

Notice of Decision and Reasons for Decision

Applicant:	'EN1'
Agency:	City of Stonnington
Decision date:	2 June 2022
Exemption considered:	Section 38 of the <i>Freedom of Information Act 1982</i> (Vic) in conjunction with section 125(1) of the <i>Local Government Act 2020</i> (Vic)
Citation:	'EN1' and <i>City of Stonnington (Freedom of Information)</i> [2022] VICmr 146 (2 June 2022)

FREEDOM OF INFORMATION – council documents – communication between lawyer and client – [occupation] – legal advice – legal professional privilege – information provided in confidence – *Local Government Act 2020* (Vic) – secrecy provision

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 a document requested by the Applicant under the FOI Act.

I am satisfied the document is exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the *Local Government Act 2020* (Vic).

As I am satisfied it is not practicable to delete the exempt information in the document in accordance with section 25, the document is exempt in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

2 June 2022

Reasons for Decision

Background to review

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

Full legal advice that was partially extracted and provided to me by [named person] in [their] email to me of [date], regarding the [subject of legal advice] issue.

[Background information redacted].
2. The Agency identified one document falling within the terms of the Applicant's request and refused access to the document in full under sections 32(1) and 38. 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. I have examined a copy of the six page document subject to review. On the face of the document, it is a memorandum of legal advice provided to the Council by its external legal advisers.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered all communications and submissions received from the parties.
7. 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.
8. 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.

New Local Government Act and its focus on Council integrity

9. On 24 October 2020, the *Local Government Act 2020* (Vic) (**LG Act**) was enacted. The objectives of the LG Act are set out in section 4 and include ensuring, '[c]ouncils are constituted as representative bodies that are accountable, transparent, collaborative, efficient and engaged with their communities'.
10. Section 9 of the LG Act sets out overarching governance principles and supporting principles for that Act:
 - (1) A Council must in the performance of its role give effect to the overarching governance principles.
 - (2) The following are the overarching governance principles—
 - (a) Council decisions are to be made and actions taken in accordance with the relevant law;
 - (b) priority is to be given to achieving the best outcomes for the municipal community, including future generations;
 - (c) the economic, social and environmental sustainability of the municipal district, including mitigation and planning for climate change risks, is to be promoted;
 - (d) the municipal community is to be engaged in strategic planning and strategic decision making;
 - (e) innovation and continuous improvement is to be pursued;

- (f) collaboration with other Councils and Governments and statutory bodies is to be sought;
 - (g) the ongoing financial viability of the Council is to be ensured;
 - (h) regional, state and national plans and policies are to be taken into account in strategic planning and decision making;
 - (i) the transparency of Council decisions, actions and information is to be ensured.
- (3) In giving effect to the overarching governance principles, a Council must take into account the following supporting principles—
- (a) the community engagement principles;
 - (b) the public transparency principles;
 - (c) the strategic planning principles;
 - (d) the financial management principles;
 - (e) the service performance principles.
11. As can be seen by the above objectives and principles of the LG Act (and other provisions in that Act),¹ public transparency in council decision making and the exercise of statutory and administrative functions and powers is a key focus of the Act.
12. However, principles regarding the object of transparency under the LG Act may be subject to the secrecy provision in section 125 of the LG Act, which provides:

125 Confidential information

- (1) Unless subsection (2) or (3) applies, a person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, must not intentionally or recklessly disclose information that the person knows, or should reasonably know, is confidential information.
- Penalty: 120 penalty units.
- (2) Subsection (1) does not apply if the information that is disclosed is information that the Council has determined should be publicly available.
- (3) A person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff, may disclose information that the person knows, or should reasonably know, is confidential information in the following circumstances—
- (a) for the purposes of any legal proceedings arising out of this Act;
 - (b) to a court or tribunal in the course of legal proceedings;
 - (c) pursuant to an order of a court or tribunal;
 - (d) in the course of an internal arbitration and for the purposes of the internal arbitration process;
 - (e) in the course of a Councillor Conduct Panel hearing and for the purposes of the hearing;
 - (f) to a Municipal Monitor to the extent reasonably required by the Municipal Monitor;
 - (g) to the Chief Municipal Inspector to the extent reasonably required by the Chief Municipal Inspector;
- ...

13. It is relevant to consider the context within which section 125 of the LG Act sits within Division 1 of Part 6 of that Act, which deal with 'Improper Conduct' and 'Council integrity' respectively. For example, section 123 of the LG Act deals with 'Misuse of position' and provides it is an offence for a

¹ See for example, sections 57 and 58 of the LG Act.

