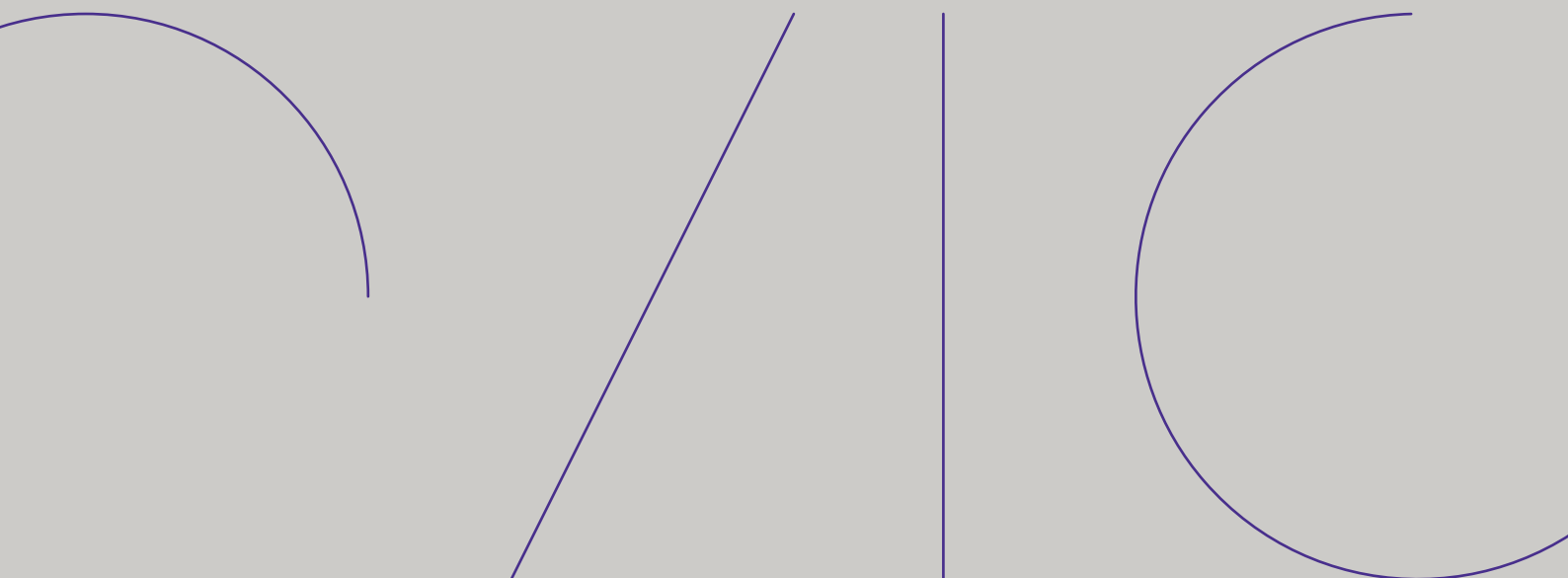


Process versus Outcome: Investigation into VicForests' handling of a series of FOI requests

Under s 61O of the *Freedom of Information Act 1982* (Vic)



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This document is a report of an investigation under s 61O of the *Freedom of Information Act 1982* (Vic).

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Foreword

This investigation report tells the story of one person's unsuccessful attempt to get access to information about herself. She believed VicForests had spied on her and attempted to harm her reputation. She wanted to understand what it had done, and why.

Over the course of almost two years involving multiple FOI requests, review applications, complaints, and this investigation, the applicant tried to access this information.

The series of events detailed in this report highlights a regrettably common situation, where the legal process that underlies FOI is the focus of attention at the expense of the public good that FOI is intended to achieve.

The FOI Act sets out a process for agencies to follow to give access to information. That process is important to protect and balance a range of rights and interests. But it is a means to an end.

I observed that in handling these FOI requests, VicForests focussed on legal soundness and efficiency, sometimes at the expense of achieving the FOI Act's underlying goal of providing access to information. In doing so, VicForests missed opportunities to help the applicant make a successful FOI request. Some of these opportunities were as simple as speaking to the applicant to ask her what she was seeking.

The applicant's questions remain unanswered, despite significant personal cost to her and the expenditure of public funds. The applicant is dissatisfied with the outcome and with her experience of the FOI system generally.

VicForests does not accept all my findings. Its reasons are set out in the appendix. However, I am hopeful that VicForests' agreement to implementing my recommendations demonstrates a commitment to meeting its FOI obligations.

This investigation provides lessons for other agencies about the importance of focusing on the objects of the FOI Act. The Act is not intended merely to prescribe a process. It is intended to provide access to information so that the people of Victoria can hold their government to account and participate meaningfully in their democracy.

Sven Bluemmel
Victorian Information Commissioner

8 March 2023

Executive summary

In July 2020, a member of the public made a freedom of information (FOI) request to VicForests.

VicForests is a state business corporation responsible for managing the harvest, sale, and regrowing of sustainable timber from Victorian state forests on behalf of the Victorian Government. The member of the public, called 'the applicant' in this report, sought information she believed VicForests held about her. The information related to past interactions with VicForests related to her work as an environmentalist and a board member of another organisation.

VicForests declined to process the request on the basis that it was not sufficiently clear.

Over the following year, the applicant made a further three requests to VicForests to get the information she wanted.

Each of the requests was either refused by VicForests, or not processed. The applicant made a complaint to OVIC in October 2021 about one of her requests that VicForests had declined to process on the basis that the request was invalid.

While handling the complaint, the Information Commissioner expressed a view to VicForests that the FOI request should be processed. VicForests did not do so.

Decision to conduct investigation

The Commissioner was concerned that an apparently simple series of requests for information had not resulted in any information being released some eighteen months after the first FOI request was made.

Having regard to VicForests' decisions under the *Freedom of Information Act 1982 (Vic)* (FOI Act) and its response to the applicant's complaints, the Commissioner decided to commence an investigation into the handling of the series of requests.

The investigation sought to determine whether VicForests complied with the FOI Act and the Professional Standards when responding to the applicant's FOI requests and complaints.

Overview of findings

VicForests' conduct satisfied many of the procedural and substantive requirements of the FOI Act, while contravening others. In isolation, some of those contraventions might be regarded as small. However, they did not occur in isolation.

Nineteen months passed between when the applicant made their first FOI request and when this investigation began. In that time the applicant lodged four FOI requests, made two complaints and one application for review.

A wide range of factors contributed to this situation.

VicForests identified a number of matters that create challenges in processing the requests including the variable nature of its FOI workload, competing priorities and pandemic-related remote working arrangements. The Commissioner was satisfied that these matters contributed to the issues identified in this report and were part of the reason that the applicant did not obtain access to information.

However, the investigation identified other contributing factors.

The investigation identified a mismatch between the values VicForests said it wanted to demonstrate in its approach to FOI, and the approach it took in practice. VicForests' CEO told the Commissioner that it is the duty of public servants to help FOI applicants, so VicForests should not be too technical about the words of an application. Other VicForests staff mentioned the pro-disclosure objects of the Act. However, it appeared that the primary consideration in processing the applicant's requests was handling them 'efficiently' and 'legally and soundly'. VicForests' stated focus on legal soundness and efficiency sometimes appeared to come at the expense of giving due regard to the Act's object of facilitating access to information. The Commissioner suggests that agencies should be clear about the values they wish to demonstrate in their FOI practice and communicate these to their staff and any advisers or consultants supporting their FOI work.

The investigation identified contraventions of the FOI Act in relation to how VicForests' consulted with the applicant. Instead of telephoning the applicant to discuss her request, VicForests sent lengthy and complex letters which the Commissioner considered would be confounding and difficult to process for a typical member of the public. Unnecessary queries and clarifications about the terms of the applicant's requests delayed the release of information in practice, by extending the processing period for the requests. Challenges made by VicForests about the validity of some of the applicant's FOI requests and complaints, including challenges to the Information Commissioner's jurisdiction, extended the timeframe of the requests and complaints.

Considering its conduct across all the requests and complaints examined in this investigation, the Commissioner found that VicForests acted inconsistently with the objects outlined in section 3 of the FOI Act. The Commissioner also found that VicForests did not meet its obligations under s 16(1) to administer the Act with a view to making the maximum amount of government information promptly and inexpensively available to the public.

Recommendations

The Commissioner recommended that VicForests process the applicant's outstanding FOI request, which it has now done. VicForests responded to that FOI request with a decision to release information and waive access charges.

The Commissioner made several recommendations directed at enhancing VicForests' FOI processes and practices. These included guidance about the values and culture VicForests wants to demonstrate in its FOI approach, a self-assessment of its FOI processes, and a review of its FOI policies, procedures, and training.

Finally, the Commissioner recommended that VicForests provide two reports to OVIC about the performance of its FOI function.

The Commissioner's eight recommendations are:

Recommendation 1	Process the applicant's outstanding FOI request (with revised terms as agreed to by the applicant) and provide the Commissioner with updates on the progress of the request.
Recommendation 2	Provide guidance to VicForests' FOI staff about the values and culture that VicForests wants to inform its approach to FOI, as described to OVIC by its CEO. This should include stating the values it wants to inform its approach to FOI in relevant policies and procedural documents.
Recommendation 3	When selecting staff to oversee its FOI function, and when engaging external consultants (including legal advisers) to support it in meeting its FOI obligations, VicForests should consider if their values and approach to FOI align with the object of the FOI Act and VicForests' desired approach and communicate this object and associated values to them.
Recommendation 4	In consultation with OVIC, VicForests should undertake an assessment of its FOI function and practices, including an assessment of its compliance with the FOI Professional Standards, using OVIC's Self-Assessment Tool. Provide the Commissioner with the outcome of the assessment within 90 days.
Recommendation 5	Update its FOI policy and procedures manual to address issues identified in the Self-Assessment Tool described in recommendation 4, and to reflect the values described in recommendation 2. Provide the Commissioner with a copy within 120 days.
Recommendation 6	Expand the range of training provided to VicForests' authorised officers and any other staff undertaking FOI functions, to include OVIC's FOI training and relevant courses such as plain English training and customer service for public sector employees training within 180 days.
Recommendation 7	Identify ways to encourage VicForests' staff to adopt a responsive and respectful approach to FOI service delivery, including engaging in a wider range of communication techniques, such as speaking to applicants by telephone.
Recommendation 8	Provide the Commissioner with two six-month reports setting out progress against the above recommendations and details of all FOI requests received and decisions made, together with an attestation from VicForests' Principal Officer that requests were processed in accordance with VicForests' FOI procedures manual policy, the FOI Act and the Professional Standards.

VicForests response to investigation and recommendations

VicForests' response to the investigation and recommendations is detailed in Appendix 2 to the report. It advises that it has completed recommendations 1 and 6, accepts and will implement recommendations 2-4 and 8, and accepts recommendations 5 and 6 with reservations (detailed in its response).

Background

This report considers VicForests' handling of a series of freedom of information (**FOI**) requests and complaints from a single applicant. It highlights challenges agencies face in administering FOI and the implications for FOI applicants when their legal right to access information from an agency is denied.

All references to legislation in this report are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Parties involved

VicForests is the agency involved in receiving and processing the series of FOI requests and complaints examined in this report.

Established in 2004, VicForests is a state-owned business managing the harvest, sale, and regeneration of sustainable timber from Victorian state forests on behalf of the Victorian Government.

VicForests has approximately 160 staff. Around 130 staff deliver VicForests' harvesting and regenerating functions.

The applicant is a Victorian citizen with environmental interests. She believes that VicForests conducted surveillance of, and directed a public campaign against her, including by attacking her character in the press and at her place of work. The applicant sought, under the FOI Act, access to documents held by VicForests associated with any such surveillance of or personal attacks made against her.

The applicant made mention of the above concerns in an email to VicForests on 29 April 2021 and VicForests repeated them in a letter back to the applicant on 10 May 2021. However, VicForests advised OVIC in this investigation that it was not until the public airing on the ABC program 7.30 that VicForests' staff became fully aware of the applicant's claims of surveillance.

The applicant in this case is not the subject of any adverse comment or opinion.

At the time of finalising this report, the alleged surveillance of the applicant by VicForests is the subject of a separate ongoing investigation by OVIC under the *Privacy and Data Protection Act 2014* (Vic).

Summary of key events

This section summarises the series of FOI requests and complaints made by the applicant under the FOI Act, and VicForests' handling of, and responses to, the applicant and OVIC regarding those requests and complaints. A more detailed description of each FOI request and complaint is set out in later sections of this report.

First FOI request

On 22 July 2020, the applicant made an FOI request to VicForests. She requested access to a range of documents relating to herself created in the period January 2010 to the date of her request.

On 10 August 2020, VicForests sought clarification of the request. On 3 September 2020, the applicant amended her request, however, on 15 September 2020, VicForests closed the request due to its view that the applicant's attempt to clarify the request was unsuccessful. That is, VicForests refused to process the request on the basis it did not comply with the requirement under s 17(2) for a request to be sufficiently clear and was not a valid request.

The applicant made a complaint to OVIC about VicForests' decision to refuse to process the request.

First complaint

On 12 October 2020, OVIC notified VicForests that it had accepted the applicant's complaint. However, VicForests contested the validity of the complaint and challenged OVIC's jurisdiction to accept or consider it. VicForests argued that the complaint should be limited to challenging the adequacy of its consultation or assistance provided to the applicant.

On 3 February 2021, OVIC advised VicForests of its preliminary view that the clarified request was sufficiently clear to process. On 9 February 2021, VicForests reiterated its response and asked that the complaint be dismissed. On 22 March 2021, the applicant made a second FOI request to VicForests. The complaint was kept open by OVIC while the applicant discussed the scope of her second request with VicForests. On 11 August 2021, the applicant agreed to OVIC finalising the complaint, and she pursued her second FOI request instead.

Second FOI request

On 22 March 2021, the applicant made a new FOI request to VicForests for any 'investigative documents' including notes, reports, documents, and texts that involve surveillance of herself, as well as any internal correspondence and briefings that discuss her by name, and any documents in relation to an organisation she was involved in that include her name from January 2009 to February 2021.

On 31 May 2021, after three clarifications and amendments, VicForests advised the applicant that it would consider the request.

However, on 20 July 2021, VicForests refused to grant access to documents the subject of the applicant's request pursuant to s 25A(1).

Review of decision

On 5 August 2021, OVIC notified the applicant that it had accepted her request for a review of VicForests' decision. On 29 September 2021, the Public Access Deputy Commissioner issued a Notice of Decision that she was satisfied on the basis of the information before her that the applicant's request would substantially and unreasonably divert the resources of VicForests from its other operations. Therefore, VicForests was not required to process the applicant's second FOI request.

Third and fourth FOI requests

On 31 August 2021, the applicant made two FOI requests to VicForests. Once again, VicForests sought clarification of both requests under s 17(2) on the basis that they were not sufficiently clear to process. The applicant made a complaint to OVIC about the way in which VicForests was handling the second of these requests (that is, her fourth FOI request).

Second complaint

On 29 October 2021, the applicant made a second complaint to OVIC relating to VicForests' consideration of her fourth FOI request. On 30 November 2021, OVIC notified VicForests of the complaint. On 1 December 2021, VicForests responded, contesting that the complaint was not in the correct form and therefore the Information Commissioner had no jurisdiction to entertain the complaint. It requested that OVIC provide a clearer statement setting out the nature of the complaint in sufficient detail for VicForests to understand with precision what was being alleged against it.

On 21 December 2021, the Public Access Deputy Commissioner wrote to VicForests providing a preliminary view that the applicant's request was sufficiently clear to process. She invited VicForests to consider processing the applicant's clarified request, or provide a submission as to why it considered the request was not sufficiently clear, or why it could not conduct a search for documents captured by the request.

On 23 December 2021, VicForests wrote to the Public Access Deputy Commissioner renewing its request that she provide a clearer statement of the complaint made by the applicant.

On 20 January 2022, the Information Commissioner wrote to VicForests stating that both the applicant's FOI request and her complaint were clear enough to be progressed. He asked VicForests to process the applicant's request and outlined the regulatory actions he might take if it declined to do so, including commencing an investigation under s 61O.

On 27 January 2022, VicForests wrote to the Information Commissioner maintaining that the applicant's request was not validly made in accordance with s 17(2). In that letter, VicForests also proposed some terms of a revised request it stated it could process. As a result of VicForests' suggested revised terms, OVIC contacted the applicant to ask her if she would agree to the revised terms. However, the applicant declined to accept the revised terms.

Own motion investigation

On 16 March 2022, the Information Commissioner responded to VicForests advising that having considered its response on 27 January 2022, the Commissioner had decided to undertake an own motion investigation under s 61O. The Commissioner advised VicForests the investigation would consider VicForests' handling of the applicant's FOI requests and its response to the complaints made to OVIC.

OVIC acknowledges that due to an administrative oversight, OVIC did not inform VicForests that the applicant did not agree to revise the terms for her request. OVIC acknowledges this would have been useful knowledge for VicForests in responding to the complaint and the initial stages of this investigation.

Commissioner's investigation

The investigation's objective was to determine whether VicForests complied with the FOI Act and the Professional Standards when responding to the applicant's FOI requests and complaints being handled by OVIC and to examine reasons for any non-compliance.

Under s 61O, the Information Commissioner may, on the Commissioner's own motion, investigate the failure by an agency or principal officer to perform or exercise a function or obligation, under the FOI Act.

To reach a conclusion about whether VicForests acted consistently with the requirements of the FOI Act and Professional Standards, the Commissioner examined whether:

- VicForests' refusal to process the applicant's FOI requests, on the basis that those requests were unclear or unreasonably voluminous, was consistent with:
 - sections 13 and 17(1)–(2A);
 - FOI Professional Standards 8 and 9;
 - the object of the FOI Act under ss 3, and 16(1);
- VicForests provided appropriate assistance and advice to the applicant to help her make a valid FOI request, consistent with:
 - sections 17(3)–(4) and 25A(6);
 - FOI Professional Standards 2 and 5;
 - the object of the FOI Act under s 3, and s 16(1);
- VicForests' interaction with OVIC, with respect to the applicant's review applications and complaints, was consistent with:
 - sections 61E and 49I;
 - FOI Professional Standard 10;
 - the object of the FOI Act under s 3, and s 16(1).

