

## Notice of Decision and Reasons for Decision

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Applicant:	'FQ7'
Agency:	Baw Baw Shire Council
Decision date:	6 June 2024
Exemption considered:	Section 32(1)
Citation:	'FQ7' and Baw Baw Shire Council (Freedom of Information) [2024] VICmr 38 (6 June 2024)

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FREEDOM OF INFORMATION – council matters relating to global current affairs – petitions – legal 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 a document by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision and no further information is to be released.

Please refer to page 5 for information about further review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
Acting Public Access Deputy Commissioner

6 June 2024

## Reasons for Decision

### Background to review

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

The legal advice that was provided as to the compliance of the petition tabled on 22 November 2023 calling for a vigil and prayer for people of Palestine with Governance Rule 64.9.

2. The Agency identified one document falling within the terms of the Applicant's request and refused access in full under section 32(1). 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
4. I have examined a copy of the document subject to review.
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 relevant 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.

### Review of exemption

#### *Section 32(1) – Documents affecting legal proceedings*

9. 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'.
10. To apply section 32(1), it is generally not necessary to distinguish between legal professional privilege and client legal privilege.<sup>1</sup>

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<sup>1</sup> This approach is also adopted by the Victorian Civil and Administrative Tribunal (VCAT). See for example, *Coulson v Department of Premier and Cabinet* [2018] VCAT 229.

11. Both legal professional privilege and client legal privilege cover confidential communications:
  - (a) providing legal advice (**advice privilege**); and
  - (b) prepared for current or anticipated litigation or court proceedings (**litigation privilege**).<sup>2</sup>
12. A document or information attracts advice privilege, and is exempt under section 32(1), if it would disclose:
  - (a) a confidential communication between a client (or their agent) and their lawyer that was made for the dominant purpose of obtaining or providing legal advice; or
  - (b) a confidential communication between two or more lawyers acting for their client that was made for the dominant purpose of obtaining or providing legal advice; or
  - (c) the contents of a confidential document (whether delivered or not) prepared by a client, their lawyer, or another person for the dominant purpose of obtaining or providing legal advice.
13. The document subject to review is a letter from an external law firm to an agency officer.
14. On the information before me, I am satisfied:
  - (a) the letter is a confidential communication;
  - (b) the requisite client/lawyer relationship exists between the Agency and their external legal representative; and
  - (c) the dominant purpose of the document was to provide the Agency with legal advice.

*Has legal professional privilege been waived?*

15. A document will not be exempt under section 32(1) if legal privilege has been lost or waived.
16. Legal privilege can be either expressly waived, or waiver can be implied from the circumstances.
17. Legal privilege can be lost or waived where the client acts inconsistently with the confidentiality of legal privilege.<sup>3</sup>
18. The fine balance in implied waiver is demonstrated in *Mann v Carnell* (1999) 201 CLR 1 where the High Court found disclosure of the substance of the legal advice for the purposes of explaining and justifying the actions of a member of Parliament did not waive legal privilege, but disclosure of the substance of the legal advice to further the client's own personal or commercial interests did waive legal privilege.

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<sup>2</sup> See *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67 and *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49.

<sup>3</sup> Sections 121 to 126 in the *Evidence Act 2008* (Vic) deal with different circumstances in which client legal privilege may be lost.

19. There is publicly available material about the Agency seeking legal advice. For example, a newspaper article reporting on the petition states:

Answering two questions on notice... the chief executive officer said...legal advice had been sought on the compliance of the petition.<sup>4</sup>

20. Further, the confirmed minutes of the Council Meeting on 7 February 2024 states in response to questions on notice:

**5. Governance Rule 64.9 states that petitions must relate to Council Business and not be the responsibility of another authority or body. Was any legal advice sought to support the officer report to the February meeting position taken that the petition was within the scope of council business?** Legal advice was sought as to the compliance of the petition with Governance Rule 64.9.<sup>5</sup>

21. Accordingly, the question is whether the Agency has waived legal privilege over the piece of legal advice that is subject to review due to having disclosed publicly that legal advice was sought in relation to ‘compliance of the petition with Governance Rule 64.9’.
22. I consider references to the fact the Agency sought legal advice is distinguishable from disclosing the substance of the legal advice provided to the Agency.
23. Therefore, I am satisfied that legal privilege has not been waived as the legal advice the Agency obtained has not been disclosed in publicly available material.
24. In this case, there is no information before me to suggest legal privilege has been waived.
25. Accordingly, I am satisfied the document is subject to legal privilege for the purpose of section 32(1).

### ***Section 25 – Deletion of exempt information***

26. 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.
27. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>6</sup> 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.<sup>7</sup>

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<sup>4</sup> Emma Ballingall, ‘No action of Gaza Petition’, *The Warragal and Drouin Gazette* (online, 13 February 2024).

<sup>5</sup> Available at <https://bawbaw.civicclerk.com.au/web/Player.aspx?id=1321&key=-1&mod=-1&mk=-1&nov=0>.

<sup>6</sup> *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].

<sup>7</sup> *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], [155].

28. I have considered the effect of deleting exempt information from the document. In my view, it is not practicable for the Agency to delete the exempt information because to do so would render the document meaningless.

### Conclusion

29. On the information before me, I am satisfied the document is exempt from release under section 32(1).
30. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the document with exempt information deleted in accordance with section 25, access is refused in full.

### Timeframe to seek a review of my decision

31. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
32. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
33. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.

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<sup>8</sup> Section 52(5).

<sup>9</sup> Section 52(9).