

Access requests for documents that are obviously exempt

A guide to interpreting and using section 25A(5) of the FOI Act

Summary

The power in s 25A(5) of the *Freedom of Information Act 1982 (Vic)* (**the Act**) to categorically refuse an access request, where it is apparent from the face of the request that all documents sought are or would be exempt, will only be available in limited circumstances.

The Information Commissioner encourages agencies to engage with applicants with a view to assisting them to rescope a request so as to avoid the use of s 25A(5) and allow a request to be processed under the Act.

When does s 25A(5) apply?

Section 25A(5) allows an access request to be refused where it is apparent from the nature of the documents, as described in the request, that:

- all of the documents are or would be exempt under Part IV of the Act; and
- there is no obligation under s 25 for the decision maker to grant access to an edited copy of any of the documents, or that the applicant does not wish to receive an edited copy of the documents.

Interpreting s 25A(5) consistently with the purpose and object of the Act

The object of the Act is to extend, as far as possible, the right of the community to access information in the possession of Victorian government agencies and Ministers.¹

¹ Section 3(1).

The Act creates a general right for any person to access information in the possession of a Victorian agency or Minister. Limited exceptions and exemptions may apply where non-disclosure is necessary to protect an essential public interest, personal privacy or sensitive commercial information of a business or government.²

Parliament's intention is that the Act be interpreted so as to further the object of the Act and that any discretion available to a decision maker under the Act be exercised so as to facilitate and promote the disclosure of information promptly and at the lowest reasonable cost.³

Supreme Court decision on s 25A(5)

A decision of the Supreme Court of Victoria provides the most authoritative statement on the proper interpretation and use of s 25A(5).⁴

The applicant sought access to documents that concerned him and agreed to receive an edited copy with any exempt matter deleted in accordance with s 25 of the Act.

The agency refused the request under s 25A(5) on the basis that it was apparent from the face of the request that all of the documents would be exempt.

The Court referred to s 25A(5) as a 'carefully circumscribed power', adding that:

² Section 3(1)(b).

³ Section 3(2).

⁴ *Knight v Corrections Victoria* [2010] VSC 338.

... in the clear and limited category to which it is meant to apply, this power permits the request to be categorically refused consistently with the purposes of the legislation in s 3(1) and the requirements of ss 3(2) and 16(1).

The Court confirmed that s 25A(5) can only be relied on to refuse access to documents when the following two elements are satisfied:

- firstly, it is objectively apparent from the nature of the documents, as described in the request, that all of the documents are exempt; and
- secondly, it would not be reasonably practicable to provide access to any of the documents in edited form, with exempt matter deleted under s 25 or that an edited copy of the documents is not wanted by the applicant.

First element – all documents must be obviously exempt

In relation to the first element, the Court noted that the nature of the documents means ‘nature’ in terms of ‘the inherent or essential quality and character of the documents’ as described in the request. This means that there is no requirement for the decision maker to go behind the description of the documents in the request.

Example

An example of where it would be objectively apparent from the face of a request that the documents sought would be exempt is a request for access to Cabinet submissions submitted to and considered by Cabinet.

All such documents would likely be subject to the Cabinet exemption in s 28(1) of the Act. In such circumstances, the request could be refused under s 25A(5).

Second element – no scope to provide an edited copy of any document

In relation to the second element, the Court held that it must be objectively apparent from the nature of the documents, as described in the request, that no obligation arises under s 25 to provide the applicant with an edited copy of any document sought. If an obligation exists under s 25 for a decision maker to provide access to an edited copy of just one document, s 25A(5) will not apply.

Section 25 – Providing access to edited copies of documents

Section 25 of the Act provides that an agency or Minister must grant access to an edited copy of a document with irrelevant or exempt information deleted where:

- it is practicable for the agency or Minister to grant access to the document with the exempt or irrelevant material deleted; and
- it appears from the request or the applicant later indicates that they would wish to have access to an edited copy of the documents sought.

The Court held that a narrow or arbitrary view of what is ‘practicable’ is not consistent with the purpose of s 25 or, ss 3 and 16 of the Act:

Where it is reasonably practicable, in all the circumstances, for the decision maker to give the applicant access to a non-exempt copy of a document by deleting the exempt matter, it is obliged to do so under s 25 of the Act. That will mean creating a redacted copy of the document, which will not be exempt under the Act.

Example

Where a request seeks access to correspondence and reports, including correspondence sent between the applicant and the agency in relation to an investigation – the correspondence is unlikely to be subject to an exemption or, at the very least, s 25 will require the decision maker to provide access to an edited copy of the correspondence with any exempt information removed.

Similarly, if the reports quote information provided by the applicant (eg information provided by the applicant at an interview), such information is also unlikely to be exempt and s 25 requires that the decision maker provides access to an edited copy of the report.

How can an applicant scope an access request to avoid s 25A(5)?

The Information Commissioner encourages applicants to carefully consider the specific type of documents they would like to access with a view to being able to frame their access request in such a way as to avoid requesting documents that would, by their nature, all be apparently exempt documents from the face of the request.

For example, an applicant who seeks access to documents concerning a workplace investigation in which they were involved or were interviewed, could frame their access request by seeking, ‘an edited copy of all investigation documents concerning me with any personal information relating to other persons deleted from the documents in accordance with s 25 of the FOI Act’.

