



**Office of the Victorian  
Information Commissioner**

A background image showing a blurred crowd of people walking on a light-colored tiled floor. The image is split vertically: the left half is in grayscale, and the right half is overlaid with a magenta-to-purple gradient. The people are out of focus, creating a sense of movement and a busy public space.

# Information Access Series

Seminar 1

*27 August 2018*

# Refusal of requests for documents

A guide to interpreting and using sections 25A(1) and (5) of the *Freedom of Information Act 1982*

OVIC

## Section 25A(1)

- Overview of provision
- Estimating the work involved
- Multiple separate requests
- Assisting applicant to amend request
- Effect on decision making time

# Substantial and unreasonable diversion

- Section 25A(1) allows a request to be refused if work involved in processing request would substantially and unreasonably –
  - divert agency's resources from its other operations; or
  - interfere with performance of Minister's functions
- Section 25A(6) requirements must be met before a request is refused under s 25A(1)
- When invoking s 25A(1), ensure you are acting in accordance with the object and purpose of the FOI Act

# Estimating work involved

- No requirement to have processed request before refusing request, however, you must estimate work involved in processing request
- Relevant considerations when estimating work involved – s 25A(2)
  - identifying, locating or collating documents
  - deciding the request, including –
    - examining documents or consulting any person or body in relation to the request
  - redacting and making copies of documents
  - notifying parties of any decision

# Estimating work involved continued...

- Other possible relevant considerations –
  - volume of documents
  - agency size
  - resources (including necessary expertise) available within your agency to undertake work
  - time limit within which the decision must be made
  - impact on agency if work is undertaken – would work involved divert an officer from other important tasks?
  - Document sampling can be used to estimate time required

# Estimating work involved continued...

- Irrelevant considerations when estimating work involved – ss 25A(3) and 25A(4)
  - charge for processing request
  - applicant's reasons for requesting access
  - agency or Minister's belief as to applicant's reasons for requesting access

# Multiple separate requests

- Multiple requests may be aggregated to assess the workload and impact when deciding to refuse
- Satisfy the below factors –
  - made by the same applicant
  - relating to the same or similar subject matter
  - lodged at or about the same time (2-3 weeks)
  - attempting to avoid grounds of refusal under s 25A(1)



# Assisting applicant to amend request

- Section 25A(6) requires that before refusing request, applicant must be notified in writing of –
  - intention to refuse request; and
  - details of agency officer with whom applicant can consult, with a view to amend request so as to remove proposed grounds for refusal
- Agency officer must –
  - give applicant a reasonable opportunity to consult; and
  - provide applicant with information to assist them in amending request

## Assisting applicant to amend request continued...

- Agency officer may suggest amendments to reduce work involved in processing request –
  - reduce the date range for documents
  - reduce the scope of the relevant topic
  - omit duplicates, drafts, correspondence to and from the applicant
  - specify applicant does not want personal affairs information of other persons
- Further information about the use of s 25A(1) is available from OVIC website

## Effect on decision making time

- Time pauses the day you send notice of intention to refuse access to an applicant
- Time resumes the day after the revised or confirmed request is accepted by agency. e.g. –
  - advise applicant of intention to refuse on ‘Day 10’, after receiving the request on 1 October
  - if no response or agreement from an applicant until 15 October, the clock resumes from 16 October, which will be ‘Day 11’ of the initial 30 day period

## Review of s 25A(1) refusal by Commissioner

During a review the Commissioner may ask your agency to provide a written submission which:

- Explains any attempts that were made to narrow the scope of the request;
- Explains how dealing with the request would substantially and unreasonably divert the resources of your agency from its other operations;
- Explains how many dedicated staff comprise your FOI unit and the total capacity within your agency to process the request;
- Identifies what resources and time you estimate would be involved in processing the request

## Key Points – s 25A(1)

- Engage with applicants early and meaningfully with a view to assisting them to rescope or narrow their request
- Properly resource the FOI function
- Keep records of how estimates are calculated and any document sampling
- Provide detailed reasons in the decision letter to explain the basis on which s 25A(1) has been applied
- Cooperate with OVIC during the review process

## Section 25A(5)

- Overview of provision
- When the provision applies
- Providing access to edited copies
- Requirement to afford procedural fairness
- Review of s 25A(5) refusals by the Commissioner

## Overview of s 25A(5)

- The power in section 25A(5) allows an agency or Minister 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
- Applies in limited circumstances

