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Information Commissioner

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Notice of Decision and Reasons for Decision

Applicant:	'DB5'
Agency:	Mornington Peninsula Shire
Decision date:	26 May 2021
Exemptions considered:	Sections 34(1)(b), 32(1) and 38 in conjunction with section 125 of the <i>Local Government Act 2020</i> (Vic).
Citation:	'DB5' and Mornington Peninsula Shire (Freedom of Information) [2021] VICmr 141 (26 May 2021)

FREEDOM OF INFORMATION – council documents – [Suburb] Airfield Noise Assessment – business undertaking – invoices – legal advice – legal professional privilege – confidential information – secrecy provision – *Local Government Act 2020* (Vic)

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 differs from the Agency's decision in that I have determined the information to which the Agency refused access under sections 32(1) is exempt under section 38 in conjunction with section 125 of the *Local Government Act 2020* (Vic) (**LG Act 2020**).

However, I am not satisfied information in the documents is exempt under section 34(1)(b).

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

Joanne Kummrow

Public Access Deputy Commissioner

26 May 2021

Reasons for Decision

Background to review

1. On [date], the Applicant made two FOI requests to the Agency. The first request sought access to the following documents:

...a copy of all documentation, letters, notes, emails, and records of telephone calls, conveying the request for the Planning Report to [suburb] Legal, or like documents (in electronic medium, handwritten, printed or otherwise) relating to the planning permits issued for and relating to the use & development of the [suburb] Airfield precinct, along with all Reports (whether Preliminary, Interim and/or Final) provided by [named individual] to the [Agency].
2. The second request sought access to the following documents:

...a copy of the Noise Study, including a description of the scope of methodology, all the Noise Test data, commissioned by the [Agency] from [business undertaking], and all reports (interim or otherwise) drawing upon that data obtained by the hire with respect to the flying and other activities on or around the [suburb] Airfield precinct since [date].

A copy of the invoice or invoices for the costs involved in obtaining the noise data & the preparation of all the subsequent reports is to be included.
3. The Agency identified ten documents falling within the terms of the Applicant's request, and granted access to three documents in full and refused access to six documents in full. The Agency also advised a document that fell within the terms of the Applicant's request is accessible via its website.
4. The Agency relied on the exemption in sections 32(1) and 34(1)(b) to refuse access to the documents. The Agency's decision letter sets out the reasons for its decision.

Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. I have examined copies of the six documents subject to review.
7. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
8. I have considered all communications and submissions received from the parties.
9. 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.
10. 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

11. In undertaking a review under section 49F, I am required to make a fresh or new decision.¹ This means my review does not involve determining whether the Agency's original decision is correct, but rather I am required to ensure my decision is the 'correct or preferable decision'.² This involves ensuring it is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.
12. On 24 October 2020, the LG Act 2020 commenced. The secrecy provision in section 125 of the LG Act 2020 replaced the secrecy provision in the former *Local Government Act 1989* (Vic). Section 125 of the LG Act 2020 changes the way a council must process certain FOI requests as it prohibits the disclosure of 'confidential information', which includes personal affairs information in documents held by a council.
13. Therefore, it is appropriate for me to first consider whether the documents subject to review are exempt under section 38 of the FOI Act in conjunction with section 125 of the LG Act.

Review of exemptions

Section 38 – Secrecy provision

14. 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).
15. 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?

16. Section 125 of the LG Act 2020 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;

¹ Section 49P.

² *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

- (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;

17. I am satisfied the LG Act 2020 is an enactment in force for the purpose of section 38.

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

18. The term 'confidential information' is defined in section 3 of the LG Act 2020, which relevantly provides:

3 Definitions

...

- (e) legal privileged information, being information to which legal professional privilege or client legal privilege applies;

...

- (g) private commercial information, being information provided by a business, commercial or financial undertaking—
 - i. relates to trade secrets; or
 - ii. if released, would unreasonably expose the business, commercial or financial undertaking to disadvantage;

19. The definition of 'confidential information' in the LG Act 2020, as set out above, overlaps with the exemptions under sections 32(1) and 34(1)(b) of the FOI Act.