As detailed below, the Commissioner examined these matters for each of the applicant's four FOI requests and two complaints, and then assessed VicForests' conduct across the series of requests and complaints, with reference to the object of the FOI Act under s 3, and s 16(1).

Investigation process

The first phase of the investigation involved a review of the requirements of the FOI Act and Professional Standards to identify where either VicForests or the applicant had potentially not met the requirements of the Act. The areas identified were tested in the following stages of the investigation.

The second phase involved OVIC completing a detailed examination of documents created and/or held by the applicant, VicForests and OVIC. This phase involved identifying the key steps each party had followed including their decision points, reasoning, and interactions with one another. OVIC staff conducted an interview with the applicant during this phase.

The Commissioner issued a notice to produce to VicForests under s 61P and Part VIC, requiring it to produce relevant documents. VicForests provided documents in response to the notice but exercised its right under s 61ZA to refuse to provide some documents on the basis that they were subject to legal professional privilege.

The third phase involved the Commissioner asking VicForests to submit answers to written questions, including about its FOI function generally, and the handling of each of the applicant's FOI requests and complaints.

Finally, the Commissioner examined three VicForests employees: the Corporate Counsel who made the relevant FOI decisions, the Legal Unit Manager who oversaw the VicForests legal function and general administration of VicForests' FOI function, and its Chief Executive Officer. All three examinations were conducted in accordance with a notice issued under s 61P and Part VIC requiring three VicForests employees to attend an examination with the Commissioner during which they were required to give evidence under oath or affirmation in accordance with s 61ZE. Each of the witnesses was supported during the examination by a senior counsel engaged by VicForests. This was not the external legal adviser that acted on its behalf in relation to the FOI requests and complaints.

Once the above evidence was gathered and analysed, the Commissioner prepared a draft report in accordance with s 61Q. A copy of the report or report excerpts was provided to VicForests, its employees referred to in the draft report, and the external legal adviser that acted on its behalf in relation to the FOI requests and complaints, in accordance with s 61R. Each of these persons provided a response, and the report was finalised taking into consideration the responses.

The Information Commissioner then transmitted the report to each House of Parliament for tabling, in accordance with s 61T.

Access to privileged information and the role of the external legal adviser

The external legal adviser assisted VicForests in the handling of some of the requests and complaints.

Throughout the investigation, VicForests asserted its right to maintain the confidentiality of privileged communications between it and the external legal adviser, via s 61ZA of the FOI Act. This meant the Commissioner could not have a full understanding of the legal adviser's involvement in these matters.

The comments and opinions in the report therefore are restricted to what the evidence the investigation obtained demonstrates.

As noted above, the Commissioner consulted with the external legal adviser under s 61R of the FOI Act. The Commissioner acknowledges that the external legal adviser was placed in a difficult position by being asked to respond to the draft report (which was based on evidence gathered from VicForests and its staff, rather than the external legal provider), as it had to respond without disclosing any privileged information. The solicitor/client relationship between it and VicForests meant there were limitations on how it could respond.

The Commissioner took those matters into account in finalising the report.

The external legal adviser has provided a response to the findings in the report which are detailed in Appendix 3.

VicForests' engagement with OVIC

VicForests cooperated with the Commissioner's investigation. The Commissioner acknowledges that the VicForests employees examined during the investigation provided assistance, spoke thoughtfully and reflected on their own and their agency's performance in a professional manner. The Commissioner also thanks the applicant for her assistance and for her patience, as her outstanding FOI request and complaint were placed on hold during the conduct of the investigation.

Investigation findings

The Commissioner considered each of the applicant's four FOI requests to determine whether:

1. VicForests' refusal to process the requests on the basis that they were unclear or unreasonably voluminous was in line with the FOI Act and Professional Standards.
2. VicForests gave appropriate assistance to the applicant to help her make a valid FOI request.

The Commissioner considered, with respect to the two complaints made by the applicant to OVIC, whether:

3. VicForests' interactions with OVIC met the standard required by the FOI Act and Professional Standards.

Finally, the Commissioner considered the actions taken by VicForests across the series of four requests and two complaints to determine whether:

4. VicForests acted in accordance with the object of the FOI Act under s 3, and s 16(1).

The legislation, case law, policy and procedural documents referred to in this chapter are detailed in the appendix to this report: *'Appendix: what does the FOI Act and the Professional Standards require of agencies?'*.

The first FOI request

On 22 July 2020, the applicant made an FOI request to VicForests (**the original first request**) seeking access to:

All particulars relating to me, [name], including, but not limited to; emails, transactions, letters, all advice, instructions to 3rd parties, text messages, surveillance records, notes (digital and hand-written) and written records from January 2010 – August 2020. This date range captures the period of formal engagement that I have had with the company. This should include all draft documents or emails, personal and professional information.¹

¹ VicForests, FOI Request Form, 22 July 2020.

The FOI request was not accompanied by an application fee. On 22 July 2020, the applicant wrote to VicForests to ask about how to pay, and VicForests provided her with instructions. On 31 July 2020, the applicant advised VicForests that she had deposited the FOI application fee in VicForests' bank account.²

On 10 August 2020, VicForests' Corporate Counsel wrote to the applicant stating that the FOI request did not meet the requirements of a valid request under s 17(2). The letter said:

The Freedom of Information Act 1982 (Vic) (Act) creates a right of access to documents of an agency. Section 13 of the Act states that the right of access is to be exercised 'in accordance with this Act'. Section 17 of the Act sets out the procedural requirements to be satisfied for a valid request for access to documents to exist.

One of those requirements is that the request must provide such information concerning the documents you seek as is reasonably necessary to enable the agency to identify the documents sought. That is, an applicant must define with as much precision as possible the documents sought to enable an appropriate officer to constructively search for those documents. If a request is ambiguous, unclear or otherwise ill defined, it does not comply with the Act and need not be processed. Finally, a request must be for documents and not just information as such because the Act is about access to information in documentary form.

In my view, for the reasons set out below, your FOI Request does not provide sufficient information for me to identify the documents you seek.

The date range you have provided ends after receipt of your request and provides a month (August 2020), but no fixed date. A freedom of information request is crystallised as at the date the request is received, in this case being 31 July 2020 (the date on which full payment was received). Documents dated after the date of the request are not required to be produced.

Your request is also for all "particulars relating to (you), [name]..." The documents you are seeking are not clear. Are you seeking all documents which include your name? Are you seeking documents with information about you (i.e. beyond your name)? As framed, it is not possible to determine the scope of the searches that should take place to identify responsive/relevant documents.³

The letter then invited the applicant to consult with VicForests with a view to amending or clarifying the FOI request. It provided an email address for the applicant to write to for that purpose.

² Email chain between the applicant and VicForests, 31 July 2020.

³ Letter from VicForests' Corporate Counsel to the applicant, 10 August 2020.

The applicant did not respond, and on 2 September 2020, VicForests' Corporate Counsel sent her a letter which said:

In accordance with s17 of the Freedom of Information Act 1982 (Vic) (Act) and standard 2.4 of the Professional Standards issued by the Information Commissioner under Part 1B of the Act, an agency need not process an invalid request that is not clarified within 21 days of notification from that agency that the request requires clarification.⁴

The letter told the applicant that she had until 4 September 2020 to provide clarification, or no further action would be taken on her FOI request. The applicant replied by email on 3 September 2020, and suggested the following amended terms for her FOI request (**the revised first request**):

I would like material; photos, emails, texts, files, documents (both complete or incomplete) related to or with my name in relation to surveillance undertaken pertaining to me.

I would like all documents, emails, texts that relate to or with my name in relation to; public relations, social media and media, specifically covering work with third-party media and public relations entities.

I would like all documents, emails, texts that relate to or with my name in relation to the Forest Stewardship Council (FSC).

I would [sic] all documents, where redaction exist or not.

I would like all documents that include my name, about my name and in relation to my name.

I would like documents in relation to the conditions outlined above from July 31, 2008 to the date July 31, 2020.

She also provided some contextual information and invited VicForests to call her if her request was unclear:

I believe on very reasonable grounds that VicForests are, and have, engaged surveillance to watch me, have directed a public campaign against me and continue to do so as evidenced by the recent attack on my character in the press and at my place of work by the CEO. Recent evidence for this claim can be seen in the press - [internet link]

If this is not clear enough please call me on [phone number].⁵

⁴ Letter from VicForests' Corporate Counsel to the applicant, 2 September 2020.

⁵ Email from the applicant to VicForests' Corporate Counsel, 3 September 2020.

On 15 September 2020, VicForests sent a letter to the applicant which said:

Unfortunately, your attempt at clarification or amendment of your request has not been productive of a sufficiently clear request to enable us to constructively search for documents you might seek. It remains unclear what documents you seek. In addition, you have requested all documents in relation to broad (and uncertain) categories.

Accordingly, as you have been provided with a reasonable opportunity to consult, and there has been no satisfactory change to your request, I have decided to refuse to process your request on the basis that it does not comply with s17(2) of the FOI Act; you have not provided to VicForests such information about the documents you seek as is reasonably necessary to enable a responsible officer of VicForests to identify them.

In the circumstances, VicForests will also return your application fee of \$29.60.⁶

Was the original or the revised first request invalid under s 17(2)?

To be valid, an FOI request must meet the requirements of s 17(2):

A request shall provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, as the case may be, to identify the document.

During the investigation VicForests maintained its position that both the original first request and the revised first request failed to meet the requirements of s 17(2).

The request as received was not clear enough to allow VicForests to identify, with precision, the documents to which access was being requested. That is, it did not provide such information as is reasonably necessary to enable a responsible officer of VicForests to identify the documents sought.

The request was for “all particulars” relating to [the applicant]. It was unclear what nature of documents were being requested and what was meant by “all particulars”. Was a mere mention of [the applicant’s] name sufficient? Were photographs of [the applicant] part of the search? We note that photographs may well appear in public third-party documents held by VicForests (e.g. annual reports of organisations [the applicant] may have been involved with) and be likely to be identifiable only by way of a physical search. Was it intended to capture documents regarding the court case that [the applicant] and VicForests were involved in (MyEnvironment Inc. v VicForests Supreme Court Proceeding No. 4452 of 2011 and subsequent appeal)? Was it intended

⁶ Letter from VicForests’ Corporate Counsel to the applicant, 15 September 2020.

to cover [the applicant's] position as a director of the Forest Stewardship Council? Was it intended to cover other matters? As can be seen, the request was unclear.⁷

The critical question is whether the original first request and the revised first request were sufficiently clear to enable VicForests to identify the documents sought by the applicant.

The original first request, for '[a]ll particulars relating to me' would be difficult for any agency to process. Although the decisions outlined in the appendix make it clear that an applicant need not be overly precise and can express a request in broad terms, VicForests' decision to query what the applicant meant by her request for all documents relating to her was not unreasonable.

The original first request, on its face, extends beyond documents containing the applicant's name, to information that 'relates' to her. That could potentially include a large range of possible documents. It was reasonable for VicForests to consult with the applicant about the validity of this request.

On the other hand, the revised first request provided more detail. The request comprised six points. However, looking at those points in context, only the first three points are the categories of documents sought. The final three points are responses to questions raised by VicForests in its letter of 10 August 2020. The three categories requested by the applicant in the revised first request were:

I would like material; photos, emails, texts, files, documents (both complete or incomplete) related to or with my name in relation to surveillance undertaken pertaining to me.

I would like all documents, emails, texts that relate to or with my name in relation to; public relations, social media and media, specifically covering work with third-party media and public relations entities.

I would like all documents, emails, texts that relate to or with my name in relation to the Forest Stewardship Council (FSC).

The first point requests documents 'related to or with [the applicant's] name' that relate to 'surveillance undertaken pertaining to [her].' Although the words 'related to or with' might be said to have the same issue as the original first request, the cases described in the appendix make it clear that an FOI request should not be read in an overly legalistic or technical manner.

It is hard to imagine how a document could 'relate to' a person's name. A more reasonable reading of these words is to look at it as simply meaning documents that contain the applicant's name.

To identify documents meeting this description, VicForests could have searched for all documents with the applicant's name, and then considered each document to see if it related to surveillance.

⁷ Response by VicForests to Information Commissioner Questions, 19 August 2022.

Alternatively, it could have searched for documents that related to surveillance of the applicant, and then remove those which did not bear her name.

Another approach would be to conduct initial searches and then advise the applicant of the types of records VicForests considered were responsive to her request and ask the applicant which records she was seeking. This approach recognises that an applicant often does not know what records an agency holds and therefore it is difficult for them to make a request in precise terms.

The second point requests documents relating to media and social media. The third point requests documents 'with [the applicant's] name in relation to the Forest Stewardship Council (FSC).' These points also refer to documents 'related to or with [the applicant's] name', but as with the first point, the only reasonable way of reading this is to understand it as meaning documents that contain the applicant's name.

This request could have been expressed more simply and precisely by the applicant. However, agencies are required to look at requests 'fairly with an eye to what the person making a particular request is trying to describe regardless of the terms used.'⁸ As described above, meaning can be given to the words of the request by reading them fairly and with regard to the rest of the applicant's communications with VicForests to do with this request. The words alone were sufficiently clear.

Furthermore, the applicant also invited VicForests to call her to clarify any aspect of the request, if required. If VicForests found the words of the revised first request to be unclear, it could have sought to clarify their meaning with a telephone call.

Findings

The Commissioner finds that the applicant's first FOI request, on its original terms, did not meet the requirements of s 17(2). VicForests' decision to consult with the applicant about the terms of that request was reasonable.

Finding 1: The applicant's original first request did not meet the requirements of s 17(2) of the FOI Act and was not a valid request.

However, the Commissioner finds that the applicant's revised first FOI request provided sufficient information as was reasonably necessary for VicForests to process the request.

⁸ *Chopra v Department of Education and Training* (Review and Regulation) (No 2) [2020] VCAT 932.

Finding 2: The applicant's revised first request met the requirements of s 17(2) of the FOI Act and was a valid FOI request.

As the applicant's revised first FOI request was valid under s 17(2), VicForests was required to process the request in accordance with the Act. It was required to either provide access to the requested documents under s 20 or provide a statement of reasons explaining its reasons for refusal under s 27.

It failed to do this because of its view that the FOI request was invalid.

Did VicForests provide appropriate assistance to the applicant?

As described in the appendix, before refusing a request on the basis that it is invalid, an agency must assist the applicant to make a valid request and give the applicant a reasonable opportunity to consult about their request.

VicForests' Corporate Counsel confirmed at interview that the letter of 10 August 2020 was the extent of the assistance VicForests provided to the applicant to make her original first request valid. That letter explained why the request was invalid and invited the applicant to be consulted. When the applicant did not respond within the statutory timeframe, VicForests responded by sending a further letter that extended the timeframe for clarifying her request.

VicForests' Corporate Counsel reflected on how her approach had been informed by her legal background handling litigation and court discovery requests:

Well, I hadn't done any FOI training at this point in time, I was very new to FOI. So, my – sorry, this might sound a little bit long winded but I think some of my background is a little bit relevant to how I looked at the requests.

I'll have a look at the wording and look at it from a point of view of being able to do meaningful searches across particular document repositories with a view to identifying documents. So, I looked at that request at first blush and went what sort of search terms could I apply to this and where would I go looking for it.

She said that with hindsight she may have handled some parts of the applicant's first valid request differently:

... throughout my training something that had been made clear to me is that it's not the responsibility of the officer in fulfilling her obligations to put words in the mouth of someone submitting a request.

Having reflected of late I think that what might be a little bit more helpful in that regard is to perhaps provide suggestions to the applicant. So, say something was unclear, is this

what you meant? Sort of stating a premise back to them to make sure that that was what they were getting at as opposed to sort of leaving it a little bit more open ended. ...

Look, I think if I did the first request [again] ... I think I would probably approach it on the basis that I just mentioned. I would perhaps put back to her what I understood, [the applicant] rather, what I understood her to be asking for in a little bit more detail.⁹

When asked why she didn't telephone the applicant to discuss her request, Corporate Counsel explained as follows:

Verbal dialogue is a little bit difficult at that point in time. I'd started at VicForests on a six-month fixed term contract and we were still in lockdown at that point and I didn't have a work phone. So, I was using my personal mobile phone internally within the business but because I so rarely, you know, was required to speak to anyone outside of the business I wasn't comfortable using my personal phone for that, so I - and we didn't have employee phones at that point either, so my personal phone was all I had.¹⁰

She also explained that she didn't have any knowledge of the allegations of surveillance referred to in the applicant's FOI request, which were later the subject of the current affairs program, 7.30. She explained that this meant that at the time she processed the request she did not have the benefit of that additional context to inform her decision making:

I didn't have the benefit of any of that at this point in time, this was all well before that had come out. So I think I sort of looked at it and went - I - I guess I found it [the allegations of surveillance] very unusual, and it didn't occur to me that - I didn't think there was any way that I might be able to help her like that. Like I - I - I guess how do you - sorry, I'm trying to think of the best way to word this. It seemed like it was - it's something that's so odd, that I - I don't think it would've occurred to me that anything would've existed to prove or disprove that either way.¹¹

The Corporate Counsel said that she did not consult internally in response to the original request to try to understand what it contained:

I wasn't specifically sure what it was she was asking, it made it a little bit difficult to target particular areas of the business, so no.¹²

⁹ Interview with VicForests' Corporate Counsel, 31 August 2022.

¹⁰ Interview with VicForests' Corporate Counsel, 31 August 2022.

¹¹ Interview with VicForests' Corporate Counsel, 31 August 2022.

¹² Interview with VicForests' Corporate Counsel, 31 August 2022.

When asked at interview whether she was able to draw on previous knowledge of VicForests' interactions with the applicant to help her understand the request, the Legal Unit Manager indicated she was not able to do so:

I was looking at the request as the request appeared. I don't think our role is to second guess or guess what an applicant wants. The words of her request were the words of her request.

