

## Article Information

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# Hands off: Internal investigation documents and freedom of information

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The *Freedom of Information Act 1985 (Vic) (Act)* and its interstate and Commonwealth equivalents provide a means to access public sector documents in the name of open and transparent government. However a recent decision affirms that the exclusions under the Act extend to protecting operational employees' testimony taken as part of investigations and ensuring future potential witnesses will contribute to internal investigations. The impact of [Country Fire Authority v McGregor \(Review of Regulation\) \[2017\] VCAT 582](#) will impact organisations subject to the freedom of information framework. While "employee records" exemptions exclude many private sector employers, public sector and volunteer workforces are within scope.

**Hannah Linossier, Associate** and **John Evans, Lawyer** discuss the important implications of this decision.

### Background

The case arose when a CFA volunteer took issue with his Captain's decision not to dispatch a tanker to assist another brigade in January 2013. The volunteer contended that the Captain was not authorised to deny the request whilst others in the CFA thought he was. Those discussions culminated in the volunteer complaining to the CFA that the Captain, as well as a CFA Operations Officer, and a CFA Operations Manager, had bullied and harassed him.

An external third party investigated the volunteer's claim. Both the preliminary and final findings of that investigation were that there was no bullying or harassment. The volunteer lodged a request under the Act for documents related to his complaint and the subsequent investigation. The CFA located 107 documents in total, providing some to the volunteer in full, some in part and refusing access to some documents.

The volunteer applied to the Freedom of Information Commissioner for review of CFA's decision. The Commissioner decided to disclose additional documents, some in full, some redacted and maintaining refusals for some. On appeal to VCAT, the CFA objected to the Commissioner's decision to release further documents.

### Freedom of Information framework

The Act's object is to extend as far as possible the right of the community to access information in the possession of the Victorian government and other bodies constituted under the law of Victoria. This broad object and the Act generally allow for a wide range of disclosures.

However, there are exceptions. This includes exceptions for internal working documents, documents relating to personal affairs and documents in confidence. The internal working document exception requires not only that the disclosure would disclose opinion, advice or recommendations prepared by an officer of the employer, but also that the opinion, advice or recommendation formed part of a deliberative process.

### VCAT Decision

The Tribunal held that documents pertaining to the opinion and deliberation of CFA officers about the volunteer's complaint and the investigation were broadly exempt from disclosure for public interest reasons. The Tribunal commented

that the documents fall under the public interest exemption insofar as disclosure would put the CFA's internal deliberative process at risk.

The Tribunal accepted the evidence of the CFA that information provided to investigators was done so in confidence. Disclosure of such information would “*significantly impair the CFA's ability to obtain such further information in future investigations*”<sup>[1]</sup>. The Tribunal noted that a likely result of allowing the information to be released would cause potential witnesses to be “*less forthcoming than they otherwise would be*”<sup>[2]</sup>.

In relation to identifying information which appeared in emails, the Tribunal noted that the volunteer could work out some of the redacted names with the material already disclosed to him. However, on the basis that some of the redacted names were those in operational roles (as opposed to human resources professionals), the names were exempt from disclosure. This is because those in operational roles would reasonably expect to remain anonymous in relation to contentious issues they were not directly involved in.

Throughout the decision, the Tribunal held that it should be cautious to not allow disclosure of information that would be “*adding fuel to the fire*”, in that disclosure of internal investigation documents may lead a reader, without the full story, to a conclusion not warranted on the specific document alone.

Lastly, the Tribunal reaffirmed that draft communications and letters continue to be exempt from disclosure under the Act's internal working document exception.

### **Lessons for organisations**

This decision is an important touchstone for public sector and volunteer workforces, and for employers who are called on to investigate conduct of workers who are not their direct employees, all of whom are potentially covered by freedom-of-information regimes. It reinforces that as long as operational workers' contributions to independent internal investigations are given in the context of the complaint at hand, that information will remain exempt from the freedom of information process. This aligns with other recent decisions, including in the Commonwealth jurisdiction in [LC and Australia Post \(Freedom of Information\) \[2017\] AlCmr 31](#), it is now clear that individuals will find it difficult to have witnesses' evidence disclosed. The Commissioner and Tribunal have clearly identified that there is a concern that disclosure of these documents would cause reluctance by future potential witnesses to engage with internal investigations.

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<sup>[1]</sup> *Country Fire Authority v McGregor (Review of Regulation)* [2017] VCAT 582 at [41].

<sup>[2]</sup> *Ibid.*