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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant: 'BY1'
Agency: Office of the Chief Parliamentary Counsel
Decision date: 20 August 2020
Exemptions considered: 25A(5), 32(1)
Citation: 'BY1' and Office of the Chief Parliamentary Counsel Victoria (Freedom of Information) [2020] VICmr 230 (20 August 2020)

FREEDOM OF INFORMATION – communications related to the planning and drafting of legislation – created for the dominant purpose of obtaining and providing legal advice – legal professional privilege

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.

I am satisfied the requirements for the application of section 25A(5) are met in that all documents to which the Applicant seeks access, should any exist, would be exempt in full.

Accordingly, I have decided to refuse to grant access to the requested documents in accordance with the Applicant's request under section 25A(5).

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

20 August 2020

Reasons for Decision

Background to review

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

... all documents existing from [date] onwards in relation to the planning and drafting of s 30 of the *Justice Legislation Amendment (Serious Offenders and Other Matters) Bill 2019 (Vic)* that fall in the categories below:

- (a) all correspondence, notes, or other documents exchanged between the Department of Justice and Community Safety (including Corrections Victoria) and the Department of Premier and Cabinet.
- (b) all correspondence, notes or other documents exchanged between any Members of Parliament of Victoria and the Department of Premier and Cabinet;
- (c) all correspondence, notes or other documents exchanged between the Victorian Government Solicitor's Office and the Department of Premier and Cabinet.
- (d) all correspondence, notes or other documents relating to the Bill specifically.

The above includes in particular any documents referencing "emergency management days"...

...Examples of documents that might fall in the above categories are as follows:

- (a) an email from the VGSO to the Secretary of the Department of Premier and Cabinet concerning "emergency management days" and/or the Bill.
- (b) written submissions sent by Corrections Victoria (operating under the Department of Justice and Community Safety) to the Department of Premier and Cabinet concerning reform being needed to the scheme for emergency management days
- (c) a draft Bill being exchanged between the Department of Premier and Cabinet with a Member of Parliament (e.g. Premier of Victoria)
- (d) a file note of a telephone conversation between the Secretary to the Department of Premier and Cabinet with the Premier of Victoria concerning s 30 of the Bill.

...

For the purposes of this FOI request, any reference to the "Department of Premier and Cabinet" includes the Office of the Chief Parliamentary Counsel.

2. The Agency refused to grant access to documents, should any exist, in accordance with the Applicant's request under section 25A(5).
3. In refusing to grant access to documents under section 25A(5), the Agency determined the documents, should any exist, would be exempt under section 32(1).
4. The Agency's reasons for decision are set out in its decision letter dated 4 May 2020.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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 received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (a) information provided with the Applicant's review application;

- (b) the Agency's submission dated 12 June 2020; and
 - (c) communications between OVIC staff, the Applicant and the Agency.
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.

Review of section 25A(5) – refusal to grant access to documents

9. Section 25A(5) allows an agency to refuse to grant access to documents in accordance with an FOI request:
- (a) if it is apparent from the nature of the request all documents sought would be exempt under the FOI Act; and
 - (b) where it is not possible to provide the applicant with an edited copy of the documents with exempt information deleted, or it is clear the applicant does not seek an edited copy of the documents.
10. Importantly, an agency is not required to identify any or all documents relevant to a request or to specify any relevant exemption under which a document would be exempt.
11. The refusal power under section 25A(5) is 'carefully circumscribed'.¹ Therefore, I must be satisfied the following three requirements are met, which limit its application:
- (a) First, the exempt nature of the documents sought must be objectively apparent from the terms of the applicant's request. The 'nature' of documents refers to their inherent or essential quality or character.
 - (b) Second, it must be apparent from the terms of the applicant's request that all documents relevant to the request would be exempt.
 - (c) Third, it must be apparent from:
 - i. the nature of the documents, as described in the applicant's request, that no obligation would arise under section 25 for the agency to grant access to an edited copy of a document with exempt or irrelevant information deleted; or
 - ii. the applicant's request, or through consultation with the applicant, they do not seek access to an edited copy of a document.

What is the essential character of the documents requested?

12. The Agency submitted the following:

... OCPC's functions are to:

- draft all government Bills and House amendments for the Victorian Parliament;
- provide legislative services to non-government members on a confidential basis;
- draft/settle and certify all statutory rules; and
- maintain the authoritative database of Victorian legislation.

¹ *Knight v Corrections Victoria* [2010] VSC 338 at [37].

The first function is the only one relevant to this request. The drafting of legislation by OCPC occurs on instructions from instructing departments and is undertaken by lawyers in OCPC, all of whom are required to hold a practising certificate. Drafting instructions are settled by OCPC for the purposes of being approved by Cabinet or the Premier. Once the Bill to which the instructions related received appropriate approval, OCPC drafts the Bill, which is ultimately approved by Cabinet for introduction into the Parliament.

... The function of OCPC in relation to the development and drafting of legislation is a technical legal function.

...

The request seeks access to 'all documents' in relation to the 'planning and drafting of' s 30 of the *Justice Legislation Amendment (Serious Offenders and Other Matters) Bill 2019*.

