

Notice of Decision and Reasons for Decision

Applicant:	'DU8'
Agency:	Department of Premier and Cabinet
Decision date:	4 November 2021
Provisions considered:	Sections 25A(5), 32(1)
Citation:	'DU8' and Department of Premier and Cabinet (Freedom of Information) [2021] VICmr 315 (4 November 2021)

FREEDOM OF INFORMATION – refusal to process request on grounds all documents, should any exist, would be exempt - legal professional privilege – waiver of privilege – not satisfied all documents exempt under section 25A(5)

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 review differs from the Agency's decision.

I am not satisfied it is 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 is the Agency is 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.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

4 November 2021

Reasons for Decision

Background to review

1. 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 [the Premier] 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 [the Premier] 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."

[The Premier] 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 taxpayer one hundred million dollars, perhaps more. This is not a cheap thing, it does cost a lot [sic]..."

I am requesting the legal advice [the Premier] 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. The Agency 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). The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and correspondence received from the parties.
6. 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.
7. 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 application of section 25A(5) to refuse to grant access to documents

8. Section 25A(5) provides an agency may refuse to grant access to a request for documents, without having identified any or all of the documents, if it is apparent from the nature of the request that all documents would be exempt in full under the FOI Act, and either there is no obligation for the agency to provide the applicant with an edited copy of the documents or the applicant does not agree to receive an edited copy of the documents.
9. The power to refuse a request under section 25A(5) is carefully circumscribed. The Supreme Court of Victoria has held the power to refuse an FOI request under this provision will apply in limited circumstances where each of the following three elements are met:
 - (a) Based on the description of the documents, as requested in the FOI request, the decision maker must work out the inherent or essential quality or character of the requested documents.
 - (b) The decision maker must determine whether the documents, as described by the Applicant, would be exempt.
 - (c) From the face of the FOI request or the Applicant's agreement, there must be no scope for the agency to provide an edited copy of any of the documents.¹

What is the essential character of the document requested?

10. I am satisfied the nature or character of the requested documents, as described in the Applicant's FOI request, is apparent from the terms of their request, being documents that comprise of legal advice received by the Victorian Premier regarding whether the State can charge quarantined persons for the cost of hotel quarantine as part of the response to the COVID-19 pandemic.

Would the requested documents, as described in the FOI request, be exempt?

11. As stated above, in refusing access to the requested document under section 25A(5), the Agency submits the documents, should they exist, would be exempt in full under section 32(1).

Section 32 – Legal Professional Privilege

12. 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'.
13. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication² 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. In its decision letter, the Agency advised the following regarding the application of section 32(1):

I am satisfied that, on the face of your request, it is objectively apparent that all of the documents to which you seek access would be exempt pursuant to section 32(1) of the Act, which applies to documents which would be privileged from production in legal proceedings on the grounds of legal professional privilege.
14. In this case, the Applicant specifically requested "legal advice" and that the Agency's decision also considers the documents sought to be legal advice. Consequently, I am satisfied that the documents

¹ *Knight v Corrections Victoria* [2010] VSC 338.

² *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.

that they sought would attract legal professional privilege because the dominant purpose of these documents was to provide legal advice.

Has legal professional privilege been waived?

15. 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.³
16. 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.
17. In relation to whether any issue of waiver or loss of privilege has arisen in relation to the documents, the Applicant submitted the following:

The moment Victorian Premier Danial Andrews revealed the conclusions and gist of this legal advice, of which he made several statements about, the Premiers action became ‘inconsistent’ with maintaining legal professional privilege. Whether this was the Victorian Premiers intention or not, by revealing details about the legal information received he effectively waived the Victorian Governments right to Legal Professional Privilege.

18. In relation to whether any issue of waiver or loss of privilege has arisen in relation to the documents, 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.

19. 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”.
20. 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,⁴ will amount to a waiver of privilege. I do not agree with the Agency’s submission that without clear conduct or language on the part of the Premier evidencing an intention to waive LPP, legal privilege has not been waived.
21. Disclosure of the conclusion or substance of legal advice is considered a waiver of privilege.⁵ This is in contrast to the disclosure of the existence or fact of legal advice, which is not generally considered a waiver of privilege.⁶ 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.⁷
22. Having decided the legal advice to which the Applicant has sought access is the subject of legal professional privilege, I 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

³ *Mann v Carnell* (1999) 201 CLR.

⁴ *Mann v Carnell* (1999) 201 CLR.

⁵ *Attorney General for the State of South Australia v Seven Network (Operations) Ltd* [2019] SASFC 36.

⁶ *Osland v Secretary to the Department of Justice* [2008] HCA 37.

⁷ *Osland v Secretary to the Department of Justice* [2008] HCA 37; *Nine Films and Television Pty Ltd v Ninnox Television Ltd* (2005) 65 IPR 442.

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.

23. It is therefore not apparent the documents, should they exist, would all be exempt under section 32(1), and therefore the requirements of section 25A(5) are not met.

Third requirement – is there scope to provide an edited copy of the documents requested?

24. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable for the agency or Minister to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
25. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁸ 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 25.⁹
26. Having considered the particular circumstances of this matter, I am satisfied there may be scope to provide the Applicant with an edited copy the requested documents, should any exist, with any exempt information deleted in accordance with section 25. I am also satisfied it may be practicable to do so as it would not necessarily require substantial time and effort, and the edited documents would likely retain some meaning.
27. Accordingly, I am not satisfied the requirement under section 25A(5) for there to be no scope to provide the Applicant with edited copies of any of the documents is met in this case.
28. I have therefore determined section 25A(5) does not apply to the request.

Conclusion

29. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply to a limited category of cases only.
30. Having considered the provision in section 25A(5) and for the reasons set out above, I am not satisfied it is apparent from the terms of the Applicant’s request that all documents relevant to the request, should they exist, would be exempt under section 32(1).
31. The effect of my decision is the Agency is 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.

Review rights

32. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.¹⁰
33. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹¹

⁸ *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].

⁹ *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].

¹⁰ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹¹ Section 52(5).

34. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹²
35. 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.
36. 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.¹³

¹² Section 52(9).

¹³ Sections 50(3F) and (3FA).