Section 32(1) – legal professional privilege and client legal privilege

20. 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'.

21. A document will be 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; or
- (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.

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.

22. The term 'client professional privilege' is a reference to Part 3.10, Division 1 of the *Evidence Act 2008* (Vic). There are minor differences between the scope of professional legal privilege and client legal privilege.
23. Where a question of legal privilege arises, the Agency must satisfy me that the dominant purpose for which the document was prepared was either for legal advice, or alternatively for anticipated litigation.⁴ These are referred to as advice privilege and litigation privilege respectively.
24. The High Court of Australia has held the purpose of legal professional privilege or client legal 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.⁵
25. The dominant purpose for which the confidential communication was made determines whether the exemption applies.⁶ The dominant purpose test applies to both communications for the purpose of obtaining or giving legal advice.
26. When documents are attached to a request for legal advice, those attachments will be subject to privilege if the dominant purpose for which they were created was to seek legal advice. This is the case even if the original documents were not privileged.⁷
27. The Agency applied section 32(1) to refuse access to Documents 2-6 in full on the grounds that they were provided for the purpose of the Agency obtaining legal advice from its external legal advisers to inform it on the relevant permit conditions and subsequent enforcement action.
28. Having reviewed the documents and on the information before me, I am satisfied:
- (a) the documents amount to confidential communications;
 - (b) between the Agency and its professional legal advisers;
 - (c) submitted for the purposes of the Agency requesting and the Agency's external legal advisers providing legal advice and services.

Has legal privilege been waived?

29. 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.⁸

⁴ *Grant v Downs* 135 CLR 674 at 689.

⁵ *Grant v Downs* (1976) 135 CLR 674 at [19].

⁶ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

⁷ *Frugtniet v Legal Services Board* [2014] VCAT 1299; *Birrell v Department of State and Regional Development and Department of Premier and Cabinet* [2001] VCAT 50

⁸ Sections 122(2) and (3) of the *Evidence Act 2008* (Vic) (for client legal privilege) or *Mann v Carnell* (1999) 201 CLR 1 at [28] (for legal professional privilege).

30. There is no information before me to establish legal professional privilege in the documents has been waived.
31. Accordingly, I am satisfied the information identified as exempt by the Agency under section 32(1) is information to which professional legal privilege or client legal privilege applies. Therefore, I am satisfied Document 2-6 contain 'confidential information' for the purposes of the LG Act 2020.
32. As such, I am satisfied section 38 of the FOI Act applies to the 'legal privileged information', as:
 - (a) section 125 of the LG Act 2020 is an enactment in force;
 - (b) section 125(3)(e) of the LG Act 2020 refers specifically to the 'legal privileged information' in the documents; and
 - (c) section 125 of the LG Act 2020 prohibits Agency officers, specifically councillors and council staff, from disclosing 'confidential information'.
33. Accordingly, I am satisfied Documents 2-6, which the Agency determined were exempt under section 32(1), are exempt under section 38 in conjunction with section 125 of the LG Act 2020.

Section 34(1)(b)

34. A document will be an exempt document under section 34(1)(b), if the document contains information:
 - (a) acquired from a business undertaking;
 - (b) that relates to matters of a business, commercial or financial nature; and
 - (c) the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.
35. The Agency applied section 34(1)(b) to the invoices supplied by an external consultant for provision of services to the Agency (the **business undertaking**).
36. I am satisfied the invoices were provided to Agency by the business undertaking.
37. I also accept the information broadly relates to matters of a business and financial nature.
38. In deciding whether disclosure of this information would expose the business undertaking unreasonably to disadvantage, I may take into account of any of the following considerations listed in section 34(2):
 - (a) whether the information is generally available to competitors of the undertaking;
 - (b) whether the information would be exempt matter if it were generated by an agency or Minister;
 - (c) whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking; and
 - (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental controls—and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

