

Notice of Decision and Reasons for Decision

Applicant:	'ER7'
Agency:	Victorian Legal Services Board and Commissioner
Decision date:	21 July 2022
Exemptions and provisions considered:	Sections 25A(5), 33(1) and 38 in conjunction with section 462(1) of the <i>Legal Profession Uniform Law Application Act 2014</i> (Vic)
Citation:	'ER7' and <i>Victorian Legal Services Board</i> (Freedom of Information) [2022] VICmr 189 (21 July 2022)

FREEDOM OF INFORMATION – refusal to process request on grounds all documents, should any exist, would be exempt from release – complaints made against Agency officers – secrecy provision – *Legal Profession Uniform Law Application Act 2014* (Vic) – Uniform Law – disclosure of personal affairs information unreasonable

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.

Having carefully considered the application of section 25A(5) to the terms of the Applicant's FOI request and for the reasons set out below, I am satisfied it is apparent from the nature of the requested documents as described in the Applicant's request that all documents, should any exist, would be exempt from release in full under section 33(1). Accordingly, I am satisfied the requirements for section 25A(5) are met.

The effect of my decision is the Agency is not required to process the Applicant's request in accordance with the FOI Act.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

21 July 2022

Reasons for Decision

Background to review

1. The Applicant made a request seeking access to all complaints made against [number] named Agency officers.
2. The Agency refused the Applicant's request under section 25A(5) as it was satisfied all documents to which the request relates, should any exist, would be exempt in full under sections 33(1) and 38 in conjunction with section 462(1) of the *Legal Profession Uniform Law Application Act 2014* (Vic) (**Uniform Law**). In doing so, the Agency was not required to identify any documents relevant to the terms of the request. The Agency's decision letter sets out the reasons for its decision.
3. The Applicant also sought access to a list of all FOI requests they had made to the Agency and their current status (**Point 4**). The Agency addressed Point 4 in its correspondence with the Applicant during the processing of the request and its decision letter. The Applicant acknowledged and subsequently agreed to withdraw Point 4 from the terms of their FOI request.

Review application

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
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 all 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.
9. In conducting a review under section 49F, section 49P requires that I make a new or 'fresh decision'. Therefore, my review does not involve determining whether the Agency's decision is correct, but rather requires my fresh decision is the 'correct or preferable decision'.¹ This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of making my fresh decision.

Review of application of section 25A(5)

10. The power under section 25A(5) is carefully circumscribed. In *Knight v Corrections Victoria*,² the Supreme Court of Victoria held section 25A(5) will apply to an FOI request where each of the following three elements are met:
 - (a) First, the exempt nature of the document must be objectively apparent from the face of the request. Namely, the terms of the request, as described by the applicant. The 'nature' of a document refers to its inherent or essential quality or character.

¹ *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

² *Knight v Corrections Victoria* [2010] VSC 338 at [37].

- (b) Second, it must be apparent any requested document is exempt from release.
- (c) Third, it must be apparent from:
 - (i) the nature of the document, as described in the request, no obligation would arise for the agency to grant access to an edited copy of a document in accordance with section 25; or
 - (ii) the request, or through consultation with the applicant, they would not wish to have access to an edited copy of the document.

Is the nature of the document objectively apparent from the Applicant's request?

- 11. I consider the nature of the requested documents is objectively apparent from the terms of the Applicant's request, being documents that detail complaints made against the named Agency officers.

Would the requested documents, as described in the FOI request, be exempt from release?

- 12. In refusing access to the requested documents under section 25A(5), the Agency was satisfied any document to which the request relates, should any exist, would be exempt in full under sections 33(1) and 38 in conjunction with section 462 of the Uniform Law.
- 13. I will first consider the application of section 38 followed by section 33(1).

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 the requested document; and
 - (c) the enactment prohibits persons referred to in the enactment from disclosing the specific kind of information in the requested documents, either absolutely or subject to exceptions or qualifications in the enactment.
- 15. The Agency submits the requested documents, should any exist, would be prohibited from disclosure under section 462(1) of the Uniform Law, which provides in part:

462 Prohibition on disclosure of information

- (1) A relevant person must not disclose to any other person, whether directly or indirectly, any information obtained in the execution or administration of this Law or the Uniform Rules unless permitted to do so under subsection (2).

