

Notice of Decision and Reasons for Decision

Applicant:	'CA2'
Agency:	Department of Justice and Community Safety
Decision date:	4 September 2020
Exemptions considered:	25A(5), 28(1), 32(1)
Citation:	'CA2' and Department of Justice and Community Safety (<i>Freedom of Information</i>) [2020] VICmr 249 (4 September 2020)

FREEDOM OF INFORMATION – records of decision or deliberation of the Cabinet – 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 Applicants 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 Applicants 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 Applicants' request under section 25A(5).

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

4 September 2020

Reasons for Decision

Background to review

1. Following consultation with the Agency, the Applicant, on behalf of their clients [named individuals], made a combined request for access to the following documents:

I would be grateful if you could kindly provide all documents in relation to the planning, development and drafting of s30 of the Justice Legislation Amendment (Serious Offenders and Other matters) Bill 2019 (Vic) or any other provisions in relation to emergency management days, including but not limited to the following categories in respect of the above:

- 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 (including the OCPC);*
 - b) *All correspondence, notes or other documents exchanged between any Members of the Parliament of Victoria and the Department of Justice and Community Safety (including the OCPC); and*
 - c) *All correspondence, notes or other documents exchanged between the Victorian Government Solicitor and the Department of Justice and Community Safety (including the OCPC);*
 - d) *All correspondence, notes or other documents relating to the Bill and to pending court proceedings, in relation to "emergency management days"*
2. The Agency refused to grant access to documents, should any exist, in accordance with above request terms 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 sections 28(1) and 32(1).
 4. The Agency's reasons for decision are set out in its decision letter dated 20 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 relevant communications received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application;
 - (c) the Applicant's submission dated 30 July and 26 August 2020; and
 - (d) 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 Applicants with an edited copy of the documents with exempt information deleted, or it is clear the Applicants 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 Applicants’ 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 Applicants’ 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 Applicants’ 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 Applicants’ request, or through consultation with the Applicants, they do not seek access to an edited copy of a document.

What is the essential character of the documents requested?

12. In its decision letter, the Agency stated the following:

Submissions are made to Cabinet requiring approval of a Bill and supporting documents, prior to its introduction to Parliament.

Legislation proposals come to Cabinet in at least two stages: first, Cabinet **Approval in Principle (AIP)** for the drafting of the Bill and second, approval of the **Bill at Cabinet (BAC)**.

If the proposed legislation represents a new policy position or change in existing policy, Cabinet or Committee approval on the policy position should be obtained.

...The documents you are requesting were the subject of deliberations by Cabinet in relation to the amendments of the legislation and therefore would be exempt under this section of the FOI Act.

...Some of the documents you have requested would be exempt from release as they would have been produced for the purpose of providing legal advice to the department regarding the amendments to the

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

legislation. In this case, the information is covered by legal professional privilege and the information is therefore exempt.

(emphasis in original)

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.
14. The nature of the documents is documents that were either the subject of deliberations by Cabinet in relation to the amendments of the legislation and/or legal advice prepared for the Agency regarding the *Amendment (Serious Offenders and Other matters) Bill 2019 (Vic) (Amendment Bill)*.

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

15. In refusing to grant access to the documents requested under section 25A(5), the Agency submits all documents, should any exist, would be exempt under sections 28(1) and/or 32(1).

Section 28(1)

16. Section 28(1)(d) provides:

28 Cabinet documents

- (1) A document is an exempt document if it is –

...

- (d) a document the disclosure of which would involve the disclosure of any deliberation or decision of the Cabinet, other than a document by which a decision of the Cabinet was officially published.

17. The definition of ‘Cabinet’ in section 28(7) includes a sub-committee of Cabinet.
18. In *Ryan v Department of Infrastructure*,² the Victorian Civil and Administrative Tribunal (VCAT) observed:

It has been said that a document is not exempt merely because it has some connection with Cabinet, or is perceived by departmental officers or others as being of a character that they believe ought to be regarded as a Cabinet document or because it has some Cabinet “aroma” around it. Rather, for a document to come within the Cabinet document exemption, “it must fit squarely within one of the four exemptions [(now five)]” in section 28(1) of the Act.

