



Office of the Victorian
Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'CP7'
Agency:	University of Melbourne
Decision date:	3 February 2021
Exemption considered:	Section 32(1)
Citation:	'CP7' and <i>University of Melbourne (Freedom of Information)</i> [2021] VICmr 34 (3 February 2021)

FREEDOM OF INFORMATION – university – Vice-Chancellor Report to Council – legal advice – not a document to which section 8 of the FOI Act applies

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.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied certain information in the document is exempt under section 32(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, I have granted access to the document in part.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

3 February 2021

Reasons for Decision

Background to review

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

This request is for any document having the effect of being a notification to the University Council by the Vice-Chancellor, pursuant with section 5(6) of the Vice-Chancellor's Regulation, in relation to any decision of the Vice-Chancellor to exercise a power under sections 5(5)(a)-5(5)(c) of the Vice-Chancellor's regulation with regard to [description of action]. This request is for documents created on or after [date].

2. The Agency identified one document falling within the terms of the Applicant's request and relied on section 32(1) to refuse access to certain information in the document. The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the document in full.
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.
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.
8. 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.

Review of exemptions

Section 32(1) – Documents subject to legal privilege

9. Section 32 provides:
 - (1) 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.
 - (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 the inclusion in the document of a matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8(1).

10. Section 8(1) provides that an agency must make certain documents it holds available for public inspection and purchase:
- (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—
 - (a) in making decisions or recommendations, or in providing advice to persons outside the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled, eligible or subject, being—
 - (i) documents containing interpretations or particulars of Acts or schemes administered by the agency, not being particulars contained in another Act; or
 - (ii) manuals, rules of procedure, statements of policy, records of decisions, letters of advice to persons outside the agency, or similar documents containing rules, policies, guidelines, practices or precedents; and
 - (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.
11. 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;
 - (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.
12. 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.²
13. In relation to the application of section 32(1) to the document, the Applicant submits:

The s 32 exemption is incorrectly applied as the matter exempted by the University is of a kind referred to in s 8 of the Act. Note that s 32(2) states that “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 the inclusion in the document of a matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8(1)”. The matter that is subject to the claimed exemption was provided to the University Council of the agency for its use as a record of decision of the Vice-Chancellor in the exercise of section 5(5) of the Vice-Chancellor’s Regulation. The decision being recorded is for the

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

use of the agency and its officers in making further decisions and recommendations to or which a person was subject.

14. The Agency advised it has not waived legal privilege on the part of the document to which it claims legal privilege applies and exempted that information under section 32(1).
15. Having reviewed the document and on the information before me, the information to which the Agency claimed section 32(1) is exempt under this provision as I am satisfied:
 - (a) it amounts to a confidential communication;
 - (b) between the Agency and its legal advisers;
 - (c) for the purposes of providing legal advice; and
 - (d) section 32(2) does not apply.
16. In my view section 8(1) does not apply as this provision refers to specific types of documents used by Agency officers to guide their decisions, for example, an agency's interpretation of a legislative scheme or provision, a manual or statement of policy or operational procedures. In contrast, the information subject to review in the document constitutes specific legal advice relating to a discreet matter under consideration by the Agency.
17. Accordingly, I am satisfied the information to which the Agency claimed section 32(1) is subject to legal privilege and is exempt under section 32(1).

Deletion of exempt or irrelevant information

18. 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.
19. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'³ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁴
20. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. As my decision is the same as the Agency's in relation to the application of section 32(1), I am satisfied it is practicable to release a copy of the document with the exempt information deleted.

Conclusion

21. On the information before me, I am satisfied certain information in the document is exempt under section 32(1).
22. I am satisfied it is practicable to provide the Applicant with an edited copy of the document with information exempt under section 32(1) deleted in accordance with section 25.
23. Accordingly, I have granted access to the document in part with the sixth dot point under the heading 'Key information' deleted.

³ *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].

⁴ *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].

Review rights

24. 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.⁵
25. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
26. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
27. 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.
28. 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.⁸

⁵ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁶ Section 52(5).

⁷ Section 52(9).

⁸ Sections 50(3F) and (3FA).