

Notice of Decision and Reasons for Decision

Applicant:	'AZ8'
Agency:	Department of Education and Training
Decision Date:	16 January 2020
Exemptions considered:	Sections 32(1) and 33(1)
Citation:	'AZ8' and Department of Education and Training (<i>Freedom of Information</i>) [2020] VICmr 3 (16 January 2020)

FREEDOM OF INFORMATION – legal professional privilege – student injury during a sporting event – personal affairs information – communications with insurer

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 have decided to release additional information in the documents to the Applicant.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

16 January 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to certain documents. Following consultation with the Agency, the Applicant clarified the initial request.
2. The clarified request was for access to the following documents relating to an incident on a specified date involving the Applicant at a specified school:
 1. Details of the trained first aid staff who assessed [the Applicant] and provided initial first aid to [them] following the incident;
 2. Statements obtained from the trained first aid staff;
 3. Statements obtained from any teacher or coach who was present during the football game and who may have been a witness to the incident;
 4. All filed records in relation to any communication that the Department had with [the Applicant] or [their] family in relation to the incident;
 5. A copy of all statements that the loss adjuster/investigator obtained from any person that was interviewed or spoken to that formed part of the investigation;
 6. A copy of the Department's investigation file concerning the incident;
 7. Any other document that the Department has in their possession which is relevant to the incident.
8. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request. It decided to grant access to some of those documents in full, some in part and refused access to other documents in full.

Review

9. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
10. I have examined copies of the documents subject to review.
11. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
12. 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 submission dated 8 August 2019 and information provided with the Applicant's review application; and
 - (c) the Agency's submission dated 26 July 2019 and subsequent correspondence with OVIC.
13. 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.

Review of exemptions

14. The Agency relied on sections 30(1), 32(1) and 33(1) to refuse access to some documents. The Agency's decision letter sets out the reasons for its decision.
15. This review relates to the documents to which the Agency refused access in part and in full, being Documents 2, 4, 5, 7, 8, 16 – 19, 22 – 24, 28 – 30, 32, 33 and 39.

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'.
17. Client legal privilege, often characterised as legal professional privilege, exists to protect the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a Court or Tribunal.
18. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:¹
 - (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.
19. Legal professional privilege exists to protect the confidentiality of communications between a client and their legal representative.
20. The High Court of Australia has held the purpose of legal professional privilege, or client legal privilege, ensures a client can openly and candidly discuss legal matters with their legal representative and seek legal advice:

The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.²
21. In determining if legal professional privilege applies, I must consider the dominant purpose for which the confidential communication was made.³ Therefore, whether a document is privileged will depend upon the purpose for which it was brought into existence and is a question of fact.
22. The relevant intention will be that of the legal representative, which will generally be for the purpose of providing legal advice to their client, as it is in the present case.

¹ *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.

² *Grant v Downs* (1976) 135 CLR 674, 685.

³ *Esso Australia Resources Limited v Commissioner of Taxation* [1999] HCA 67; 201 CLR 49.

23. The High Court of Australia described this legal principle as:

... a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.⁴

24. 'Dominant' in the context of determining whether the dominant purpose for which a document was created, requires there must be a 'clear and paramountcy' of purpose for privilege to attach.⁵

25. The Agency applied section 32(1) to Documents 5, 7, 8, 16 – 19, 22 – 24 and 28 in full and Documents 2, 4, 29 and 30 in part, on the grounds that release would disclose confidential communications between the Agency, their legal advisers and the Agency's insurer, and that the information was created for the dominant purpose of providing or obtaining legal advice.

26. Having viewed the information I have determined that the documents are exempt because:

(a) they are confidential communications between the Agency's professional legal advisers, Agency staff and the Agency's insurer;

(b) the documents were made for the dominant purpose of obtaining or providing legal advice.

27. I am therefore satisfied the documents are subject to legal professional privilege and exempt under section 32(1).

Has legal professional privilege been waived?

28. 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.⁶

29. An implied waiver of privilege will occur when a positive act of a party is inconsistent with maintaining the confidentiality in the communication irrespective of whether waiver of privilege was the subjective intention of the party.

30. On the information before me, there is no evidence to suggest privilege in the document has been waived by the Agency.

31. As I have determined that Documents 2, 4, 5, 7, 8, 16 – 19, 22 – 24 and 28 – 30 are exempt in part or in full under section 32(1), I do not consider it necessary to review the additional exemptions the Agency relied on to exempt the same information in these documents.

Section 33(1)

32. The Agency refused access in part to Documents 32, 33 and 39 based on its application of section 33(1).

33. A document is exempt under section 33(1) if two conditions are satisfied:

⁴ *Grant v Downs* (1976) 135 CLR 674, 677.

