

## Notice of Decision and Reasons for Decision

---

Applicant: 'EH5'  
Agency: Transport Accident Commission  
Decision date: 11 February 2022  
Exemption considered: Section 32(1)  
Citation: 'EH5' and Transport Accident Commission (*Freedom of Information*)  
[2022] VICmr 96 (11 February 2022)

---

FREEDOM OF INFORMATION – investigation report – legal professional privilege – litigation privilege – documents affecting legal proceedings – documents prepared by an external party

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.

As the Agency no longer claims Document 1b is exempt, it is to be released in full and is not subject to review.

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

I am satisfied the documents subject to review are exempt from release under section 32(1).

As 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, access to the 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.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
11 February 2022

## Reasons for Decision

### Background to review

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

Information/File re [Applicant's name] provided to the TAC from the Private Investigator hired by the TAC on [date].
2. The Agency identified four documents falling within the terms of the Applicant's request and refused access to all documents in full under sections 30(1) and 32(1). The Agency's decision letter sets out the reasons for its decision.

### Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. During the review, the Agency agreed to release Document 1b in full. Accordingly, that document is not subject to review and is to be released to the Applicant by the Agency following my decision.
5. I have examined a copy of the documents 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 and submissions 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 – Legal professional privilege***

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'.
11. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:<sup>1</sup>
  - (a) between the client (or their 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;

---

<sup>1</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).

- (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. 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>2</sup>

13. The dominant purpose for which a confidential communication was made will determine whether the exemption applies.<sup>3</sup> Where mixed purposes exist, the paramount purpose of the communication is used.<sup>4</sup>
14. The question of whether litigation was reasonably contemplated or reasonably anticipated at the relevant time is a question of fact, determined by reference to objective criteria.<sup>5</sup>
15. Whether legal proceedings are anticipated requires consideration of whether there was, at the relevant time, a real prospect of litigation, as distinct from a mere possibility.<sup>6</sup>
16. The documents are external reports prepared by an external investigator who was engaged by the Agency's solicitor in relation to a proceeding involving the Applicant before the County Court of Victoria.
17. I acknowledge the documents were not prepared by the Agency's solicitor. However, litigation privilege applies even in situations where a document was prepared by non-lawyers. For example, in *Setka v Dalton (No 2)*,<sup>7</sup> the Supreme Court of Victoria held:

In many cases where litigation privilege is claimed, often all the evidence that is necessary to support such a claim is evidence concerning the existence of a current or anticipated legal proceeding ...

...While most of these documents record communications between non-lawyers, it is evident from the subject matter and the contents of the documents that the communications were made for the purpose of, or in connection with, Boral's prosecution of the contempt proceeding and the damages proceeding

18. Based on the information provided by the Agency and the Applicant, I am satisfied the documents were prepared for the dominant purpose of preparation for a legal proceeding in circumstances where there was a real prospect of litigation.
19. Therefore, I am satisfied the documents contain confidential communications between the Agency's solicitors and a third party for the purpose of litigation.
20. 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

<sup>2</sup> *Grant v Downs* (1976) 135 CLR 674 at [19].

<sup>3</sup> *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

<sup>4</sup> *Martin v Melbourne Health (Review and Regulation)* [2019] VCAT 1190 at [35].

<sup>5</sup> *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* 4 VR 332; [2002] VSCA 59 at [22].

<sup>6</sup> *Ibid*; *In the matter of Southland Coal Pty Ltd* [2006] NSWSC 899 at [49].

<sup>7</sup> *Setka v Dalton (No 2)* [2021] VSC 604 at [84]-[85]

that confidentiality – for instance where the substance of the information has been disclosed with the client’s express or implied consent.<sup>8</sup>

21. There is no information before me to demonstrate legal professional privilege has been waived in relation to the documents.
22. Accordingly, I am satisfied the documents are exempt under section 32(1).
23. My decision in relation to section 32(1) is outlined in the Schedule of Documents in **Annexure 1**.

#### ***Section 30(1) – Internal working documents***

24. As I am satisfied the documents are exempt under section 32(1), it is not necessary for me to consider the application of section 30(1).

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

25. 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.
26. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>9</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>10</sup>
27. I have considered whether it is practicable to provide the Applicant with an edited copy of the documents with exempt information deleted from the documents in accordance with section. Given the purpose for which the documents were created and my decision in relation to section 32(1), I am satisfied each of the documents is exempt in full.

#### **Conclusion**

28. On the information before me, I am satisfied the documents are exempt in full under section 32(1).
29. As the Agency no longer claims document 1b is exempt, it is to be released in full and is not subject to review.

#### **Review rights**

30. 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>11</sup>
31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>12</sup>
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>13</sup>

---

<sup>8</sup> *Mann v Carnell* (1999) 201 CLR 1 at [28].

<sup>9</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>10</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>11</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>12</sup> Section 52(5).

<sup>13</sup> Section 52(9).

33. 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.
34. 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>14</sup>

---

<sup>14</sup> Sections 50(3F) and 50(3FA).

## Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1a.	[date]	Report	4	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	<p><b>Section 32(1):</b> I am satisfied this document is exempt under section 32(1) for the reasons outlined in the Notice of Decision, above.</p> <p><b>Section 25:</b> I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt deleted in accordance with section 25. Accordingly, access is refused in full.</p>
1b.	[date]	General Searches	7	Release in full  During the review, the Agency agreed to release this document in full	Release in full	Document not subject to review.
2.	[date]	Report	22	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	<p><b>Section 32(1):</b> See comments for Document 1a.</p> <p><b>Section 25:</b> See comments for Document 1a.</p>
3.	[date]	Report	6	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	<p><b>Section 32(1):</b> See comments for Document 1a.</p> <p><b>Section 25:</b> See comments for Document 1a.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
4.	[date]	Report	3	Refused in full Sections 30(1), 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1a. Section 25: See comments for Document 1a.