

Notice of Decision and Reasons for Decision

Applicant:	'EY6'
Agency:	Department of Health
Decision date:	22 December 2022
Exemptions considered:	Sections 30(1), 32(1), 35(1)(a)
Citation:	'EY6' and Department of Health (Freedom of Information) [2022] VICmr 252 (22 December 2022)

FREEDOM OF INFORMATION – internal working documents – legal professional privilege – information provided in confidence – public interest considerations – referral of product to Therapeutic Goods Administration (TGA) – Food Standards Code – Food for Special Medical Purposes (FSMP)

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.

While I am satisfied certain information is exempt from release under sections 30(1), 32(1) and 35(1)(a), I am not satisfied other information to which the Agency refused access under sections 30(1) and 35(1)(a) is exempt from release.

Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with exempt information deleted in accordance with section 25, I have determined to grant access to the document in part.

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

22 December 2022

Reasons for Decision

Background to review

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

Email and attachment(s) sent by DHHS representative to TGA [**Therapeutic Goods Administration**] on [date] at [time], which attached an email from an external [consultant] in the Food Standards Code who provides their opinion on [product] as an FSMP [**Food for Special Medical Purposes**].

All emails, documents, meeting notes and similar items discussing the [external consultant's] (referred to in item #1), opinion on [product] as an FSMP.

2. The Agency identified five documents falling within the terms of the Applicant's request and refused access to the documents in part under sections 30(1), 33(1) and 35(1)(a).
3. The Agency's decision letter sets out the reasons for its decision.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant does not seek access to personal information in the documents. Accordingly, I will not consider the application of section 33(1).
6. During the review, the Agency sought to apply an additional exemption under section 32(1) to Document 4.
7. I have examined a copy of the documents subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered all communications and submissions received from the parties.
10. 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.
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'.¹ 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.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

Review of exemptions

Section 32(1) – Documents affecting legal proceedings

13. In its submission, the Agency sought to apply section 32(1) to Document 4. I have also considered the application of this exemption to Document 3.
14. A document will be subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:²
 - (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;
 - (a) between the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (b) 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.
15. Legal privilege extends to communications between a government agency and its inhouse lawyers, so long as the Agency's lawyers are sufficiently independent.³
16. The dominant purpose for which the confidential communication was made will determine whether the exemption applies.⁴
17. Documents 3 and 4 are emails exchanged between the Agency's Legal Services Branch and Food Safety Unit of the Agency, in relation to determining the suitability of the Applicant's product to be regulated in a certain way.
18. I am satisfied a client-lawyer relationship exists between the Legal Services Branch and Food Safety Unit for the purposes of establishing legal professional privilege.
19. I accept the email chain in Document 4 forwards emails to an inhouse lawyer which was not initially created for the purposes of obtaining legal advice. However, as I am satisfied the forwarding email was created for the purpose of obtaining legal advice, and is referred to in Document 4, I am satisfied the entire email chain attracts legal professional privilege.
20. Accordingly, I am satisfied the email chains are confidential communications made for the dominant purpose of obtaining and receiving legal advice.

Has legal professional privilege been waived?

21. 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.⁵

² *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).

³ *Waterford v The Commonwealth* [1987] HCA 25 at [4] (per Mason and Wilson JJ) and at [5] to [6] (per Brennan J).

⁴ *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49.

⁵ *Mann v Carnell* (1999) 201 CLR 1 at [28].

22. An implied waiver of privilege occurs when a positive act of a party is inconsistent with maintenance of confidentiality in the communication, irrespective that a waiver of privilege was not the subjective intention of the party.
23. There is no information before me to indicate legal professional privilege has been waived under these circumstances.
24. Accordingly, I am satisfied Documents 3 and 4 are exempt in full under section 32(1).
25. My decision in relation to section 32(1) is set out in the Schedule of Documents in **Annexure 1**.

Section 35(1)(a) – Information communicated to an agency that would be exempt if generated by an agency

26. A document is exempt under section 35(1)(a) if two conditions are satisfied:
 - (a) disclosure would divulge information or matter communicated in confidence by or on behalf of a person or a government to an agency or a Minister; and
 - (b) the information would be exempt matter if it were generated by an agency or Minister.