The process of planning and drafting legislation involves the following key steps:

- the sponsoring agency is required to submit a draft of the proposed submission and drafting instructions to OCPC for advice as to whether the instructions are adequate to enable the first draft of the proposed Bill to be prepared.
- OCPC will check the submission and proposed drafting instructions. At this stage, if the matter is complex or raises a number of issues that require clarification, OCPC's lawyer may discuss the proposal with the instructing agency. At the end of this review process, OCPC will send written comments to the agency and indicate whether or not the drafting instructions are adequate for the preparation of a first draft of the Bill.
- Submissions and accompanying documents are lodged with the Cabinet Office in DPC and are considered at an appropriate Cabinet meeting.
- If Cabinet gives approval in principle to a legislative proposal (with or without qualifications), the drafting process can begin.

So, the nature of the documents described in the requests are:

- the draft of the proposed submission and drafting instructions that are provided to the OCPC for advice;
- communications between OCPC and the sponsoring agency;
- OCPC's advice to the agency on whether or not the drafting instructions are adequate for the preparation of a first draft of the Bill; and
- the submissions and accompanying documents as lodged with the Cabinet Office, which are to be considered by Cabinet.

I ... note that the applicants have stated that they do not seek access to Cabinet documents. So, it is only the first three kinds of documents that are the documents sought as part of the planning and drafting stage.

13. On the information before me, I am satisfied the essential quality or character of the documents as described by the Applicant is apparent from the request. The nature of the documents is legal advice prepared by the Agency in performance of its functions.

Would all the documents requested, as described by the Applicant in their request, be exempt?

14. In refusing to grant access to the documents requested under section 25A(5), the Agency submitted all documents would be exempt under section 32(1).

Section 32(1)

15. Section 32(1) provides a document is exempt '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'.

16. A document is 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.
17. The Agency submitted the following information in support of its application of section 32(1) to the documents:

OCPC relies on the decision of the Full Court of the Federal Court in *State of New South Wales v Betfair Pty Ltd* [2009] FCAFC 160. This decision is decisive in relation to the application of legal professional privilege to parliamentary Counsel documents as it confirms that the relationship between the instructing agencies of government and the Parliamentary Counsel in producing draft legislation is one attracting legal professional privilege.

In particular, *Betfair* is authority for the proposition that draft instructions and related communications between the State and third parties in relation to the drafting and amendments to legislation are subject to legal professional privilege.

...

The decision in *Betfair* has been applied in many cases. In particular, the Victorian Supreme Court in *Tabcorp Holdings Limited v State of Victoria (No 2)* [2013] VSC 541 applied *Betfair* in finding that communications in relation to the preparation and drafting of legislation are properly the subject of client legal privilege.

Therefore, given the nature of the documents requested by the applicants, being for documents in relation to the planning and drafting of legislation, such as the agency's drafting instructions and OCPC advice on such instructions, it is apparent from the nature of the request that all of the documents will be exempt under section 32 of the FOI Act.

...

I note, for completeness, that a privileged document may cease to be privileged in the event of 'waiver. Waiver may be express or implied. A person may unintentionally waive privilege by particular conduct that is 'inconsistent with the maintenance of confidentiality which the privilege is intended to protect'.

However, OCPC has in no way, not by conduct or otherwise, waived the privilege that is in the documents being sought by the applicants.

Would the documents contain confidential communication?

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.

18. I am satisfied any advice the Agency provided would be legal advice and privileged. In my view, communications of this type are confidential in nature.
19. Accordingly, I am satisfied the documents would contain confidential communications between the Agency and counterpart agencies.

Were communications for the dominant purpose of obtaining or providing legal advice, or referable to pending or contemplated litigation?

20. Having considered the above description of the Agency's functions and responsive document categories, I am satisfied the communications were for the dominant purpose of obtaining and providing 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.³
22. I accept the Agency's submission dated 12 June 2020 that legal privilege has not been waived.

Is there scope to provide an edited copy of the documents requested?

23. 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.
24. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁴ 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 25.⁵
25. The Agency submitted:

...there is no scope for giving access to edited copies of the requested documents here on the basis that it is the whole of the document that is exempt having regard to its character as being privileged.

I also note that the applicants have not sought access to edited copies of the documents.

26. I have considered whether it is practicable to provide 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 do so, as it would render the documents meaningless.

Conclusion

27. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:

³ Sections 122(2) and (3) of the Evidence Act 2008 (Vic) (for CLP) or Mann v Carnell (1999) 201 CLR 1 at [28] (for LPP)

⁴ 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].

⁵ 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].

(a) the essential quality or character of the documents, as described in the Applicant's request, should any exist, would be legal advice prepared by the Agency;

(b) given the nature of the requested documents, I am satisfied the requested documents, should any exist, would be exempt under section 32 of the FOI Act; and

(c) it is not practicable to delete exempt information in the requested documents in accordance with section 25, as to do would render them meaningless.

Review rights

28. 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.⁶
29. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
30. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
31. 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.
32. 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.⁹

When this decision takes effect

33. My decision does not take effect until the relevant review periods (as stated above) expire. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).