Civil penalty: 50 penalty units.

“relevant person” means—

- (a) the council or Commissioner; or
- ...
- (j) a person who is a member of the staff of, or acting at the direction of, any of the entities referred to in paragraph (a) to (j).

Is there an enactment in force?

16. I am satisfied the Uniform Law is an enactment in force for the purpose of section 38.

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

17. For section 38 of the FOI Act to apply, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.

18. The Agency submits:

Complaints made to the Board about any of its officers or staff would contain or comprise information which the Board receives in the execution or administration of the Uniform Law.

The Chairperson is appointed under s 33 of the Application Act and presides at meetings of the Board,³ which has functions and powers set out in the Application Act and the Uniform Law.⁴

Similarly, the Commissioner is established under s 48 of the Application Act and has all the functions and power conferred under the Application Act and the Uniform Law.⁵ The Commissioner is also the chief executive officer of the Board and, in that capacity, is to administer the affairs of the Board in accordance with the Board's policies and directions.⁶

The Commissioner employs staff necessary for the purposes of the Board or the Commissioner.⁷ Those employees may also have functions of the Commissioner delegated to them.⁸

Therefore, any complaint "filed" with the Board against the Commissioner, the Chairperson, or a named staff member would be information received by the Board (i.e. a relevant person) obtained in the execution or administration of the Uniform Law or the Uniform Rules.

Accordingly, it would be prohibited from disclosure and, therefore, exempt under s 38 of the FOI Act.

19. I have considered the wording of section 462(1) of the Uniform Law, in particular, the words, 'any information obtained in the execution or administration of this Law or the Uniform Rules'.

20. I have also considered the Agency's submission in relation to the application of the secrecy provision in section 462(1) of the Uniform Law to the requested documents, which would concern complaints made against the named Agency officers. However, I do not agree with the Agency's submission that the requested documents, should any exist, would fall within the scope of section 462(1) of the Uniform Law. I consider the broad interpretation adopted by the Agency would have the effect of extending the secrecy provision in section 462(1) to not only documents concerning the Agency's statutory functions in regulating registered legal practitioners, but also to all internal administrative operations of the Victorian Legal Commissioner and the Legal Services Board. Arguably, such a broad interpretation of 'administration of this Law' to the internal, administrative and corporate activities of the Agency would prohibit the disclosure of most documents held by the Agency under the FOI Act. I do not agree this is the intended operation of section 462(1) of the Uniform Law.

21. In my view, section 462(1) of the Uniform Law applies to information obtained by the Agency in executing its regulatory and enforcement functions in relation to legal practitioners in Victoria, which includes:

³ Section 39 of the Uniform Law.

⁴ Section 31 of the Uniform Law.

⁵ Section 49 of the Uniform Law.

⁶ Section 50 of the Uniform Law.

⁷ Section 59 of the Uniform Law.

⁸ Section 56 of the Uniform Law.

- (a) issuing, renewing, suspending, cancelling and imposing conditions on practicing certificates;
- (b) maintaining the Victorian Legal Profession Register;
- (c) monitoring, inspecting and investigating lawyers' trust accounts;
- (d) investigating complaints made about lawyers or law practices;
- (e) own-motion investigations about lawyer conduct; and
- (f) prosecuting breaches of the Uniform Law.

22. Accordingly, I am not satisfied the three requirements for section 38 are met as I cannot be satisfied, on the information before me, that the second requirement of the exemption is satisfied, namely, that each of the requested documents would be prohibited from disclosure under section 462(1) of the Uniform Law.

Section 33(1) – Personal affairs information of a third party

23. A document is exempt under section 33(1) if two conditions are satisfied:

- (a) disclosure of the document under the FOI would 'involve' the disclosure of the information relating to the 'personal affairs' of a person other than the Applicant (**a third party**);⁹ and
- (b) such disclosure would be 'unreasonable'.

24. Information relating to a person's 'personal affairs' includes information that identifies any person or discloses their address or location. It also includes any information from which such information may be reasonably determined.¹⁰

25. A document will disclose personal affairs information if it is capable, either directly or indirectly, of identifying a particular individual whose personal affairs are disclosed. As the FOI Act does not place any restrictions on an applicant's use or dissemination of documents obtained under FOI, this is to be interpreted by reference to the capacity of any member of the public to identify a third party.¹¹

Do the requested documents contain personal affairs information of a third party?

