

## Notice of Decision and Reasons for Decision

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Applicant:	'EL4'
Agency:	Victorian Legal Services Board and Commissioner
Decision date:	18 May 2022
Exemptions and provisions considered:	Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), and 38 in conjunction with section 462 of the <i>Legal Profession Uniform Law Application Act 2014</i> (Vic)
Citation:	'EL4' and Victorian Legal Services Board ( <i>Freedom of Information</i> ) [2022] VICmr 131 (18 May 2022)

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FREEDOM OF INFORMATION – regulator documents – complaint – legal profession – lawyer – legal practitioner – internal documents – law practice – information provided in confidence – secrecy provision – *Legal Profession Uniform Law Application Act 2014* (Vic)

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.

My decision on the Applicant's request differs from the Agency's decision in that I am satisfied certain documents identified by the Agency, being enclosures to other documents, do not fall within the scope of the Applicant's request and are irrelevant information for the purpose of section 25.

I am satisfied the documents that are relevant and subject to my review are exempt from release under section 38 of the FOI Act in conjunction with section 462(1) of the *Legal Profession Uniform Law Application Act 2014* (Vic) (**Uniform Law**).

As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with irrelevant and exempt information deleted in accordance with section 25, access to the documents is refused in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner

18 May 2022

## Reasons for Decision

### Background to review

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

...copies of documentation and investigation files other than direct correspondence between [applicant] and [agency] in relation to the following case references - [specific case references redacted]
2. The Agency identified 17 documents and 11 attachments falling within the terms of the Applicant's request and refused access to all documents in full under sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), and 38 in conjunction with section 462 of the Uniform Law. 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 Agency's decision to refuse access.
4. I have examined a copy of the documents 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 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.

### Review of exemptions

#### *Section 38 – Secrecy provision*

9. A document is exempt under section 38 if the following three requirements are met:
  - (a) there is an enactment in force;
  - (b) that applies specifically to the kind of information in the document; and
  - (c) the enactment must prohibit persons, referred to in the enactment, from disclosing that specific kind of information (either absolutely or subject to exceptions or qualifications).
10. For section 38 to apply, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
11. The Agency relies on section 38 in conjunction with section 426 of the Uniform Law.
12. Section 462 of the Uniform Law Act 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 (i).

*Is there an enactment in force?*

13. I am satisfied the Uniform Law is an enactment in force for the purpose of the secrecy exemption under section 38 of the FOI Act. Accordingly, I am satisfied the first requirement of section 38 is met.

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

14. For section 38 of the FOI Act to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
15. Section 462(1) states that information obtained in the execution or administration of the Uniform Law must not be disclosed.
16. It is clear from the terms of the Applicant’s request and the Agency’s submissions that the Applicant seeks access to documents in the Agency’s complaint or investigation files that relate to information obtained in the execution or administration of the Uniform Law.
17. Investigations conducted by the Agency into complaints made against legal practitioners and law practices is one of its core statutory functions under the Uniform Law. I accept information in the requested documents relates to a complaint made to and an investigation conducted by the Agency as part of its statutory functions.
18. Therefore, I am satisfied the documents would contain information obtained by the Agency in the execution and administration of the Uniform Law. That is, the documents would comprise information obtained by the Agency in the course of receiving complaints or conducting an investigation into a complaint made under the Uniform Law.
19. Accordingly, I am satisfied the second requirement of section 38 is met.
20. I note the documents contain information that relates to the Applicant and other third party individuals. I accept the Agency’s submission the information does not solely relate to the Applicant and in most documents the information pertaining to the Applicant and third parties is intertwined.
21. In relation to the terms of the Applicant’s request, the Applicant specifically seeks access to third party information and excludes direct correspondence between themselves and the Agency.
22. Therefore, I consider any direct correspondence between the Applicant and the Agency is outside the scope of my review and constitutes irrelevant information for the purpose of section 25.

