

## Notice of Decision and Reasons for Decision

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Applicant:	'DG6'
Agency:	Department of Premier and Cabinet
Decision date:	23 June 2021
Provision and exemption considered:	Sections 25A(5), 32(1)
Citation:	'DG6' and Department of Premier and Cabinet ( <i>Freedom of Information</i> ) [2021] VICmr 187 (23 June 2021)

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FREEDOM OF INFORMATION – refusal to process request on grounds all documents, should any exist, would be exempt – COVID-19 pandemic – 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.

I am satisfied the requirements of section 25A(5) are met, and I have refused 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

23 June 2021

## Reasons for Decision

### Background to review

1. On [date], the Agency received a request from the Applicant for the following documents:

...any documents that pertain to the Government's position on Australians (and/or Victorians) returning to Australia during COVID-19 pandemic.

The scope of this request includes, but is not limited to, all policy documents, briefings, reports, correspondence, meeting records, emails, records of internal discussions, information notes, text messages (or other communications) and working documents. IT includes, but not limited to, documents or records in the possession of any official minister, employee, or staff member of the Department of Premier and Cabinet, even if their do not originate from that source.

In particular, I request any legal opinion on the lawfulness of the Government decisions, actions, instruments, or regulations or legislation (including drafts, proposals and enacted rules) that result in Australians abroad finding it more difficult to return home. This includes decisions regarding caps on arrival in Australia, any actions whatsoever that would limit an Australian's ability to return to Australia. This includes contributions made to National Cabinet, and positions taken to that forum. This also includes, but is not limited to, any documents that reflect on whether the Government is compliant with rules under the Australian Human Rights Commission Act 1986 (Cth), the Charter of Human Rights and Responsibilities Act 2006 (Vic), and the International Covenant on Civil and Political Rights.

Finally, I ask for any records that pertain to previous communications I have sent to Government ministers. I have never received a response to any. I request any documents or information that provide information on whether correspondence was received by any Minister, read by any Minister, and what their proposed action was (ie if they determined simply not to respond, despite my request).

2. On [date], in discussions with the Agency, the Applicant agreed to narrow the terms of their request to the following documents:

I request any legal opinion on the lawfulness of Government decisions, actions, instruments or regulations or legislation (including drafts, proposals, and enacted rules) that result in Australians abroad finding it more difficult to return home as a result of the COVID-19 pandemic. 'Legal Opinion' refers to both internal, and/or external advice, in addition to commentary on such advice (that might be held in minutes, correspondence or briefings).

Briefings, memos, meeting invites or correspondence from or to Ministers that reference this advice would also be relevant. The date range of this request is [date] to the date of this request.

3. By letter dated [date], the Agency advised the Applicant that any documents relevant to the terms of the request would likely be exempt under section 32(1). Therefore, it advised that it proposed to refuse access to documents in accordance with the Applicant's request under section 25A(5). The Agency invited the Applicant to consult with a view of refining the scope of their request to remove the proposed ground for refusal. However, the Applicant declined to consult further with the Agency.

4. On [date], without having identified any, or all documents, the Agency refused access to documents in accordance with the Applicant's request under section 25A(5). In its decision, the Agency advised documents falling within the terms of the Applicant's request, should any exist, would be exempt from release under section 32(1).

5. The Agency's decision letter sets out the reasons for its decision.

### Review

6. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision.

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 received from the parties.
9. 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.
10. 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 section 25A(5)**

11. Section 25A(5) provides an agency may refuse to grant access to documents in accordance with an FOI request:
  - (a) if it is apparent from the nature of the request all documents sought would be exempt under the FOI Act: and
  - (b) where it is not possible to provide the applicant with an edited copy of the documents with exempt information deleted, or it is clear the applicant does not seek an edited copy of the documents.
12. Importantly, an agency is not required to identify any or all documents relevant to a request or to specify any relevant exemption under which a particular document would be exempt.
13. The power under section 25A(5) is carefully circumscribed.<sup>1</sup> A decision maker must be satisfied of the following three elements, which operate to limit its application:
  - (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 a document refers to its inherent or essential quality or character.
  - (b) Second, it must be apparent all requested documents are exempt.
  - (c) Third, it must be apparent from:
    - i. the nature of the documents, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
    - ii. the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.<sup>2</sup>

#### ***Is the nature of the documents objectively apparent from the face of the request?***

14. The terms of the Applicant's request seek access to legal advice provided to the Agency on government decisions relating to the COVID-19 pandemic, as well as any document that record such

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<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

<sup>2</sup> *Knight v Corrections Victoria* [2010] VSC 338.

advice. I am satisfied the nature of the documents is objectively apparent from the specific terms of the request.

***Would all documents, as described in the request, be exempt?***

15. In refusing access to the requested documents under section 25A(5), the Agency determined, should any exist, they would be exempt under section 32(1).

***Section 32(1) – Documents subject to legal privilege***

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’.<sup>3</sup>
17. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>4</sup>
- (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.
18. The High Court of Australia has held 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.<sup>5</sup>

19. Legal privilege exists to protect the confidentiality of communications between a client and their lawyer. In this case, the requisite client/lawyer relationship would be between the Agency and its legal advisers.