26. I accept the requested documents, should any exist, would likely contain the 'personal affairs information' of third parties for the purpose of section 33(1).

Would disclosure of the personal affairs information be unreasonable?

27. The concept of 'unreasonable disclosure' involves balancing the public interest in the disclosure of official information with the interest in protecting the personal privacy of a third party in the particular circumstances.

28. In *Victoria Police v Marke*,¹² the Victorian Court of Appeal held there is 'no absolute bar to providing access to documents which relate to the personal affairs of others'. Further, the exemption under section 33(1) 'arises only in cases of unreasonable disclosure' and '[w]hat amounts to an unreasonable disclosure of someone's personal affairs will necessarily vary from case to case'.¹³

⁹ Sections 33(1) and 33(2).

¹⁰ Section 33(9).

¹¹ *Hanson v Department of Education & Training* [2007] VCAT 123.

¹² [2008] VSCA 218 at [76].

¹³ *Ibid.*

The Court further held, '[t]he protection of privacy, which lies at the heart of [section] 31, is an important right that the FOI Act properly protects. However, an individual's privacy can be invaded by a lesser or greater degree'.¹⁴

29. In its submission, the Agency states it took into consideration the following factors in determining whether disclosure of the personal affairs information of the third parties would be unreasonable:
- (a) the nature of the information – namely complaint information about an officer or staff member;
 - (b) the circumstances in which the information would be received and held by the Board;
 - (c) the likelihood that the individuals would not consent to disclosure of any such documents about them – as the request has not been processed, no consultation has occurred and is not required, but a view has been taken about the likelihood of objection;
 - (d) the likelihood that if such documents existed, disclosure could lead to at least one third party to suffer stress, anxiety or embarrassment;¹⁵
 - (e) the fact that one of the staff members is at a non-executive level and that disclosure of personal affairs information has been more readily accepted as unreasonable where it would reveal the information about non-executive staff;¹⁶
 - (f) the absence of any public interest in disclosure as distinct from the personal interest of the applicant;
 - (g) s 33(2A), as required, although irrelevant in the present context;
 - (h) there is no demonstrable need for the applicant to know the personal affairs information sought;¹⁷
 - (i) disclosure of complaints, if they existed, without any further documents such as to the outcome of the investigation of any such complaints, could give rise to a misleading and unwarranted questioning of the behaviour of such officers or staff. However, s 33(1) of the FOI Act is not about disclosure in conjunction with supplementary information which the agency might choose to make available or not, it is about whether disclosure of the particular document itself (alone and without anything more) being unreasonable disclosure of personal affairs.
- ...
30. In determining whether disclosure of the requested documents would be unreasonable, I have also considered the following factors:
- (a) the nature of the personal affairs information in the requested documents and the circumstances in which it would have been obtained by the Agency;
 - (b) the Applicant's interest in the personal affairs information or their purpose for seeking access to the information;
 - (c) whether any public interest would be promoted by the release of the requested personal affairs information;
 - (d) whether the third parties to whom the information relates object, or would be likely to object, to the release of their personal affairs information under the FOI Act; and
 - (e) whether disclosure of the personal affairs information would or would be reasonably likely to endanger the life or physical safety of any person.¹⁸

¹⁴ Ibid at [79].

¹⁵ *Reilly v Kilmore and District Hospital* (1993) 6 VAR 16, 23

¹⁶ *Monash University v Naik* [2021] VCAT 557 at [45].

¹⁷ *White v Pyrenees Shire Council* [2001] VCAT 2043 at [28].

¹⁸ Section 33(2A).