I can give you a personal reflection which is that from my experience it was an unusual request. Most requests are about documents, rather than a person themselves.¹³

When asked why she thought VicForests' consultation with the applicant did not result in a successful request being created, the Corporate Counsel said:

I'd like to avoid breaching privilege, so - look, I think perhaps it was my lack of experience at that point in time. The advice available to me at that point in time. Lockdown and communication issues.

But equally, I think, a lack of meaningful response from [the applicant], I think it was sort of a culmination of factors.¹⁴

Analysis

VicForests' letter of 10 August 2020 to the applicant was the extent of its assistance provided to her to make a valid FOI request. That letter explained why the request was invalid and gave the applicant an opportunity to consult.

VicForests submitted to OVIC that this was sufficient and that where an applicant has made a request that is considered invalid under s 17(1), an agency's obligation to assist:

*extends **and is limited to**, giving the applicant a reasonable opportunity of consultation with the agency with a view to making a request in a form that complies with s 17(2). It is up to the applicant to accept the invitation to consult. It is not for the agency to actively initiate the consultation process other than to make the initial invitation. By doing so, an agency complies with its obligations under ss 17(3) and (4).¹⁵ [emphasis added]*

In support of this, VicForests referred to Judge Jenkins' comments in *Chopra v Department of Education and Training (No2)* [2020] VCAT 932 at [74] (**Chopra**):

¹³ Interview with VicForests' Legal Unit Manager, 31 August 2022.

¹⁴ Interview with VicForests' Corporate Counsel, 31 August 2022.

¹⁵ Letter from VicForests' external legal adviser to OVIC, 27 November 2020.

In my view these assertions are simply self-serving and without any basis. In particular, I am satisfied that the factual circumstances detailed above clearly provide a positive answer to each of the following questions, namely:

- a. First, the Respondent did have a legitimate basis for asserting that Item 4 did not comply with s 17(2);*
- b. Secondly, the Respondent did engage in a consultation process, in accordance with ss 17(3) and (4);*
- c. Thirdly, the Applicant acknowledged that there had been an opportunity to consult; and*
- d. Fourthly, the Applicant, of his own volition, refused to engage in any further consultation.*

The Commissioner disagrees with VicForests' position that an agency's obligation to assist an FOI applicant 'is limited to' giving the applicant a reasonable opportunity to consult. In the passage referred to by VicForests, Judge Jenkins was making findings about the specific case before her, not the proposition suggested by VicForests.

Section 17(3) clearly states that an agency must assist a person to make a request:

*It is the duty of an agency ... to assist a person who wishes to make a request, or has made a request that does not comply with this section ...*¹⁶

This is separate to the duty in s 17(4) to consult with an applicant.

Although consultation may go towards an agency meeting its duty in s 17(3) to assist an applicant, there is nothing in s 17 that suggests consultation is all that is required.

The critical question is whether VicForests 'assist[ed]' the applicant 'to make a request in a manner that complies with [s 17]',¹⁷ and gave the applicant a 'reasonable opportunity to consult'.¹⁸

The circumstances described by Judge Jenkins in *Chopra* were different to the present case. In *Chopra*, the applicant refused the agency's offer to consult.¹⁹ In the present case, the applicant engaged with the agency, by replying and providing a suggested revised scope and further context. She also invited the agency to speak with her further: 'If this not clear enough, please call me on [phone number]'.²⁰

¹⁶ FOI Act, s 17(3) [emphasis added].

¹⁷ FOI Act, s 17(3).

¹⁸ FOI Act, s 17(4). See also Professional Standard 2.4.

¹⁹ *Chopra v Department of Education and Training* (Review and Regulation) (No 2) [2020] VCAT 932.

²⁰ Email from the applicant to VicForests' Corporate Counsel, 3 September 2020.

The Commissioner considered a range of other steps VicForests might have taken to assist the applicant and give her a reasonable opportunity to consult.

The Commissioner considered whether VicForests should have conducted preliminary searches to inform its consultations with the applicant. Based on the verbal evidence of VicForests' Corporate Counsel, given under oath, the Commissioner was satisfied that she had no knowledge of the allegations that were a subject of the applicant's FOI request. He was also satisfied that the Corporate Counsel found the allegation to be unlikely at the time she processed the request (as the allegation had not, at that stage, been aired publicly or otherwise come to her attention), and that she therefore thought it unlikely that any relevant documents would exist.

Also, as described above, the terms of the original first request were unclear, and it would be difficult to conduct preliminary document searches. In those circumstances, it was reasonable for the Corporate Counsel to have commenced s 17 consultations with the applicant prior to conducting any document searches or consulting within VicForests.

The Commissioner considered whether VicForests should have engaged in better dialogue with the applicant to understand what she sought before refusing her request. The applicant responded to VicForests' consultation letter providing additional information about the documents she sought and inviting VicForests to call her if her request remained unclear. VicForests did not call her and proceeded to refuse the request.

The Commissioner accepted the Corporate Counsel's evidence that she could not call the applicant because she did not have a work-issued telephone in circumstances where she was required to work from home at short notice due to state-wide health rules. This explains why the Corporate Counsel did not call the applicant but does not justify VicForests' failure to arrange for a telephone discussion with the applicant. VicForests could have reasonably arranged a verbal discussion by either issuing a telephone to the Corporate Counsel, utilising video conferencing software, or arranging for someone else to call the applicant.

The Commissioner considered whether VicForests could have provided the applicant with more helpful information in its consultation letter to help her make a valid request, especially in circumstances where the applicant would have no knowledge of the types of documents held by VicForests.²¹ VicForests' consultation letter of 10 August 2020 explains why VicForests considered the applicant's request to be invalid, but did not provide her with information that would assist her to make a valid request.

Although the Commissioner agreed with the comment of VicForests' Corporate Counsel that it is not for an FOI officer to 'put words in the mouth of someone submitting a request', an FOI officer may need to assist an applicant to come up with words that describe what documents they seek to meet the obligation to assist in s 17(3). That may include providing examples of request terms the agency could process, or information about what sort of documents or categories of documents could be requested.

²¹ See discussion of *O'Brien* in the Appendix.

Findings

The Commissioner finds that VicForests provided the applicant with a reasonable opportunity to consult on the original first request, as required by s 17(4). VicForests did this by writing to her and inviting her to consult.

Finding 3: VicForests provided the applicant with a reasonable opportunity to consult on the original first request, as required by s 17(4) of the FOI Act.

However, the Commissioner finds that VicForests failed to assist the applicant to make a valid FOI request as required by s 17(3) after she accepted its invitation to consult, by not employing strategies such as those outlined in OVIC's Practice Note *Receiving an access request: valid requests and early considerations*²² and VicForests' FOI procedures manual.

VicForests should have:

- telephoned the applicant to discuss her request;
- provided further information to the applicant in its consultation letter or in other ways to help her make a valid request. Examples include suggestions for how she might have worded her request, or detailed information about the documents it held that would be responsive to her request; and
- drafted its correspondence with the applicant in a manner that was simpler and easier for the applicant to understand and engage with.

Finding 4: VicForests failed to discharge its duty to assist the applicant to make a valid request during its consultations on the original first request, as required by s 17(3) of the FOI Act.

The first complaint

On 17 September 2020, the applicant complained to OVIC about VicForests' refusal to process the original first request.

²²See OVIC Practice Note *Receiving an access request: valid requests and early considerations* at <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/receiving-an-access-request-valid-requests-and-early-considerations/>

I wish to challenge the refusal on the grounds that the agency did not consult nor adequately assist me, even when invited, and approached my request with hostility and an absence of consultation when I requested it, thus failing [VicForests'] refusal to provide information null and void under the Act.

I wish to challenge the above rejection under section 17(4) of the FOI Act.

I was not reasonably consulted with, nor assisted and therefore the basis for rejection has not been met.²³

On 12 October 2020, the Public Access Deputy Commissioner sent a letter to the Chairperson of VicForests notifying him that she had accepted the complaint from the applicant.

On 23 November 2020, OVIC wrote to VicForests requesting the following information:

- a brief submission addressing why VicForests is of the view the terms of the applicant's request are unclear;
- any further consultations that may have occurred under s 17(3) where VicForests provided suggested wording or assistance to the applicant; and
- advice on why VicForests is not able to conduct a search for documents that include the applicant's name, or any such similar search.²⁴

On 27 November 2020, VicForests wrote to OVIC addressing only point two above. VicForests argued that items one and three were beyond the scope of the applicant's complaint and, accordingly, beyond the jurisdiction of the Commissioner:²⁵

[the] precise terms and nature of the complaint to be dealt with by the Commissioner is as set out in the complaint made by [the applicant], attached to the letter provided to VicForests by the Commissioner. The complaint to be dealt with by the Commissioner is confined by the terms of the written complaint made, which sets out the full extent of the nature of the complaint. That necessarily determines the scope of the jurisdiction of the Commissioner.

...

That is, the complaint is limited to challenging the adequacy of consultation or assistance provided to [the applicant] by VicForests. It is not, as asserted in the email of

²³ Complaint from the applicant to OVIC, 17 September 2020.

²⁴ Email from OVIC to VicForests' Corporate Counsel, 23 November 2020.

²⁵ Letter from VicForests to OVIC, 27 November 2020.

23 November 2020 from your office detailed below, something which requires OVIC to assess the validity of the request.²⁶

VicForests outlined its assistance to and consultation with the applicant in relation to her revised first request and then set out legal arguments as to how it had met its legislative obligations in relation to providing assistance to and consulting with the applicant.

On 3 February 2021, the Assistant Commissioner, Public Access Operations and Compliance responded to VicForests' submission regarding OVIC's jurisdiction:

*The Information Commissioner has broad complaint jurisdiction over 'an action taken or failed to be taken by an agency in the performance or purported performance of the agency's functions and obligations' under the FOI Act. Further, in conducting preliminary inquiries, the Information Commissioner may consult with an agency to determine 'the material facts and issues in relation to the complaint'. In my view, the validity of the request both before, and after the Agency consultation, is clearly a material fact or issue in relation to the complaint.*²⁷

The Assistant Commissioner provided a preliminary view that the applicant's revised first request was sufficiently clear to process:

Having initially assessed the correspondence between your Agency and the Applicant, and having consulted with the Commissioners, their preliminary view is that the request is sufficiently clear to process.

The Commissioners consider that despite the range of documents sought, the clarified request is sufficiently limited by confining the request to documents bearing the Applicant's name.

*This preliminary view is based on an assessment of the documents, the views of the Commissioners and in consideration of whether the Information Commissioner is likely to make a different decision to that of your Agency.*²⁸

The Assistant Commissioner invited VicForests to respond to the other two queries, or alternatively process the FOI request. She requested a response from VicForests by 17 February 2021.

²⁶ Letter from VicForests to OVIC, 27 November 2020.

²⁷ Letter from OVIC to VicForests, 3 February 2021.

²⁸ Letter from OVIC to VicForests, 3 February 2021.

Through its external legal adviser, VicForests responded on 9 February 2021:

In summary, for the reasons elaborated upon below, VicForests submits that:

(a) your views have not established that the Information Commissioner has jurisdiction under the Freedom of Information Act 1982 ("FOI Act") to address issues extending beyond the terms of the complaint made by [the applicant] – the Information Commissioner does not in handling a complaint have jurisdiction to address matters not complained about;

(b) if the clarified request was validly made (which is denied), the fact that a decision in respect of that request was not made within 30 days gives rise to a decision under s 53 of the FOI Act which is reviewable by the Tribunal. Accordingly, as that subject matter could be dealt with by an application for review by the Victorian Civil and Administrative Tribunal, the Information Commissioner must dismiss the complaint under s 61B(3) of the FOI Act;

(c) in any event, the clarified request is still not validly made under s 17(2) of the FOI Act.²⁹

The letter from VicForests' external legal adviser then addressed points one and two. While it maintained its position that asking those questions was out of OVIC's jurisdiction, it answered them 'as a matter of courtesy'.³⁰

On 16 February 2021, the applicant emailed OVIC requesting advice in making a second request:

If it's merely that I was not clear enough, would it not be a sensible solution that I re-draft my FOI request in accordance with their requirements and proceed that way? I would welcome your assistance to enable a correct request is sent to VicForests to save them time.³¹

OVIC staff responded:

I acknowledge your intention of communicating with the VicForests in order to redraft and hopefully clarify your request.

However, at the moment our office is currently actively engaged with VicForests in order to facilitate an outcome to your initial complaint. The outcome of which may include next steps and specific suggestions in corresponding with VicForests to submit a validly worded FOI request.³²

²⁹ Letter from VicForests' external legal adviser to OVIC, 9 February 2021.

³⁰ Letter from VicForests' external legal adviser to OVIC, 9 February 2021.

³¹ Email from the applicant to OVIC, 16 February 2021.

³² Email from OVIC to the applicant, 17 February 2021.

In March 2021, OVIC staff spoke by telephone to the applicant and explained that a new separate request may be the most efficient way forward, while keeping her complaint open.

The applicant made a second FOI request to VicForests on 22 March 2021, as discussed above.

The applicant's complaint was kept open while she attempted to agree the terms of a second request with VicForests. As described above, this discussion resulted in an FOI request that VicForests accepted as valid under s 17, and later refused under s 25A(1).

On 11 August 2021, OVIC staff wrote to the applicant seeking her agreement to close her complaint on the basis that 'the first request has been fully pursued and there is no basis for the making of further inquiries or taking further action'.³³

The applicant agreed to close her complaint and OVIC notified VicForests on 16 August 2021 that the complaint had been finalised.³⁴

Analysis

OVIC first sought assistance from VicForests on 23 November 2020. It provided a response on 27 November, answering some of OVIC's questions but declining to answer others, disputing the relevance of those questions.

When OVIC later provided a view to VicForests that the questions were valid, it responded to the questions and provided detailed answers within the timeframe requested. The letter provided submissions maintaining that OVIC's questions were irrelevant and the matters they concerned were outside OVIC's jurisdiction. However, it did not take any further action on those submissions, and answered the questions asked, although it continued to assert that it was not obliged to, and that the questions were not relevant to the applicant's complaint.

VicForests provided responses in advance of deadlines imposed by OVIC. It met its duty under Professional Standard 10.3 to provide all information within requested or agreed timeframes.

After VicForests received a preliminary view from OVIC on 3 February 2021, it provided detailed responses to each point. Although it did not agree with the preliminary view, it did consider it.

VicForests' responses to OVIC were lengthy and contained detailed legal argument. Its submissions on the Information Commissioner's jurisdiction under the FOI Act ultimately had no effect other than slightly delaying its eventual response to OVIC's original questions. However, this delay was not significant as VicForests responded promptly to all correspondence from OVIC.

³³ Email from OVIC to the applicant, 11 August 2021.

³⁴ Email from the applicant to OVIC, 12 August 2021.

VicForests responses were not conducive to resolving the applicant's complaint being handled by OVIC. The lengthy submissions on jurisdiction from VicForests through its external legal adviser in its letter of 9 February 2021, made when VicForests was nonetheless providing OVIC the information it requested, were unnecessarily argumentative. Nonetheless, VicForests and other agencies are entitled to make submissions to OVIC disagreeing with a course of action or a preliminary view. Despite its disagreement, VicForests provided the information OVIC requested to assist in progressing the complaint.

Section 61E and Professional Standard 10.1 require agencies to assist the Information Commissioner in handling a complaint and their informal resolution. However, this does not require agencies to always agree with OVIC. While the approach adopted by VicForests slightly delayed the finalisation of the complaint, its conduct was not so obstructive as to amount to non-cooperation contrary to s 61E and Professional Standard 10.1.

Findings

The Commissioner finds that VicForests, with respect to the First Complaint, cooperated with the Commissioner as required by s 61E and Professional Standard 10.1.

Finding 5: In responding to the applicant's first complaint, VicForests cooperated with the Information Commissioner as required by s 61E of the FOI Act.

While VicForests could have done more to assist the informal resolution of the applicant's first complaint, it provided assistance to the Commissioner when asked to do so to informally resolve the complaint.

Finding 6: In responding to the applicant's first complaint, VicForests assisted the Information Commissioner as required by Professional Standard 10.1.

The second FOI request

On 22 March 2021, the applicant submitted her second FOI request, accompanied by the appropriate fee (the **second request**).

I would like any investigative documents including notes, reports, documents, texts that involved surveillance of myself. Any internal correspondence and briefings that discuss

myself by name and any documents in relation to the FSC that include my name from January 2009 to February 2021.

On 8 April 2021, VicForests wrote to the applicant stating that her FOI request did not provide sufficient information for VicForests to identify the documents she was seeking:³⁵

Your Request seeks access to “any investigative documents” and then sets out examples. It is unclear what that term means and, in particular, what you would consider to be investigative documents that involve surveillance of you. Could you please clarify what documents you seek.

Your Request seeks “any documents in relation to the FSC that include (your) name”. As you can appreciate, as you are a director of the FSC, there would be a multitude of documents that include your name, including mere mentions. I need to know the context in which you are seeking such documents, and clarity around the type of documents you are seeking so we know where to conduct such searches.

Your Request also seeks “(a)ny internal correspondence and briefings that discuss (you) by name”. As you can appreciate (and noting that Your Request covers a 12-year period) we have had a lot of interactions with you over the years. Again, I need to know with precision the types of “internal correspondence” and references to yourself that you are seeking to even begin to consider Your Request and to consider the breadth of searches that may need to be undertaken.³⁶

On 29 April 2021, the applicant replied to VicForests, providing various clarifications and additional contextual information.

On 10 May 2021, VicForests wrote to the applicant confirming the terms of the request while also seeking clarification of the term ‘surveillance’:

In trying to understand what your Amended Request means, VicForests will interpret the word “surveillance” according to its ordinary meaning of:

- *watch kept over a person...especially over a suspect, a prisoner, or the like;*
- *close observation, especially of a suspected person.*

³⁵ Letter from VicForests’ Corporate Counsel to the applicant, 8 April 2021.

³⁶ Letter from VicForests’ Corporate Counsel to the applicant, 8 April 2021.