20. In its submission, the Agency submitted the following:

It is objectively apparent on the face of the request, that by seeking access to material which contains ‘*legal opinion*’, that they are exempt in nature. This is on the basis that documents containing ‘*legal opinion*’ would attract legal professional privilege and would therefore be privileged from production in legal proceedings, pursuant to section 32(1) of the Act.

...

Documents containing ‘*legal opinion on the lawfulness of Government decisions, actions, instruments or regulations or legislation*’, would by their very nature, be subject to legal professional privilege. This is

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<sup>3</sup> The term ‘client professional privilege’ is a reference to Part 3.10, Division 1 of the *Evidence Act 2008* (Vic). In summary, there are minor differences between the scope of professional legal privilege and client legal privilege.

<sup>4</sup> *Graze v Commissioner of State Revenue* [2013] VCAT 869 at [29]; *Elder v Worksafe Victoria* [2011] VCAT 1029 at [22]. See also section 119 of the *Evidence Act 2008* (Vic).

<sup>5</sup> *Grant v Downs* (1976) 135 CLR 674 at [19].

due to the fact that such 'legal opinions' would be sought or provided for the dominant purpose of seeking or obtaining legal advice.

...

[The Agency] contents that **all** documents are exempt. This is on the basis that:

- i. By their very nature, any relevant documents which contain '*legal opinion*' would be provided on a confidential basis for the dominant purpose of giving or receiving legal advice by either:
  - External lawyers, or
  - Legal advisors employed by the department in their role as legal advisors.
- ii. Documents which do not contain '*legal opinion*', fall outside the scope of the request and would therefore be deemed irrelevant.
- iii. The applicant has also request '*commentary on such advice*', however it would not be possible to provide such commentary without revealing the legal advice which is subject to legal professional privilege.
- iv. The department has not waived its right to protect such privilege, whether explicitly or implicitly. It reserves all rights to maintain such privilege.

21. To the extent the Applicant seeks documents that reveal 'legal opinion' provided to the Agency, I consider such documents, should any exist, would be obtained by the Agency in the course of seeking and/or receiving legal advice and services from its legal advisers. I accept the submission of the Agency that any such communications would be provided on a confidential basis and for the dominant purpose of giving and/or receiving legal advice.
22. Further, legal privilege will apply to a document prepared by the recipient of legal advice or an employee of the recipient, if the document contains a written record of confidential legal advice provided by the recipient's legal advisor. The dominant purpose test is to be applied to the original communication and extends to notes without necessarily having to again apply the dominant purpose test to a separate document recording the legal advice.<sup>6</sup>
23. This means, if the Agency creates an internal document that records or discloses legal advice received by the Agency, legal privilege also will extend to that document. Therefore, to the extent the Applicant's request seeks access to any documents providing 'commentary' or a 'briefing' on any legal advice received by the Agency, any such documents would also fall under the ambit of legal professional privilege for the purposes of section 32(1).
24. Therefore, having considered the terms of the Applicants request, I am satisfied:
  - (a) any documents that provide 'legal opinion' to the Agency on 'Government decisions' would be made for the dominant purpose of receiving and obtaining legal advice and therefore, would be subject to legal privilege;
  - (b) any documents that contain a record, or reveal legal advice obtained by the Agency would satisfy the dominant purpose test and be subject to legal privilege; and
  - (c) there is no information before me to establish legal privilege in any documents has been waived by the Agency.
25. Accordingly, I am satisfied the requested documents, should any exist, would contain legal advice that would be privileged from production in legal proceedings on the ground of legal professional privilege, and would be exempt under section 32(1).

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<sup>6</sup> *Standard Chartered Bank of Australia Ltd v Antico* (1995) 36 NSWLR 57 at [91-93].

### ***Section 25 – Is there scope to provide an edited copy of the documents requested?***

26. Section 25 requires an agency to grant access to an edited copy of a document where 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’<sup>7</sup> 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.<sup>8</sup>
28. I have considered whether it would be practicable to provide the Applicant with an edited copy of one or more of the requested documents, should any exist.
29. Given the nature of the requested documents and their likely contents, as discussed above, I am satisfied it would not be practicable to grant access to an edited copy one or more of the documents, should any exist, as the deletion of any exempt information would remove the substance of information requested by the Applicant and would render the documents devoid of substantive meaning.
30. Accordingly, I am satisfied no obligation would arise under section 25 to provide the Applicant with an edited copy of one or more of the documents.

### **Conclusion**

31. On the information before me, I am satisfied the requirements for the application of section 25A(5) are met.
32. Accordingly, I have refused to grant access to documents in accordance with the Applicant’s FOI request on grounds the requested documents, should any exist, would be exempt under section 32(1).

### **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.<sup>9</sup>
34. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>10</sup>
35. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>11</sup>
36. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto: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.<sup>12</sup>

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<sup>7</sup> *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].

<sup>8</sup> *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].

<sup>9</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>10</sup> Section 52(5).

<sup>11</sup> Section 52(9).

<sup>12</sup> Sections 50(3F) and (3FA).