

Notice of Decision and Reasons for Decision

Applicant:	'A05'
Agency:	Greater Shepparton City Council
Decision date:	1 October 2019
Provision and exemption considered:	Sections 25A(5), 32(1)
Citation:	'A05' and Greater Shepparton City Council (<i>Freedom of Information</i>) [2019] VICmr 131 (1 October 2019)

FREEDOM OF INFORMATION – documents exempted in previous FOI applications – communications between agency and professional legal advisor – created for the dominant purpose of obtaining and providing legal advice – legal professional privilege

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 is the same as the Agency's decision in that I have decided to refuse to grant access to documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

1 October 2019

Reasons for Decision

Background to review

1. On 17 April 2019, the Applicant made an FOI request to the Agency for access to the following documents:

I wish to apply under the Freedom [of Information Act] for copies of documents previously identified as exempt documents under Section 32 (1) of the Freedom of Information Act.

...

In making this application I refer to previous determination letters sent to me by [Agency] officers as a way of quickly identifying the document that I am seeking.

The documents have been previously identified in Council letters to myself of [date], [date] and [date], as exempt documents using Section 32 (1) of the Freedom of Information Act.

...

2. On 7 May 2019, the Agency notified the Applicant it proposed to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(5). The Agency sought clarification of whether the Applicant would accept edited copies of the documents with irrelevant material deleted in accordance with section 25.
3. In reply, the Applicant advised the Agency they sought access to the documents in full and did not wish to receive edited copies of the documents.
4. By letter dated 9 May 2019, the Agency notified the Applicant of its decision to refuse to process the request in accordance with section 25A(5).

Review

5. By email dated 10 May 2019, the Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse to process the request.
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, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the Applicant's review application;
 - (c) the Applicant's submissions dated 17 June, 12 and 15 August 2019 and other communications with OVIC staff; and
 - (d) the Agency's submissions dated 31 May and 28 August 2019 and other communications with OVIC staff.
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.

Applicant's submissions

9. The Applicant submitted the following in support of their application for review:

I do not accept that these documents are exempted documents under Section 25A(5) of the FOI Act, as I do not believe that the purported "legal advice" is privileged legal advice, as the advice was given to Council officers in enforcing Acts or Schemes administered by Council not given to Council officers in the cause of providing advice for any legal action.

The legal advice being withheld by council under this FOI application is and can only be guidance advice which is expressly covered under Section 8(1)(b) of the Act where such "legal advice" is described as for 'the use or guidance of, or used or may be used by the council or its Officers in enforcing Acts or Schemes administered by Council where a member of the public might be directly affected by that enforcement, being documents containing information on the procedures to be employed or the objectives to be pursued in enforcement of the Act or Schemes'.

...

The documents that I have requested under FOI in my opinion, are clearly NOT legal advice provided to Council in any matter to do with any land within the Flood Study area which the property [address] I am involved with lies within.

The documents that I have requested, in my opinion, are clearly discussions between Council and a Project partner of Contract [number] relating to planning issues of land within the Flood Study area of which they are receiving payment for from Council under Contract [number].

I have included a copy of Council minutes of [date] item [number] for your information where Council voted to adopt the Flood Study that was the result of Contract [number]. This action, in my opinion, clearly shows that the Project Partners of the Water Technology tender were actively involved in the study from [month and year] until [month and year] and indeed, in my opinion, are clearly still involved today in the preparation of Planning Overlays over the entire area of the Flood Study area including the land at [address]...This planning process will be the subject of public submission process that will involve, in my opinion, [named person's] involvement in their role as Project partner of the Tender as indicated in the copies that I have supplied to you today.

Clearly [named person], in my opinion, cannot perform 2 roles, the first as Contractor the second as Lawyer without declaration under section 80C of the Local Government Act. This has not been evidenced.

Review of application of section 25A(5) to refuse to grant access to documents

10. The Agency claimed documents falling within the terms of the Applicant's request would be exempt under section 32(1).
11. Section 25A(5) provides that an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request the documents would be exempt under the FOI Act and where removal of the exempt material would not facilitate the release of the documents, or where it is clear the Applicant does not seek an edited copy of the documents.
12. The power in section 25A(5) is carefully circumscribed. A decision maker must be satisfied of three elements, which limit its application to a limited category of cases:
- (a) First, the exempt nature of the documents must be objectively apparent from the face of the request. Namely, the terms of the request as described by the applicant. The 'nature' of the documents refers to its inherent or essential quality or character.
 - (b) Second, it must be apparent that all of the documents in the request are exempt.

(c) Third, it must be apparent from:

- (i) the nature of the documents, as described in the request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document; or
- (ii) the request or through consultation with the applicant that the person would not wish to have access to an edited copy of the document.¹

What is the essential quality or nature of the documents requested?

13. The Agency submitted the following:

...the applicant is specifically seeking access to documents which were previously identified as exempt from release under section 32(1) of the Act. As such, the inherent or essential quality and character of the documents sought in the request is for documents which are, by their essential quality and character, exempt from disclosure under section 32(1) of the Act.

In the alternative, it is submitted that the inherent or essential quality and character of the documents sought in the request is for documents which are, by their essential quality and character, documents which would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege. This characterisation of the nature of the documents is not inferred by going behind the description of the request, but rather objectively from the terms of the request itself.

In *Victorian Casino & Gaming Authority v Halls* [1998] VSC 266; [1998] VICSC 38 the Supreme Court found that the exempt nature of the documents only had to be apparent to the agency:

“...the sub-section can operate to the benefit of an agency only if it is apparent (no doubt to the agency) from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate “are exempt documents” ...”.