Was the information communicated in confidence to the Agency?

27. The Agency refused access to Document 2 in full under section 35(1)(a) on grounds the document is email correspondence between an Agency officer and an external consultant, contains information communicated in confidence and would be exempt from release under section 30(1) had it been generated by the Agency.
28. I am not satisfied the originating email from the Agency officer was communicated in confidence to the Agency. Therefore, I am not satisfied this information is exempt from release under section 35(1)(a).
29. The Agency advised OVIC it did not consult with the external consultant to seek their view on whether the information was communicated in confidence and disclosure, as required under section 35(1)(a).⁶
30. Having considered the purpose of the communication, I am satisfied the consultant communicated the information to the Agency with an expectation of confidentiality in these circumstances. Therefore, I am satisfied the first condition of section 35(1)(a) is met.

Would the information be exempt from release if it were generated by the Agency?

31. The second condition requires I be satisfied that, had the consultant's email been generated by the Agency, it would be exempt from release under the FOI Act.
32. The Agency submits this information would be exempt from release under section 30(1) if it had been generated by the Agency. I note the Agency refused access to information in other documents under section 30(1). Therefore, I will consider the application of section 30(1) to all information to which it refused access under sections 30(1) and 35(1)(a) below.

⁶ Section 35(1A).

Section 30(1) – Internal working documents

33. Section 30(1) has three requirements:
- (a) the document must disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister;
 - (b) such matter must be made in the course of, or for the purpose of, the deliberative processes involved in the functions of an agency or Minister or of the government; and
 - (c) disclosure of the matter would be contrary to the public interest.
34. Section 30(3) provides that the exemption under section 30(1) does not apply to purely factual material in a document.

Do the documents disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister, or consultation or deliberation that has taken place between officers, Ministers or an officer and a Minister?

35. It is not necessary for a document to be in the nature of opinion, advice or recommendation. Rather, it is enough that release of the document would disclose matter of that nature.⁷
36. The information exempted from release under section 30(1) in Document 1 is a description of an attachment to the email from the Agency to the TGA. I am satisfied this information is factual in nature and is not exempt from release under section 30(1) by virtue of section 30(3).
37. I am satisfied Document 2 is an email thread between the Agency and an external consultant, for the purpose of seeking the consultant's professional opinion.
38. Document 5 is a record of a meeting between Agency officers and external parties, which I accept records consultation and deliberation of those persons.

Were the documents made in the course of, or for the purpose of, the deliberative process involved in the functions of an agency or Minister or of the government

39. The term 'deliberative process' is interpreted broadly and includes any of the processes of deliberation or consideration involved in the functions of an agency, Minister or government.⁸
40. In *Re Waterford and Department of Treasury (No.2)*,⁹ the former Victorian Administrative Appeals Tribunal held:

... "deliberative processes" [is] wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency... In short, ...its thinking processes — the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action.

41. I am satisfied the documents were created in the course of the Agency's deliberative processes in relation to how [product name] should be regulated and whether it is a Food for Special Medical Purposes (**FSMP**).

⁷ *Mildenhall v Department of Education* (1998) 14 VAR 87.

⁸ *Brog v Department of Premier and Cabinet* (1989) 3 VAR 201 at 208.

⁹ [1984] AATA 67; (1984) 5 ALD 588; 1 AAR 1 at [58].

Would disclosure of the documents be contrary to the public interest?

42. In determining if disclosure of a document would be contrary to the public interest, I must consider all relevant facts and circumstances remaining mindful the object of the FOI Act is to facilitate and promote the disclosure of information. In doing so, I have given weight to the following relevant factors:¹⁰
- (a) the degree of sensitivity of the issues discussed in the documents and the broader context giving rise to the creation of the documents;
 - (b) the right of every person to gain access to documents under the FOI Act;
 - (c) the stage of a decision or status of policy development or a process being undertaken at the time the communications were made;
 - (d) whether disclosure of the documents would be likely to inhibit communications between Agency officers, essential for the Agency to make an informed and well-considered decision or participate fully and properly in a process in accordance with the Agency's functions and other statutory obligations;
 - (e) whether disclosure of the documents would give merely a part explanation, rather than a complete explanation for the taking of a particular decision or the outcome of a process, which the Agency would not otherwise be able to explain upon disclosure of the documents;
 - (f) the impact of disclosing documents in draft form, including disclosure not clearly or accurately representing a final position or decision reached by the Agency at the conclusion of a decision or process; and
 - (g) the public interest in the community being better informed about the way in which the Agency carries out its functions, including its deliberative, consultative and decision making processes and whether the underlying issues require greater public scrutiny.