Before VicForests can begin to process the Amended Request, can you please confirm that its understanding of what you now seek is correct. If not, please indicate as soon as possible how it is incorrect and what you intended to seek.³⁷

On 13 May 2021, the applicant confirmed via email that the terms of the request were satisfactory. However, she requested that an additional reference to communications between VicForests and a particular Member of Parliament be included, where those communications related to the applicant.³⁸ On 18 May 2021, VicForests sought two further minor clarifications³⁹ which were confirmed by the applicant on 24 May 2021.⁴⁰

On 31 May 2021, VicForests advised the applicant that it would now consider the finalised request and provide a decision in accordance with the FOI Act.⁴¹

On 23 June 2021, VicForests provided the applicant with an eight page notice under s 25A(6) advising that it considered her request was too large to process, and inviting her to consult with VicForests with a view to amending the terms of her request to be in a form that would remove the ground for refusal. Alternatively, it suggested that the applicant may wish to submit an amended request that narrows the scope of what is sought in a way that would be more manageable for VicForests to process and remove the ground for refusal.⁴²

VicForests' consultation letter also provided the following information as to why the applicant's request, if processed in its present form, would substantially and unreasonably divert the resources of VicForests from its other operations:

- (a) The potential number of documents falling within the scope of the Request are unknown given the lengthy periods covered by each of the 5 parts of the Request, but it is not inconceivable that there are likely to be many thousands, or even tens of thousands, of pages of documents to be searched through in order to identify any relevant documents falling within the request.*
- (b) As you may be aware, the definition of a "document" in the FOI Act is very broad and effectively includes anything on which information is stored. Preliminary inquiries of appropriate staff of VicForests in light of the terms of the Request*

³⁷ Letter from VicForests' Corporate Counsel to the applicant, 10 May 2021.

³⁸ Email from the applicant to VicForests' Corporate Counsel, 13 May 2021.

³⁹ Letter from VicForests' Corporate Counsel to the applicant, 18 May 2021.

⁴⁰ Email from the applicant to VicForests, 24 May 2021.

⁴¹ Email from VicForests' Corporate Counsel to the applicant, 31 May 2021.

⁴² Letter from VicForests' Corporate Counsel to the applicant, 23 June 2021.

*suggest that any documents falling within the Request are likely to exist in hard copy and/or electronic form.*⁴³

The letter described some of the difficulties associated with VicForests' processing the request including:

- the need to search two email systems (Lotus Notes and Outlook) in respect of each of the five different parts of the request;
- keyword searches would need to be conducted by the government IT service provider (Cenitex) at first instance as VicForests does not have the resources and capacity to conduct the searches itself;
- the need to manually search around 30 email accounts of past staff members;
- the need to search an additional 43 new staff member's email accounts;
- each office (head office and 14 regional offices) has its own computer systems containing huge volumes of documents which would need to be searched;
- the Covid-19 pandemic working from home arrangements created difficulties in arranging and conducting searches; and
- the number of FOI requests received by VicForests has increased significantly in recent years.⁴⁴

The letter also set out detailed calculations of the time and cost for VicForests to process the applicant's request. It estimated that it would take almost 1,039.76 work hours to search for potentially relevant emails,⁴⁵ and that processing the request would also represent an internal cost to VicForests between \$131,552.47 - \$149,218.65.⁴⁶ This estimate was said to be in relation to emails only and the request extended beyond emails to other documents.⁴⁷

VicForests invited the applicant to narrow the terms of her request and provided the following suggestions:

In order to possibly remove the ground for refusal I suggest that you consider the following matters (and any other ways in which you believe the Request could be narrowed in scope):

⁴³ Letter from VicForests' Corporate Counsel to the applicant, 23 June 2021.

⁴⁴ Letter from VicForests' Corporate Counsel to the applicant, 23 June 2021.

⁴⁵ Letter from VicForests' Corporate Counsel to the applicant, 23 June 2021.

⁴⁶ Letter from VicForests' Corporate Counsel to the applicant, 23 June 2021.

⁴⁷ VicForests submission to OVIC in relation to the Application for Review, 16 August 2021, p.4.

1. *You may wish to remove one or more items in your request.*
2. *You may wish to seek documents over much narrower periods (such as the last 12 months);*
3. *You may wish to seek only specific documents, such as emails;*
4. *You may wish to only seek documents from or to particular individuals rather than any VicForests staff;*
5. *You may wish to seek emails only from when VicForests moved to Outlook at the end of 2018;*
6. *You may wish to seek only certain types of documents or categories of documents and exclude others;*
7. *You may wish to seek documents relating only to particular topics or subject matter.*⁴⁸

These matters are only raised by way of suggestion. By including them in this notice, you should not take it that doing any one or more of them will remove the grounds for refusal.

On 13 July 2021, the applicant submitted an amended FOI request (the **revised second request**):⁴⁹

I wish to amend my request to the following scope;

All documents from 1 January 2009 to 28 February 2021 that refer to my name and which relate to surveillance of me by VicForests

All correspondence from [*a named individual*] between 1 June 2011 and 20 November 2014 that refers to my name

All correspondence with [*a named company*] be limited 21 June 2016 to 24 June 2021

All documents from 1 January 2016 to 28 February 2021 that refer to my name and/or refer to my role as a member of the Board of the Forest Stewardship Council (FSC) which were sent to VicForests management and/or VicForests Board by one or more of the following:

- [*a named company*]
- [*a list of 8 named individuals*]
- Any VicForests staff

⁴⁸ Letter from VicForests' Corporate Counsel to the applicant, 23 June 2021.

⁴⁹ Email from the applicant to VicForests' Corporate Counsel, 13 July 2021.

- [a list of 2 named individuals]

On 20 July 2021, VicForests wrote to the applicant advising that it had decided to refuse the revised second request under s 25A(1):

I have decided to refuse access to the Further Amended Request under s 25A(1) of the FOI Act without processing the Further Amended Request, on the basis that the work involved in processing the Further Amended Request would substantially and unreasonably divert the resources of VicForests from its other operations.

Despite your attempt to remove this ground for refusal by narrowing the scope of your Amended Request, the timeframes sought and the range of documents requested remain excessively broad. Therefore, significant work would still be involved were the Further Amended Request to be processed.

I am satisfied for the reasons set out above and in the s 25A(6) Notice that processing the Further Amended Request would substantially and unreasonably divert from its other operations the resources of VicForests reasonably required to process the Further Amended Request consistent with attendance to other priorities.⁵⁰

The letter noted that if the applicant was not satisfied with VicForests' decision, she could seek review by the Information Commissioner within 28 days of receiving the letter.

On 5 August 2021, the Public Access Deputy Commissioner wrote to VicForests advising that she had received an application for the review of its decision to refuse the applicant's request and invited it to make a submission in relation to the review detailing its reasons for relying on s 25A(1).⁵¹

VicForests made a submission to OVIC,⁵² and on 29 September 2021, the Public Access Deputy Commissioner issued a notice of decision which determined the requirements for refusing the applicant's second FOI request were met.⁵³

Was the request unreasonably voluminous (s 25A(1))?

VicForests' Corporate Counsel described the steps she took to determine how long the version of the applicant's request, as it stood on 24 May 2021, would take to process:

⁵⁰ Letter from VicForests' Corporate Counsel to the applicant, 20 July 2021.

⁵¹ Letter from the Public Access Deputy Commissioner to VicForests, 5 August 2021.

⁵² VicForests' submission to the review, 16 August 2021, pp. 5-6.

⁵³ Public Access Deputy Commissioner, Notice of Decision and Reasons for Decision, 29 September 2021.

[O]nce that request had been clarified I made enquiries with our HR team to identify the number of staff during particular - the relevant period for [the applicant's] request. ...

[O]nce I had lists of staff, looked to identify the most likely members of staff, but equally with a line to the request noting that to be able to do those searches properly we were still going to have to look at everybody.

I then made enquiries of Cenitex, the government IT provider. ... [I] discussed with Cenitex how long those searches would take to run, how much it would cost, the volume of data that we were looking at.

So, I'd sort of nussed out scoped search terms like you would for discovery with [a colleague], so I had a basis for going to Cenitex to get a quote from them to find out how much it would take to do all that work.

We had decided to largely focus on email repositories as a starting point, but then I think I'd also looked to get an idea of the volume of what sits on our network folder. It's a little bit trickier to get a quote from searching that because of the way it's set up, it's - we do not have sophisticated IT systems here, it's - it is a little bit old-fashioned. So, - but I believe off the top of my head I'd made that clear in notifying [the applicant] about the scope of the searches and the cost involved, that - that what we were looking at was a starting point because we were just talking about emails.

So, once I had all of that scope worked out in the background I was then able to use that to form a bit of a cost estimate, that factored in the costs for Cenitex to do those searches, because as I said, we can't physically do them ourselves. And from a capacity point, let alone the technology point, we couldn't have done them ourselves either.

I then had a think about the potential volume of data that would come in and how long it might take me and others if we needed to tap in resources to consider those documents for relevance because just because they're responsive to term search terms doesn't mean they're going to be responsive to the request generally. And equally factor in time for considering those three exemptions, and I think that's how we came to the figure of - it was a range of somewhere around about \$250,000.

The Corporate Counsel confirmed that she did not make any inquiries to determine whether documents responsive to the applicant's original request might be held by VicForests, or where in VicForests they might be located:

Not at that time because I'd chosen to - or sought to clarify the request with her instead. If investigative documents - I guess, depending on the form of the other request I would have - when she clarified I would have made those enquiries then.

The Corporate Counsel said that after receiving the final terms of the Revised Second Request on 20 July 2021, it was apparent to her that the request was still voluminous:

I did rerun some figures, I think, but it was purely from a reading of it, it was apparent that that would still be a voluminous and unreasonable diversion request.

Analysis

This evidence provided by VicForests' Corporate Counsel supports her reasons as outlined in her letter of 23 June 2021. It demonstrates that she had a sufficient basis to conclude that the scope of the second request (as described by the applicant on 24 May 2021, after it was revised during consultation) was voluminous.

The later revised second request, communicated by the applicant to VicForests on 13 July 2021, was similar enough that the Corporate Counsel could reasonably rely on the information she had previously gathered to assess if the request was voluminous.

Findings

The Commissioner finds that the work involved in processing the revised second request would substantially and unreasonably divert the resources of VicForests from its other operations.

Did VicForests provide a reasonable opportunity to consult, and relevant information to help the applicant make a revised request (s 25A(6))?

Analysis

Before refusing a request under s 25A(1), agencies must take three steps outlined in s 25A(6). Agencies must have:

- (a) *given the applicant a written notice—*
 - (i) *stating an intention to refuse access; and*
 - (ii) *identifying an officer of the agency or a member of staff of the Minister with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and*
- (b) *given the applicant a reasonable opportunity so to consult; and*
- (c) *as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.*

The letter of 23 June 2021 met the requirements of s 25A(1)(a). It was a written notice stating an intention to refuse access and invited the applicant to consult with the Corporate Counsel.

Although the letter provided the applicant with a reasonable opportunity to consult, as required by s 25A(1)(b), the Commissioner was concerned that the letter was unnecessarily long and complex.

VicForests was also required to provide the applicant with 'any information that would assist the making of a [non-voluminous] request' by s 25A(1)(c).

The letter of 23 June 2021 provided detailed reasons for why VicForests considered the request to be voluminous. It provided some general suggestions about ways the applicant might revise her request (for example, by reducing the date range, or the type of documents sought), but noted that even if she took up the suggestions, the request might still be voluminous.

It did not provide information about what documents VicForests held that might be responsive to the request.

Looking at the letter in isolation, the Commissioner had initially been concerned that VicForests had failed to meet the requirements of s 25A(1)(c). However, the Corporate Counsel's evidence suggested that she was not aware of any documents or information that she might provide to the applicant to assist her to make a request. It also indicated that the Corporate Counsel had considered what information she could provide to the applicant to help her make a valid request. While this was a borderline case, on balance, the Commissioner was satisfied that the letter met the requirements of s 25A(1)(c).

Findings

The Commissioner was satisfied that VicForests had reasonable grounds to conclude that both the second request and the revised second request were voluminous. VicForests provided the applicant with a reasonable opportunity to consult and provided any information that would assist her to make a non-voluminous request.

Finding 7: VicForests was entitled to be satisfied that the work involved in processing the second request and the revised second request would substantially and unreasonably divert it from its other operations, in accordance with s 25A(1) of the FOI Act.

Finding 8: VicForests met its obligations to consult with the applicant under s 25A(6) of the FOI Act before refusing her request under section 25A(1).

VicForests was therefore entitled to refuse the request under s 25A(1). This is consistent with the reasons given by the Deputy Commissioner in her notice of decision of 29 September 2022.⁵⁴

⁵⁴ Public Access Deputy Commissioner, Notice of Decision and Reasons for Decision, 29 September 2021.

The third and fourth FOI requests

On 31 August 2021, the applicant made two new FOI requests. She said in her email that ‘based on your suggestion, I have refined the FOI request to a more recent date range and confined the request to a smaller number of references’.⁵⁵

The first request made on 31 August 2021 (the **third request**) sought access to:

All documents from 1 January 2017 to 28 February 2021 that refer to my name and/or refer to my role as a member of the Board of the Forest Stewardship Council (FSC) which were sent to VicForests management and/or VicForests Board by one or more of the following:

[Named organisation]

[4 named individuals]

VicForests staff

Clemenger Group and staff

Board Directors – *[Named individual]*, *[Named individual]*

[2 named individuals]

ANWE

The second request made on 31 August 2021 (the **fourth request**) sought access to:

All documents with my name or pertaining to me and my role at the FSC from June – August 2020 from Environment Victoria and/or Victoria National Parks association *[sic]* to VicForests staff or Board and from VicForests Staff or Board, including those from the Chair.

The applicant paid the required fee for each FOI request.

⁵⁵ Email from the applicant to VicForests’ Corporate Counsel, 31 August 2021.

On 21 September 2021, VicForests' Corporate Counsel wrote two letters to the applicant. The letters are included as an Annexure to this report. Both letters stated:

In my view, for the reasons set out below, your FOI Request does not provide sufficient information for me to identify the documents you seek.⁵⁶

The letters asked the applicant for a range of clarifications, as shown in the tables below. They invited the applicant to either submit a clarified request or contact VicForests to consult on the request so that it is in the form which complies with s 17(2) and provides the information necessary to enable VicForests to identify the documents sought.

Clarifications sought by VicForests in relation to the third request⁵⁷

Term	Clarification sought
Refer	A document referring to your name may include a mere passing reference (e.g. a list of VicForests stakeholders, a list of the Board members of the FSC). A document referring to your role as a member of the Board of the FSC, could include a mere reference to the Board of the FSC or a Director of the FSC. Are you seeking documents with a mere reference to you or something more detailed? In seeking documents referring to your role as a member of the Board of the FSC, are you referring to the role of a director generally, your performance in that role, the mere fact you are a director, or something else?
Management	It is not clear to me what you mean by "management". VicForests has a number of levels of management. The executive management team is set out on the VicForests website and in its annual reports (also on the VicForests website), but there is also, for example, regional and department-level management and project management staff.
VicForests staff	VicForests has many full time, part time and fixed term employees, in addition to contractors and consultants. I have assumed that "staff" does not include the VicForests Board as you have referred to them elsewhere,

⁵⁶ Two letters from VicForests' Corporate Counsel to the applicant, 21 September 2021.

⁵⁷ Letter from VicForests' Corporate Counsel to the applicant, 21 September 2021.

	but would be grateful if you could confirm and clarify what you mean by “staff”.
Clemenger Group and staff	“Clemenger Group” has not been defined in Your Request. Are you referring to Clemenger Group Limited, which is a very large holding company spanning Australia and New Zealand, or to one or some of its many subsidiaries? Further, as noted above, please clarify what you mean by “staff” in this context.
Board Directors	[Named individual] and [Named individual]. It’s not clear to me whether you are just seeking documents from Mr ... and Ms ..., either of them, or whether you are seeking documents from the whole VicForests Board (mentioning Mr ... and Ms ... by way of example), or another board, noting that Mr ... and Ms ... have positions on boards other than VicForests.
ANWE	Noting there is more than one entity using the acronym “ANWE”, please confirm that you are referring to Allied Natural Wood Enterprises.

Clarifications sought by VicForests in relation to fourth request⁵⁸

Term	Clarification sought
“with (your) name or pertaining to (you) and (your) role at the FSC”.	A document with your name could, as noted in my earlier letter, include a mere passing reference (e.g. a list of VicForests stakeholders, a list of the Board members of the FSC). A document “pertaining to you and your role as a director at the FSC” could include documents which are merely <i>relevant</i> to you in your capacity as a director (which is likely to be very broad and impossible for me to identify with any precision) or documents that include mere mention of the fact that you are a director of the FSC. Please provide further detail on the types of references to yourself that you are seeking.

⁵⁸ Letter from VicForests’ Corporate Counsel to the applicant, 21 September 2021.

VicForests staff	Again, as noted in my earlier letter, VicForests has many full time, part time and fixed term employees, in addition to contractors and consultants. Can you please confirm and clarify what you mean by “staff”?
“Victoria National Parks association”	I have assumed you are referring to the incorporated association “Victorian ⁵⁹ National Parks Association”, but grateful if you could confirm.
“including those from the Chair”	Can you please clarify whether you are also seeking documents sent to or received by the VicForests chair from either or both of Environment Victoria and/or the Victorian National Parks association.

On 6 October 2021, the applicant emailed VicForests expressing frustration with the clarification process. She said:

With respect to your otherwise professional conduct, I have never seen anything like this (treatment of me) by any government agency.

I have complied with everything you have requested previously in this request, including making it specific, making it shorter than my last 16 months of personal information requests (for which I have not received a single document) and making it narrower in timeline for VicForests to oblige.

I have been told that to meet my legal requests it will cost more than \$200,000 to collect the information on me and as you know, the matter is now in a case with OVIC. As to whether I pursue VCAT, as you continually raise, will be a matter for consideration if you and your company fail to meet the requirements of the law. This is nudging a matter of Human Rights now.

You have met my request with nearly a year and a half of holding letters and I feel victimised and despairing.

I will answer your requests again. My responses are in capitals for your benefit.⁶⁰

⁵⁹ Underlining in original letter.

⁶⁰ Email from the applicant to VicForests’ Corporate Counsel, 6 October 2021.

