

Notice of Decision and Reasons for Decision

Applicant:	'CF9'
Agency:	Manningham City Council
Decision date:	28 October 2020
Exemption considered:	Section 32(1)
Citation:	'CF9' and Manningham City Council (<i>Freedom of Information</i>) [2020] VICmr 303 (28 October 2020)

FREEDOM OF INFORMATION – council documents – fallen tree – incident – arborist report – 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 a document requested by the Applicant under the FOI Act.

The Applicant does not seek access to pages 1 to 11 and, accordingly, they are irrelevant to this review.

Having conducted a review of pages 12 to 23, I am satisfied they are exempt under section 32(1).

As I am satisfied it is not practicable to delete irrelevant and exempt information in the document in accordance with section 25, pages 12 to 23 are exempt in full.

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

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

28 October 2020

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

In regards to an incident involving [description of relationship]

On [specific date] at approximately [time], [year] at [location].

We request the following:

- An arborist report of the fallen [description of] tree
 - An incident report of the cause of the incident, when/where
 - A risk assessment and preventative control of the area report.
2. In its decision, the Agency identified four documents falling within the terms of the Applicant's request. It granted access to one document in full and refused access to one document in full. The Agency also granted access to two documents outside the FOI Act.
 3. In its decision, the Agency determined no documents exist or could be found relating to 'a risk assessment and preventative control of the area report'. The Agency provided a detailed summary of searches undertaken to locate documents relevant to the terms of the Applicant's request.

Review

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 Document 1 which totals 23 pages and comprises:
 - (a) a letter of legal advice prepared by the Agency's external legal representative (pages 1 to 11); and
 - (b) an attached arboricultural assessment and report prepared by an arborist engaged by the Agency's external legal representative (pages 12 to 23) (the **Report**).
6. During the review, the Applicant stated they do not seek access to the personal affairs information of third parties and seek review of the Agency's decision in relation to the Report only. As such, I have not considered pages 1 to 11 of Document 1 as part of my review. The Applicant also agrees to accept an edited copy of the Report if certain information is held to be exempt or irrelevant.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. 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 [date] and information provided with their review application;
 - (c) the Agency's confidential submission dated [date]; and

(d) all other communications between the Agency, the Applicant and OVIC staff.

9. In undertaking a review under section 49F, I am required to make a fresh or new decision.¹ This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my fresh decision is the 'correct or preferable decision'.² This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my decision.
10. 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.
11. 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.

Submissions

12. In its decision, the Agency submits:

(a) In relation to the exemption under section 32(1):

...

Document 01 contains material exempt under section 32(1) of the FOI Act, which was determined on the basis of the following:

- The arborist report was commissioned by Council's external lawyer on behalf of Council;
- The arborist report was brought into existence for the dominant purpose of having Council's external lawyer provide legal advice to Council;
- The report was prepared with the intention that it remain confidential; and,
- Legal privilege has not been waived or lost by Council.

(b) In relation to deletion of exempt or irrelevant material under section 25:

...

I must consider both of the following:

- Whether it is practicable to provide access to a copy with the exempt matter or irrelevant material removed; and,
- Whether the applicant has indicated a willingness to receive access to a copy with the exempt matter or irrelevant material removed.
- If both conditions are satisfied, then access to a copy of Document 01 with the exempt matter or irrelevant material removed, is to be provided to the applicant.
- I acknowledge that in your email dated [date], you stated that you did not want copies of any relevant documents with exempt matter or irrelevant material removed.
- Whether it is practicable to remove the exempt matter from Document 01:
 - o It is practicable to remove the material that falls under section 33(1) of the FOI Act.
 - o It is not practicable to remove all the material that is exempt under section 32(1) of the FOI Act.

¹ Section 49P.

² *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

- This is because the report in its entirety falls under this exemption. In order to redact the material that is exempt under section 32(1), it would require the removal of the report's contents. This would in effect, render the document meaningless without its contents.