31. Having carefully considered the nature of the requested personal affairs information, I am satisfied it is likely disclosure of most, if not all of the information would be unreasonable given it would involve allegations made about the conduct of one or more of the Agency officers to which the request refers. For example, in the event any complaints have been made against the Agency officers, it may be that the matters have been resolved with or without further action being taken against an officer, or is still under investigation by the Agency. In either circumstance, I consider the personal affairs information would be sensitive in nature, given it would relate to alleged conduct and involve the professional and personal reputation of the Agency officers.
32. This is not to suggest that disclosure of complaint information concerning an Agency officer would be unreasonable in all cases. I acknowledge that disclosure of such information is in the public interest where there is a requirement for transparency and accountability, although this public interest in disclosure needs to be balanced with the interest in protecting an individual's right to personal privacy.
33. In this case, there is no evidence provided by the Applicant or otherwise before me to demonstrate that any public interest would be promoted by release of the requested personal affairs information. Rather, the basis for the Applicant's FOI request appears to arise from a personal interest in obtaining access to personal affairs information about the Agency officers only. In this regard, I note the Applicant appears to have serious concerns about the conduct of registered legal practitioners with whom they have been involved, and those concerns have subsequently expanded to the named Agency officers based on the Agency's handling of complaints made by the Applicant against the registered legal practitioners.
34. I also accept, given the circumstances of this matter, that the Agency officers would be likely to object to the disclosure of the requested documents under the FOI Act.
35. Accordingly, I am satisfied the documents, should any exist, would contain personal affairs information that would be exempt from release under section 33(1).

Section 33(6) – Agency neither confirms or denies the existence of the requested documents

36. The Agency submits that if a hypothetical document exists, it would be subject to section 33(6), which provides:

Nothing in this Act shall be taken to require an agency or Minister to give information as to the existence or non-existence of a document of a kind referred to in subsection (1) where information as to the existence or non-existence of that document, if included in a document of an agency, would cause the last-mentioned document to be an exempt document by virtue of this section.

37. The Agency submits:

A hypothetical document with information as to the existence or non-existence of the actual documents would disclose information about the personal affairs of the named individuals.

If the hypothetical document stated documents do not exist, that would disclose that there have been no written complaints against the named individuals. If it stated that documents do exist, that would disclose that there had been written complaints against the named individuals. In either instance, that would be information about the named individuals and would disclose information relating to their personal affairs.

38. I note the Agency's submission that, should any of the requested documents exist, they would contain sensitive personal information. However, on the limited information before me, I do not agree that merely acknowledging the existence of one or more of the requested documents would disclose exempt information for the purpose of section 33(1).

39. Accordingly, I am not satisfied the requirements for section 33(6) are met.

Is there scope to provide an edited copy of the requested documents?

40. The final requirement for section 25A(5) requires that I am satisfied it is apparent from the nature of the requested documents as described in the FOI request, that the agency would not be under an obligation to grant access to an edited copy of a document in accordance with section 25. Alternatively, it is apparent or the Applicant confirms they do not agree to receive an edited copy of the requested documents.
41. Section 25 provides an agency must 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.
42. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'¹⁹ 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 25.²⁰
43. The Applicant is willing to accept an edited copy of the requested documents.
44. Given the nature of the requested documents and their likely contents, which I accept would comprise the personal affairs information of the relevant Agency officers and any complainant or other third party, I am satisfied providing an edited copy of the requested documents, should any exist, with personal affairs information deleted in accordance with section 25, would render the documents meaningless and devoid of necessary context or detail.
45. Accordingly, I am satisfied the Agency would not be under an obligation to provide the Applicant with an edited copy of the requested documents as they would be exempt from release in full under section 33(1).

Conclusion

46. As stated above, the power for an agency to refuse a request under section 25A(5) is carefully circumscribed and will apply in a limited category of cases only.
47. Having carefully considered the application of section 25A(5) to the terms of the Applicant's FOI request and for the reasons set out above, I am satisfied it is apparent from the nature of the requested documents, as described in the Applicant's request that all documents, should any exist, would be exempt from release in full under section 33(1). Accordingly, I am satisfied the requirements for section 25A(5) are met.
48. The effect of my decision is the Agency is not required to process the Applicant's request in accordance with the FOI Act.

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.²¹

¹⁹ *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].

²⁰ *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].

²¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

50. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.²²
51. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.²³
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.²⁴

When this decision takes effect

54. My decision does not take effect until the Agency's 14 day review period expires.
55. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

²² Section 52(5).

²³ Section 52(9).

²⁴ Sections 50(3F) and 50(3FA).