⁵ See *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332; *Commissioner of Taxation v Pratt Holdings* [2005] FCA 1247.

⁶ 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).

(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;⁷ and

(b) such disclosure would be 'unreasonable'.

34. Information relating to a person's 'personal affairs' includes information that identifies any person, or discloses their address or location. It also includes any information from which this may be reasonably determined.⁸
35. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
36. I note a number of Agency and third party staff names have been disclosed to the Applicant as part of documents released to them.
37. However the Agency applied section 33(1) to personal affairs information that related to the Agency's staff that were not directly involved with the Applicant.
38. I am satisfied that this information constitutes personal affairs information. I therefore must decide if the release of this information is unreasonable.
39. The Agency advised that release of this information would be unreasonable because:
- (a) disclosure would reasonably be expected to prejudice the protection of an individual's right to privacy; and
- (b) that disclosure may cause stress and anxiety for the individuals.
40. I note that these people were not consulted about the release of their personal affairs information in accordance with section 33(2B). I therefore do not have any information before me about whether the people concerned would object to the disclosure of their personal affairs information.
41. I have decided it would not be unreasonable to release this information because:
- (a) the information is not sensitive, as it relates to those individual's professional duties;
- (b) the staff appear to be relatively senior and in any case information about their roles is publicly available;
- (c) my view is that, subject to the specific circumstances of any given case, it is not unreasonable to disclose the names and position titles of agency staff, where they are merely carrying out their duties as public servants.
42. Section 33(2A) requires that, in deciding whether the disclosure of a document would involve the unreasonable disclosure of information relating to the personal affairs of any person, I must take into account whether the disclosure of the information would, or would be reasonably likely to, endanger the life or physical safety of any person. However, I do not consider this to be a relevant factor in the circumstances.
43. On balance, I consider that release of the personal affairs information to the Applicant would not be unreasonable. Accordingly, I am satisfied section 33(1) does not apply to the personal affairs information in Documents 32, 33 and 39.

⁷ Sections 33(1) and (2).

⁸ Section 33(9).

Deletion of exempt or irrelevant information

44. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
45. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ and the effectiveness of the deletions. Where deletions would render the document meaningless they are not 'practicable' and release of the document is not required under section 25.¹⁰
46. I have considered the effect of deleting exempt information from the documents. In my view, it is practicable for the Agency to delete the exempt information, because it would not require substantial time and effort, and the edited documents would retain meaning.

Conclusion

47. On the information available, I am satisfied that the exemptions in sections 32(1) applies to some of the documents. However, I am not satisfied section 33(1) applies to the documents. I have therefore decided to release the additional information to the Applicant.
48. **Annexure 1** sets out my decision in relation to each document.

Review rights

49. 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.¹¹
50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
52. 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.
53. 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.¹⁴

When this decision takes effect

54. I have decided to release documents that contain the personal affairs of a third parties.
55. The relevant third party will be notified of my decision and is entitled to apply to VCAT for a review within 60 days from the date they are given notice.

⁹ *Mickelburgh v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

¹⁰ *Honeywood v Department of Human Services* [2006] VCAT 2048 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140], [155].

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).

56. For that reason, my decision does not take effect until that 60 day period expires, or if an application to VCAT is made, until the VCAT proceeding is concluded.

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1	[date]	Email chain – last email sent [date] at [time]	4	Released in full	Not subject to review	
2	[date]	Email chain – last email sent [date] at [time] (with attachment)	2	Released in part Section 32(1)	Release in part Section 32(1) The document is to be released except for the email dated [date].	Section 32(1): I am satisfied the email on page one dated [date] was prepared by the Agency's insurer for the Agency's legal advisers for the dominant purpose of obtaining and providing legal advice. It is therefore exempt under section 32(1). The email and attached letter dated [date] from the Applicant's legal representative to the Agency are not exempt under section 32(1).
3	[date]	Letter from Applicant	2	Released in full	Not subject to review	
4	[date]	Email chain – last email sent [date] at [time]	2	Released in part Section 32(1)	Release in part Section 32(1) The document is to be released except for the emails dated [date].	Section 32(1): I am satisfied that two emails dated [date] were prepared by the Agency's legal advisers and Agency's insurer for the dominant purpose of obtaining and providing legal advice. It is therefore exempt under section 32(1). The email and attached letter dated [date] from the Applicant's legal representative are not exempt under section 32(1).
5	[date]	Email chain – last email sent [date] at [time]	4	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): I am satisfied it was prepared by the Agency's legal advisers for the dominant purpose of providing legal advice. It is therefore exempt under section 32(1).