The applicant’s request seeks access to documents which have previously been identified by Council as exempt documents under section 32 of the Act. As such, it is objectively apparent to Council, without going behind the description of the request, that the nature of the documents are such that they would be privileged from production in legal proceedings on the ground of legal professional privilege or client legal privilege and therefore are exempt from disclosure under section 32(1) of the Act.

In light of the above it is submitted that the exempt nature of the documents it is objectively apparent from the description of the request and the first element of section 25A(5) is satisfied.

14. On the information before me, I am satisfied the essential quality or character of the documents as described by the Applicant is apparent from the request. The nature of the documents is legal advice previously exempted by the Agency under section 32(1).

Would the documents requested, as described by the Applicant, be exempt?

15. In refusing to grant access to the documents requested under section 25A(5), the Agency submitted all documents would be exempt under section 32(1).

Application of section 32(1)

16. 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’.

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

17. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:²
- (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.
18. A document will be subject to client legal privilege where it contains a 'confidential communication'³ 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;⁴ 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.⁵
19. Whether a document is privileged depends on the intention for which it was made. The purpose for which a document is brought into existence is a question of fact.
20. Further, the term 'dominant' in determining whether a purpose is a dominant purpose, provides there must be a 'clear and paramountcy' of purpose for privilege to attach.⁶

Would the documents contain confidential communication?

21. I am satisfied any advice the Agency received from its professional legal advisers would be legal advice and privileged. In my view, communications of this type are confidential in nature.
22. Accordingly, I am satisfied the documents would contain confidential communications between the Agency and its professional legal advisers.

Were communications for the dominant purpose of obtaining or providing legal advice, or referable to pending or contemplated litigation?

23. While the Applicant contends the Agency's professional legal advisers is a 'project partner' to a particular contract, it does not preclude the legal advisers from providing legal advice.

² *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also *Evidence Act 2008* (Vic), section 119.

³ 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.

⁴ Section 118 of the *Evidence Act 2008* (Vic).

⁵ Section 119 of the *Evidence Act 2008* (Vic).

⁶ See *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332; *Commissioner of Taxation v Pratt Holdings* [2005] FCA 1247.

24. Having considered the descriptions of the documents provided by the Agency in its submission dated 31 May 2019, I am satisfied the communications were for the dominant purpose of obtaining and providing legal advice. These include instructions for a legal adviser, communications from a legal adviser discussing legal advice, legal advice, communications for the purpose of obtaining legal advice and a document prepared for the purpose of obtaining legal advice.

Has legal professional privilege been waived?

25. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client has acted in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the information has been disclosed with the client’s express or implied consent.⁷

26. I accept the Agency’s submission dated 28 August 2019 that legal privilege has not been waived.

Application of section 32(2)

27. I note the Applicant’s reference to section 8(1)(a) in their submission.

28. Under section 32(2):

A document of the kind referred to in section 8(1) is not an exempt document by virtue of subsection (1) of this section by reason only of its inclusion in the document of a matter that is used or to be used for the purposes of the making of decisions or recommendations referred to in section 8(1).

29. Section 8(1)(b) provides:

(1) This section applies, in respect of an agency, to documents that are provided by the agency for the use or guidance of, or are used or may be used by, the agency or its officers-

...

(b) in enforcing Acts or schemes administered by the agency where a member of the public might be directly affected by that enforcement, being documents containing information on the procedures to be employed or the objectives to be pursued in the enforcement of the Acts or schemes.

30. On the information before me, I am satisfied section 8(1)(b) does not apply to the documents. The documents are in the nature of communications for the purposes of obtaining and receiving legal advice for specific purposes, rather than general documents containing procedures.

31. Accordingly, I am satisfied the documents would be exempt from disclosure on the grounds of legal privilege under section 32(1).

Sections 30(1) and 33(1)

32. I note in its submission dated 28 August 2019, the Agency also submitted the documents would be exempt under sections 30(1) and 33(1). However, as I am satisfied section 32(1) would apply to the documents, it is not necessary to consider whether the documents would also be exempt under sections 30(1) and 33(1).

⁷ Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for CLP) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for LPP).

Is there scope to provide an edited copy of the documents requested?

33. Section 25 requires an agency to grant access to an edited copy of a document containing exempt or irrelevant information if it is practicable for the agency to delete that information, and if the applicant is agreeable to receiving such a copy.
34. Determining what is 'practicable' requires considerations of the effort involved in making the deletions from a 'resources point of view'⁸ and the effectiveness of the deletions – that is, whether editing the documents would render it meaningless.⁹
35. The Agency submitted:

In relation to the Applicant's preceding requests...where exemption under section 32(1) of the Act was claimed, each document was considered under section 25 and provided to the applicant to the greatest extent possible without disclosing exempt material. Consequently, there would be no additional benefit for the applicant to obtain copies of the documents with the exempt material deleted as [they] already has such copies and the purpose of his request is to specifically obtain the previously redacted or completely denied material. Consistent with the reasoning adopted by the Tribunal in *Glascott v VicRoads* [2018] VCAT 1472, in such a situation it is apparent that it would not be practicable to provide an edited copy of the documents in accordance with section 25 and thus s25A(5)(b)(i) would apply.
36. Further, on 7 May 2019, the Agency consulted with the Applicant, who advised they did not want an edited copy.
37. While the Applicant indicated during the review that they are willing to exclude 'any personal names, personal phone numbers and personal email addresses', I am satisfied, on the information before me, it is not practicable to delete exempt or irrelevant material from the documents as it would render the documents meaningless given the purpose in which the Applicant seeks the information.

Conclusion

38. On the information available, I have decided to refuse to grant access to the documents in accordance with the Applicant's request under section 25A(5).

Review rights

39. 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.¹⁰
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
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.

⁸ *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].

⁹ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

¹² Section 52(9).

43. 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.¹³

When this decision takes effect

44. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹³ Sections 50(3F) and (3FA).