*Does the enactment prohibit persons referred to from disclosing the information?*

23. Section 462(1) of the Uniform Law prohibits relevant persons from disclosing the described information. 'Relevant person' is defined in section 462(3) of the Uniform Law.
24. I am satisfied the provisions of the Uniform Law apply to the Agency and its officers.
25. Accordingly, I am satisfied the third requirement of section 38 is met.

*Do any exceptions to the prohibition on disclosure apply?*

26. Section 462(2)(c) of the Uniform Law contains an exception to the prohibition on disclosure where the relevant person is permitted to disclose information with the prior written consent of the person to whom the information relates.
27. Section 462(2)(c) of the Uniform Law provides:
  - (2) A relevant person is permitted, for the purpose of this Law, to disclose information obtained in the execution or administration of this Law or Uniform Rules—  
...  
(c) with the prior consent in writing of the person to whom the information relates.
28. In *Gullquist v Victorian Legal Services Commissioner*<sup>1</sup> the Victorian Civil and Administrative Tribunal (VCAT) determined that in making an FOI request to an Agency, an applicant is giving their consent to the release of information in the documents that concerns them.
29. Therefore, I accept the Applicant, through the making of an FOI request to the Agency, consents to disclosure of information in the Agency's complaint files that relates to them.
30. The terms of the Applicant's request seeks access to 'documents other than direct correspondence between [applicant] and [agency] in relation to the following case references'. Having considered the scope of the Applicant's FOI request, I have determined any direct correspondence between the Applicant and the Agency is irrelevant information for the purpose of section 25.
31. The Agency's submissions do not indicate whether consent was sought from third parties whose information is contained in the documents. I accept if those persons had consented to the disclosure, the Agency would have advised OVIC accordingly. I consider these third parties did not provide their consent to disclosure.<sup>2</sup>
32. Therefore, I am not satisfied the exception under section 462(2)(c) of the Uniform Law applies.
33. Based on my findings above, I am satisfied certain information in the documents subject to review is exempt from release under section 38 in conjunction with section 462(1) of the Uniform Law Act.

#### **Other exemptions**

34. As I am satisfied the information in the documents are exempt under section 38, it is not necessary for me to consider the application of the other exemptions relied on by the Agency under sections 30(1), 31(1)(a), 31(1)(d) and 35(1)(b).

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<sup>1</sup> [2017] VCAT 764.

<sup>2</sup> Ibid at [81].

### **Section 25 – Is there scope to provide an edited copy of the requested documents?**

35. 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.
36. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’<sup>3</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>4</sup>
37. As stated above, the terms of the Applicant’s request seek access to documents involving persons other than the Applicant. Considering the scope of the Applicant’s request, I am satisfied documents that were exchanged directly between the Applicant and the Agency fall outside the terms of the request and are irrelevant information.
38. I am satisfied documents relevant to the terms of the Applicant’s request and subject to review contain information that concerns both the Applicant and third parties. As this information is intertwined, I am satisfied it would not be practicable to provide the Applicant with an edited copy of the documents.
39. Accordingly, I am satisfied there is no scope for the Agency to provide access to an edited copy of the requested documents with exempt and irrelevant information deleted in accordance with section 25.

### **Conclusion**

40. On the information before me, I am satisfied the documents subject to my review are exempt from release under section 38 of the FOI Act in conjunction with section 462(1) of the Uniform Law.
41. As I am satisfied it is not practicable to provide the Applicant with an edited copy of the documents with exempt and irrelevant information deleted in accordance with section 25, access to the documents is refused in full.

### **Review rights**

42. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>5</sup>
43. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>6</sup>
44. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>7</sup>
45. 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>3</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>4</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] and [155].

<sup>5</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>6</sup> Section 52(5).

<sup>7</sup> Section 52(9).

46. 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.<sup>8</sup>

***When this decision takes effect***

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

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<sup>8</sup> Sections 50(3F) and 50(3FA).