The Information Commissioner also encourages applicants to engage with the agency or Minister to discuss the scope of their request in the event the agency is likely to refuse the request, including on the grounds of s 25A(5).

For example, an applicant could include a request for the agency to contact them about their request in the event that it considers s 25A(5) applies. Alternatively, the applicant could contact the agency after their request is accepted to discuss the scope of the request and the nature of the documents requested.

Finally, if an applicant is contacted by an agency or a Minister and advised that the way in which their request is framed means that s 25A(5) applies, the Information Commissioner encourages applicants to meaningfully engage with the agency or Minister, who can assist the applicant to rescope their request so that it can be processed in accordance with the Act.⁵

How should a decision maker approach s 25A(5)?

The Act requires that agencies administer the Act with a view to making the maximum amount of information promptly and inexpensively available to the public.⁶ The Act also encourages agencies and Ministers to publish or provide access to documents outside of the Act, where it is appropriate to do so, despite the availability of an exception or exemption.⁷

Before using s 25A(5), a decision maker should ensure that their decision is made in accordance with the purpose and object of the Act. The power under s 25A(5) to categorically refuse an access request without identifying any or all of the documents requested prevents an applicant from knowing how many or even whether relevant documents in fact exist, and enables an agency to refuse access without first carefully assessing the contents of the documents. A decision that prevents an access request from being processed in the usual way, significantly limits a person’s general right to access information.

⁵ Applicants should be aware that their agreement to a rescoped request may not necessarily mean that all documents sought will be released.

⁶ Section 16(1).

⁷ Section 16(2).

Requirement to afford procedural fairness

The rules of procedural fairness require a decision maker to give a person an opportunity to respond before making an adverse decision affecting their rights or interests.

Accordingly, the Information Commissioner encourages agencies to engage with applicants at an early stage with a view to assisting them to rescope their request so as to avoid the possible use of s 25A(5). This is despite the absence of an express requirement for an agency to do so under the Act.

This constructive approach again reflects the object and purpose of the Act and accords with the approach an agency or Minister is required to take under s 17 to assist an applicant to make a valid request.

Procedural fairness also requires that a decision maker bring an impartial and objective mind to the task at hand and not pre-judge a decision. Decision makers should ensure that they only refuse a request under s 25A(5) where it is objectively apparent on the face of the request that all of the documents would be exempt, and that there is no obligation to provide an edited copy of any of the documents in accordance with s 25.

Review of s 25A(5) refusals by the Information Commissioner

In relation to the task of conducting a review of a decision to categorically refuse an access request under s 25A(5), the Supreme Court has stated that ‘the function of the tribunal is to make the correct or preferable decision on the merits’.

While the Court’s comments were made in the context of a merits review by VCAT, they apply equally to a review conducted by the Information Commissioner under s 49F of the Act.

In making a fresh decision under s 49P, the Information Commissioner will closely consider the nature of the documents requested and the terms of the request in order to ensure that both the first and second elements in s 25A(5) are objectively satisfied.

The Information Commissioner will also consider whether third party information would likely be included in the documents, whether it would be practicable to consult those third parties about disclosure of their personal information in the documents, and whether their consent to disclosure would likely mean that the documents are not exempt.

Instances where s 25A(5) is unlikely to apply

Specifically, the Information Commissioner has determined that s 25A(5) is unlikely to apply where:

- a decision maker grants access to some of the requested documents, or part of a requested document;
- a request seeks access to multiple categories of documents, not all of which are obviously exempt on the face of the request;
- a request seeks access to documents concerning the applicant, including correspondence that was sent or received by the applicant and that would not be exempt; or
- the applicant indicates in their request, or through consultation, that they are willing to accept an edited copy of the documents and an edited copy of one or more documents could be provided.

This approach reflects the proper interpretation of s 25A(5) when read in the context of the object and purpose of the Act.

Example

An applicant's request for a complete workplace investigation file concerning their conduct may also include correspondence that was sent to and from the applicant.

In such circumstances, it would not be possible for a decision maker to determine from the face of the request alone that the nature of all documents sought would be exempt and that no requirement exists under s 25 to provide an edited copy of one or more of the documents.

For instance, s 25A(5) could not be relied upon if the:

- correspondence included letters or emails sent or received by the applicant, as such documents are unlikely to be exempt; or
- report could contain purely factual information that would not be subject to exemption under s 30(1) and no other exemption would apply.

Cooperation in the conduct of Information Commissioner reviews

The Information Commissioner relies on the cooperation of agencies and Ministers in order to conduct reviews under the Act in a timely and efficient manner and with as little formality and technicality as possible.

If necessary, the Information Commissioner will request a decision maker to provide any contextual information necessary to understand the nature of the documents requested in a general sense in order to ascertain whether the power in s 25A(5) applies.

The Information Commissioner may also request the decision maker to provide reasons why it believes that it is not practicable to edit any of the documents under s 25, and to confirm whether the applicant was consulted about whether they agree to receive an edited copy of the documents.

Finally, during the course of a review by the Information Commissioner, an agency or Minister may reconsider their initial decision on an access request and determine to make a fresh decision to process the request in the usual way.

Further Information

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This fact sheet is general in nature and does not constitute legal advice.