

## Notice of Decision and Reasons for Decision

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Applicant:	'EN3'
Agency:	Department of Premier and Cabinet
Decision date:	01 June 2022
Exemptions and provisions considered:	Sections 32(1), 25
Citation:	'EN3' and Department of Premier and Cabinet ( <i>Freedom of Information</i> ) [2022] VICmr 148 (3 June 2022)

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FREEDOM OF INFORMATION – COVID-19 pandemic – public health directions – legal advice – Cabinet documents – legal professional privilege – irrelevant information

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 differs from the Agency's decision.

Having reviewed the documents, I am satisfied Documents 1 and 3 are not relevant to the terms of the Applicant's request on the basis they do not contain information relating to legal advice referred to in a specific press conference.

In relation to Document 2, I am not satisfied the information relevant to the Applicant's request terms contained within it is exempt from release under section 32(1).

As I am satisfied it is practicable to provide the Applicant with an edited copy of Document 2 with irrelevant information deleted in accordance with section 25, access to relevant parts of Document 2 is granted 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

01 June 2022

## Reasons for Decision

### Background to review

1. On [date], the Applicant made a request to the Agency for access to the following documents:

On the 28th of June 2020 during a Covid19 update to the press, by Victorian Premier Daniel Andrews, Mr Andrews stated that the legal advice provided to the Victorian Government was that they could not legally charge for hotel quarantine. I have provided the relevant news item and text of the relevant quotes below.

Quote from Daniel Andrews streamed live at a Victorian Government press conference on the 28th of June 2020. The news piece placed on YouTube was posted by SBS Australia. Link below.

<https://youtu.be/m2xNaKF-Ssl>

The quote below starts at timestamp 40:30.

*"I looked at the notion of charging people for the hotel quarantine, the legal advice to us is that we can't do that. To make somebody pay for their own detention would be a truly unique arrangement. That is not something we use in any of our custodial facilities, and not something that would withstand challenge."*

Daniel Andrews then goes onto say:

*"So again, you'll get suggestions from different quarters from time to time, it's part of a democratic system, but we've had a good look at that one for the purposes of budget more than anything else and sadly we're not able to do that. That would have saved the tax-payer one hundred million dollars, perhaps more. This is not a cheap thing, it does cost a lot [sic]..."*

I am requesting the legal advice Daniel Andrews is referring to in this statement which specifically indicated to the Victorian Government that they cannot legally charge people for hotel quarantine in Victoria. This legal advice will need to contain the legal reasons for that decision that the Victorian Government subsequently adopted, at that time, in relation to not charging returnees for quarantine.

2. On [date], the Agency made a decision in which it refused to grant access to documents in accordance with the Applicant's request under section 25A(5). In doing so, the Agency was not required to identify any documents relevant to the request on grounds all documents to which the request relates, should any exist, would be exempt under section 32(1). (**Previous decision**)
3. The Applicant sought OVIC review of this previous decision. On [date], I made my decision on this matter. I was not satisfied it was apparent from the nature of the documents, as described in the request, that all documents to which the request relates would be exempt under section 32(1). The effect of my decision was that the Agency was required to search for and identify all documents relevant to the terms of the Applicant's request and assess those documents in accordance with the FOI Act. (**Previous review**; OVIC reference [number].)
4. In line with this previous review decision, the Agency processed the Applicant's request and identified three documents falling within the terms of the Applicant's request. The Agency refused access to the documents in full, relying on the exemption under section 32(1). 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 under section 32(1). (**Current review**)
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 submissions received from the parties.
9. I note the Agency sought to rely on submissions made to OVIC for the previous review concerning its refusal of access to the requested documents under section 25A(5). For this reason, any excerpts referring to agency submissions are submissions I have considered as part of a previous review.
10. In undertaking my current 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.
12. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision to be the 'correct or preferable decision'.<sup>1</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

### **Documents 1 and 3**

13. Document 1 is a Joint Memorandum of Advice and Document 3 is an Internal Note of the Office of General Counsel.
14. Having carefully reviewed these documents, I am satisfied they do not contain the specific legal advice the Premier communicated at a press conference.
15. Having considered the above, I am of the view that Documents 1 and 3, as well as certain information in Document 2, fall outside the terms of the Applicant's request as they do not contain information about the legal advice that advises the Victorian Government cannot charge people for hotel quarantine in Victoria.
16. As such, I consider Documents 1 and 3 are outside the scope of the Applicant's request and accordingly I have not considered the application of section 32(1) to the information in these documents as this information is irrelevant.