On 5 November 2021, VicForests wrote to the applicant addressing the points made in her 6 October 2021 email.⁶¹ This letter was sent by VicForests' Legal Unit Manager, who was the supervisor of the Corporate Counsel, with whom the applicant had been dealing with up to this point. The letter stated that as no response was received from the applicant in relation to the third request (the first on 31 August 2021), it was now considered closed.⁶²

The 10 page letter responded to the applicant's comments with requests for further clarifications relating to the fourth request (the second on 31 August 2021):

It is unclear what you mean when you say "as per my original request". To which of your previous requests are you referring?

Further, the timeframe given above, 1 June – 1 October 2020, differs from that set out in Your Second August 2021 Request, which was June – August 2020. Please confirm that, based on the above, you are extending out the date range for Your Second August 2021 Request to include September and 1 October 2020 so that Your Second August 2021 Request is now for the period identified in your 6 October 2021 email, (1 June 2020 – 1 October 2020).

In terms of the categories of documents, 'all "related" written documents' remains unclear and imprecise. From the context of Your Second August 2021 Request; being for "all documents" "from (emphasis added) Environment Victoria and/or Victoria (sic) National Parks association" it would seem that this could be restricted to letters and emails from Environment Victoria and the Victorian National Parks Association (thank you for confirming that this is the correct entity) "to VicForests staff or Board and from VicForests Staff or Board, including those from the Chair."

...

Clarification was being sought on what you meant by "pertaining to" you and "with" your name. Giving consideration to the definition of "pertaining", that can include documents that are "appropriate, related or applicable to" you. Something that is appropriate or applicable to you is not the same as something that is about you. Are you looking for documents that discuss you? Would a mere reference to your name (e.g. a list of directors of the FSC) make it relevant to include in any searches for documents or does any reference to you need to be more substantive than that? What context should references to you be in?

⁶¹ Letter from VicForests' Legal Unit Manager to the applicant, 5 November 2021.

⁶² Letter from VicForests' Legal Unit Manager to the applicant, 5 November 2021.

This letter is included as an Annexure to the report. It sought a response from the applicant by 26 November 2021.

The applicant took no further action in relation to the third FOI request. However, she made a complaint to OVIC about the fourth FOI request, as described in a later section of this report.

Was the request invalid under s 17(2)?

The two letters of 21 September 2021 from VicForests to the applicant stated that both the Court of Appeal and VCAT have held that:

... requests cannot simply be for all documents that exist over a lengthy time period that refer to the applicant's name.[Chopra]. "Requests must be for specific documents or groups of documents, not for every document in a broad category"[Kelly]. There needs to be specificity in identifying a "document or group of documents, or the nature or category of the documents being sought"[Chopra].

The letter relating to the third request stated that the applicant's request seeks 'all documents' that 'refer' to your name and/or your role as a member of the FSC. Similarly, the letter relating to the fourth request stated that the applicant's request seeks "all documents" "with" your name "or pertaining to" you and your "role at the FSC". Both letters stated 'please provide further detail around the nature or the category of the documents that you are seeking'.

The above position regarding requests for 'all documents' has been discussed in some later decisions, particularly in *O'Brien* and *McIntosh*. A request that seeks 'all documents' relating to a particular subject should not be referred back to the applicant for clarification in all cases. What will determine if the request is sufficiently clear to be valid is whether it meets the requirements of s 17(2), relevantly, that it provides 'such information concerning the [requested] document[s] as is reasonably necessary to enable a responsible officer of the agency ... to identify the document[s].'

VicForests told OVIC that it did not process either request because:

*The request as made is not sufficiently clear to allow for any meaningful searches to be undertaken and to identify, with precision, what documents are being sought.*⁶³

VicForests' letters to the applicant described its understanding of how this requirement applied:

One of those requirements [for a request to be valid] is that the request must provide such information concerning the documents you seek as is reasonably necessary to enable the agency to identify the documents sought. That is, an applicant must define with as much precision as possible the documents sought to enable an appropriate officer to constructively search for those documents. If a request is ambiguous, unclear

⁶³ Response by VicForests to the Information Commissioner's questions, 19 August 2022.

*or otherwise ill defined, it does not comply with the Act and need not be processed. Finally, a request must be for documents and not just information as such because the Act is about access to information in documentary form.*⁶⁴

This statement, in particular the suggestion that a request must define the documents sought ‘with as much precision as possible’ and cannot be in any way ‘ambiguous, unclear or otherwise ill defined’ imposes too high a standard on FOI applicants. It is inconsistent with the cases described above and in the appendix, and stands at odds with the pro-disclosure objects of the FOI Act.

The third FOI request sought access to ‘[a]ll documents from 1 January 2017 to 28 February 2021 that refer to [the applicant’s] name and/or refer to [the applicant’s] role as a member of the Board of the Forest Stewardship Council (FSC)’ sent to VicForests by a list of named people and groups. If this request is ‘interpreted fairly with an eye to what the person making the request is trying to describe’⁶⁵ the request appears clear enough. An agency officer could identify whether any document fell within the scope of the request by seeing whether it referred to the applicant, and if it was to or from one of the people named in the request.

There would be practical difficulties in searching for the documents, and indeed processing a request for access may well constitute a substantial and unreasonable diversion of VicForests resources. But this does not mean the request is unclear and invalid under s 17.⁶⁶

The fourth FOI request on its original terms was more ambiguous. The request sought access to ‘[a]ll documents with [the applicant’s] name or pertaining to [the applicant and her] role at the FSC from June – August 2020 from Environment Victoria and/or Victoria National Parks association to VicForests staff or Board and from VicForests Staff or Board, including those from the Chair.’ The first half of this request is straightforward, being a request for documents about the applicant in a short date range. However, the second half which describes who sent or received those documents is confusing and cannot be resolved, even in context. It was reasonable for VicForests to seek clarification on the meaning of this request.

However, the applicant’s revised clarified request was clearer. The revised request sought access to:

All documents relating to me (personally) and in my role/capacity as a director of the Forest Stewardship Council ANZ during the time frame previously specified (June 1 – October 1 2020).

The nature of which documents are related to the following categories: internal emails, both public and private letters of response from the VF chair, letters to the chair and board in relation to a matter relayed by the board of the Victorian National Parks

⁶⁴ Letter from VicForests’ Corporate Counsel to the applicant, 21 September 2021.

⁶⁵ *Chopra v Department of Education and Training (No 2)* (Review and Regulation) [2020] VCAT 932.

⁶⁶ VCAT stated in *McIntosh* that there is ‘no need to import a requirement into the provision that the request contain sufficient information to locate the document within a reasonable time’.

Authority, and to make it clearer, Environment Victoria. All related written documents, emails, letters (hard copy and soft copy) and notes.

This request was confined to specific types of documents bearing the applicant's name, within a reasonable time, and relating to her role as a director of the Forest Stewardship Council.

Findings

The Commissioner finds that the third request provided such information as was reasonably necessary for VicForests to process the request.

Finding 9: The third FOI request met the requirements of s 17(2) of the FOI Act and was a valid request.

As the third request was valid under s 17(2), VicForests was required to process the request in accordance with the FOI Act. It was required to either provide access to the requested documents under s 20 or provide a statement of reasons explaining its reasons for refusal under s 27. It failed to do this because of its view that the FOI request was invalid. In contrast, the Commissioner was satisfied that the original terms of the fourth request were unclear and VicForests was right to consult with the applicant under s 17.

Finding 10: The original fourth request did not meet the requirements of s 17(2) of the FOI Act and was not a valid request.

However, after consultation, the revised fourth request provided by the applicant was valid under s 17(2). It more clearly specified the information the applicant sought.

Finding 11: The revised fourth FOI request met the requirements of s 17(2) of the FOI Act and was a valid request.

As the revised fourth FOI request was valid under s 17(2), VicForests was required to process the request in accordance with the FOI Act. It was required to either provide access to the requested documents under s 20, or provide a statement of reasons explaining its reasons for refusal under s 27.

Did VicForests provide appropriate assistance to the applicant?

Before refusing a request on the basis that it is invalid, an agency must assist the applicant to make a valid request and give the applicant a reasonable opportunity to consult about their request.

In giving evidence about the requests, VicForests' Legal Unit Manager reflected on receiving the original third and fourth requests:

I can remember seeing them on the day or near to the day that they arrived, and I actually thought that we were hopefully going to be able to get to a point where we could process and, you know, make decisions on the FOI requests themselves. They seemed a lot, you know, just broadly on a quick look, seemed a lot narrower, I guess, yes. ...

Look, from memory, the timeframes were shorter. There were also a lot less words in the request and a greater deal of specificity.⁶⁷

The letters that VicForests sent to the applicant to clarify the terms of the third and fourth request asked numerous questions, as detailed in the two tables above. Two of the letters are enclosed as Annexures to this report.

OVIC put to VicForests' Corporate Counsel that some of these questions might have been unnecessary or pedantic, and asked VicForests' Corporate Counsel to explain why she asked each question. She indicated for several of the clarification requests that she would not have sought clarification if she was not already seeking clarification for another term in the request. When asked what the central ambiguity was that required consultation, she advised it was in relation to the request for 'all documents' and the reference to 'VicForests management' in the context of VicForests' management structure.

When reflecting on whether these additional consultations were necessary, with the benefit of hindsight, she said:

Necessary is a tricky one. I don't think that there was anything wrong with taking the opportunity to answer stuff that might be slightly ambiguous because I was clarifying things anyway. Again perhaps if I'd sort of set out - set it out on the basis of what I thought she was asking for, rather than in the way I did. Yeah.⁶⁸

The Corporate Counsel was asked if her intention in asking the questions was to confuse the applicant or make it difficult to respond. She responded with genuine surprise at this question:

Not at all, no. That was certainly not my intention. Look, I – you know, because I'm a lawyer by way of background, words have meaning, I guess. That's probably not a particularly perfect way to put it, but I – I'm a naturally relevantly reasonably pedantic person. So I – I can appreciate how it might seem like I'm being a little bit nitpicky. And you know, I take learnings from that and how I might state clarification requests ...

⁶⁷ Interview with VicForests' Legal Unit Manager, 31 August 2022.

⁶⁸ Interview with VicForests' General Counsel, 31 August 2022.

Corporate Counsel reflected on things she might do differently in the future, including that she may make suggestions to the applicant and explain her understanding of the meaning of relevant terms, rather than rely on the applicant to state specific meanings:

And, look, perhaps I would have done that with the, and you'll have to forgive me, the two August requests do occasionally get crossed in my head, the one that we had engagement on, perhaps the same thing. You know, this is what your request has said, this is what I understand you to be asking for, is that right?

So, I would perhaps approach the way that I prepared the clarification letter and the way that I put those questions to [the applicant] a little bit differently.⁶⁹

She also reflected on her correspondence of 21 September 2021, seeking clarification of the term 'refer':

So, the request is for documents that refer to [the applicant] by name and/or refer to her role as a member of the Board of the Forest Stewardship Council. I wasn't sure whether refer was simply, you know, just had her name in it, or - so whether it would be sufficient to run searches that were specifically for [the applicant's] name, or you know, something like, you know, Forest Stewardship Council and Director or Board Member or something along those lines. Or whether it was something a little bit more than that.

That, in and of itself would probably not have been something I sought clarification on independent of the other factors that I sought clarification on. So, if it wasn't a - you know, an all documents request, for example, that's not the - I just sort of took the opportunity to ask that as part of the clarification.

As I said, it was something that I appreciate I could have made an assumption about or inferred from that, it was only because I was otherwise seeking clarification that I thought I'd bring that up with her.⁷⁰

The Corporate Counsel explained why she had clarified the meaning of 'Clemenger Group':

Q. ... the letter asks various questions about how those different groups and people could be identified. And one example is Clemenger Group, and the letter says, "Clemenger Group has not been defined in your request. Are you referring to Clemenger Group Limited, which is a large holding company spanning Australia and New Zealand, or to one of its many subsidiaries?" So, why did you ask for clarification about that?

A. Purely because I was otherwise seeking clarification, that's another example of something I would not have clarified independently of seeking clarification. If the

⁶⁹ Interview with VicForests' General Counsel, 31 August 2022.

⁷⁰ Interview with VicForests' General Counsel, 31 August 2022.

*request was otherwise clear I would have just assumed it was Clemenger Group generally, if we had dealt with them, yeah.*⁷¹

Another example, the clarification around Allied Natural Wood Enterprises:

Q. Okay. And another example, ANWE, where the letter said, "Noting that there's more than one entity using the acronym ANWE, can you please confirm that you're referring to Allied Natural Wood Enterprises." Were there any other entities that you were thinking of that might have corresponded with VicForests about [the applicant] with the acronym ANWE?

*A. Look, I may have at the time. I - I had a pretty good idea, and again I wouldn't have probably asked her that question independent or otherwise seeking to clarify her request, but possibly. I can't be certain.*⁷²

The applicant did not respond to the request for clarifications in relation to request three. VicForests advised the applicant on 5 November 2021 that as no response had been received, the first 31 August request was now considered closed.

Analysis

Most of the clarifications relating to requests three and four were unnecessary. As long as an agency understands what documents are sought by an applicant, it should not insist on precise identification of the documents (*Penhalluriack*⁷³). Agencies are required to look fairly with an eye to what the person is trying to describe, regardless of the terms used.

The Commissioner considered whether either the Corporate Counsel or the Legal Unit Manager had intended to delay the FOI request or make their correspondence unnecessarily confusing. Both indicated that VicForests relied on external legal advice to guide their approach. In the case of the Corporate Counsel who was the decision maker for the FOI request, this was because of her limited experience of handling FOI requests, and the high workload she was experiencing at the time. While the legal advice was subject to privilege and not seen by the Commissioner, based on the evidence given by VicForests' staff, the Commissioner considered it likely that they adopted the approach they did in part because of the advice and training they received from VicForests' external legal adviser.

Although the Commissioner was satisfied that the advice and training had influenced VicForests' approach, the Commissioner notes that he did not find evidence to allow him to conclude that the intention of either officer or any legal advice was to either delay the FOI request or make

⁷¹ Interview with VicForests' Corporate Counsel, 31 August 2022.

⁷² Interview with VicForests' Corporate Counsel, 31 August 2022.

⁷³ *Penhalluriack v Department of Labour and Industry* (unreported, County Court, Vic, 19 December 1983).

correspondence unnecessarily confusing. In giving evidence to the Commissioner, both witnesses reflected on lessons learnt from handling the requests.

The Commissioner accepted both witnesses' evidence about their intentions in handling the request, and that they did not intend to confuse the applicant or delay the request. Rather, the approach they took was guided, at least to some extent, by the advice and training they received from VicForests' external legal adviser, and the legal background and training of VicForests' FOI staff. There was no evidence to suggest that the legal advice advised VicForests to either delay the FOI request or confuse the applicant. The Commissioner was satisfied that at the time the requests were processed, both officers thought the approach they were adopting was consistent with the FOI Act.

However, regardless of the intention of these two individuals, the approach taken by VicForests did not amount to 'reasonable advice and assistance', as required by Professional Standard 2.4. Nor did it meet VicForests' 'duty to assist' the applicant make a valid request as required by s 17(3).

VicForests confirmed in its written submission its letters of 21 September and 5 November 2021 were the extent of the assistance it provided to the applicant to make her request valid. Those letters explained why the request was considered invalid and gave her an opportunity to consult.

As occurred with the earlier requests, VicForests did not engage in the strategies for providing reasonable assistance or advice to the applicant that are outlined in OVIC's FOI Practice Note *Receiving an access request: valid requests and early considerations*. Nor did it employ the strategies outlined in its FOI procedures manual.

The consultation letters were lengthy. Many of the questions extracted in the table above, when looked at even in isolation, were unnecessary and pedantic. However, it is important to look at the letters as a whole to consider whether they met VicForests' duty to assist.

The letters are included in an Annexure for this purpose. Looking at the letters as a whole, the Commissioner considers that at the time they were sent by VicForests, it should have been clear these letters would be difficult for a member of the public to understand or respond without legal training or detailed knowledge of government administrative processes.

It should also have been clear that the lengthy, complex and confusing manner in which the letters were drafted would have made it difficult for an ordinary member of the public to understand and engage with, including the applicant.

Findings

The Commissioner finds that VicForests provided the applicant with a reasonable opportunity to consult on the third and fourth requests, as required by s 17(4).

Finding 12: VicForests provided the applicant with a reasonable opportunity to consult on the third request, as required by s 17(4) of the FOI Act.

Finding 13: VicForests provided the applicant with a reasonable opportunity to consult on the fourth request, as required by s 17(4) of the FOI Act.

However, the Commissioner finds that VicForests failed to assist the applicant to make a valid FOI request as required by s 17(3) by:

- not employing strategies such as those outlined in OVIC’s FOI Practice Note *Receiving an access request: valid requests and early considerations* nor those outlined in VicForests’ FOI procedures manual;
- conducting its consultation with the applicant in a manner that made it difficult for her to devise a valid revised request, including by asking numerous unnecessary and pedantic questions; and
- sending correspondence to the applicant that was complex, confusing, and not written in plain English, which an ordinary member of the public would have difficulty understanding and responding to.

Finding 14: VicForests failed to discharge its duty to assist the applicant to make a valid request during its consultations on the fourth request, as required by s 17(3) of the FOI Act.

The Commissioner makes no findings about whether VicForests provided sufficient assistance to the applicant on the third request, as (unlike the fourth request) the applicant did not respond to VicForests’ consultation letter and take up the opportunity to consult on the terms of the request.

The second complaint

On 29 October 2021, the applicant made a complaint to OVIC about VicForests’ handling of the fourth request. The complaint comprised an email chain of previous correspondence exchanged between the applicant and VicForests and the following statement:

I would appreciate this matter to be considered as part of the previous case, where I have refined my request so as to meet VicForests requests and that is affirmative, I would like the Commissioner to review this and consider it a complaint.

I do not believe VicForest are complying with their obligations under the Act.⁷⁴

⁷⁴ Complaint from the applicant to OVIC, 29 October 2021.

The chain of correspondence attached to the email included an email from the applicant to VicForests sent on 6 October 2021, in response to its requests for her to clarify the meaning of her request.