43. In its decision, the Agency states in relations to emails between the Agency and external parties:

Opinions and advice in this email have been tentatively expressed and are an initial opinion provided as part of the decision making process. It is considered that the email would disclose pre-decisional deliberation and would undermine the decision making process. The release of this material would be contrary to the public interest as it is likely to inhibit frankness and discourse from officers, and the disclosure of this initial opinion would only provide a part explanation of the decision ultimately made by the department.

44. In relation to the process of determining whether a product is an FSMP, the Agency submits:

... [T]he formal determination whether a product is a Food for Special Medical Purposes (FSMP) is more under the purview of the TGA, as they ultimately may declare whether a product is or is not a "therapeutic good" and regulate the product accordingly. As the definition of "therapeutic good" excludes a product that falls under the Food Standards Code (Code) (such as FSMP's), the department's advice was sought as the regulator of the Code in Victoria as to whether the product would meet the definition of a FSMP.

However, as noted above, the formal determination is ultimately up to the TGA to make. Therefore, queries regarding the formal determination process for whether a product is or is not a FSMP, and any associated appeal process, is more a question for the TGA.

The Food Standards Australia and New Zealand (FSANZ) are the responsible body for managing the Code. In terms of an appeal process, an application or proposal to amend the Code can be made to FSANZ. FSANZ would review the scientific basis of the request, and any information on the safety and efficacy and suitability of the compound.

¹⁰ *Hulls v Victorian Casino and Gambling Authority* (1998) 12 VAR 483.

FSANZ may reject an application or abandon work on a proposal at which point there is an opportunity for the applicant or requestor to appeal to the Administrative Appeals Tribunal.

45. This information indicates there is no option to appeal an Agency decision that a product is not an FSMP, only to appeal an eventual decision of the TGA that the product is a therapeutic good.
46. I consider there is a broad public interest in members of the public being able to better understand decisions made by government agencies, which directly affect them or their business. This is consistent with the object of the FOI Act to create a general right to information in the possession of government or other public bodies, limited only by exceptions and exemptions necessary to protect 'essential public interests, privacy and business affairs'.
47. Accordingly, I am of the view that transparency of the Agency's interpretation and application of the Food Standards Code would serve the public interest where there is no countervailing public interest against disclosure.
48. I will consider Document 2 and Document 5 more specifically, below.

Document 2 – Request for consultant's opinion and their response

49. The Agency requested a consultant's opinion in relation to the interpretation of the Food Standards and its application to [product]. Document 2 also contains an Agency officer's opinion on these matters.
50. The Agency submits:

This view was given at an early stage of the decision, before subsequent meetings internally and with the TGA to continue to deliberate on this matter. Disclosure of such an informal view from an officer would inhibit frank and honest deliberation between an officer and an engaged [consultant]; this would delay and even detract from the department performing its functions, as expert advice is essential in the department providing a full and well-informed response.

It would also be against the public interest to disclose the contents of the consultant's opinion. Consultants such as these are engaged to provide quick and efficient expert advice to assist in the department's decision making. If the informal and preliminary advice from experts engaged by the department is disclosed, this would inhibit their frankness and candour, thus impeding the department's functions.

...

Both of these opinions made at the early stage of the decision-making process contain factors and considerations that were not included in the department's final and formal advice to the TGA.