Given that both conditions are not satisfied, I am unable to provide a copy of Document 01 with the exempt matter removed.

13. The Applicant in their submission states:

The reason to seek the arborist report is to understand whether the tree that struck [description of relationship] was indeed in a volatile state and should have otherwise been removed to protect public safety. As stated in the councils tree management plan, to remove dead trees.

To point 1b, I believe the document is not subject to legal privilege based on the freedom of information, whereby the public are informed of potential risks to safety. This extends to the adequate protection and communication of potential hazards in public areas, such as falling tree signage in rest areas. As well as reassuring the public that areas are reasonably, and competently managed to offer protection and avoid further situations such as ours.

Review of exemptions

Section 32(1) – Documents affecting legal proceedings

14. 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'.
15. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:³
- 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;
 - between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - 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.
16. A document will be subject to client legal privilege where it contains a 'confidential communication'⁴ 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;⁵ or
 - 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.⁶

³ *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.

⁴ 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.

⁵ Section 118 of the *Evidence Act 2008* (Vic).

⁶ Section 119 of the *Evidence Act 2008* (Vic).

17. I acknowledge the Applicant's interest in obtaining access to the Report and the public interest factors raised in their submission. However, the exemption under section 32(1) does not permit me to have regard to any public interest factors in favour of release, or the extent to which an applicant's personal interest in the document would be served by granting access to the document.

Does the document contain a confidential communication?

18. The Agency exempted the Report under section 32(1) on grounds it discloses a confidential communication between the Agency's external legal representative and a third party made for the dominant purpose of pending or contemplated litigation.
19. Having reviewed the Report, I am satisfied it is a confidential communication between the Agency's legal representative and a third party.

What was the dominant purpose of the confidential communication?

20. The dominant purpose for which the confidential communication was made determines whether the exemption applies.⁷
21. Having reviewed the Report and considered the Agency's submission, it is evident from the face of the Report release would disclose information provided to the Agency's legal representative for the dominant purpose of pending or contemplated litigation.

Has legal professional privilege been waived?

22. 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.⁸
23. On the information before me, I am satisfied legal professional privilege in the document has not been waived.
24. Accordingly, I am satisfied the Report is exempt under section 32(1).

Section 33(1) – personal affairs information

25. In light of my decision the Report is exempt under section 32(1), and given the Applicant is not seeking review of information the Agency exempted under section 33(1), it is not necessary for me to also consider the application of section 33(1) to the document.

Deletion of exempt or irrelevant information

26. Section 25 requires an agency to grant access to an edited copy of a document when it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
27. 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

⁷ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

⁸ *Mann v Carnell* (1999) 201 CLR 1 at [28].

⁹ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁰

28. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with irrelevant and exempt information deleted in accordance with section 25. I am satisfied it is not practicable to delete such information, as to do so would render the document meaningless.

Conclusion

29. The Applicant does not seek access to pages 1 to 11 and, accordingly, they are irrelevant to this review.
30. Having conducted a review of pages 12 to 23, I am satisfied they are exempt under section 32(1).
31. As I am satisfied it is not practicable to delete irrelevant and exempt information in the document in accordance with section 25, pages 12 to 23 are exempt in full.
32. The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

Review rights

33. 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
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
36. 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.
37. 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

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).

Annexure 1 — Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Letter of legal advice with attached report	23	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 25: Pages 1 to 11 of the Report are outside the scope of this review. Section 32(1): I am satisfied pages 12 to 23 of the Report constitute a confidential communication between the Agency's external legal representative and a third party and were made for the dominant purpose of pending or contemplated litigation and legal professional privilege has not been waived by the Agency.
2.	[date]	Incident & Near Miss Summary Report		Released in full	Not subject to review	
3.	[Year – Year]	Electric Line Clearance Management Plan		Released outside the FOI Act	Not subject to review	
4.	[Month, Year]	Tree Management Plan		Released outside the FOI Act	Not subject to review	