Annexure 1 – Schedule of Documents

Document No.	Date of Document	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
1.	[Date]	1	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Refused in full</b></p> <p>Section 38</p>	<p><b>Section 38:</b> For the reasons outlined in the Notice of Decision above, I am satisfied the document is exempt from release under section 38 in conjunction with section 462(1) of the Uniform Law.</p> <p><b>Section 25:</b> 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.</p>
2.	[Date]	1	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Refused in full</b></p> <p>Section 38</p>	<p><b>Section 38:</b> See comments for Document 1.</p>
2a.	[Date]	5	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Refused in full</b></p> <p>Section 38 in conjunction with section 462 of the Uniform Law</p>	<p><b>Section 38:</b> See comments for Document 1.</p>

Document No.	Date of Document	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
2b.	[Date]	45	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Irrelevant</b></p> <p>Section 25</p>	<p><b>Section 25:</b> I am satisfied this document represents direct correspondence between the Applicant and Agency. Therefore, I am satisfied it falls outside the terms of the Applicant's request and is irrelevant information for the purpose of section 25.</p>
3.	[Date]	2	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Refused in full</b></p> <p>Section 38 in conjunction with section 462 of the Uniform Law</p>	<p><b>Section 38:</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
3a.	[Date]	19	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Refused in full</b></p> <p>Section 38 in conjunction with section 462 of the Uniform Law</p>	<p><b>Section 38:</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
4.	[Date]	1	<p><b>Refused in full</b></p>	<p><b>Refused in full</b></p>	<p><b>Section 38:</b> See comments for Document 1.</p>



Document No.	Date of Document	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
			Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 25:</b> See comments for Document 1.
4a.	[Date]	2	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
5.	[Date]	1	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
5a.	[Date]	2	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
6.	[Date]	1	<b>Refused in full</b>	<b>Refused in full</b>	<b>Section 38:</b> See comments for Document 1.

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			Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 25:</b> See comments for Document 1.
7.	[Date]	12	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
8.	[Date]	1	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
9.	[Date]	1	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
10.	[Date]	1	<b>Refused in full</b>	<b>Refused in full</b>	<b>Section 38:</b> See comments for Document 1.

Document No.	Date of Document	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
			Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 25:</b> See comments for Document 1.
11.	[Date]	1	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
12.	[Date]	4	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
13.	[Date]	1	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1. <b>Section 25:</b> See comments for Document 1.
13a.	[Date]	1	<b>Refused in full</b>	<b>Refused in full</b>	<b>Section 38:</b> See comments for Document 1.

Document No.	Date of Document	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
			Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 25:</b> See comments for Document 1.
13b.	[Date]	27	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Irrelevant</b> Section 25	<b>Section 25:</b> See comments for Document 2b.
13c.	[Date]	2	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Irrelevant</b> Section 25	<b>Section 25:</b> See comments for Document 2b.
13d.	[Date]	1	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Irrelevant</b> Section 25	<b>Section 25:</b> See comments for Document 2b.
14.	[Date]	3	<b>Refused in full</b> Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38	<b>Refused in full</b> Section 38 in conjunction with section 462 of the Uniform Law	<b>Section 38:</b> See comments for Document 1.  <b>Section 25:</b> See comments for Document 1.

Document No.	Date of Document	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
15.	[Date]	1	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Refused in full</b></p> <p>Section 38 in conjunction with section 462 of the Uniform Law</p>	<p><b>Section 38:</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
16.	[Date]	2	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Refused in full</b></p> <p>Section 38 in conjunction with section 462 of the Uniform Law</p>	<p><b>Section 38:</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
17.	[Date]	1	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Refused in full</b></p> <p>Section 38 in conjunction with section 462 of the Uniform Law</p>	<p><b>Section 38:</b> See comments for Document 1.</p> <p><b>Section 25:</b> See comments for Document 1.</p>
17a.	[Date]	2	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Irrelevant</b></p> <p>Section 25</p>	<p><b>Section 25:</b> See comments for Document 2b.</p>

Document No.	Date of Document	No. of pages	Agency Decision	OVIC Decision	OVIC Comments
17b.	[Date]	1	<p><b>Refused in full</b></p> <p>Sections 30(1), 31(1)(a), 31(1)(d), 35(1)(b), 38</p>	<p><b>Irrelevant</b></p> <p>Section 25</p>	<p><b>Section 25:</b> See comments for Document 2b.</p>