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
6	[date]	Letter from [named insurer]	1	Released in full	Not subject to review	
7	[date]	Email chain – last email sent [date] at [time]	6	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): For the reasons provided in Document 5 above.
8	[date]	Draft letter	2	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): For the reasons provided in Document 5 above.
9	[date]	Email chain – last email sent [date] at [time]	4	Released in full	Not subject to review	
10	[date]	Imaging– Tax Invoice	1	Released in full	Not subject to review	
11	[date]	Statement of Claim and Benefits Payment	1	Released in full	Not subject to review	
12	[date]	[business name] Radiology	1	Released in full	Not subject to review	
13	[date]	[third party name] – Tax Invoice	1	Released in full	Not subject to review	
14	[date]	Tax Invoice – Equipment Distribution Centre – Customer Invoice	3	Released in full	Not subject to review	
15	[date]	[business name] Physiotherapy		Released in full	Not subject to review	

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16	[date]	Email chain – last email sent [date] at [time]	4	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): For the reasons provided in Document 5 above.
17	[date]	Email chain – last email sent [date] at [time]	5	Refused in full Section 32(1)	Refuse in full Section 32(1)	Section 32(1): For the reasons provided in Document 5 above.
18	[date]	Email chain – last email sent [date] at [time]	5	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): For the reasons provided in Document 5 above.
19	[date]	Email dated [date] at [time]	2	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): For the reasons provided in Document 5 above.
20	[date]	Email from [title surname]	3	Released in full	Not subject to review	
21	[date]	Letter from [named hospital]	2	Released in full	Not subject to review	
22	[date]	Email chain – last email sent [date] at [time]	2	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): For the reasons provided in Document 5 above.
23	[date]	Email chain – last email sent	5	Refused in full	Refuse in full	Section 32(1): For the reasons provided in

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		[date] at [time]		Sections 30(1), 32(1)	Section 32(1)	Document 5 above.
24	[date]	Email chain – last email sent [date] at [time]	4	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): For the reasons provided in Document 5 above.
25	[date]	[reference number] Incident Notification form	2	Released in full	Not subject to review	
26	[date]	Injury to student occurring during activities held away from school – procedures	1	Released in full	Not subject to review	
27	[date]	First Aid Policy	2	Released in full	Not subject to review	
28	[date]	Email chain – last email sent [date] at [time]	5	Refused in full Sections 30(1), 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): I am satisfied it was prepared by the Agency and its insurer for the dominant purpose of obtaining legal advice. It is therefore exempt under section 32(1).
29	[date]	Email chain – last email sent [specified date] at [time]	4	Released in part Sections 30(1), 32(1)	Release in part Section 32(1) The document is to be released except for the emails dated [date].	Section 32(1): I am satisfied that two emails dated [date] were prepared by the Agency's legal advisers and Agency's insurer for the dominant purpose of obtaining and providing legal advice. It is therefore exempt under section 32(1). The email to Agency dated [date] at [time] sent

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
						by the Applicant's [relationship descriptor] is not exempt under section 32(1).
30	[date]	Email chain – last email sent [date] at [time] with attachment)	3	Refused in part Sections 30(1), 32(1)	Release in part Section 32(1) The document is to be released except for the email dated [date].	Section 32(1): I am satisfied that the email dated [date] was prepared by the Agency's insurer for the Agency's legal advisers for the dominant purpose of obtaining and providing legal advice. It is therefore exempt under section 32(1). The letter and email to the Applicant's legal representative dated [date] sent by the Agency's insurer is not exempt under section 32(1).
31	[date]	[reference number] Incident Notification form (Duplicate of Document 25)	2	Released in full	Not subject to review	
32	[date]	Student Chronicle – [named person]	1	Release in part Section 33(1)	Release in full	Section 33(1): I consider the personal affairs information in the document would not be unreasonable to release for the reasons set out above.
33	[date]	Email chain – last email sent [date] at [time]	3	Released in part Section 33(1)	Release in full	Section 33(1): I consider the personal affairs information in the document would not be unreasonable to release for the reasons set out above.
34	[date]	Email chain – last email sent [date] at [time] – FW: [named	3	Released in full	Not subject to review	

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Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
		person] Status				
35	[date]	Email chain – last email sent [date] at [time] – FW: [named person] Update [number]	3	Released in full	Not subject to review	
36	[date]	[named person] – meeting with [named persons] [time]	1	Released in full	Not subject to review	
37	[date]	Email chain – last email sent [specified date] at [time]	3	Released in full	Not subject to review	
38	Undated	Email chain	2	Released in full	Not subject to review	
39	[date]	STaR email dated [date] at [time] pm	2	Released in part Section 33(1)	Release in part Section 25	Section 25: I consider the name in the top left-hand corner to be the person who printed the email. This information is therefore irrelevant and is to be deleted.