

Notice of Decision and Reasons for Decision

Applicant:	'DE5'
Agency:	Country Fire Authority
Decision date:	9 June 2021
Exemption considered:	Section 32(1)
Citation:	'DE5' and Country Fire Authority (Freedom of Information) [2021] VICmr 168 (9 June 2021)

FREEDOM OF INFORMATION – workplace investigation – workplace complaint – investigator engaged by legal advisers – investigation report – legal privilege

All reference to legislation in this document are to the *Freedom of Information Act 1982 (Vic)* (**FOI Act**) unless otherwise stated.

Notice of Decision

I 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 the document is exempt in full under section 32(1).

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

9 June 2021

Reasons for Decision

Background to review

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

I am seeking a copy of an investigation report undertaken by [Name] of [law firm] during the period [timeframe]. I do not want any details pertaining to the personal information of other parties contained in the report eg Addresses and DOBs. The complaints department will most likely hold the report. I want the report as it contains material pertinent to me personally and as such I seek a copy for my own records.

2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under section 32(1).
3. The Agency's decision letter sets out the reasons for its decision.

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 copies of the document subject to review.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications received from the parties.
8. 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.
9. 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 affecting legal proceedings

10. 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' (**legal privilege**).
11. A document will attract legal privilege and be 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

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.

- (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 acts 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. The document subject to this request is an investigation report with attachments, as described in the Schedule of Documents at **Annexure 1**.
 14. The document includes two letters from the Agency’s external legal advisers (the **legal advisors**) that I am satisfied demonstrate the legal advisors commissioned and provided instructions to the investigator who, following their investigation, prepared the investigation report.
 15. I acknowledge the Applicant’s view the document was not prepared for the dominant purpose of the legal advisors providing advice to the Agency on pending or contemplated litigation.
 16. However, based on my review of the contents and nature of the document, I am satisfied it constitutes a confidential communication between the legal advisors and the investigator, and was prepared for the purpose of providing information to the legal advisors for the dominant purpose of the legal advisors providing advice to the Agency on pending or contemplated litigation.
 17. There is no information before me to demonstrate privilege in the document has been waived. Further, it is clear on the face of the document the legal advisors intended for the document to remain confidential and for legal privilege of the document to be protected.
 18. Accordingly, I am satisfied the document is exempt under section 32(1).

Section 25 – Deletion of exempt or irrelevant information

19. 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.
20. 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
21. Given the purpose for which the document was created, I am satisfied it is exempt from release under section 32(1) in full and there is no obligation under section 25 to provide the Applicant with an edited copy of the document with any exempt or irrelevant information deleted.

² Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for client legal privilege) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

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 [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267 at [140] and [155].

Conclusion

22. On the information before me, I am satisfied the document is exempt under section 32(1) and there is no obligation under section 25 to provide the Applicant with an edited copy of the document with any exempt or irrelevant information deleted.
23. Accordingly, access to the document is refused in full.

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).

Annexure 1 – Schedule of Documents

No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
1	[year]	Confidential Investigation Report	47	Refused in full Section 32(1)	Refuse in full Section 32(1)	<p>Section 32(1): I am satisfied the document is exempt under section 32(1) for the reasons set out in the Notice of Decision above.</p> <p>Section 25: I am satisfied there is no obligation under section 25 to provide the Applicant with an edited copy of the document with any exempt or irrelevant information deleted.</p>
2	Undated	Confidential Recommendations Arising from Investigation Report	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
3	[date]	Letter from Agency external legal advisors – Confidential engagement	4	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
4	Undated	Schedule – Summary of Complaints – Produced by Agency external legal advisors	5	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
5	Undated	Index – Further Supplementary Materials	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

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No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
6	[date]	Letter from Agency external legal advisors - Confidential engagement	5	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
7	Undated	Summary of complaints	8	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
8	Undated	CFA Volunteer Code of Conduct	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
9	Undated	CFA Volunteerism Strategy 2015-2020	20	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
10	[date]	CFA Policy – Equal Opportunity (EO) & Diversity	6	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
11	[date]	CFA Policy – Prevention of Discrimination, Harassment, Bullying or Violence at CFA	11	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

Annexure 1 – Schedule of Documents

No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
12	[date]	CFA Procedure – Complaint Resolution	18	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
13	[date]	Volunteer Discipline Procedure	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
14	[date]	Strategic Policy – 2. Integrity	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
15	[date]	Code of Conduct For Victorian Public Sector Employees	44	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
16	[date]	Statement	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
17	[date]	Statement	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

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No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
18	[date]	Signed Statement	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
19	[date]	Statement	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
20	[date]	Statement	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
21	[date]	Statement	4	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
22	[date]	Statement	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
23	[date]	Statement	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

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No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
24	[date]	Statement	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
25	[date]	Statement	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
26	[date]	Statement	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
27	[date]	Statement	4	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
28	[date]	Statement	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
29	Undated	Statement	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

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No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
30	[date]	Statement	4	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
31	[date]	Statement	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
32	[date]	Statement	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
33	[date]	Statement	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
34	[date]	Statement	4	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
35	[date]	Statement	4	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

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No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
36	[date and time]	Email chain	5	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
37	[date and time]	Email chain	4	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
38	[date and time]	Email chain	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
39	[date and time]	Email chain	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
40	[date and time]	Email chain	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
41	[date and time]	Email chain	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

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No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
42	[date and time]	Email chain	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
43	[date and time]	Letter	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
44	[date and time]	Email chain	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
45	[date and time]	Email chain	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
46	[date]	Preliminary Assessment – Draft	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
47	[date]	Email chain	4	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

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No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
48	[date]	Letter -RE: Meeting	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
49	[date and time]	Email (with 2 page attachment)	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
50	[date and time]	Email (with 2 page attachment)	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
51	[date and time]	Email - Complaint	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
52	[date and time]	Email – Complaint	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.
53	[date and time]	Email – Letter of Complaint	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.

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No.	Date of document	Title or description of document	No. of pages	Agency decision	OVIC decision	OVIC comments
54	[date and time]	Email (with 2-page attachment)	3	Refused in full Section 32(1)	Refuse in full Section 32(1)	Sections 32(1) and 25: Attachment to Document 1. See comments for Document 1.