39. I have decided disclosure of the invoices would not be likely to expose the business undertaking unreasonably to disadvantage for the following reasons:
- (a) Information in the documents comprises the date, invoice tasks, total amounts, invoice and job number, client reference number and the business undertaking's contact details and banking information for payment. While the billing information is commercial information, I consider it would reflect the particular circumstances of the matter.
 - (b) While I am unable to determine whether this information is available to competitors of the business undertaking, I consider it is not sufficiently detailed such that its disclosure would cause commercial or financial detriment to the business undertaking by its competitors.
 - (c) There does not appear to be any proprietary information in the documents concerning the business undertaking.
 - (d) I note the business undertaking has not been consulted and I have no information before me about whether they consider that the invoices would expose them to disadvantage.
 - (e) Lastly, I view transparency and accountability in the expenditure of public funds by government for the procurement of goods and services outweighs any potential disadvantage to which the business undertaking may be exposed.
40. Accordingly, I am satisfied disclosure of the invoices would not unreasonably expose the business undertaking to disadvantage. Therefore, I am not satisfied it is 'confidential information' under the LG Act 2020 as it does not meet the definition as per subparagraph (g)(ii) of section 3 – refer paragraph 18 above. As such, I am satisfied section 38 does not apply to Document 1.

Section 34(1)(b)

41. Having considered the information exempted by the Agency under section 34(1)(b), I am further satisfied of the following:
- (a) disclosure of the documents would disclose information that was acquired from a business undertaking, being an invoice;
 - (b) the information relates to matters of a business and financial nature; and
 - (c) for the reasons set out above, I am satisfied the information exempted by the Agency can be disclosed without causing the business undertaking substantial commercial or financial harm.
42. Accordingly, I am satisfied the documents are not exempt under section 34(1)(b).

Section 25 - Deletion of exempt or irrelevant information

43. 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.
44. 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

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].

deletions would render a document meaningless, they are not 'practicable', and release of the document is not required under section 25.¹⁰

45. I have considered the effect of deleting exempt information from Documents 2-6. I am not satisfied an edited copy of these documents can be provided to the Applicant as the deletion of exempt information would render the documents meaningless. Therefore, I am satisfied Documents 2-6 are exempt in full.

Conclusion

46. On the information before me, I am satisfied information that is subject to legal professional privilege (legal privileged information) is exempt under section 38 in conjunction with section 125 of the LG Act 2020.
47. However, I am not satisfied information is exempt under section 34(1)(b).
48. The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

Review rights

49. 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.¹¹
50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹³
52. 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.
53. 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

Third party review rights

54. As I have decided to release documents that contain information about matters of a commercial nature relating to the business undertaking, it will be notified of my decision and its right to apply to VCAT for a review within 60 days from the date it is given notice.

When this decision takes effect

55. My decision does not take effect until the business undertaking's 60 day review period expires.
56. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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].

¹¹ The Applicant 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).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[date]	Invoices	6	Refused in full Section 34(1)(b)	Release in full	Sections 38 and 34(1)(b): For the reasons set out in the Notice of Decision above, I am satisfied disclosure of information in the document would not expose the business undertaking unreasonably to disadvantage. Accordingly, this information is not exempt under sections 38 or 34(1)(b).
2.	Undated	QC Brief Table	2	Refused in full Section 32(1)	Refuse in full Section 38	Section 38: I am satisfied the document is a confidential communication between the Agency and its external legal advisers made for the dominant purpose of providing and receiving legal advice and services. Accordingly, I am satisfied the information is confidential information and is exempt under section 38 in conjunction with section 125 of the LG Act 2020. Section 25: I am satisfied it is not practicable to provide the Applicant with an edited copy of the document as deleting the exempt information would render the document meaningless.
3.	Undated	Definition Consideration	3	Refused in full Section 32(1)	Refuse in full Section 38	See comments for Document 2.

Annexure 1 – Schedule of Documents

4.	[date]	Consideration for the [Agency's] QC	59	Refused in full Section 32(1)	Refuse in full Section 38	See comments for Document 2.
5.	[date]	[suburb]Airfield request for legal advice	99	Refused in full Section 32(1)	Refuse in full Section 38	See comments for Document 2.
6.	[date]	[suburb] Airfield request for legal advice Part B	3	Refused in full Section 32(1)	Refuse in full Section 38	See comments for Document 2.