The complaint included a number of concerns the applicant had about VicForests' handling of her FOI requests, including the following:

With respect to your otherwise professional conduct, I have never seen anything like this (treatment of me) by any government agency. I have complied with everything you have requested previously in this request, including making it specific, making it shorter than my last 16 months of personal information requests (for which I have not received a single document) and making it narrower in timeline for VicForests to oblige.

I have been told that to meet my legal requests it will cost more than \$200,000 to collect the information on me and as you know, the matter is now in a case with OVIC. As to whether I pursue VCAT, as you continually raise, will be a matter for consideration if you and your company fail to meet the requirements of the law. This is nudging a matter of Human Rights now.

You have met my request with nearly a year and a half of holding letters and I feel victimised and despairing.

On 30 November 2021, the Public Access Deputy Commissioner notified the parties that she had accepted the applicant's complaint.

On 1 December 2021, VicForests' external legal adviser, corresponding on behalf of VicForests, emailed OVIC submitting the applicant's complaint was not valid:

We note that for there to be a validly made complaint under s 61A(2) of the Freedom of Information Act 1982, it must "set out the nature of the complaint". That is, it must explain or describe in a clear and detailed way the innate or essential qualities or character of the complaint.

With respect, the purported complaint presently fails to do so. An email chain followed by an assertion that "I do not believe VicForest (sic) are complying with their obligations under the Act" does not provide any clear or detailed indication of the essential qualities or character of the purported complaint.

Accordingly, there is doubt as to whether the Commissioner's jurisdiction to entertain the purported complaint has properly been triggered at this time.⁷⁵

On 21 December 2021, the Public Access Deputy Commissioner wrote to VicForests' external legal adviser confirming her view that she had jurisdiction to accept the applicant's complaint. She also provided a preliminary view that the applicant's clarified request was valid and should be processed:

⁷⁵ Email from VicForests' external legal adviser to OVIC, 1 December 2021.

Having reviewed correspondence between the Agency and the Applicant following the FOI request, my view is the clarified request is sufficiently clear to process in accordance with section 17 of the FOI Act in that it is confined to specific types of documents bearing the Applicant's name within a reasonable time period and relating to her role as a Director of the Forest Stewardship Council.⁷⁶

The Public Access Deputy Commissioner invited VicForests to either process the applicant's clarified FOI request; or provide a submission as to why VicForests considers the applicant's clarified request was not clear or why it could not conduct a search for documents.

On 23 December 2021, VicForests' external legal adviser wrote to the Public Access Deputy Commissioner, renewing its request that the applicant provide a clearer statement of the complaint:

... our email raised a question about jurisdiction and sought a clearer statement setting out the nature of the complainant's complaint in sufficient detail for our client to understand with precision what is being alleged against it ...

Any person or body against whom a complaint is made is entitled as a matter of natural justice to know with precision what is alleged against it by a complainant. This is reflected in the provisions in the FOI Act providing jurisdiction to the Information Commissioner to handle complaints and the pre-requisites that must be satisfied before that jurisdiction is triggered.

The material contained in your letter does not appear in [the applicant's] written communications to your office which were provided to our client as the complete complaint. Neither in the material forwarded to our client notifying it of the "complaint" nor in your letter is the actual complaint of [the applicant] articulated. Your letter merely assumes that there has been a validly made "complaint" in circumstances where you have been unable or unwilling to identify where in the complainant's material that "complaint" arises.

We renew our request that you provide a clearer statement of the complaint as made in writing by the complainant in sufficient detail for our client to understand with precision what is being alleged against it.

On 20 January 2022, the Information Commissioner wrote to VicForests' Principal Officer stating that the applicant's FOI request was sufficiently clear to process, that her complaint was valid, and that OVIC had jurisdiction to consider it:

In my view, it is clear the applicant seeks documents about herself, in a specific capacity, during a short, identified, timeframe.

⁷⁶ Letter from Public Access Deputy Commissioner to VicForests' external legal adviser, 21 December 2021.

The Information Commissioner again invited VicForests to process the applicant's FOI request. He outlined that if VicForests declined to do so, he may take any or all of the following actions:

- *Conclude this complaint, potentially by making and publishing a finding that your Agency breached the FOI Act or Professional Standards. In my view, your agency has spent more time and resources taking complex technical arguments and jurisdictional points than processing what I consider to be a reasonably simple freedom of information request.*
- *Issue a Notice under Part VIC of the FOI Act compelling you and an appropriate officer to attend an examination and answer questions on oath or affirmation about why you believe the freedom of information request and complaint are not clear enough to progress.*
- *Investigate your Agency's performance and capacity to progress what I consider to be a reasonably simple freedom of information request under Part VIB of the FOI Act.⁷⁷*

On 27 January 2022, VicForests external legal adviser, corresponding on behalf of VicForests, wrote to the Information Commissioner maintaining that the applicant's FOI request was not validly made in accordance with s 17(2):

A simple examination of the terms of the request, in circumstances where all words used are to be given some meaning, and taking a broad interpretation, result in the intended request not providing such information as is reasonably necessary under s 17(2) of the FOI Act.

An agency such as our client should not be left guessing what documents are sought where there is clear ambiguity in the terms of the request and reasonable steps have been taken to seek to clarify the request. Similarly, an agency ought not presume to know what is being sought where there is ambiguity in the terms of the request.⁷⁸

VicForests proposed a suggested re-wording of the applicant's request:

I seek the following categories of documents dated between 1 June 2020 to 1 October 2020 inclusive, that refer to me by name:

- *internal emails;*
- *letters from the VicForests Chair;*

⁷⁷ Letter from Information Commissioner to VicForests, 20 January 2022.

⁷⁸ Letter from VicForests' external legal adviser to Information Commissioner, 27 January 2022.

- *letters to the Chair or Board of VicForests (or both) received from the Board of the Victorian National Parks Association;*
- *letters to the Chair or Board of VicForests (or both) received from Environment Victoria.*

On 8 February 2022, OVIC asked the applicant if she wished to accept the revised scope suggested by VicForests, propose alternative wording, or maintain the scope outlined in her email of 6 October 2021.⁷⁹ On 15 February 2022, the applicant confirmed she wished to maintain the original terms of her request and requested that OVIC continued with its enquiries.

The Information Commissioner subsequently decided to commence this own motion investigation.

Analysis

Was the complaint valid?

To be valid, a complaint must meet the requirements of s 61A(2). That is, it must ‘be in writing’ and ‘set out the nature of the complaint’.

The requirement that the complaint set out the nature of the complaint reflects the common law rules of natural justice. Natural justice requires fairness in administrative decision making. It relates to the process by which decisions are made, not the fairness of the decision that is made.

There are two rules of natural justice: the rule against bias, and the requirement to provide a fair hearing. Relevantly, the fair hearing rule requires a decision maker to give a person, whose interests are adversely affected, notice of the allegations against them, and a reasonable opportunity to present their case before making a decision. What is required depends on the particular circumstances, taking into account factors such as the nature of the inquiry, and the consequences that could arise from an adverse decision.⁸⁰

VicForests asserted that OVIC had failed to sufficiently particularise the applicant’s complaint, thereby denying VicForests natural justice.

The applicant’s email of 29 October 2021 is in writing. If it is considered in isolation, VicForests’ submissions that it does not adequately set out the nature of the complaint would have merit. The allegation, ‘I do not believe VicForests are complying with their obligations under the Act’, is not specific enough for VicForests to reasonably respond to. However, the complaint referred to other matters and attached an email which clarified the nature of the complaint.

⁷⁹ Email from OVIC to the applicant, 8 February 2022.

⁸⁰ *Gribbles Pathology (Vic) Pty Ltd v Cassidy* (2002) 78 ALD 289.

The circumstances in which the complaint was made also shed light on its meaning. It would be a mistake to look at the complaint email in isolation and read its terms overly literally, as a contract or similar legal document might be read. The circumstances in which the complaint was made and communicated to VicForests make the nature of it clear, for the following reasons:

1. In her written complaint, the applicant indicated that she wanted her complaint to be considered 'as part of the previous case', drawing a connection to the matters she raised in her previous complaint. As described above, her earlier complaint made specific allegations about VicForests' failure to treat her request as valid and provide her with appropriate assistance.
2. The way in which the fourth request was handled by VicForests was similar to that which gave rise to the applicant's earlier complaint (that is, the earlier request was refused on the basis that it was invalid under s 17(2), following an unsuccessful consultation process).
3. OVIC's communications to VicForests indicate the issues OVIC was concerned about namely VicForests' refusal to accept the request as valid under s 17.
4. The emails appended to the complaint contain several statements from the applicant setting out her concerns about how VicForests handled the complaint.

Having regard to this context, the applicant's complaint was clear. The complaint was about VicForests' refusal to accept her request as valid under s 17(2) and failure to provide the applicant with assistance to make a valid request. It was also about the applicant's view that although she had repeatedly requested information from VicForests and done everything it asked her to, she had still received no information.

The FOI Act is beneficial legislation intended to make government information available to the public in a timely manner and for the lowest possible cost. The Information Commissioner is required to deal with complaints with as little formality and technicality as possible. It would be inconsistent with this duty for the Commissioner to refuse to process complaints by applying the sort of narrow construction suggested by VicForests.

The complaint was sufficiently clear to afford VicForests natural justice. VicForests was also able to make multiple submissions to OVIC about the subject matter of the complaint.

Both the FOI Act and the Professional Standards require agencies to cooperate with the Information Commissioner in the handling of an FOI complaint. In contrast to its approach to the First Complaint, where VicForests challenged the validity of the applicant's complaint but still provided the information requested by OVIC, with this complaint VicForests persisted with its arguments rather than cooperating with a view to resolving the complaint.

An OVIC officer advised VicForests that the Information Commissioner had accepted the complaint as valid on 30 November 2021. On 1 December 2021, VicForests responded saying that the complaint was invalid for the reasons described above. The Public Access Deputy Commissioner provided a preliminary view to VicForests that the complaint was valid on 21 December 2021. VicForests' responded through its external legal adviser with detailed submissions disagreeing with the preliminary view.

The Information Commissioner considered those submissions, and wrote to VicForests' Principal Officer on 20 January 2022, providing his reasons for finding that the applicant's complaint was clear enough to be processed and her FOI request made to VicForests was valid. He asked VicForests to confirm by 28 January 2022 that it would process the request. VicForests' responded through its external legal adviser on 27 January 2022 with further submissions arguing that the request was invalid.

The tone and content of the correspondence sent by VicForests' external legal adviser on behalf of VicForests was unnecessarily argumentative and combative. This correspondence was not conducive to the resolution of the complaint.

It was open to VicForests to make a legal submission about the validity of the complaint, and it did so in response to the original notice from OVIC that it had accepted the complaint, and a later preliminary view from the Deputy Commissioner. The Information Commissioner then communicated his view to VicForests that the complaint and application was valid, and asked it to take specific action based on that view. Rather than taking those actions, VicForests' made further submissions on the same issue in an unnecessarily argumentative and combative manner. In doing so, VicForests failed to cooperate with the Information Commissioner as required by s 61E and Professional Standard 10.1.

Findings

The Commissioner finds that the applicant's complaint of 29 October 2021 met the requirements of a valid complaint under s 61A.

Finding 15: The second complaint met the requirements of s 61A(1) of the FOI Act and was a valid complaint.

The Information Commissioner therefore had jurisdiction to handle the complaint under Part VIA.

The Commissioner finds that VicForests failed to meet the requirements of s 61E and Professional Standard 10.1 by:

- making unnecessarily argumentative and combative submissions through its external legal adviser;
- persisting with those submissions in its letter of 27 January 2022, after a view had already been given by the Information Commissioner on 20 January 2022; and
- failing to process the valid FOI request when the Information Commissioner asked it to do so on 20 January 2022.

Finding 16: VicForests failed to cooperate with the Information Commissioner as required by s 61E of the FOI Act.

Finding 17: VicForests failed to assist the Information Commissioner in his attempt to informally resolve the complaint as required by Professional Standard 10.1.

VicForests' conduct as a whole

VicForests satisfied many of the procedural and substantive requirements of the FOI Act in handling the applicant's requests, while contravening others. In isolation, some of those contraventions might be regarded as small. However, they did not occur in isolation. Across the series of requests and complaints described in this report, several patterns of conduct emerged, which are discussed in this section of the report.

Nineteen months passed between when the applicant made the first request and when this investigation began. That includes the time spent by the applicant in making four FOI requests, two complaints and one application for review, as well as the time spent by VicForests and OVIC in responding to them.

During that time, the applicant received no documents nor confirmation about whether the information she sought existed. Additionally, the administrative burden placed on the applicant was not acceptable and not in accordance with the object of the FOI Act.

The Commissioner examined this series of events as a whole to consider if VicForests acted consistently with the object of the FOI Act in s 3 and its obligation in s 16(1). Section 3 outlines Parliament's intention that any discretion conferred by the Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information. Section 16(1) requires agencies to administer the Act with a view to making the maximum amount of government information promptly and inexpensively available to the public.

In considering this question, the Commissioner examined VicForests' actions relating to the four FOI requests and two complaints as described above. The Commissioner also considered other relevant issues that spanned the series of requests and complaints considered by the investigation including:

- the VicForests' culture and values as represented by its approach to the FOI requests;
- the VicForests' external legal adviser approach;
- the purpose of the consultation processes conducted by VicForests;
- the promptness of VicForests' actions; and
- the challenges VicForests experienced in handling the FOI requests.

FOI culture and values

The FOI Act seeks to promote openness, accountability and transparency in the Victorian public sector by giving the public the right to access government documents and by requiring publication of certain information.

VicForests' staff interviewed by the Commissioner demonstrated an understanding of the purpose and intent of the FOI Act to facilitate access to information promptly and inexpensively. However, the case discussed in this report suggests that VicForests could enhance its FOI policies and procedures to create a more customer-service oriented culture that allows applicants to access documents in a timely manner and reflecting the object of the FOI Act.

VicForests' CEO said that as a public sector agency, VicForests operates in a legal framework that emphasises that it is in the public interest for information to be made available to the public. The CEO advised that the starting position is that information will be released, and then there is a review of any exemptions as outlined in the FOI Act.⁸¹ She said that VicForests' position is also to consider administrative release.⁸² However, in this case that did not occur. When provided with a copy of the draft investigation report, the CEO provided the following clarification to her remarks:

While I made remarks to this effect, when I referred to operating in a 'legal framework', I was contemplating that the framework requires that FOI requests be validly made. One aspect of validity is that the request is sufficiently clear (in the sense that it provides 'such information concerning the document[s] as is reasonably necessary to enable a responsible officer of [VicForests] to identify the documents[s]'). And while it is certainly in the public interest for information to be made publicly available, in the context of FOI this is in response to a valid request. Furthermore, I stated that in making decisions on FOI matters, VicForests officers work within the legal framework of the legislation.

The Legal Unit Manager said VicForests had not considered giving the applicant answers to any of her questions or releasing information that would answer her questions informally and outside FOI processes.⁸³

VicForests' CEO agreed with the Information Commissioner that there had been an undesirable outcome in this instance but that it was not intentional:

I certainly agree that it shouldn't be this hard, Mr Commissioner, it shouldn't be this hard
*... if there's a view that we have in any way strung things out or we've deliberately obfuscated, I just want to be very clear that I don't believe that to be the case and my impression from my officers there was certainly no intention that they would be behaving in that way.*⁸⁴

⁸¹ Interview with VicForests' Chief Executive Officer, 1 September 2022.

⁸² Interview with VicForests' Chief Executive Officer, 1 September 2022.

⁸³ Interview with VicForests' Legal Unit Manager, 31 August 2022.

⁸⁴ Interview with VicForests' Chief Executive Officer, 1 September 2022.

The VicForests' Legal Unit Manager also agreed that, looking at the requests together, it might appear that VicForests had not always acted consistently with the object of the Act but reinforced her view that each request was handled promptly:

Reflecting on the matters now, possibly not, but you're looking at those - at each matter in a cumulative way...On each individual matter, I believe we responded in a timely fashion and sought to deal with each application in a timely fashion.⁸⁵

A tension appeared to exist within VicForests between the object of the FOI Act and a focus on completing FOI requests in a manner that was procedurally correct. An example of this is contained in VicForests' written submission to this investigation:

A responsibility rests on the applicant to strive to define with as much precision as they can precisely what they want, and perverse requests maintained in an ill-defined form may not be supported as a matter of policy.⁸⁶

This stands in contrast to the approach suggested by VicForests' CEO:

I think it's our duty as public servants to help applicants so don't be too technical about the words of an application. You know, we shouldn't be holding people to the script kinds of words, it's more about helping them to – you know, I've always counselled my officers, don't take a technical position in terms of the words. They might ask for something but they don't know your business, that's not their fault. We know our business so if we can help people to articulate in a way where it means it is something we can process that we should help people to do that.⁸⁷

She further stated that she wanted staff who can make decisions within the ethos of the FOI Act:

... we're having a general conversation about training and how we, you know, how we help people to go beyond just reading a manual to being able to operate beyond what you see in a manual to being able to talk about the spirit and the nature of FOI and how you take a position which is more consistent with the vibe of FOI rather than using a manual...⁸⁸

When asked about VicForests' culture and values as it relates to FOI, VicForests' Legal Unit Manager said that VicForests must consider, process and manage every request efficiently and as legally and soundly as possible.

⁸⁵ Interview with VicForests' Legal Unit Manager, 31 August 2022.

⁸⁶ Response by VicForests to the Information Commissioner's questions, 19 August 2022.

⁸⁷ Interview with VicForests' Chief Executive Officer, 1 September 2022.

⁸⁸ Interview with VicForests' Chief Executive Officer, 1 September 2022.

While these are important considerations, there are other values or objectives that can inform FOI decision making, such as openness, pro-disclosure, customer service, responsiveness, respectfulness or supporting the public interest.

The Legal Unit Manager later clarified her comment was specifically about the values and culture of her team in relation to FOI. She noted that although she is a manager of a multidisciplinary team, her FOI team comprises lawyers. She said her response was in that context, which explains why she focused on the approach to each request being managed efficiently and as 'legally and soundly' as possible. She also noted the legal framework of FOI incorporates many of the values and objectives listed above.

