



Office of the Victorian
Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'BB8'
Agency:	Major Transport Infrastructure Authority
Decision Date:	7 February 2020
Exemption considered:	Section 32(1)
Citation:	'BB8' and Major Transport Infrastructure Authority (<i>Freedom of Information</i>) [2020] VICmr 22 (7 February 2020)

FREEDOM OF INFORMATION – legal professional privilege – email communications between lawyer and client – infrastructure projects

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 am satisfied the documents requested are exempt under section 32(1) in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

7 February 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:
 1. Copies of all draft documents and subsequent versions of what became schedule 29 (Assumed Transport Network Enhancements Schedule) of the West Gate Tunnel Project Agreement.
 2. Any documents or emails pertaining to schedule 29 (Assumed Transport Network Enhancements Schedule) of the West Gate Tunnel Project Agreement and the negotiation of what projects were included and omitted from the final agreement.
2. In its decision, the Agency identified two documents comprising nine pages, falling within the terms of the Applicant's request. It decided to refuse access to both documents in full.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined copies of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Agency's submission dated 18 April 2019; and
 - (d) additional information provided by the Agency on 20 November 2019 and 29 January 2020.
7. 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

8. The Agency relied on the exemption in section 32(1) to refuse access to the documents in full. The Agency's decision letter sets out the reasons for its decision.

Section 32(1)

9. 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'.
 10. Legal professional privilege protects the confidentiality of certain communications made in connection with giving or receiving legal advice or the provision of legal services, including representation in proceedings in a court.
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11. For the purposes of this review, a document is privileged and, therefore, exempt under section 32(1) if, it contains a confidential communication 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.¹
12. The dominant purpose for which the confidential communication was made determines whether the exemption applies.² The dominant purpose test applies to both communications for the purpose of obtaining or giving legal advice.
13. Document 1 is a chain of emails. The first email is an instruction from the Agency's in-house legal counsel to the Agency's external legal advisers. The email seeks advice on the proposed government infrastructure projects, relevantly referred to as 'PA Schedule 28'. The succeeding emails consist of exchanges between the Agency's legal adviser, executive officers and a technical consultant concerning the proposed PA Schedule 28.
14. Document 2 is an attachment to the final email in the chain, entitled 'PA Schedule 29'. It appears to be an amended version of the initial schedule, which includes tracked changes and edits made by the Agency's legal advisers.
15. The Agency submits:

...the two documents falling within the scope of the request held by [the Agency] all comprise communications by which [the Agency] sought or obtained legal advice on matters including the relevant Schedule.
16. Having carefully reviewed the documents, I am satisfied they are subject to legal professional privilege and exempt under section 32(1).
17. With respect to Document 1, the communications comprise confidential exchanges between in-house Agency lawyers and executive staff for the dominant purpose of giving and receiving legal advice regarding the West Gate Tunnel Project Agreement. The requisite client/lawyer relationship here is between the Agency (as the client) and the Agency's external legal advisers.
18. With respect to Document 2, I accept legal professional privilege extends to a draft document or comments made upon a draft document submitted by a lawyer. In such circumstances, the lawyer is regarded as furnishing advice when preparing or revising a draft communication upon a major transaction in which he or she is an adviser.³
19. In this case, the PA Schedule 28 was provided for the dominant purpose of the Agency obtaining advice from its legal adviser. As part of its advice, the Agency's external legal advisers revised and made amendments to the PA Schedule 28, creating a new document (PA Schedule 29). Therefore, I am satisfied the confidential communications were made for the dominant purpose of the Agency requesting and the Agency's external legal advisers providing legal advice.
20. Accordingly, I am satisfied the documents are exempt under section 32(1).

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 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

³ See *Conyers v Monash University* [2005] VCAT 2509; *Re Osland and Department of Justice* [2005] VCAT 1648; *Re City Parking Pty Ltd and City of Melbourne* (1996) 10 VAR 170, 202; *Re Smith and Directorate of School Education* (unreported, AAT, Macnamara DP, 14 August 1996).

Has privilege been waived?

21. 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.⁴
22. An implied waiver of privilege will occur when a positive act of a party is inconsistent with maintaining the confidentiality in the communication irrespective that a waiver of privilege was not the subjective intention of the party.
23. In relation to whether any issue of waiver or loss of privilege has arisen in respect of the documents, the Agency submitted the following:

It has long been accepted that the use of consultants in such roles does not exclude the operation of exemptions under the FOI Act that rely on the involvement of officers of an agency...

[named consultant] expertise was required for these particular email exchanges to provide the factual and technical input for the purpose of WGTP obtaining, and [external legal advisers] providing, legal advice. WGTP refer to and relied upon the decision and reasoning in *Pratt Holdings Pty Ltd. v Commissioner of Taxation* (2004) 136 FCR 357 and in particular at [41]-[43], for the proposition that the involvement of a third party in privileged communications does not waive the privilege where the party’s involvement (as here) was required for the purposes of obtaining legal advice...

24. It is well established, an external consultant, who is engaged by an agency (or on behalf of an agency) to provide an opinion, advice or recommendation, is taken to be an officer of the agency for the purposes of the FOI Act.⁵ In this case, I accept the Agency’s submission the technical adviser was engaged by the Agency to provide expert opinion and advice concerning the proposed infrastructure projects, and is taken to be an officer of the Agency.
25. Having carefully considered the information before me, I am satisfied privilege has not been waived in relation to these documents.
26. Therefore, I am satisfied the documents would be privileged from production in legal proceedings on the ground of legal professional privilege and are exempt under section 32(1).

Deletion of exempt or irrelevant information

27. 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.
28. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁶ 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 25.⁷
29. I have considered the effect of deleting exempt information from the documents. I am not satisfied it is practicable to delete exempt information from the documents as to do so would render the documents meaningless.

⁴ *Mann v Carnell* (1999) 201 CLR 1 at [28].

⁵ *Tregale v Department of Human Services* [2012] VCAT 722 at [32]-[33].

⁶ *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].

⁷ *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] and [155].

Conclusion

30. On the information before me, I am satisfied the documents are exempt under section 32(1).
31. As I have determined it is not practicable to delete exempt information in the documents, I have decided to refuse access to the documents in full.

Review rights

32. 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.⁸
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
35. 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.
36. 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.¹¹

When this decision takes effect

37. 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.

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).
