[This decision](https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2019/1878.html?context=1;query=%22review%20and%20regulation%20list%22;mask_path=au/cases/vic/VCAT) illustrates the “heavy burden” facing agencies seeking to rely on section 25A(5) to claim it is apparent from the nature of the documents as described in the request that they are all exempt. In particular:

* When relying on the section 38 (secrecy) exemption, ensure that there are no exceptions in the underlying secrecy provision where edited information could be released.
* When relying on the section 30 (internal working documents) exemption, make sure that there is no purely factual material that can be released in an edited document.
* When applying section 25A(5)(b), the Tribunal will receive information up to the hearing about whether the applicant does not want edited documents (rather than asking whether the applicant agrees to receive edited material).

Facts and background

Mr Grahame (the **FOI applicant**) made an FOI request to the Victorian Legal Services Commissioner (the **VLSC**) for its investigation documents about a complaint about him made to the VLSC. He sought:

1. A report of the Ethics Committee of the Victorian Bar Incorporated (the **Committee**) (the **Report**).
2. Any draft or interim reports of the Committee (**Draft Reports**).
3. Correspondence between the VLSC and Committee about the matter (**Correspondence**).

The VLSC refused access to all documents relying on section 25A(5). Relevantly, section 25A(5) permits an agency to refuse an FOI request without identifying all the documents or exemptions where it is apparent on the face of the FOI request that all the documents would be exempt and the FOI applicant would not wish access to edited copies of documents.

The FOI applicant sought review of the VLSC decision to OVIC. During the OVIC review, the FOI applicant narrowed the scope of the review to the Report and agreed to accept an edited copy of the document.

The (then) Acting Public Access Deputy Commissioner (the **Commissioner**) decided at least part of the Report would not be exempt and thus concluded that section 25A(5) did not apply. The VLSC applied to VCAT for review of the Commissioner’s decision.

VCAT Decision

**What test did the Tribunal apply?**

The Tribunal applied the three conditions the Supreme Court[[1]](#footnote-1) set outto engage section 25A(5):

1. The exempt nature of the documents must be objectively apparent from the face of the request.
2. It must be apparent that all of the documents in the request are exempt.
3. From the face of the request or the applicant’s declared wishes, there must be no scope to provide edited copies of any of the documents.

The Tribunal noted commentary that this was a “heavy burden” on agencies that relied on section 25A(5).

**What documents did the Tribunal consider against section 25A(5)?**

During the OVIC review, the FOI applicant reduced the documents in contention. Nevertheless, the VLSC argued that the Tribunal had to consider all the documents in the FOI application, not just the Report.

The FOI applicant did not appear at the Tribunal hearing. In the circumstances, the Tribunal accepted the VLSC’s approach because it “effectively maintains the heavy burden on the VLSC given the wider set of documents to be considered”.

**Was it apparent that all of the documents in the request were exempt?**

In response to submissions from the VLSC, the Tribunal confirmed that the test as to whether section 25A(5) applies to documents is an objective, not subjective test. It noted this was consistent with the approach in *Knight v Corrections Victoria*.

The Tribunal received evidence from the VLSC about the three types of documents the FOI applicant sought, then considered whether it was apparent that the documents were exempt.

The Tribunal accepted that it was apparent that parts of the Report, Draft Reports and Correspondence would be exempt under sections 30, 38 and 33. Nevertheless, the Tribunal also found it was apparent parts of these documents were not exempt.

Section 38 Secrecy - While the Tribunal accepted the documents contained information subject to a secrecy provision in section 462 the *Legal Profession Uniform Law Application Act 2014* (**LPULA**), it found the documents also included information about the FOI applicant. Insofar as they did, the exception to the secrecy in section 462(2) of the LPULA meant that information was not secret and thus not apparently exempt under section 38. The member followed the *Gullquist*[[2]](#footnote-2)decision that dealt with this issue.

Section 32 Legal privilege - The Tribunal did not accept that the Report or Draft Reports contained information exempted by section 32. Although the authors of the Report were barristers, the Tribunal did not accept it was apparent that the Report contained legal advice to which privilege attaches.

Section 30 Internal working documents and factual material – Based on evidence about the documents, the Tribunal found that it was apparent that some documents contained purely factual information that would not be exempt under section 30.

**Would the FOI applicant wish to have access to an edited copy of the documents?**

Although the Tribunal was satisfied it was not apparent that all of the documents captured by the request would be exempt, it also considered section 25A(5)(b).

The VLSC contended the FOI applicant had not positively agreed to receive edited copies of documents to the VLSC and that any concession to this effect made by the FOI applicant to OVIC should be disregarded. The VLSC suggested that it was “too late” to agree to edited copies at the Tribunal.

The Tribunal disagreed, finding that standing in the shoes of the decision-maker, it could take account of information up to the date of the hearing and inform itself as it sees fit.

The Tribunal found that section 25A(5)(b)(ii) required it to decide whether it was apparent that the FOI applicant “would not wish to have access to an edited copy of the documents”, as opposed to requiring a positive indication the applicant did agree to edited documents. In this case, the Tribunal concluded section 25A(5)(b) had not been engaged.

**Conclusion**

The Tribunal was not satisfied that section 25A(5) of the FOI Act applied to the documents captured by the FOI applicant’s request. Accordingly, the Tribunal ordered the VLSC to process the FOI request.

Further Information

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1. See *Knight v Corrections Victoria* [2010] VSC 338 at [37]. [↑](#footnote-ref-1)
2. *Gullquist v Victorian Legal Services Commissioner* [2017] VCAT 764. [↑](#footnote-ref-2)