### **Review of exemptions**

#### ***Section 32(1) – Documents affecting legal proceedings***

17. The Agency exempted Documents 1, 2 and 3 under section 32(1) in full. Document 1 is a Joint Memorandum of Advice, Document 2 is Advice for the Office of the Premier and Document 3 is an Internal Note of the Office of General Counsel.
18. 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**).
19. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>2</sup>

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<sup>1</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

<sup>2</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).

- (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
  - (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.
20. The High Court of Australia has held the purpose of legal professional privilege or client 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>3</sup>
21. The dominant purpose for which a confidential communication was made will determine whether the exemption applies.<sup>4</sup>
22. The purpose a document is brought into existence is a question of fact.<sup>5</sup> While it is necessary to consider the intentions of the person involved in deciding to create and use the document, the intention of the author or person who authorised the document is not conclusive.
23. Legal professional privilege extends to communications between government agencies and their legal officers.<sup>6</sup>
24. 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 (**waiver of privilege**).<sup>7</sup>

## **Document 2**

25. Document 2 is legal advice prepared by the Agency Office of the General Counsel for the Office of the Premier. The advice was exchanged between multiple persons within the public service across government agencies.
26. The document appears to be a communication between a lawyer and their client (the Agency).
27. As stated above, I have considered the document and I am satisfied certain information in this document falls outside the terms of the Applicant's request as it does not contain information about the legal advice that advises the Victorian Government cannot charge people for hotel quarantine in Victoria.

<sup>3</sup> *Grant v Downs* (1976) 135 CLR 674 at [19].

<sup>4</sup> *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

<sup>5</sup> *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* [2002] VSCA 59 at [14]

<sup>6</sup> *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; 59 ALJR 749; [1985] HCA 60 at [510], [521–522] and [530–531]. (CLR); *Waterford v Commonwealth* (1987) 163 CLR 54; 61 ALJR 350; [1987] HCA 25 at [62] and [81–82].

<sup>7</sup> Sections 122(2) and (3) of the *Evidence Act 2008* (Vic).

28. For this reason, I will only consider the paragraph in Document 2 that contains the information the Applicant has sought access to as part of my review.
29. In my view, disclosure of the document would directly reveal the content and substance of confidential legal advice.
30. I am satisfied the document attracts legal professional privilege, such that it contains details of a confidential communication between a client and a lawyer that was made for the dominant purpose of providing legal advice.

*Has privilege been waived?*

31. 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.<sup>8</sup>
32. Implied waiver of privilege occurs when a positive act of a party is inconsistent with the maintenance of confidentiality in the communication, irrespective that waiver of privilege was not the subjective intention of the party.
33. A document may also be privileged in part. As such, the fact a document contains non-privileged material does not mean the document, in its entirety, ceases to be privileged.<sup>9</sup> In this respect, the High Court of Australia has held:

If a communication satisfies the description of a document brought into existence for the sole purpose of enabling a confidential professional communication between a client and his legal adviser in connexion with pending or anticipated legal proceedings then in our opinion it follows that it is an exempt document within the meaning of s. 42 of the Act. In such a case it is not to the point that the document may contain advice which relates to matters of policy as well as of law. It is the connexion between the document and legal proceedings that establishes its character and thus attracts the privilege.<sup>10</sup>

34. In relation to whether any issue of waiver or loss of privilege has arisen in relation to the document, the Agency submitted the following:

Privilege is not waived unless there is clear conduct or language which evidences an intention to waive privilege either expressly or by necessary implication.

35. Importantly, disclosure of the conclusion of legal advice does not of itself waive legal professional privilege. Whether a limited disclosure of the existence, and the effect, of legal advice, is inconsistent with maintaining confidentiality in the terms of advice will depend upon the circumstances of the case. Determining whether there has been a waiver of privilege is a matter of fact and degree and should take into account the conduct of the privilege-holder after the creation of the document. The Agency submits that there is no such clear conduct or language on the part of the Premier evidencing “an intention to waive LPP”.
36. It is well established that a positive act of a party inconsistent with the maintenance of confidentiality in the communication, irrespective of whether waiver was a subjective intention of the party,<sup>11</sup> will amount to a waiver of privilege. I do not agree with the Agency’s submission that only clear conduct or language on the part of the Premier evidencing an intention to waive LPP, can result in waiver of legal privilege.

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<sup>8</sup> *Mann v Carnell* (1999) 201 CLR.