## When does s 25A(5) apply?

- Section 25A(5) allows a request to be refused if it is objectively apparent from the face of request that –
  - all documents sought are exempt; and
  - applicant does not seek, or would not agree to receive, a copy of documents with exempt information deleted under s 25
- It must be apparent on the face of the request that every document falling within the terms of the request would be exempt



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

The object and purpose of the FOI Act is to :

- extend as far as possible the right of the community to access information held by Government agencies by creating a general right of access to information;
- this is limited only by exceptions and exemptions necessary to protect essential public interests and the private and business affairs of persons; and
- it is the intention of Parliament that the provisions of the FOI Act be interpreted so as to further the object of the Act and any discretions shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information

## Invoking s 25A(5)

*Knight v Corrections Victoria* [2010] VSC 338 – most authoritative statement on the proper interpretation of s 25A(5)

The Supreme Court confirmed that s 25A(5) can only be invoked to refuse access to documents when 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

# All documents must be obviously exempt

- 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** - 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).

## No scope to provide an edited copy of any document

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.

# 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 view of what is ‘practicable’ is not consistent with the purpose of s 25 or the object of the Act.

## Example 1

Request for access to a complete workplace investigation file concerning the applicant's conduct.

- 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 (the documents may include correspondence that was sent to and from the applicant); 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 documents included a report which contained purely factual information that would not be subject to exemption under s 30(1) and no other exemption would apply.

## Example 2

The scope of an applicant's request has two limbs with regard to Council documents.

The first limb seeks access to a decision made in a closed council meeting. On the face of the request and without having conducted a search, the agency is satisfied that all documents in the first limb will be exempt under s38A of the FOI Act.

The second limb of the applicant's request would include two documents which are publically available and therefore not exempt. The Agency intends to release these documents outside of the Act.

***Can the Agency rely on s25A(5) to the remainder of the documents which it considers to be exempt?***

## Example 3

Request seeks access to correspondence and reports:

- the correspondence is unlikely to be exempt if it includes correspondence sent between the applicant and the agency; and
- 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.



## Requirement to afford procedural fairness

A decision that prevents an access request from being processed in the usual way:

- prevents an applicant from knowing how many or even whether relevant documents in fact exist;
- significantly limits a person's general right to access information

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.

OVIC 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 use of s 25A(5).

## Example

An agency receives a request for access to documents concerning an investigation in which they were involved and interviewed. It is apparent from the face of request and the way in which the request is framed that all documents sought would be exempt.

The agency could contact the applicant and assist them reframe their request to:

- “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”.

# Review of s 25A(5) refusal by the Commissioner

During a review the Commissioner may ask an agency to provide:

- any contextual information necessary to understand the nature of the documents requested;
- 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

## Review of s 25A(5) refusal by the Commissioner continued...

- Where the Commissioner is not satisfied that all the documents are or would be exempt, the Agency may be asked to consider providing a written submission explaining why the documents would be exempt
- If the Agency provides a written submission and the Commissioner is still not satisfied, the Commissioner may give notice under s49KA(2)(a) to process a sample of documents
- The sample documents are to be provided to OVIC for consideration, or inspected at the Agency if section 31 is claimed

# Review of s 25A(5) refusal by the Commissioner continued...

- The Commissioner will conduct an assessment of the sample documents to determine if the applicant's request should have been refused under s 25A(5)
- If the Commissioner decides that the request should not have been refused under s 25A(5), the Agency will be required to process the applicant's request

## Key points – s 25A(5)

- The power in section 25A(5) allows an agency or Minister 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
- 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

## Key points – s 25A(5)

- The power under s 25A(5):
  - prevents an applicant from knowing how many or even whether relevant documents in fact exist; and
  - significantly limits a person's general right to access information
- Prior to making a decision to refuse access, the decision maker should consider the object and purpose of the FOI Act
- If a decision maker relies on s25A(5) the decision letter should clearly set out the elements that need to be met before s25A(5) can be invoked
- s 25A(5) applies in limited circumstances

# Resources

- Please visit the OVIC website to access:
  - **Guide to interpreting and using s 25A(1) of the Freedom of Information Act 1982**
  - **Guide to interpreting and using s 25A(5) of the Freedom of Information Act 1982**



# Upcoming Information Access Series events

- **Monday 29 October:** Preparing decision letters in freedom of information matters
  - 12-2pm, Level 5, 121 Exhibition Street
- **Wednesday 28 November:** Working with OVIC – demystifying our processes and procedures
  - 12-2pm, Level 27, 121 Exhibition Street
- Please register via our website: [www.ovic.vic.gov.au](http://www.ovic.vic.gov.au)

# Contact us

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