51. I acknowledge the correspondence was prepared at an early stage of a deliberative process and does not represent the Agency's final view. Nevertheless, I am not satisfied disclosure would be contrary to the public interest for the following reasons:
 - (a) Parts of the correspondence refers to publicly available instruments, or is information of which I am satisfied the Applicant would already be aware.
 - (b) Disclosure would add to the Applicant's understanding of the Agency's decision making process and the basis upon which the product was ultimately referred to the TGA.
 - (c) While I acknowledge the Agency's submission that certain factors discussed in the correspondence did not contribute to the Agency's final advice to the TGA, on the information before me, I am satisfied information in the document contributes to the advice provided to the TGA. In my view, it is clear on the face of the document that the opinions are preliminary and do not constitute the Agency's final decision.
 - (d) I do not accept disclosure would affect the quality of advice prepared by Agency officers or external consultants in the future, where it was provided in the course of discharging their professional obligations or fulfilling a fee for service arrangement.

(e) I consider the remaining factors referenced in the document would be reasonably expected to be considered as context in the early stages of the Agency's decision making process. As such, I am of the view the Applicant is capable of understanding this information did not form the sole basis for the referral to the TGA. If the Agency considers disclosure of the information would mislead the Applicant about the matters contributing to the advice to the TGA, it is open to them to provide clarification to the Applicant.

52. However, the final paragraph of the external consultant's email includes information falling outside the scope of the Agency's inquiry. Therefore, as it was provided outside the consultant's professional obligations, I consider the Agency's ability to obtain this additional information in the future may be impacted by its disclosure. In any case, the opinion expressed is not directly related to whether [product] is a FSMP. I am satisfied this information is exempt from release under section 35(1)(a) as it would be exempt from release under section 30(1) if it had been generated by the Agency.

53. Further, where the Agency officer provided views and commentary that I consider go beyond the information required to obtain an opinion from the external consultant, I am satisfied disclosure of this information would deter the provision of such information in the future, and detract from the Agency's ability to discuss potential issues in a fullsome and open manner. Therefore, I am satisfied this information is exempt from release under section 30(1).

Document 5 – Meeting notes from TGA meeting

54. The Agency submits:

In respect of the meeting notes, in situations such as these, where it appears the jurisdiction of multiple state and Commonwealth agencies overlap, it is essential that these agencies are able to have frank discussions in relation to the matter. The disclosure of the informal and frank discussions about the regulation of [product] would undermine this trust and thus inhibit discussions between agencies. This would be a detriment to the decision-making process for both agencies, as without a full, unencumbered exchange of advice and recommendations, this may result in a delay in decision making or in improper decisions being made.

55. Having reviewed the document, I am satisfied it contains short-form handwritten notes of a meeting which are preliminary in nature and were intended to record a range of initial issues associated with the regulation of the Applicant's product. Often, notes of this nature are brief and do not convey all details of a discussion.

56. I consider conversations of the nature recorded in the document are useful in determining the best course of action to pursue at the beginning of a regulatory process and can often include details of ancillary issues that are not directly relevant to Agency's final or more considered course of action or decision. I am satisfied disclosure of this document in this instance may detract from the fulsome discussion in collaborative settings and the recording of discussions such as this in the future.

57. Further, the document contains details of an ongoing regulatory process. I am satisfied it would be contrary to the public interest to release this document as it could compromise the Agency's ongoing work in this area.

58. As such, I am satisfied Document 5 is exempt from release under section 30(1).

Conclusion on the application of sections 30(1) and 35(1)(a)

59. On balance, I am satisfied certain information in the documents is exempt from release under section 30(1).

60. Where I am satisfied the information was provided by the external consultant in confidence, and I am satisfied it would be exempt from release under section 30(1) if it had been generated by the Agency, I am satisfied this information is exempt from release under section 35(1)(a).

