

Notice of Decision and Reasons for Decision

Applicant: 'CJ3'
Agency: Bairnsdale Regional Health Service
Decision Date: 26 November 2020
Exemption considered: Section 32(1)

Citation: 'CJ3' and Bairnsdale Regional Health Service (*Freedom of Information*)
[2020] VICmr 332 (26 November 2020)

FREEDOM OF INFORMATION – internal email chains – legal professional privilege – provision of legal advice and services

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 decision.

I am satisfied the documents are exempt under section 32(1).

As I am satisfied it would not be practicable to delete exempt information from the documents in accordance with section 25, I have refused access to the documents in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
26 November 2020

Reasons for Decision

Background to review

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

Only internal emails to and/or from either [named person] or [named person] or [named person] or [named person] over the period [date range] mentioning the name [named person] or some derivation thereof or the name [named person] or some derivation thereof or [another Victorian government agency], also called [another Victorian government agency] or some derivation thereof. Please note that the documents sought do not fall under any exemptions provided by the FOI Act.
2. In its decision, the Agency identified certain documents falling within the terms of the Applicant's request and refused access to the documents in full under section 32(1).
3. The Agency's decision letter sets out the reasons for its decision.

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. I have examined copies 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 verbal and written communications from the parties, including:
 - (a) correspondence and submissions received from the Applicant on [various dates] and information provided with their review application; and
 - (b) the Agency's responses to inquiries made by OVIC staff throughout the review.
8. The documents subject to review are email chains and individual emails exchanged between Agency officers and solicitors from the [another Victorian government agency]. Initially, the Agency did not provide OVIC with copies of the attachments to certain emails within the scope of the review.
9. Following enquiries conducted by OVIC staff, the Agency provided copies of the attachments to the emails. In its response, the Agency claimed the attachments were also exempt under section 32(1) of the FOI Act.
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.

Section 32(1)- Documents affecting legal proceedings

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 communication:
 - (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;
 - (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
14. In establishing a document is subject to litigation privilege, for a proceeding to be 'anticipated or pending' for the purposes of section 119 of the *Evidence Act 2008* (Vic), there must be more than a mere possibility of litigation. As a general rule, there must be a real prospect of litigation, but it does not have to be more likely than not.¹
15. 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.²
16. The dominant purpose for which a confidential communication was made will determine whether the exemption applies.³ Where mixed purposes exist, the paramount purpose of the communication is used.⁴
17. Material gathered by a lawyer or client in preparation for litigation is privileged as if it were a confidential communication between the lawyer and the client, even if it is not such a communication.⁵
18. 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.⁶ In this respect, the High Court of Australia has held:

¹ *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332.

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

³ *Thwaites v DHS* [1998] VCAT 580 at [22]-[24].

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

⁵ *Dingle v Commonwealth Development Bank of Australia* (1989) 23 FCR 63 at [66]. This principle was cited with approval by the Victorian Civil and Administrative Tribunal in *Mostafa v Victorian WorkCover Authority* [2013] VCAT 782.

⁶ *Waterford v Commonwealth* (1987) 163 CLR 54 at [66-7].

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.⁷

19. The Applicant made the following submission, addressing case law relevant to the dominant purpose test:
 1. The dominant purpose (Refer S118(c) of The Evidence Act) of a communication must be determined objectively, with regard to all of the circumstances in which it was made and its nature (*Grant v Downs* (1976) 135 CLR 674 at 689 per Stephen, Mason and Murphy JJ). It is necessary to take an objective view of all of the evidence and to take into account the evidence of not only the author but also that of the person or authority under whose direction the document was prepared.
 2. If the document would have been prepared irrespective of the intention to obtain professional legal services, then it will not satisfy the test (*Grant v Downs* (1976) 135 CLR 674 at 688 per Stephen, Mason and Murphy JJ).
 3. However, a 'but for' test is not determinative – if two purposes are of equal weight, one would not dominate the other. 'More important purpose' does not necessarily mean it was the 'dominant purpose' (see discussion in Odgers, *Uniform Evidence Law in Victoria* (2010) at [1.3.10520]).
 4. A claim for privilege will not succeed if all that emerges is that the document is a commercial document or has been brought into existence in the ordinary course of business (unless the court is satisfied there is a dominant purpose in accordance with s118 or s119) (*Re Southland Coal Pty Ltd (rec & mgrs apptd) (in liq)* [2006] NSWSC 899 at [14] per Austin J).
 5. There is a two step approach to determining dominant purpose:
 - first, the subjective purpose/s of the person/s making or commissioning the particular communication must be determined; and
 - second, if the court determines that there was more than one purpose, and at least one of those purposes was capable of attracting legal professional privilege, the court must determine whether the party claiming the privilege has established that the privileged purpose was the dominant purpose (*Matthews v SPI Electricity Pty Ltd & Ors (No 6)* [2013] VSC 422 at [57] per Derham AsJ, citing *Carter Holt Harvey Wood Products Australia Pty Ltd v Auspine Ltd* [2008] VSCA 59 at [3] per Maxwell P (for the Court)).
 6. The word 'dominant' has been interpreted as meaning that there must be 'a "clear paramountcy" of purpose' (*Perry v Powercor Australia Ltd* [2011] VSC 308 at [55] per Robson J, citing *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at 45 per Young J; [2006] FCA 1234; *Mitsubishi Electric Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332 at 337; [2002] VSCA 59 at [10] per Batt JA (Charles and Callaway JJA agreeing); *Waugh v British Railways Board* [1980] AC 521 at 543 per Edmund-Davies LJ; *Dick Smith Electronics Pty Ltd v Westpac Banking Corp* [2002] FCA 1040 at [34]-[35] per Beaumont J; *Sydney Airports Corporation Ltd v Singapore Airlines Ltd & Qantas Airways Ltd* [2005] NSWCA 47 at [7] per Spigelman CJ (Sheller JA and M W Campbell AJA agreeing)).
 7. Upon the basis of points 1-6 above, BRHS cannot satisfy Section 32 of the FOI Act on the balance of probabilities and so all exemption claims must fail.
20. The documents comprise five emails in total, including four email chains and one document comprising a single email. Three of the emails contain attachments.
21. The Applicant provided further submissions on [dates] detailing their history with the Agency and views on OVIC's application of section 32(1) to documents subject to a previous review application lodged by the Applicant. Specifically, the Applicant submitted the following information regarding email chains and the dominant purpose test:

