a breach of a specific law. The investigation will usually need to be active, not concluded, at the time of the request. However, an actual breach of the law does not need to be established. It is enough to suspect a breach, resulting in an investigation.
20. The information must relate to that specific investigation⁸ and must have been prepared during, or for the purposes of, the specific investigation identified.⁹
21. In relation to the enforcement or proper administration of the law, a document is exempt under section 31(1)(a) if two conditions are satisfied:
 - (a) the information relates to the enforcement or proper administration of the law in a particular instance; and
 - (b) release of the information would or would be reasonably likely to prejudice the enforcement or proper administration of that law.
22. The ‘enforcement of the law’ and the ‘proper administration of the law’ mean different things:
 - (a) enforcement of the law deals with the actual process of enforcing the law (for example, prosecuting cases or pursuing fines and court orders);¹⁰ and
 - (b) the proper administration of the law deals with how the law is administered.¹¹ It requires a connection with the criminal law or with the process of upholding or enforcing the civil law (for example, the collection of information to monitor compliance with the law).¹²
23. The Agency has confirmed it is investigating two incidents. One of those investigations is currently the subject of legal review and the other investigation is ongoing.
24. The inspection reports were created by inspectors and investigators to comply with their obligations under legislation the Agency administers, in this case the *Occupational Health and Safety Act 2004* (Vic) and *Dangerous Goods Act 1985* (Vic).
25. The exempted information details the nature of any contraventions of the above legislation, any relevant next steps, evidence obtained, and whether the employer complied with the next steps in the notices.
26. The Agency considers the reasons why the notices were issued, whether or not the employer followed the next steps, and descriptions of seized documents in the notices are exempt under section 31(1)(a) because they are likely to be relied upon as evidence if the matter is ultimately prosecuted.

⁸ *O’Sullivan v Police Force (Vic)* (1986) 1 VAR 171, 175–176; *Lapidos v Office of Corrections (No 4)* (1990) 4 VAR 283.

⁹ *Shulver v Victoria Police Force* (1995) 9 VAR 71, 76.

¹⁰ *JCL v Victoria Police* [2012] VCAT 1060, [28].

¹¹ *JCL v Victoria Police* [2012] VCAT 1060, [28].

¹² *Accident Compensation Commission v Croom* [1991] 2 VR 322, 324; *Cichello v Department of Justice* [2014] VCAT 340, [23], referring to *JCL v Victoria Police* [2012] VCAT 1060, [28] and *Accident Compensation Commission v Croom* [1991] 2 VR 322.

27. The Agency considers publication of the exempted information could impact the veracity of any future witness statements and may impact the Agency's ability to bring a prosecution, as it could make it difficult to find an impartial jury and the Agency may need to stop its investigations because the likelihood of a successful prosecution would be impacted.

28. I have carefully considered the Applicant's arguments in support of their review application:

... in this instance [redacted information about the facility], and any risk of prejudicing an investigation is therefore minimal.

[Redacted information about the incident to which the documents relate]

I list these to emphasise the impact on the public this [incident] had, and the public interest in the conduct and practices that were occurring at the facility.

I believe these circumstances necessitate greater transparency and insight from WorkSafe, in relation to the [the third party].

I would also note that while I am still awaiting the final release of documents from the [another government agency], the [the other government agency] have granted the release of a wider range of documentation relating to this situation than WorkSafe have.

29. I also note the Applicant's view that the redactions made by the Agency:

By redacting these sections in the wholesale manner that WorkSafe have, the inspection reports are reduced to uninformative lists of legal powers exercised and generic texts.

It is my argument that this renders the documents meaningless, and defeats the objective of transparency, and the obligation WorkSafe has to the public to give a full appraisal of the situation.

30. On careful consideration of all information before me, I accept the Agency's submissions that disclosure of information in the documents would be reasonably likely to prejudice the Agency's investigation, for the incident that is still under investigation, and the proper administration of the law in a particular instance for both incidents.

Is there a public interest in granting access to the documents?

31. There are six circumstances where the exemptions in section 31(1) do not apply.¹³ This is limited to where there is a public interest in granting access to the document. This means that:

- (a) one of the circumstances in section 31(2) must be established; and
- (b) it must be in the public interest to release the document.

32. The six circumstances includes where the document:

- (a) reveals that the scope of a law enforcement investigation has exceeded the limits imposed by law;¹⁴

¹³ Section 31(2).

¹⁴ Section 31(2)(a).

- (b) reveals illegal methods or procedures were used to prevent, detect, investigate, or deal with matters arising out of breaches or evasions of the law;¹⁵
 - (c) reveals processes an agency uses to investigate, enforce or administer the law;¹⁶
 - (d) reports on the success of programs or processes an agency uses to investigate, enforce or administer the law;¹⁷
 - (e) reports on routine law enforcement inspections or investigations by an agency that enforces or regulates compliance with a particular law other than the criminal law;¹⁸ or
 - (f) reports on a law enforcement investigation, where the substance of the report has been disclosed to the person who, or the body which, was the subject of the investigation.¹⁹
33. While I acknowledge the Applicant's submissions that disclosure of the information in the documents would be in the public interest, I am satisfied that none of the above six circumstances apply in this matter.
34. Therefore, on the information before me, I am satisfied certain information in the documents is exempt from release under section 31(1)(a).

Section 25 – Deletion of exempt or irrelevant information

35. 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.
36. Deciding whether it is 'practicable' to delete exempt or irrelevant information requires an agency or Minister to consider:
- (a) the effort involved in making the deletions from a resources point of view;²⁰ and
 - (b) the effectiveness of those deletions – that is, whether the edited document still has meaning.²¹
37. The documents contain irrelevant personal affairs information that the Applicant did not seek access to.
38. Given my decision is the same as the Agency's decision and it granted access to the documents in part in accordance with section 25, I consider it remains practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted.

¹⁵ Section 31(2)(b).

¹⁶ Section 31(2)(c).

¹⁷ Section 31(2)(d).

¹⁸ Section 31(2)(e).

¹⁹ Section 31(2)(f).

²⁰ *Mickelburgh v Victoria Police* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967, [82].

²¹ *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.

Conclusion

39. On the information before me, I am satisfied certain information in the documents is exempt from release under section 31(1)(a) and I have decided not to release any further information in the documents to the Applicant.

Timeframe to seek a review of my decision

40. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.²²
41. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²³
42. 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.
43. 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.²⁴

²² The Applicant in section 50(1)(b) and the Agency in section 50(3D).

²³ Section 52(5).

²⁴ Section 50(3FA).