<sup>9</sup> *Waterford v Commonwealth* (1987) 163 CLR 54 at [66]-[67].

<sup>10</sup> *Waterford v Commonwealth* (1987) 163 CLR 54 at [67].

<sup>11</sup> *Mann v Carnell* (1999) 201 CLR.

37. Disclosure of the conclusion or substance of legal advice is considered a waiver of privilege.<sup>12</sup> This is in contrast to the disclosure of the existence or fact of legal advice, which is not generally considered a waiver of privilege.<sup>13</sup> The latter scenarios are limited to where a client makes limited disclosure, only disclosing the fact that legal advice has been sought and not disclosing the conclusion of that advice.<sup>14</sup>
38. Having decided the legal advice to which the Applicant has sought access is the subject of legal professional privilege, I have considered whether privilege has been lost due to the Premier's conduct. In my view, based on the information before me, the Premier acted inconsistently with the maintenance of legal privilege by revealing the conclusion of the legal advice at the press conference on 28 June 2020. Whether or not the Premier subjectively intended to waive privilege is not relevant.
39. Having reviewed Document 2, I am satisfied certain information which the Agency exempted from released under section 32(1) is no longer subject to privilege.
40. Accordingly, I am not satisfied certain information in Document 2 is exempt from release under section 32(1).
41. My decision on the application of section 32(1) to Document 2 is outlined in the Schedule of Documents in **Annexure 1**.

### **Section 25 – Deletion of exempt or irrelevant information**

42. 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.
43. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>15</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>16</sup>
44. As detailed above, while the Agency exempted Document 1 and 3 under section 32(1) in full, I consider Document 1 and 3, as well of part of Document 2, do not contain information relating to legal advice the government relied on that the Premier explicitly waived privilege to as part of a press conference. Rather this information is legal advice that covers many different issues that were not discussed at the press conference. As such, I consider Documents 1 and 3 in full and part of Document 2 fall outside of terms of the Applicant's request and therefore this content is irrelevant information under section 25.
45. In relation to Document 2 only, I am satisfied it is practicable to provide the Applicant with an edited copy with irrelevant information deleted in accordance with section 25.
46. My decision on section 25 is set out in the Schedule of Documents in **Annexure 1** for each document.

### **Conclusion**

47. I have determined that Documents 1 and 3 in full, and parts of Document 2, fall outside the terms of the Applicant's request under section 25, and I have excluded this content from my review.
48. On the information available, I am satisfied the relevant information in Document 2 is not exempt under section 32(1) and have determined to release this document.

<sup>12</sup> *Attorney General for the State of South Australia v Seven Network (Operations) Ltd* [2019] SASFC 36.

<sup>13</sup> *Osland v Secretary to the Department of Justice* [2008] HCA 37.

<sup>14</sup> *Osland v Secretary to the Department of Justice* [2008] HCA 37; *Nine Films and Television Pty Ltd v Ninox Television Ltd* (2005) 65 IPR 442.

<sup>15</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].

<sup>16</sup> *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].

49. My decision on each document is provided in the Schedule of Documents in **Annexure 1**.

### **Review rights**

50. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>17</sup>
51. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>18</sup>
52. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>19</sup>
53. 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.
54. 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>20</sup>

### ***When this decision takes effect***

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

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<sup>17</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>18</sup> Section 52(5).

<sup>19</sup> Section 52(9).

<sup>20</sup> Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Document 1	14	Refused in full Section 32(1)	Not relevant Section 25	<b>Section 25:</b> I am satisfied the document does not contain information relating to legal advice the government relied on that the Premier explicitly waived privilege to as part of a press conference, rather it is legal advice that covers many different issues that were not discussed at the press conference. As such, I consider Document 1 falls outside of the Applicant's request terms and therefore irrelevant.
2.	Undated	Document 2	7	Refused in full Section 32(1)	Release in part Sections 32(1), 25  The document is to remain deleted except for the following relevant information on page 1 which is not exempt under section 32(1):  <ul style="list-style-type: none"> <li>The first three sentences underneath the first blue heading.</li> </ul>	<b>Section 32(1):</b> For the reasons outlined in the Notice of Decision above, certain information in the document is not exempt from release under section 32(1) as it is no longer subject to privilege.  <b>Section 25:</b> I am satisfied it is practicable to provide the Applicant with an edited copy of this document with irrelevant information deleted in accordance with section 25
3.	Undated	Document 3	6	Refused in full Section 32(1)	Not relevant Section 25	<b>Section 25:</b> See comments for Document 1.