

## Notice of Decision and Reasons for Decision

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Applicant:	'EM5'
Agency:	Victorian Legal Services Commissioner
Decision date:	27 May 2022
Provisions considered:	Sections 25A(5), 38 in conjunction with section 462(1) of the <i>Legal Profession Uniform Law Application Act 2014</i> (Vic)
Citation:	'EM5' and Victorian Legal Services Commissioner ( <i>Freedom of Information</i> ) [2022] VICmr 141 (27 May 2022)

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FREEDOM OF INFORMATION – refusal to process request on grounds all documents, should any exist, would be exempt – legal practitioner – complaints – 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 is the same as the Agency's decision.

I have refused to grant access to documents in accordance with the Applicant's request under section 25A(5) as I am satisfied each of the requirements of section 25A(5) are met.

My reasons for decision follow.

**Joanne Kummrow**  
Public Access Deputy Commissioner  
27 May 2022

## Reasons for Decision

### Background to review

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

Any information received from [third party] regarding Court Case [Case reference]  
This may be a Letter / Email or Verbal conversation contact during [date].
2. The Agency refused the Applicant's under sections 33(6) and/or 25A(5). In refusing the request under section 25A(5), the Agency was not required to identify any documents relevant to the terms of the request as it was satisfied all documents to which the request relates, should any exist, would be exempt in full under section 38 in conjunction with section 462(1) of the *Legal Professional Uniform Law Application Act 2014* (Vic) (**Uniform Law**).

### Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
5. I have considered all communications and submissions received from the parties.
6. 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.
7. 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 application of section 25A(5)

8. The power under section 25A(5) is carefully circumscribed. In *Knight v Corrections Victoria*,<sup>1</sup> 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.
  - (b) Second, it must be apparent any requested document is exempt.
  - (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.

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<sup>1</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [37].

***Is the nature of the requested documents objectively apparent from the Applicant's request?***

9. The Applicant seeks access to documents received from the Agency from a third party relating a legal proceeding. The legal proceeding would concern the Agency exercising its functions under the Uniform Law.
10. I consider the nature of the requested documents is objectively apparent from the terms of the Applicant's request.

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

11. In refusing access to the requested documents under section 25A(5) the Agency was satisfied any documents to which the request relates, should any exist, would be exempt in full under section 38 in conjunction with section 462(1) of the Uniform Law. In its submission, the Agency also stated the documents would also be exempt under section 33(1).

***Application of section 38 – Secrecy provision***

12. 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).
13. For section 38 to apply, an enactment must be formulated with such precision that it specifies the actual information sought to be withheld.
14. The Agency relies on section 38 of the FOI Act in conjunction with section 426 of the Uniform Law.
15. Section 462 of the Uniform Law 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.

...

- (3) In this section —  
***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?***

16. I am satisfied the Uniform Law is an enactment in force and the first requirement of section 38 is met.

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

17. For section 38 to apply to an enactment, the enactment must be formulated with such precision that it specifies the actual information sought to be withheld. Section 462(1) states that information obtained in the execution or administration of the Uniform Law must not be disclosed.
18. It is clear from the terms of the Applicant's request and the Agency's submission that the Applicant seeks access to information concerning any complaints made against a legal practitioner and law practice.
19. Investigations conducted into complaints made against legal practitioners and law practices by the Agency 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.
20. 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 a complaint or conducting an investigation into a complaint under the Uniform Law.
21. Accordingly, I am satisfied the second requirement of section 38 is met.

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

22. 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.
23. I am satisfied the provisions of the Uniform Law apply to the Agency and its officers.
24. Accordingly, I am satisfied the third requirement of section 38 is met.

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

25. Section 462(2) of the Uniform Law provides:
  - (2) A relevant person is permitted, for the purposes of this Law, to disclose information obtained in the execution or administration of the Law or Uniform Rules—
    - (a) to the extent that the disclosure is reasonably required to exercise functions under this Law, the Uniform Rules or any other legislation; or
    - (b) to the extent that the relevant person is expressly authorised, permitted or required to disclose the information under this Law, the Uniform Rules or any other legislation; or
    - (c) with the prior consent in writing of the person to whom the information relates; or
    - (d) to a court or tribunal in the course of legal proceedings; or
    - (e) pursuant to an order of a court or tribunal under any law; or
    - (f) to the extent the disclosure is reasonably required to enable the enforcement or investigation of the criminal law or a disciplinary matter; or
    - (g) to the Attorney-General of any jurisdiction.
26. Specifically, section 462(2)(c) of the Uniform Law contains an exception to the prohibition on disclosure which provides a 'relevant person' is permitted to disclose information with prior consent in writing of the person whom the information relates.

27. The Agency's submission does not indicate whether consent was sought from any third party whose information may be contained in the documents. I accept if a third party had consented to disclosure of their personal affairs information, the Agency would have advised OVIC of this fact. Therefore, I consider the relevant third parties did not provide their consent to disclosure of their personal affairs information.
28. Therefore, I am not satisfied the exceptions under the Uniform Law apply in this case.
29. Based on the information before me, I am satisfied the requested documents, should any exist, would be exempt from release under section 38 in conjunction with section 462(1) of the Uniform Law.

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

30. 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.
31. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>2</sup> and the effectiveness of the deletions. Where deletions would render the document meaningless, they are not 'practicable', and release of the document is not required under section 25.<sup>3</sup>
32. I have considered the effect of providing the Applicant with an edited copy of the documents with exempt information deleted in accordance with section 25. I am satisfied it would not be practicable to do so, as the documents, should any exist, would be rendered meaningless.
33. Accordingly, I am satisfied there is no scope for the Agency to provide an edited copy of the requested documents, should any exist.

**Other exemptions**

34. As I am satisfied the requested documents, should any exist, would be exempt under section 38 in conjunction with section 462(1) of the Uniform Law, it is not necessary for me to also consider the application of sections 33(1) and 33(6).

**Conclusion**

35. 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.
36. 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, should any exist, would be exempt from release in full under section 38 in conjunction with section 462(1) of the Uniform Law.
37. Accordingly, I am satisfied each of the requirements of section 25A(5) are met and access to the requested documents is refused in full.

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<sup>2</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>3</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].

## **Review rights**

38. If the Applicant is not satisfied with my decision, they are entitled to apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for it to be reviewed.<sup>4</sup>
39. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>5</sup>
40. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>6</sup>
41. 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.
42. 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>7</sup>

## ***When this decision takes effect***

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

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<sup>4</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

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

<sup>6</sup> Section 52(9).

<sup>7</sup> Sections 50(3F) and 50(3FA).