61. My decision in relation to sections 30(1) and 35(1)(a) is set out in the Schedule of Documents in **Annexure 1**.

Section 25 – Deletion of exempt or irrelevant information

62. 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.
63. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’¹¹ 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 25.¹²
64. I have considered the information the Agency deleted from the documents under section 33(1), which is irrelevant for the purposes of this review.
65. There is a small amount of information in the documents that I consider does not identify a third party and is relevant to the terms of the Applicant’s request. I have determined this information can be released to the Applicant.
66. In relation to all other information to which the Agency refused access under section 33(1), I am satisfied it constitutes the personal affairs information of a third party and falls outside the scope of the Applicant’s request for review.
67. I have considered the effect of deleting irrelevant and exempt information from the documents.
68. In my view, it is practicable to delete the irrelevant and exempt information from Documents 1 and 2, as to do so would not require substantial time and effort, and the edited documents would retain meaning.
69. However, I am satisfied it is not practicable to delete irrelevant and exempt information from Documents 3, 4 and 5 as the edited documents would not retain meaning.
70. My decision in relation to section 25 is set out in the Schedule of Documents in **Annexure 1**.

Conclusion

71. On the information before me, I am satisfied certain information in the documents is exempt from release under sections 30(1), 32(1) and 35(1)(a).
72. Where I am satisfied it is practicable to provide the Applicant with an edited copy of a document with irrelevant and exempt information deleted in accordance with section 25, access to the document is granted in part.
73. A marked-up copy of the documents indicating exempt or irrelevant information in accordance with my decision has been provided to the Agency.

¹¹ *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].

¹² *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].

Review rights

74. 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.¹³
75. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
76. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁵
77. 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.
78. 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.¹⁶

Third party review rights

79. As I have determined to release documents that contain documents claimed exempt under section 35(1)(a), practicable, I am required to notify those persons of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.¹⁷
80. In this case, I am satisfied it is practicable to notify the relevant third party of their review rights and confirm they will be notified of my decision on the date of decision.

When this decision takes effect

81. My decision does not take effect until third party's 60 day review period expires.
82. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

¹³ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁴ Section 52(5).

¹⁵ Section 52(9).

¹⁶ Sections 50(3F) and 50(3FA).

¹⁷ Section 50(3AB) and 52(3).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Email chain	12	Released in part Sections 30(1), 33(1)	Release in part Section 25 The document is to be released in accordance with the marked-up copy provided to the Agency.	<p>Section 30(1): I am satisfied this information is not exempt from release under section 30(1) for the reasons outlined in my Notice of Decision above.</p> <p>Section 25: I am satisfied the document contains personal affairs information that is irrelevant to the request, being the names, email addresses, phone numbers, position titles and pronouns of third parties. However, there is some information in the document which I consider is not capable of identifying any third parties, and is therefore relevant to the Applicant's request.</p> <p>I am satisfied it is practicable to provide the Applicant with an edited copy of the document with exempt and irrelevant information deleted in accordance with section 25.</p>
2.	[date]	Email chain	4	Refused in full Sections 30(1), 33(1), 35(1)(a)	Release in part Sections 30(1), 35(1)(a) 25 The document is to be released in	<p>Section 30(1): I am satisfied certain information in this document is not exempt from release under section 30(1) for the reasons outlined in my Notice of Decision above.</p>

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
					accordance with the marked-up copy provided to the Agency.	<p>Section 35(1)(a): I am satisfied information was provided in confidence to the Agency by a third party. I am satisfied certain information in this document would not be exempt under section 30(1) if it were generated by the Agency, for the reasons outlined in my Notice of Decision above.</p> <p>Section 25: See comments for Document 1.</p>
3.	[date]	Email chain	3	Refused in full Sections 30(1), 32(1) 33(1), 35(1)(a)	Refuse in full Section 32(1)	<p>Section 32(1): I am satisfied the information in this document is a confidential communication between a lawyer and a client made for the dominant purpose of obtaining legal advice. Accordingly, this information is exempt under section 32(1).</p> <p>Section 25: I am not satisfied it is practicable to provide the Applicant with an edited copy of this document with exempt information deleted in accordance with section 25.</p>
4.	[date]	Email	1	Refused in full Sections 30(1), 33(1)	Refuse in full Section 32(1)	Section 32(1) and 25: See comments for Document 3.

Document No.	Date of Document	Document Description	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
5.	[date]	Meeting minutes	2	Refused in full Sections 30(1), 33(1)	Refuse in full Section 30(1)	<p>Section 30(1): I am satisfied this document is exempt from release under section 30(1) for the reasons outlined in my Notice of Decision above.</p> <p>Section 25: See comments for Document 3.</p>