19. Notwithstanding, where a document attracts the Cabinet exemption, the exemption in section 28(1) provides complete protection from release of the document.
20. I am satisfied that any documents responsive to the terms of the request would be exempt under section 28(1)(d) because the planning, development and drafting of legislation is a core function of Cabinet. I accept the Agency’s position in its decision letter that any responsive documents would have been created as part of either the Cabinet Approval in Principle or approval of the Bill at Cabinet processes.
21. Accordingly, I am satisfied the relevant information is exempt under section 28(1)(d) as its disclosure would disclose a decision or the deliberations of Cabinet.

² (2004) VCAT 2346 at [33].

Section 32(1)

22. 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'.
23. A document is subject to legal professional privilege and exempt under section 32(1) where it contains a confidential communication:³
- (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.

Would the documents contain confidential communication?

24. I am satisfied any advice the Agency received from the Victorian Government Solicitor's Office (VGSO) or the Department of Premier and Cabinet (including the Office of the Chief Parliamentary Counsel) (OCPC) regarding the drafting of the Amendment Bill would be legal advice and privileged. In my view, communications of this type are confidential in nature.
25. Accordingly, I am satisfied some of the documents would contain confidential communications between the Agency and counterpart agencies VGSO and OCPC.

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

26. Having considered the core functions of the VGSO and OCPC, I am satisfied the communications would be for the dominant purpose of obtaining and providing legal advice.

Has legal professional privilege been waived?

27. 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.⁴
28. There is no suggestion that privilege has been waived in this matter make no findings in this regard.

³ *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.

⁴ *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)

Exceptions to legal professional privilege

29. The Applicant submits that legal privilege can be overridden where there is a deliberate misuse of statutory power or where documents that attract legal privilege further the commission of a crime or fraud.
30. The Applicant submits that in this case there may be 'a higher public interest involved that would be injurious to the interests of justice if the privilege were maintained, or where there is a deliberate [sic] of statutory power' citing a minority opinion of Chief Justice Gibbs in *Attorney-General (N.T.) v Kearney* (1985),⁵ who stated:

It would be contrary to the public interest which the privilege is designed to secure - the better administration of justice - to allow it to be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law. It would shake public confidence in the law if there was reasonable ground for believing that a regulation had been enacted for an unauthorized purpose and with the intent of frustrating legitimate claims, and yet the law protected from disclosure the communications made to seek and give advice in carrying out that purpose.⁶
31. However, His Honour tempered this principle in the same judgment by stating 'The privilege is of course not displaced by making a mere charge of crime or fraud or... a charge that powers have been exercised for an ulterior purpose.'⁷
32. The Applicant submits that in this case there has been a deliberate misuse of statutory power in this instance, the details of which were outlined in the Applicant's written submissions and remain confidential. I make no specific findings as to the likelihood of the alleged misuse of statutory power, other than to say that I am satisfied that the 'higher public interest' exception has not been made out in this instance as the Applicant submissions amount to a mere charge.
33. There is no evidence before me to suggest that the documents, should they exist, to which the privilege is attached further the commission or a crime or fraud, beyond inference by the Applicant. Therefore, I am also satisfied that the exemption set out in *Clements, Dunne & Bell Pty Ltd v Commissioner, Australian Federal Police* [2001]⁸ has not been made out.

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

34. 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 Applicants agrees to receiving such a copy.
35. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁹ 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 25.¹⁰
36. The Agency submits that 'no obligation arises to grant access to an edited copy of the documents, because the documents would be exempt in their entirety, under the above sections of the FOI Act'.

⁵ *Attorney-General (N.T.) v Kearney* (1985) 158 CLR 500.

⁶ *Ibid* at [18].

⁷ *Ibid* at [19].

⁸ *Clements, Dunne & Bell Pty Ltd v Commissioner, Australian Federal Police* [2001] FCA 1858.

⁹ *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].

¹⁰ *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].

37. I have considered whether it is practicable to provide the Applicants 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

38. On the information before me, I am satisfied the following requirements for the application of section 25A(5) are met:
- (a) the essential quality or character of the documents, as described in the Applicant's request, should any exist, would be documents that were either the subject of deliberations by Cabinet in relation to the amendments of the legislation and/or legal advice prepared for the Agency regarding the Amendment Bill;
 - (b) given the nature of the requested documents, I am satisfied the requested documents, should any exist, would be exempt under section 28 or 32 of the FOI Act; and
 - (c) it would not be practicable to delete exempt information in the requested documents in accordance with section 25, as to do would render them meaningless.

Review rights

39. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
41. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
42. 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.
43. 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.¹⁴

When this decision takes effect

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

¹¹ The Applicants in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

¹³ Section 52(9).

¹⁴ Sections 50(3F) and (3FA).