Councillor or a former Councillor to intentionally misuse their position ‘to gain or attempt to gain, directly or indirectly, an advantage for themselves or for any other person’ or ‘to cause, or attempt to cause, detriment to the Council or another person’. The penalty for an offence under section 123 is 600 penalty units or imprisonment for five years, which indicates the seriousness with which the Parliament holds the importance of Council and Councillor integrity and proper conduct. Further, section 124 of the LG Act prohibits a Councillor from directing a Council staff member to do certain things and provides for a penalty of 120 penalty units.

14. Division 2 of Part 6 of the LG Act deals with ‘general’ and ‘material’ conflicts of interest. For example, section 127 of the LG Act provides that a ‘relevant person’ has a ‘general’ conflict of interest in a matter ‘if an impartial, fair-minded person would consider that the person's private interests could result in that person acting in a manner that is contrary to their public duty’.²
15. Division 5 of Part 6 of the LG Act deals with ‘Councillor conduct’ and requires each of Victoria’s 79 Councils develop a Councillor Code of Conduct that sets out ‘the standards of conduct expected to be observed by Councillors in the course of performing their duties and functions as Councillors, ...’.³
16. Accordingly, the various provisions under Part 6 of the LG Act are directed at ensuring the integrity of local government, Councils, Councillors and Council employees in the discharge of their statutory functions and official duties and responsibilities.

Review of exemptions relied on by Agency

Section 38 – Documents to which secrecy provisions of enactments apply

17. A document is exempt under section 38 if the following three requirements are met:
 - (a) there is an enactment in force;
 - (b) the enactment applies specifically to the kind of information in a document; and
 - (c) the enactment prohibits persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
18. For section 38 to apply to a document, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

Is there an enactment in force?

19. I am satisfied section 125 of the LG Act is an enactment in force for the purpose of section 38, and the first requirement of section 38 is met.

Does the enactment apply specifically to the kind of information in the document?

20. ‘Confidential Information’ in section 125(1) of the LG Act is defined in section 3(1) of that Act and includes under paragraph (e):
 - (e) legal privileged information, being information to which legal professional privilege or client legal privilege applies;
21. In determining whether the document contains ‘legal privileged information’ within the meaning of section 3(1)(e) of the LG Act and ‘confidential information’ for the purpose of section 125(1) of the

² The phrase ‘private interests’ means ‘any direct or indirect interest of a relevant person that does not derive from their public duty and does not include an interest that is only a matter of personal opinion or belief’. The phrase ‘public duty’ means the responsibilities and obligations that a relevant person has to members of the public. A ‘relevant person’ includes a Councillor.

³ Section 139 of the LG Act.

LG Act, I have had regard to similar considerations that arise under the 'legal professional privilege' exemption in section 32(1) of the FOI Act.

Legal professional privilege

22. A document will be subject to legal professional privilege where it contains a confidential communication between:⁴
- (a) 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) the client's professional legal advisers and third parties, that was made for the dominant purpose of pending or contemplated litigation; or
 - (c) 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.

Client legal privilege

23. A document will be subject to client legal privilege where it contains a 'confidential communication'⁵ between:
- (a) 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,⁶ or
 - (b) the client and another person, which was made for the dominant purpose of the client being provided with professional legal services relating to a proceeding in which the client is or was a party.⁷
24. For convenience, I refer to 'legal professional privilege' and 'client legal privilege' as 'legal privilege' in this decision.
25. The High Court of Australia held legal privilege ensures a client can openly and candidly discuss legal matters with their legal representative and seek and obtain 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.⁸

26. Where a question of legal privilege arises, an agency must show the dominant purpose for which the document was prepared was either for legal advice, or alternatively for anticipated litigation.⁹ The dominant purpose test applies to both communications for the purpose of obtaining or providing legal advice.

⁴ *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).

⁵ Defined in section 117 of the *Evidence Act 2008* (Vic) to mean communications made in circumstances where the Agency and its professional legal advisers were under an obligation not to disclose their contents.

⁶ Section 118 of the *Evidence Act 2008* (Vic).

⁷ Section 119 of the *Evidence Act 2008* (Vic).

⁸ *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 at [19].

⁹ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

27. The Agency's decision letter states:

The document sought by your request contains a confidential communication between Council and its external professional legal advisers made for the dominant purpose of providing legal advice.

On this basis, the document is subject to legal professional privilege.

28. Having reviewed the document, I am satisfied it constitutes a confidential communication that was made for the dominant purpose of the Agency's professional legal advisers providing legal advice to its client – the Agency.

