

Notice of Decision and Reasons for Decision

Applicant:	'DZ7'
Agency:	Victorian Government Solicitor's Office
Decision date:	13 May 2022
Exemptions and provisions considered:	Sections 25, 32(1)
Citation:	'DZ7' and Victorian Government Solicitor (Freedom of Information) [2022] VICmr 25 (13 May 2022)

FREEDOM OF INFORMATION – legal advice – legal professional privilege – emails – communications between lawyer and client

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, however, the Agency determined further information in Document 1 can be released to the Applicant during the review.

I am satisfied information in the documents is exempt under section 32(1). Given my decision on section 32(1), it is not necessary to consider the application of section 33(1) to information in the documents.

Where I am satisfied it is practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to certain documents is granted in part. Where it is not practicable to do so, access to documents is refused in full.

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

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

13 May 2022

Reasons for Decision

Background to review

1. The Applicant made a request to the Department of Justice and Community Safety for access to the following documents:

... all correspondence between the Attorney-General of Victoria and [named individual], [email address], a government solicitor, in regard to my, [Applicant], [description of] application and decision.
2. The request was transferred to the Agency under section 18.
3. In its decision, the Agency identified 19 documents falling within the terms of the Applicant's request. It decided to refuse access to all but one of the documents in full, releasing the remaining document in part.
4. The Agency relied on the exemptions in sections 32(1) and 33(1) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Review Application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the documents subject to review.
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 submission 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 exemptions

Section 32(1) – Documents affecting legal proceedings

11. Section 32(1) provides a document is exempt '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'.
12. A document is 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;

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.
13. The Agency submits the documents subject to review are communications between a client and solicitor made for the sole purpose of providing legal advice in relation to legal proceedings.
 14. The documents are emails between the Office of the Attorney-General and the Agency. The Agency provides legal services to ministers and officers in the Victorian Public Service.
 15. Having reviewed each of the documents, I accept they are confidential communications between the Office of the Attorney-General (**the client**) and its legal advisers (**the Agency**), provided for the dominant purpose of obtaining or providing legal advice in relation to pending legal proceedings.
 16. In forming this view, I am satisfied:
 - (a) each of the documents contains communications between the Office of the Attorney-General and the Agency for the purpose of seeking and providing legal advice in relation to pending litigation;
 - (b) the Agency is staffed with inhouse lawyers for the purposes of providing legal advice, including to the Office of the Attorney-General; and
 - (c) lawyers within the Agency are qualified to provide legal advice.
 17. 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 There is no information before me to suggest legal professional privilege has been waived.
 18. For the above reasons, I am satisfied information in the documents is exempt under section 32(1). Where I have decided a document is exempt under section 32(1), I have not considered the application of section 33(1) to the same information.
 19. The Schedule of Documents at **Annexure 1** sets out my decision in relation to each document with respect to section 32(1).

Section 25 – Deletion of exempt or irrelevant information

20. 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.
21. 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

² *Mann v Carnell* (1999) 201 CLR 1 at [28].

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].

22. I have considered the effect of deleting exempt information from certain documents. In my view, it is not practicable for the Agency to delete the exempt information from most of the documents, because it would render the documents meaningless. Where the Agency has already released a document in part, I consider it remains practicable to provide the Applicant with an edited copy of the relevant document.

Conclusion

23. On the information before me, I am satisfied information in the documents is exempt under section 32(1).
24. Where it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25, access is granted in part. Where it is not practicable to do so, access is refused in full.

Review rights

25. 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
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁶
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁷
28. 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.
29. 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

When this decision takes effect

30. My decision does not take effect until the Agency's 14-day review period expires.
31. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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).

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Email chain and attachment	21	Refused in full Sections 32(1), 33(1)	Release in part Sections 32(1), 25 <ul style="list-style-type: none"> The email thread is exempt in full under section 32(1) and is not to be released. The attachment is to be released to the Applicant in full. 	<p>During the course of the review, the Agency located the attachment to this email chain. The Agency does not claim the attachment is exempt.</p> <p>Section 32(1): I am satisfied the document is exempt under section 32(1) for the reasons provided in the Notice of Decision, above.</p> <p>Section 25: 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.</p>
2.	[date]	Email chain	2	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	<p>Section 32(1): See comments for Document 1.</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25 as it would render the document meaningless.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
3.	[date]	Email chain	3	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
4.	[date]	Email chain	3	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
5.	[date]	Email chain	4	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
6.	[date]	Email chain and two attachments	14	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): The document comprises of an email chain and attached memoranda of advice between the Office of the Attorney-General and its legal advisers. I consider these are confidential communications that were made for the dominant purpose of obtaining legal advice

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						on pending litigation and are exempt under section 32(1). Section 25: See comments for Document 2.
7.	[date]	Email chain	2	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
8.	[date]	Email chain	2	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
9.	[date]	Email chain	3	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32: See comments for Document 1. Section 25: See comments for Document 2.
10.	[date]	Email chain	3	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
						Section 25: See comments for Document 2.
11.	[date]	Email chain	3	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
12.	[date]	Email chain	4	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
13.	[date]	Email chain	4	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
14.	[date]	Email chain	4	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.

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15.	[date]	Email chain and attachment	11	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 6. Section 25: See comments for Document 2.
16.	[date]	Email chain	6	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
17.	[date]	Email chain	6	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
18.	[date]	Email chain	6	Refused in full Sections 32(1), 33(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 2.
19.	[date]	Email chain	1	Released in part	Release in part Sections 32(1), 25	Section 32(1): See comments for Document 1.

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				Sections 32(1), 33(1)	No further information in this document is to be released to the Applicant, as I am satisfied it is exempt under section 32(1) and is to remain deleted in accordance with section 25.	<p>Section 33(1): As I am satisfied the information is exempt under section 32(1), it is not necessary to consider section 33(1) to the same information.</p> <p>Section 25: See comments for Document 1.</p>