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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant: 'CQ7'
Agency: Victoria Police
Decision date: 11 February 2021
Exemption considered: Section 32(1)

Citation: 'CQ7' and Victoria Police (Freedom of Information) [2021] VICmr 43
(11 February 2021)

FREEDOM OF INFORMATION – police records – evidence of criminal offending – in-house legal advice

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.

My decision on the Applicant's request is the same as the Agency's decision.

I am satisfied the document is exempt under section 32(1).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted, I have determined to refuse access to the documents in full.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

11 February 2021

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency seeking access to the '[name] [year] report dated [date]'
2. In its decision, the Agency identified two documents falling within the terms of the Applicant's request and refused access to the documents in full under sections 32(1) and 33(1). The Agency's decision letter sets out the reasons for its decision.

Review

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant advised they do not seek access to emails identified by the Agency in response to the Applicant's FOI request. Therefore, my review relates to Document 2 only (the document).
5. I have examined a copy of the document 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 communications and submissions received from the parties.
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.
9. 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.

Review of exemptions

Section 32(1)

10. 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'.
11. A document will be subject to client legal privilege where it contains a 'confidential communication'¹ 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;² or

¹ 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.

² Section 118 of the *Evidence Act 2008* (Vic).

- (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.³
12. In accordance with established law, legal privilege can apply to advice from in-house, salaried lawyers.⁴
13. Section 32(2) provides, a document of the kind referred to in section 8(1) is not exempt under section 32(1) by reason of the inclusion in the document of a matter that is used or to be used for the purpose of the making of decisions or recommendations referred to in section 8(1) only.
10. Section 8(1) provides an agency must make certain documents it holds available for public inspection and purchase:
- (1) This section applies, in respect of an agency, to documents that are provided by the agency for the use or guidance of, or are used or may be used by, the agency or its officers—
 - (a) in making decisions or recommendations, or in providing advice to persons outside the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to or for which persons are or may be entitled, eligible or subject, being—
 - (i) documents containing interpretations or particulars of Acts or schemes administered by the agency, not being particulars contained in another Act; or
 - (ii) manuals, rules of procedure, statements of policy, records of decisions, letters of advice to persons outside the agency, or similar documents containing rules, policies, guidelines, practices or precedents; and
 - (b) in enforcing Acts or schemes administered by the agency where a member of the public might be directly affected by that enforcement, being documents containing information on the procedures to be employed or the objectives to be pursued in the enforcement of the Acts or schemes.

Has legal professional privilege in the document been waived?

14. Legal privilege exists to protect the confidentiality of communications between a lawyer and a client. Privilege will be lost where the client acts 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

Applicant's submission

15. The Applicant submits:

Section 8 Freedom of Information Act clearly applies.

...

In the first instance I say that such an exemption does not apply as Victoria Police have advised they will not be pursuing the matter. It is logically implausible to withhold a document on the grounds that the document would be privileged from production in legal proceedings when the prospect of such legal proceeding as nil.

The document in question provides reasoning as to the decision by Victoria Police not to pursue the matter I have reported. The matter is one of historical fraud and there is little doubt that the matter is complex and there may be hurdles to a successful prosecution. My reason for requesting this document

³ Section 119 of the *Evidence Act 2008* (Vic).

⁴ *AWB Limited v Honourable Terence Roderic Hudson Cole (No 5)* [2006] FCA 1234 at [44].

⁵ Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for CLP).

is to understand these reasons and therefore is there a path open to pursue the matter further with Victoria Police.

In the first instance I would say that this is a matter of public interest and the document should be exempt from legal professional privilege on this basis.

In the alternative, the conclusion of the legal advice has been expressed to me by telephone call from [Agency officer, name and rank]. It is inconsistent for Victoria Police to provide me that advice without providing to me the basis of that advice; which they have not done. Provision of the document I seek would overcome this inconsistency.

In the alternative, the advice in question has been produced by in house lawyer(s). To attract privilege, communications must be made in a lawyer's capacity as a lawyer, rather than any other capacity. According to the SOSO this can be particularly difficult for in-house lawyers to prove due to the nature of their employment. As in-house lawyers, they are often likely to act for purposes unrelated to providing legal advice, as opposed to external lawyers who are instructed to provide legal advice. Communications made by in-house lawyers who act beyond their role as a legal adviser may also fall outside the scope of privilege because they are found to have been made for mixed non-legal and legal purposes rather than a 'dominant purpose'...

In the alternative; again, according to the SOSO, legal privilege can be rejected on the basis that in-house lawyers have not acted at sufficient arms length from their client. Doubts have been expressed as to whether legal professional privilege extends to documents produced by in-house lawyers who are subject to the directions of their managers and therefore, might lack the necessary independence. In this instance the client and lawyer are one and the same and it is hard to imagine any independence between lawyer and client exists.

...

16. Having reviewed the document and on the information before me, I have determined the document is exempt under section 32(1) as I am satisfied it amounts to a confidential communication between the Agency and its legal advisers for the purpose of receiving and providing legal advice.
17. While the outcome of the advice was provided to the Applicant, the substance of the advice has not. Therefore, I am satisfied privilege has not been waived and section 32(2) does not apply.
18. Further, I am satisfied section 8(1) does not apply to the document. This provision refers to specific types of documents used by agency officers to guide their decisions. For example, an agency's interpretation of a legislative scheme or provision, a manual or statement of policy or operational procedures. In contrast, the information in the document subject to review constitutes specific legal advice concerning a discreet matter under consideration by the Agency.
19. Whether or not the Agency determines to take further action in the matter is not a consideration as to whether a document is exempt under section 32(1). In addition, I confirm the exemption under section 32(1) does not provide for me to consider any public interest reasons as to whether a document should be released under the FOI Act.

Deletion of exempt or irrelevant information

20. 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.
21. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'⁶ and the effectiveness of the deletions. Where

⁶ *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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.⁷

22. 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. I am satisfied it is not practicable to delete the exempt information, as to do so would render the document meaningless.

Conclusion

23. On the information before me, I am satisfied the document is exempt under section 32(1).
24. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted, I have determined to refuse access to the documents in full.

Review rights

25. 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.⁸
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
27. 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.
28. The Agency is required to notify the Information Commissioner in writing as soon as practicable if an application is made to VCAT for a review of my decision.¹⁰

⁷ *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].

⁸ Section 50(1)(b).

⁹ Section 52(5).

¹⁰ Sections 50(3F) and (3FA).