The Commissioner accepts that explanation. However, he also considered that processing the applicant's requests 'efficiently' and 'legally and soundly' did in fact appear to be a primary consideration of VicForests, consistently with the Legal Unit Manager's original answer. For example, VicForests' correspondence to the applicant appeared to the Commissioner to be written in a way that reflected a primary purpose of satisfying the procedural and content requirements of the FOI Act. The purpose of communicating to the applicant clearly and in plain English, and making it easy for her to provide a useful and relevant responses that would help progress her FOI request, appeared to be less important secondary purposes.

VicForests' focus on legally sound decision making and efficiency sometimes appeared to come at the expense of giving due regard to the Act's object of facilitating access to information. This appeared to be contributed to by the legal background and training of the VicForests staff who handled the FOI requests and complaints, as well as the Legal Unit Manager's views on what aspects of FOI are most important. The handling of the complaints and possibly the handling of the FOI requests was also influenced by the approach taken by VicForests' external legal adviser. For example, when writing on behalf of VicForests, the legal adviser adopted an unnecessarily argumentative, technical and legalistic approach in responding to the complaints.

Overall, the Commissioner formed the view that there was a mismatch between the values VicForests' CEO said she wanted to inform VicForests' approach to FOI, and its actual approach (through both its employees and its legal adviser) to handling the applicant's FOI requests.

VicForests' external legal adviser

VicForests sought legal advice from an external legal adviser in relation to some, but not all aspects the applicant's FOI requests and the related complaints and reviews made to OVIC. This assistance was mostly in relation to the second request and the two complaints.

The Commissioner was concerned that VicForests' external legal adviser, which acted on behalf of VicForests in the complaints, and advised it on the FOI requests, adopted an overly technical approach to interpreting and applying the provisions of the FOI Act. This was evidenced by the style of the correspondence VicForests sent to the applicant, including the sort of clarification questions asked of her and the legal arguments it made. It was also apparent in the persistent arguments the external legal adviser advanced on behalf of VicForests in the Second Complaint. An example of this correspondence is included as an Annexure.

VicForests' CEO said during an interview that some email correspondence sent by its external legal adviser to OVIC did not reflect a tone she would want:

I do know that some of the exchanges with your office, Mr Commissioner, have not been the kind of tone that I would have expected from this organisation.

VicForests' CEO said that she would prefer FOI functions to be done in-house as much as possible in the future:

... we are contemplating moving the FOI function back into our legal area so we don't have to rely on counsel from external FOI advisers to be able to make decisions. I'd rather decisions be made by people inside VicForests with expertise so that it's not being guided by the views of others about how to interpret the legislation. It's guided by our knowledge of the field.

VicForests' Corporate Counsel had not processed an FOI request prior to handling the first FOI request. She had also not had FOI training until a month after receiving the request, as she had only recently started working at VicForests. She indicated that she considered legal advice in deciding how to handle some elements of the applicant's requests and complaints, for example in discussing VicForests' application of s 25A:

This was very new territory to us at this point in time, so we sought advice. We considered that advice and proceeded accordingly.

Correspondence from VicForests to OVIC in the second complaint (described above and enclosed as an Annexure) was suggestive of an unnecessarily argumentative, overly technical, and legalistic approach to FOI. It was also suggestive of a lack of regard for the role and functions of the Information Commissioner and his office.

VicForests' external legal adviser corresponded with OVIC under instruction from VicForests. The Commissioner notes that in such circumstances, VicForests remains responsible for ensuring its legal representative's compliance with the requirements of the FOI Act and Professional Standards.

The Commissioner suggests that agencies should communicate with any external legal or service provider they are considering using to assist with functions such as FOI, to ensure the approach taken on behalf of the agency aligns with the agency's values.

Inadequate consultation

VicForests' inadequate consultation with the applicant, particularly its over-reliance on lengthy and technical correspondence, is outlined in the earlier sections of this report. VicForests' consultation processes on the four requests only resulted in one of the four requests being amended into a request that it considered to be valid, and that request was deemed to be voluminous and not processed.

OVIC sought evidence from VicForests' Corporate Counsel and Legal Unit Manager about whether certain correspondence they had sent to the applicant was intended to delay the requests, or to confuse

or make it difficult for the applicant to respond to the requests for clarification. Under oath, these employees said it was not their intention and the Information Commissioner accepted this evidence.

The Commissioner was satisfied that VicForests' staff did not intentionally delay or obstruct the applicant's requests. However, even though it was not intentional, VicForests' consultations with the applicant had the effect of making it difficult for her to formulate a valid FOI request.

In a response to the Commissioner's draft report, VicForests' Chief Executive Officer noted that the applicant was an 'accomplished experienced individual' who was well placed to formulate a clear FOI request:

... the report portrays an unsupported picture of the applicant's ability to formulate a clear request for information that would have been able to be processed through greater specificity of scope.

In contrast, VicForests could fairly expect that [the applicant] had the capacity to clearly articulate the information that she was seeking. Indeed, [the applicant] was clearly in a better position to articulate this than VicForests as VicForests was at all times in the dark about the purpose of her requests.

VicForests' response to the draft report further stated:

VicForests notes that the applicant has more experience interacting with the Government and VicForests than most members of the public. Her involvement with government and forestry matters is considerable and, we respectfully submit, that she is most likely familiar with government administrative processes.

The Commissioner acknowledges that the applicant has more experience working with government and VicForests than most members of the community. However, experience working with government does not necessarily provide the skills needed to draft a clear FOI request. Nor does it necessarily provide knowledge of what documents an agency holds that answers the questions the applicant wants answered.

In this case, VicForests and its staff have repeatedly said that the applicant's requests were unclear and lacked precision. If that is true, it should have been clear to VicForests that the applicant needed help to formulate a request that was clearer and more precise.

In any event, even 'sophisticated' applicants will often need the sort of assistance the FOI Act mandates. Section 17(3) says it is the duty of an agency to assist a person who wishes to make a request. This duty applies to requests from all applicants. Every applicant, no matter how experienced they are with FOI, will need assistance where they are unsure – as this applicant was – what information and documents the agency holds.

The FOI Act required VicForests to assist the applicant better than it did. Its opinion about her level of sophistication does not change that.

When seeking to clarify and confirm requests in future, the Commissioner encourages VicForests to use a range of consultative mechanisms as appropriate to each circumstance. Suggested methods are outlined in VicForests' procedure manual and OVIC's Practice Note⁸⁹ and described earlier in this report.

Timeliness of responses

VicForests followed the procedural steps required by the FOI Act and met the statutory timeframes for considering the applicant's FOI requests. It responded to the Commissioner's enquiries promptly.

However, unnecessary queries and clarifications about the terms of the applicant's requests delayed the release of information in practice, by extending the processing period for the requests. The challenges made by VicForests through its external legal adviser about the validity of the applicant's two complaints, including challenges to the Information Commissioner's jurisdiction, extended the timeframes of these matters further.

The result is that after making four FOI requests and two complaints to OVIC, two years later, the applicant did not receive any documents from VicForests.

Challenges faced by VicForests in responding to this series of requests

The investigation revealed a range of challenges faced by VicForests staff in fulfilling its FOI responsibilities.

They included:

- the nature and complexity of this series of FOI requests;
- longstanding challenges recruiting suitable staff with FOI experience;
- the inconsistent nature of the FOI workload;
- competing priorities for the small internal legal team;
- inexperienced staff processing the earlier requests;
- lack of staff FOI training and development at certain points;
- lack of sophistication in business systems, including IT systems and records management and physical records that are dispersed throughout the state;
- pandemic remote working arrangements.

The Commissioner was satisfied that these factors also contributed to VicForests and the applicant failing to agree to an FOI request that could be processed.

⁸⁹ OVIC, *Practice Note 3, Receiving an Access Request: Valid Requests and Early Considerations*. Available online at <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/receiving-an-access-request-valid-requests-and-early-considerations/>

Many of these challenges are connected to Professional Standard 9. Professional Standard 9.1 requires a principal officer to ensure their agency has the necessary resources and procedures in place to be able to meet their agency's statutory obligations under the FOI Act, including:

- (a) being sufficiently resourced to receive and process requests, as and when required, within the required statutory time;
- (b) the necessary software or systems to enable officers to process requests;
- (c) internal policies to enable officers to carry out their functions across the agency; and
- (d) anything else reasonably necessary for the agency to carry out its statutory obligations in an effective and efficient manner.

In terms of the first obligation, the Commissioner notes VicForests' view about the resourcing of its FOI function:

VicForests considers its resourcing to be adequate. However, the FOI workload, by its very nature, is sporadic, so periods arise, without notice, of numerous applications or simply one complex, voluminous application that may stretch otherwise appropriate resources.

Professional Standard 9.2 states that the principal officer must ensure, or must be actively working towards ensuring, all officers who are responsible for responding to requests have the appropriate skills and training to perform their responsibilities.

VicForests is an agency that has numerous duties including discharging its legislative FOI obligations. The Commissioner acknowledges that VicForests, as a small agency with an inconsistent FOI workload, experienced real difficulties in handling these requests which were caused by some factors outside its control. Where these sorts of issues arise, agencies will not always be able to meet all of their legal duties under the FOI Act and the Professional Standards.

However, as outlined in this report, the Commissioner considers that some actions taken by VicForests in handling the applicant's requests exacerbated the difficulties it was experiencing. In circumstances where resources to put towards FOI are limited, agencies should use the most efficient means to process requests. For example, to determine the meaning of an ambiguous FOI request, in most cases a phone call to an FOI applicant to ask what a request means would be quicker than researching relevant case law then writing a lengthy and complex legal letter explaining why the request is invalid.

While recognising the above factors as the cause of the challenges faced by VicForests in responding to these series of requests, nevertheless VicForests could have handled the requests that were the subject of this investigation more efficiently than it did.

Findings

Having regard to the issues discussed above for the series of requests and complaints the Commissioner finds that VicForests failed to:

- act in accordance with Parliament's intention as described in s 3(1); and

- administer the FOI Act with a view to making the maximum amount of government information promptly and inexpensively available to the public (s 16(1)).

Finding 19: With respect to the four FOI requests and two complaints, VicForests failed to administer the FOI Act with a view to making the maximum amount of government information promptly and inexpensively available to the public, as required by s 16(1) of the FOI Act.

Finding 20: With respect to the four FOI requests and two complaints, VicForests did not act consistently with Parliament's intention as described in s 3 of the FOI Act.

Recommendations

The applicant's outstanding request for information

As described in this report, the Commissioner considered that the applicant's outstanding FOI request was valid.

The Commissioner would like to see a resolution to the applicant's current request, and for her to obtain access to information. The Commissioner encourages the parties to work together to arrive at a reworded request that will identify the relevant documents the applicant seeks, and is of a size that VicForests is reasonably able to process.

In September 2022, OVIC recommenced work on the applicant's outstanding FOI complaint and spoke to both the applicant and VicForests to seek to achieve this objective. VicForests and the applicant expressed a willingness to negotiate a revised FOI request and cooperated with OVIC to identify a request that could be processed.

The applicant and VicForests agreed to a revised request scope, which VicForests processed and finalised with a decision to release information.

This information responsive to the applicant's revised request was released to her (and published online by VicForests) shortly before the publication of this report. The applicant has advised that the information she received does not address her original questions and she will need to make further FOI requests.

The Commissioner encourages VicForests to assist the applicant to make a valid request, if necessary. The Public Access Deputy Commissioner has written to VicForests and to the applicant with an offer to assist them to reach an agreement about a suitable request.

As described below, the Commissioner also asks that VicForests report to OVIC on the outcome of any FOI requests for 12 months following the publication of this report.

Recommendation 1: Process the applicant’s outstanding FOI request (with revised terms as agreed to by the applicant) and provide the Commissioner with updates on the progress of the request.

Whether VicForests should provide an apology

Although VicForests is now working to assist the applicant to obtain access to information, the Commissioner considers that she is entitled to an apology for experiencing the issues described in this report.

In an earlier draft of this report, the Commissioner expressed a preliminary view to VicForests that it should apologise to the applicant for how it had handled her requests.

This formed a second part of the above Recommendation 1. VicForests told the Commissioner:

The second part of the recommendation is ... not acceptable. I do not consider the circumstances justify a written apology to the applicant. Taking a fair and balanced view of the matters you have examined, it appears that both the applicant and VicForests contributed to the events that transpired.

Recommending an apology from VicForests alone unfairly attributes blame to VicForests in full. Further, the subject FOI requests were processed in good faith by VicForests [sic] officers, which processing was not intended at any point to cause delay, harm or distress to the applicant. There has been no finding to the contrary. Given these circumstances, it is inappropriate to require VicForests to apologise to the applicant.

For an apology to be effective, it must be genuine. In her report *Apologies*, the Victorian Ombudsman discusses what makes an effective apology:

Effective apologies are a necessary life skill that have to be honed until mastered. Anyone with children, or who has seen a parent telling their child to “apologise properly”, knows this. With this in mind, the report goes through the six R’s of an effective apology – recognition, responsibility, regret, reasons, redress and release.⁹⁰

VicForests does not believe an apology is warranted. It says that its staff did not act with malice and the applicant also contributed to the circumstances described in this report.

⁹⁰ Victorian Ombudsman (2017) *Apologies*. Available online at <https://assets.ombudsman.vic.gov.au/assets/Best-Practice-Guides/Apologies.pdf>

The Commissioner remains of the view that an apology is warranted. The applicant has been inconvenienced by various actions and inactions of VicForests' staff that are contrary to the letter and the spirit of the FOI Act.

Although VicForests' staff members may not have intended to cause delay, harm, or distress, VicForests as an organisation should take responsibility for the consequences of its actions, even if those consequences were not intended. This is especially so where those actions and inactions contravened the FOI Act. With respect to the applicant's own contribution to the circumstances described in this report, it is open to VicForests to apologise for its own actions, without taking on responsibility for those of other people.

Despite this, the Commissioner considers that an apology made under a sense of duress, in response to a recommendation in this report, would likely lack the necessary elements described by the Victorian Ombudsman. It would lack recognition, responsibility, and regret. For those reasons, the Commissioner has decided to not make a recommendation to VicForests that it apologise to the applicant.

In the absence of an apology, the applicant may find some satisfaction in reading this report. In doing so she may at least see recognition of the fact that her FOI requests were not properly handled; and get reasons about what happened and why.

Improvements to FOI practice at VicForests

The investigation identified several issues with VicForests' FOI function. The Commissioner makes the below recommendations to VicForests to support it to address this.

Most significantly, the Commissioner was concerned that there was a misalignment between the approach taken by VicForests to the FOI requests and complaints it handled, and the desired approach that VicForests' CEO said should inform its approach to FOI and OVIC. This was apparent in both the correspondence and actions of VicForests' staff detailed in this report.

In contrast to the technical approach taken by VicForests in handling the requests, VicForests' CEO said the following about how she thought FOI should be administered:

it's our duty as public servants to help applicants. So don't be too technical about the words of an application. ... I've always counselled my officers, don't take a technical position in terms of the words. [Applicants] might ask for something but they don't know your business, that's not their fault. We know our business so if we can help people to articulate in a way where it means it is something we can process, then we should help people to do that ... We should be helpful because people have rights to have access to the information.

Sometimes when we're discussing generally the way that we're responding to requests, ... a mantra that I have with FOI is if we start to let the information free and then we work within the Act and we work it through. ... I think it's much more about good administration rather than taking legal or technical points.

... We should be able to deal with these things globally. Obviously [the applicant] wants something. "What do you want and how can we give it to you?" That would have been much better if we could have taken that first application and get it to a point where we would have actually been able to process it...

VicForests should better communicate its desired approach to FOI to its staff and external advisers. As a start, it should explicitly state this in relevant policy and procedural documents. It should also consider those values when choosing staff (especially management staff) and consultants or legal advisers and communicate its values to them.

There are numerous possible approaches to handling FOI requests, and when agencies are choosing who should run its FOI function and support it, they should take steps to ensure that their values are clearly made known and aligned.

Recommendation 2: Provide guidance to VicForests' FOI staff about the values and culture that VicForests wants to inform its approach to FOI, as described to OVIC by its CEO. This should include stating the values it wants to inform its approach to FOI in relevant policies and procedural documents.

Recommendation 3: When selecting staff to oversee its FOI function, and when engaging external consultants (including legal advisers) to support it in meeting its FOI obligations, VicForests should consider if their values and approach to FOI align with the object of the FOI Act and VicForests' desired approach and communicate this object and associated values to them.

OVIC did not have specific concerns about VicForests' documented FOI policies and procedures. OVIC only examined a single applicant's FOI requests to VicForests. Nonetheless, all of VicForests' witnesses who appeared before OVIC indicated the investigation had given them cause to consider VicForests' approach to FOI. It would therefore be timely for VicForests to complete a self-assessment of its FOI function to conclude this consideration and identify whether there are any changes it should make.

The Commissioner considers the FOI Professional Standards Self-Assessment Tool published by OVIC would assist VicForests to examine and assess its FOI culture and practices and asks that VicForests complete an assessment and provide it to OVIC. It should then make any changes to its policies and procedures manual identified in the course of that self-assessment.

Recommendation 4: In consultation with OVIC, VicForests should undertake an assessment of its FOI function and practices, including an assessment of its compliance with the FOI Professional Standards, using OVIC's Self-Assessment Tool. Provide the Commissioner with the outcome of the assessment within 90 days.

Recommendation 5: Update its FOI policy and procedures manual to address issues identified in the Self-Assessment Tool described in recommendation 4, and to reflect the values described in recommendation 2. Provide the Commissioner with a copy within 120 days.

The Commissioner considered that one of the main causes of VicForests' and the applicant's failure to agree to a request was VicForests' reliance on complex written correspondence as its primary means of communication. Much of the correspondence it sent to the applicant was lengthy, legalistic, and would not have been easy for an ordinary member of the public to understand or respond to. VicForests' staff indicated that their approach was informed by their legal backgrounds and training.

The Commissioner considers that training that focussed on improved communication and customer service for public sector employees would be beneficial. The Commissioner also considers that VicForests should use a wider range of consultation strategies, including speaking to applicants by telephone.