Has legal privilege in the advice been waived by the Council?

29. As stated above, legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be waived where the client acts in a way that is inconsistent with the maintenance of that confidentiality – for instance where the substance of the advice is disclosed with the client's express or implied consent.¹⁰

30. In its decision letter, the Agency states:

Your request refers to an email to you from [named person] on [date] regarding the legal advice, and that you consider that any legal professional privilege that may have existed in it has been waived by the Council as a result.

I note that this email was marked 'Confidential: Subject to Legal and Professional Privilege' and that it only discloses the conclusion of the legal advice, which is general in nature. It did not disclose any other information contained in the advice. I consider it was only provided to you in your capacity as a [occupation]. I am informed that the legal advice has not been disclosed to any external third party.

As a result, Council did not act inconsistently with the maintenance of privilege, and I do not believe that the information provided amounts to the waiver of privilege.

31. The Applicant submits:

If I am entitled to the advice in my capacity as [occupation], I am entitled to the entirety of the advice.

If I am not entitled to the Legal Advice in my role as a [occupation] then the only basis that I could have been provided the executive summary was an individual.

If I was provided the advice as an individual then Legal Professional Privilege has been waived by the client.

This is because I have not been provided the advice in my capacity as [occupation] but as a person with a potential cause of action against the Council.

32. While widespread disclosure of legal advice within an agency may give rise to waiver of legal privilege,¹¹ I am satisfied the provision of some information about the legal advice by the Agency to the Applicant was limited and occurred between personnel of the Agency in their official capacity and was not inconsistent with the maintenance of legal privilege in the advice.

33. The Applicant now seeks access to the document through the exercise of their personal right of access to information under the FOI Act. However, I do not accept their role as [occupation] entitles them to a full copy of the document under the FOI Act given it is subject to legal privilege and there is no evidence before me privilege in the document has been waived by the Agency.

34. Accordingly, I am satisfied section 125 of the LG Act applies specifically to the kind of information in the document, and the second requirement of section 38 is met.

¹⁰ *Mann v Carnell* (1999) 201 CLR 1 at [28].

¹¹ *Setterfield v Minister for Education* [1986] VCAT .

Does the enactment prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications)?

35. I am satisfied section 125(1) of the LG Act prohibits a person who is, or has been, a Councillor, a member of a delegated committee or a member of Council staff from disclosing Council 'confidential information' subject to the exceptions in sections 125(2) and 125(3) of the LG Act.
36. Having considered the exceptions to the prohibition on disclosure under sections 125(2) and 125(3) of the LG Act, I am satisfied none of those exceptions apply in the circumstances of this matter.
37. Accordingly, I am satisfied section 125(1) of the LG Act prohibits the Agency through its officers from disclosing a copy of the document to the Applicant, and the third requirement of section 38 is met.

Conclusion of the application of section 38

38. In relation to section 38 of the FOI Act, I am satisfied:
 - (a) section 125 of the LG Act is an enactment in force;
 - (b) the document contains 'legal privileged information' as defined in subsection 3(1)(e) of the LG Act for the purposes of 'confidential information' in section 125(1) of the LG Act; and
 - (c) section 125(1) of the LG Act prohibits Agency officers, Councillors and Council officers, from disclosing the 'confidential information' in the document and none of the permitted exceptions to this prohibition apply in this case.
39. Accordingly, I am satisfied the document is exempt from release under section 38 in conjunction with section 125(1) of the LG Act.

Section 32(1) – Legal professional privilege exemption

40. The Agency also relies on section 32(1) to exempt the document from release. Given my decision above in relation to section 38, it is not necessary for me to further consider the application of this exemption.

Section 25 – Deletion of exempt or irrelevant information

41. 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.
42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹² 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 25.¹³
43. I have considered whether it is practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25. As the document constitutes a memorandum of legal advice that is subject to legal privilege, I am satisfied deletion of the exempt information would render the document meaningless.

Conclusion

¹² *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].

¹³ *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].

44. On the information before me, I am satisfied the document is exempt from release under section 38 of the FOI Act in conjunction with section 125(1) of the LG Act.
45. As I am satisfied it is not practicable to delete the exempt information in the document in accordance with section 25, the document is exempt in full.

Review rights

46. 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.¹⁴
47. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹⁵
48. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁶
49. 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.
50. 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.¹⁷

¹⁴ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹⁵ Section 52(5).

¹⁶ Section 52(9).

¹⁷ Sections 50(3F) and 50(3FA).