⁷ *Waterford v Commonwealth* (1987) 163 CLR 54 at [67].

... it may be that only part of a document meets the dominant purpose test. A particular document may contain or consist of many communications, such as an email chain, only some of which were made for the requisite purpose. (Refer *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 4)* [2014] FCA 796.)

22. I acknowledge the Applicant's submission in relation to the dominant purpose test. However, I note the circumstances of this matter can be distinguished from *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 4)*,⁸ where the communications were between several different third party advisors including financial and legal advisors. The Federal Court observed:

So far these are well known principles of general application. But in this case many of the documents in question do not involve direct lawyer-client communications, but are rather third party adviser internal documents or communications between a third party adviser and Asahi.⁹

23. Having examined the documents subject to review, I am satisfied that they comprise:

- (a) communications passing between Agency officers and their legal advisors in the context of seeking instructions regarding litigation in progress;
- (b) communications passing between Agency officers to their legal advisors in the context of seeking instructions in relation to FOI applications received from the Applicant; and
- (c) internal emails between Agency officers forwarding on legal advice or instructions received from their legal advisors.

24. I am satisfied the documents are exempt under section 32(1) for the following reasons:

- (a) Certain emails within the email chains contain legal advice provided to the Agency in circumstances in which litigation was in progress.
- (b) Other emails within the email chains contain communications where Agency officers seek to obtain legal advice for litigation currently in progress.
- (c) In my view, an email chain is a 'document' within the meaning of the FOI Act and each email within the chain is not a separate document for the purposes of the FOI Act. I consider the sender of an email chain should be taken to intend for the preceding emails to be included as part of an email. For example, they may provide context to their contribution to the email chain or to avoid the need to repeat content set out in previous emails in the chain.
- (d) The legal advice in certain emails is intertwined with preceding and proceeding emails within the email chain, such that the legal advice concerns the preceding emails and the proceeding emails represent the Agency acting upon legal advice provided.
- (e) Each of the email chains are connected to the subject matter with which the emails are concerned. Where an email does not contain legal advice, it nevertheless has the requisite connection to the legal advice contained in the email chain.
- (f) In relation to the emails attachment, I consider they were created and forwarded for the purpose of the Agency obtaining legal advice from their legal advisors or the legal advisors seeking instructions from their client on how to proceed with the litigation and FOI applications.

⁸ [2014] FCA 796.

⁹ *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 4)* [2014] FCA 796 at [37].

- (g) Further, I accept legal professional privilege extends to a draft document or comments made upon a draft document submitted by a lawyer. In such circumstances, the lawyer is regarded as furnishing advice when preparing or revising a draft communication in which he or she is the legal adviser.¹⁰

25. Having considered the information before me, I am satisfied the documents are exempt under section 32(1).

Deletion of exempt or irrelevant information

26. 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.
27. 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
28. I have considered the effect of providing the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it is not practicable to delete the exempt information, as to do so would render the documents meaningless.

Conclusion

29. On the information before me, I am satisfied the documents are exempt under section 32(1).
30. As I am satisfied it would not be practicable to delete exempt information from the documents in accordance with section 25, I have refused access to the documents in full.

Review rights

31. If the Applicant 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
32. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁴
33. 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.
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.¹⁵

¹⁰ See *Conyers v Monash University* [2005] VCAT 2509; *Re Osland and Department of Justice* [2005] VCAT 1648; *Re City Parking Pty Ltd and City of Melbourne* (1996) 10 VAR 170 at [202]; *Re Smith and Directorate of School Education* (unreported, AAT, Macnamara DP, 14 August 1996).

¹¹ *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].

¹² *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].

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

¹⁴ Section 52(5).

¹⁵ Sections 50(3F) and (3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	[date]	Email chain with attachments	9	Refused in full Section 32(1)	Refuse in full Section 32(1)	Section 32(1): I am satisfied the email chain and attachments are exempt under section 32(1) for the reasons outlined in the Notice of Decision. Section 25: As I am not satisfied it would be practicable to delete exempt information from the document in accordance with section 25, I have refused access to the document in full.
2.	[date]	Email chain with attachments	14	Refused in full Section 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 1.
3.	[date]	Email chain	2	Refused in full Section 32(1)	Refuse in full Section 32(1)	This document duplicates part of Document 1. Section 32(1): See comments for Document 1. Section 25: See comments for Document 1.
4.	[date]	Email	1	Refused in full Section 32(1)	Refuse in full Section 32(1)	Section 32(1): See comments for Document 1. Section 25: See comments for Document 1.
5.	[date]	Email chain with attachments	5	Refused in full Section 32(1)	Refuse in full Section 32(1)	This document duplicates part of Document 4. Section 32(1): See comments for Document 1. Section 25: See comments for Document 1.