Recommendation 6: Expand the range of training provided to VicForests' authorised officers and any other staff undertaking FOI functions, to include OVIC's FOI training and relevant courses such as plain English training and customer service for public sector employees training within 180 days.

Recommendation 7: Identify ways to encourage VicForests staff to adopt a responsive and respectful approach to FOI service delivery, including engaging in a wider range of communication techniques such as speaking to applicants by telephone.

To ensure that VicForests is implementing the recommendations and making appropriate improvements to its FOI function, the Commissioner recommends that VicForests provide two reports and attestations from its Principal Officer.

The Commissioner asks that the two reports contain at least the following information:

- details of actions taken by VicForests in response to each recommendation, and its view about whether each recommendation is 'implemented', 'partially implemented', or 'not implemented';
- the number of FOI requests received;
- the number of FOI decisions made;
- a summary of the type of decisions made including whether documents were released in part / in full or refused in full, and the exemptions applied;
- the number of decisions, if any, made refusing to process an FOI request on grounds it is not valid under s 17;

- the average time taken for a request to be processed; and
- the number of outstanding FOI requests, their status and due date for each.

Recommendation 8: Provide the Commissioner with two six-month reports setting out progress against the above recommendations and details of all FOI requests received and decisions made, together with an attestation from VicForests' Principal Officer that requests were processed in accordance with VicForests' FOI procedures manual policy, the FOI Act and the Professional Standards.

Appendix 1: what do the FOI Act and the Professional Standards require of agencies?

Duties to promote access to information

The FOI Act sets out the public's right to request access documents held by Victorian public sector agencies. Freedom of information promotes government transparency and accountability, and helps build trust in government and the public sector.

Section 3 sets out the object of the FOI Act, which is to extend as far as possible the right of the community to access information in the possession of the Victorian government. This right extends to all documents held by an agency and official documents of a Minister, except for specific kinds of documents that are exempt.

The FOI Act requires agencies to undertake a 'thorough and diligent' search for the requested documents. The search needs to capture all relevant documents in the possession of agency staff.

The FOI Act defines 'documents' very broadly. It includes files, emails, text messages, case notes, draft material, handwritten notes, discs, photographs, and maps. Essentially, anything in the possession of an agency that is capable of conveying information or meaning is considered a document.

Under s 3(2) it is Parliament's intention that the provisions of the Act are interpreted so as to further the object of the Act and that any discretions conferred by the Act are exercised as far as possible to facilitate and promote the prompt disclosure of information at the lowest reasonable cost.

Section 16(1) says that agencies must administer the Act with a view to making the maximum amount of government information available promptly and inexpensively.

Further, FOI Professional Standard 1.1 requires agencies to consider whether a document in its possession and requested under the Act, can properly be provided outside the Act, and if so, facilitate access or otherwise advise how an applicant can access the document

When can an agency refuse a request that is unclear? (s 17)

An FOI request must meet the requirements of s 17. There are three requirements for a request to be valid under s 17:

- The request must be in writing;
- The request must provide sufficient information as is reasonably necessary to identify the documents requested; and
- The request must include an application fee or a request for the fee to be reduced or waived.

Section 17(3) requires an agency to assist an applicant to make a valid request. Where a request does not provide sufficient information as is reasonably necessary to enable documents to be identified, an agency is required to provide an applicant with a reasonable opportunity to consult to make a request that provides sufficient information to identify documents (see s 17(4)).

How specific does a request need to be?

Section 17(2) requires a valid FOI request to provide enough information to find the documents requested:

A request shall provide such information concerning the document as is reasonably necessary to enable a responsible officer of the agency, or the Minister, as the case may be, to identify the document.

OVIC's guidance note, *Receiving an Access Request: Valid Requests and Early Considerations* says:

Applicants may not have detailed knowledge of the types of documents held by an agency, or how to accurately describe the document they are trying to access. If an applicant uses a word or term that has a common or ordinary meaning as well as a technical, the ordinary meaning should be used unless it is clear the technical was intended.

Agencies should not take artificial or strained interpretations of the words used in a request for access, and the request should be read in the context in which it is made. Contextual information might include:

- *engagements with the applicant within the agency such as previous requests for access, employment, or complaints;*
- *communications between the agency and applicant about their request or other matters; or*
- *events related to the request either within the agency or broader community, for example, construction projects or contracts that impact on the applicant or community.*⁹¹

Numerous decisions of Victorian courts and the Victorian Civil and Administrative Tribunal (VCAT) have examined how s 17 should be interpreted. In *Chopra v Department of Education and Training* (Review and Regulation) (No. 2) [2020] VCAT 932 (**Chopra No. 2**), Judge Jenkins summarised the following principles which have emerged about what amounts to a valid request in accordance with s 17:

⁹¹ OVIC, *Practice Note 3, Receiving an Access Request: Valid Requests and Early Considerations*. Available online at <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/receiving-an-access-request-valid-requests-and-early-considerations/>

- *Whether information in the request concerning the document is adequate depends on the particular case and whether the applicant has provided a sufficiently precise description of the documents sought to permit the respondent, as a matter of practicality, to locate the document;*⁹²
- *It is not the task of the responsible officer to try to tease out from such a request what the applicant might be getting at;*⁹³
- *In almost all cases, it will be possible to arrive at some type of reasonable interpretation of an FOI request.*⁹⁴
- *When considering a request, the relevant agency must use the knowledge of its organisation in interpreting the request. That is appropriate given many FOI Act applicants may not know the correct terms in which to frame their requests. That should not mean that their requests are read narrowly. Rather, they should be interpreted fairly with an eye to what the person making a particular request is trying to describe regardless of the terms used;*⁹⁵
- *It must be borne in mind that an applicant for access to documents is not possessed of full knowledge of what the relevant government agency is or is not doing in a particular field. The process of obtaining documents under the FOI Act will be greatly ‘hobbled’ if to make a valid request an applicant was required to demonstrate the sort of knowledge that only access to the government agencies records would give them;*⁹⁶
- *Whilst the legislation does not apply “a broad-brush technique” it does not advance “an overly technical or legalistic approach”;*⁹⁷
- *The agency must use the knowledge of its organisation in interpreting the request. That should not mean that requests are read narrowly; they should be interpreted fairly with an*

⁹² *Borthwick v University of Melbourne* (1985) 1 VAR 33.

⁹³ *Zeqaj v Victoria Police* [2010] VCAT 132.

⁹⁴ *Dr Chopra v Department of Education and Training* [2018] VCAT 808.

⁹⁵ *Macdonnell v State Sport Centres Trust (Review and Regulation)* [2018] VCAT 1616 at [40] to [60].

⁹⁶ *O’Brien v Department of Justice* [2010] VCAT 1379 at [23] and [24].

⁹⁷ *Penhalluriack v Department of Labour and Industry* (unreported, County Court, Vic, 19 December 1983), page 52.

*eye to what the person making a particular request is trying to describe regardless of the terms used;*⁹⁸ and

- *Requests must be specific documents or groups of documents, not for every document in a broad category.*⁹⁹

Requests under s 17 are not required to be overly precise and may be expressed in broad terms. In *Penhalluriack v Department of Labour and Industry* (unreported, County Court, Vic, 19 December 1983) (**Penhalluriack**), the County Court said that so long as an agency understands what documents are sought by an applicant, it should not insist on precise identification of the documents. The County Court further said that whilst the legislation does not apply “a broad-brush technique” it does not advance “an overly technical or legal approach.”

In *McIntosh v Department of Justice* [2009] VCAT 92 (**McIntosh**), VCAT also said that documents may be described in ‘broad terms’ and ‘need not be expressed with the same eye to detail as legislative provisions or set of pleadings.’ VCAT also said that s 17(2) is concerned with ‘the provision of sufficient information to enable the identification of the document.

In *Russell Island Development Association Inc v The Department of Primary Industries and Energy* [1994] AATA 2, Deputy President Forgie in the Administrative Appeals Tribunal noted at [34] that “Those who make requests may not know the correct terms in which to frame their requests. That should not mean that their requests are read narrowly. Rather, they should be interpreted fairly with an eye to what the person making a particular request is trying to describe regardless of the terms used.” This approach has been endorsed in VCAT (see for example, *Macdonnell v State Sport Centres Trust* (Review and Regulation) [2018] VCAT 1616 and *Chopra v Department of Education and Training* (Review and Regulation) (No 2) [2020] VCAT 932).

In *Chopra v Department of Education and Training* (Review and Regulation) (No 2) [2020] VCAT 932 (**Chopra 2020**), VCAT referred with approval to the approach taken in *Penhalluriack* and *Proudfoot*.

There is no absolute principle that, in the case of a multi-item request, the inclusion of an item which does not comply with s 17(2) when the request was made will necessarily render the whole request permanently invalid (see the Court of Appeal decision in *Chopra v Department of Education and Training* [2019] VSCA 298). Sections 17(3) and (4) permit an applicant to modify a non-compliant request to make it compliant, and this modification can take the form of severance of part of the request. Whether severance is possible will depend on the circumstances of each case, including the nature of the documents sought, how the documents are described in the request and the extent of any interdependence.

⁹⁸ *Penhalluriack v Department of Labour and Industry* (unreported, County Court, Vic, 19 December 1983), page 54.

⁹⁹ *Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [6].

What does an agency need to do before refusing a request as invalid under s 17?

Section 17(3) requires agencies to help applicants make valid requests:

It is the duty of an agency or Minister, as the case may be, to assist a person who wishes to make a request, or has made a request that does not comply with this section or has not been directed to the appropriate agency or Minister, to make a request in a manner that complies with this section or to direct a request to the appropriate agency or Minister.

Section 17(4) prevents agencies from refusing a request on the basis that it is unclear, without first providing the applicant with an opportunity to consult about the request:

Where a request in writing is made to an agency or Minister for access to a document, the agency or Minister, as the case may be, shall not refuse to comply with the request on the ground that the request does not comply with subsection (2), without first giving the applicant a reasonable opportunity of consultation with the agency with a view to the making of a request in a form that does comply with that subsection.

Professional Standard 2.4 from OVIC's *FOI Professional Standards* expands on this requirement:

An agency that receives a request that is not valid, must take reasonable steps to notify the applicant of the following information within 21 days of receiving the request:

- (a) why the request is not valid;*
- (b) provide reasonable assistance or advice to the applicant about how to make the request valid; and*
- (c) advise the applicant that the agency may refuse to comply with the request if it does not comply with section 17 of the Act.*

Note: 'refuse to comply' reflects the language of section 17(4) of the Act. An agency may also consider this to mean the request to have lapsed, been refused or otherwise finalised without being processed.

Professional Standard 2.5 says:

Before refusing to comply with a request that is not valid, an agency must provide the applicant with a minimum of 21 days from the date the agency notified the applicant of the information in Standard 2.4 to:

- (a) pay the application fee;*
- (b) provide evidence of hardship, if seeking a fee waiver or reduction;*

- (c) begin consulting with the agency to clarify the request or provide an amended request; or*
- (d) otherwise make the request compliant with section 17 of the Act.*

OVIC's FOI Guidance note *Receiving an Access Request: Valid Requests and Early Considerations* explains the steps an agency should take to consult, and outlines examples of what those steps might include:

Section 17(3) requires an agency to assist an applicant to make a valid request. Where a request does not provide sufficient information as is reasonably necessary to enable documents to be identified, an agency is required to provide an applicant with a reasonable opportunity to consult in order to make a request that provides sufficient information to identify documents (see section 17(4)).

The standard also requires reasonable assistance or advice be provided to an applicant on how to make their request valid, and to ensure the applicant is aware their request may be refused if they do not take steps to make the request valid.

Reasonable assistance or advice from an agency might include:

- discussing with an applicant what document they seek in order to understand the subject matter, and assisting the applicant to articulate the terms of their request;*
- identifying opportunities to help the applicant be sufficiently clear about the documents sought. For example, asking them about the relevant time period or business areas within the agency to search;*
- providing advice on what types of documents the agency holds and where the information the applicant seeks might be located in other places;*
- directing an applicant to an appropriate agency that holds the documents sought;*
- advising an applicant about the application fee and how it can be paid; or*
- discussing what evidence is required in order to show payment of the application fee would cause the applicant financial hardship.*

This process should also be used as an opportunity to narrow the scope of the request. For example, querying whether third party information such as names and phone numbers can be excluded from the request. This could save time and resources when processing the request.

VicForests' own FOI Manual also provides examples of steps an agency might take:

- *frankly revealing, subject to statutory exceptions (for example, privacy legislation or secrecy provisions), the nature and type of documents held*
- *providing examples of the types of documents held*
- *helpful dialogue to try to establish a real understanding of what is being sought by the applicant*
- *involving officers from the relevant line or program areas within an agency to ensure the applicant is properly informed about the types of documents available.*¹⁰⁰

Refusal of requests that are unreasonably voluminous (s 25A(1))

Under s 25A(1), an agency dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency is satisfied that the work involved in processing the request would substantially and unreasonably divert its resources from its other operations.

This type of request is commonly known as a 'voluminous request'.

The purpose of s 25A in relation to an agency's functions was described in *Secretary, Department of Treasury and Finance v Kelly*:¹⁰¹

... it is plain enough that s. 25A was introduced to overcome the mischief that occurs when an agency's resources are substantially and unreasonably diverted from its core operations by voluminous requests for access to documents. The emphasis of the amendment was on the prevention of improper diversion of the agency's resources from their other operations. The provision was introduced to strike a balance between the object of the Act ... and the need to ensure that the requests under the Act did not cause substantial and unreasonable disruption to the day to day workings of the government through its agencies.

Duty to assist and consult

Section 25A(6) states that an agency or Minister must not refuse to grant access to a document under subsection (1) unless the agency or Minister has:

- (a) given the applicant a written notice—

¹⁰⁰ VicForests, *Freedom of Information: Procedures Manual*, June 2020, p.3.5.

¹⁰¹ [2001] VSCA 246 at [48].

- (i) stating an intention to refuse access; and
 - (ii) identifying an officer of the agency or a member of staff of the Minister with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and
- (b) given the applicant a reasonable opportunity so to consult; and
- (c) as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.

Professional Standard 5 deals with the refusal of voluminous requests. It states:

5.1 An agency must take reasonable steps to notify an applicant under section 25A(6) of the Act of its intention to refuse a request under section 25A(1) within 21 days of receiving a valid request.

5.2 When providing a notice under section 25A(6) of the Act, in addition to the requirements of that section, an agency must:

(a) explain why the applicant's request would substantially and unreasonably divert the resources of the agency from its other operations; and

(b) provide a minimum of 21 days from the date of the agency's notice, for the applicant to respond.

5.3 Where an agency consults with an applicant under section 25A(6) of the Act, it must ensure it keeps a record of consultation including:

(a) any responses received from the applicant; and

(b) if amended, the final terms of the request.

VCAT has considered whether agencies have met their duty to provide a reasonable opportunity to consult and to give relevant information to the applicant on numerous occasions.¹⁰² Whether an agency has met this duty turns on the circumstances of the case. VCAT recently observed in *Davis v Department of Health* (Review and Regulation) [2022] VCAT 718 that while agencies need only provide the applicant with the 'opportunity to consult', consultation 'requires more than merely giving the other party the opportunity to confirm or change their position.' VCAT also said that 'a requirement for consultation is never to be treated as perfunctorily or as a mere formality'.

¹⁰² E.g., *Tabcorp Holdings Ltd v Department of Treasury and Finance (Vic)* [2013] VCAT 1731; *Davis v Department of Health* (Review and Regulation) [2022] VCAT 718.

Responsibility to assist OVIC during a complaint or review

A complaint may be made to the Information Commissioner in accordance with Part 61A about matters including:

- (a) an action taken or failed to be taken by an agency in the performance or purported performance of the agency's functions and obligations under this Act, including a decision by an agency that a document does not exist or cannot be located;*
- (ab) an action taken or failed to be taken by a principal officer in the performance or purported performance of the principal officer's functions and obligations under Part IB or II ...*

Section 61A(1)(a) is broad and allows complaints to be made about a variety of matters. These can include:

- a delay in processing a request with the statutory timeframe;
- a decision that a document does not exist or cannot be located;
- a failure to provide assistance to an applicant to make a valid request;
- a decision to transfer a request to another agency; or
- a failure to comply with the Professional Standards published under Part IB of the Act.¹⁰³

Section 61A(2) says that a complaint must:

- (a) be in writing; and*
- (b) set out the nature of the complaint; and*
- (c) identify the agency, principal officer or Minister concerned.*

The FOI Act requires agencies to cooperate with the Information Commissioner in his handling of a review or complaint. Section 49I states:

The agency or Minister that made the decision that is the subject of the review must assist the Information Commissioner to undertake the review.

¹⁰³ OVIC, *Practice Note 16, How to assist the freedom of information complaints process*, Available online at <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/how-to-assist-the-freedom-of-information-complaints-process/>

Section 61E states:

An agency, principal officer or Minister to which or whom a complaint relates must cooperate with the Information Commissioner in dealing with the complaint.

Professional Standard 10 states:

10.1 An agency must assist the Information Commissioner or Public Access Deputy Commissioner in their attempt to informally resolve a review or complaint.

10.2 An agency must give consideration to a preliminary view issued by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner during a review.

10.3 An agency must respond to a request for documents and information by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner within requested or agreed timeframes.

10.4 When providing documents subject to review by the Information Commissioner or Public Access Deputy Commissioner, an agency must markup documents clearly and legibly to indicate exempt matter and the applicable exemption or exemptions.

OVIC attempts to resolve complaints informally in accordance with s 61GB. In accordance with OVIC's practice note on assisting the FOI complaints process, agencies should approach the resolution process with an open mind, and work with OVIC to resolve the complaint with as little formality and technicality as possible.¹⁰⁴

¹⁰⁴ OVIC, *Practice Note 16, How to assist the freedom of information complaints process*, Available online at <https://ovic.vic.gov.au/freedom-of-information/resources-for-agencies/practice-notes/how-to-assist-the-freedom-of-information-complaints-process/>

Appendix 2: Response from VicForests

24 February 2023

Mr Sven Bluemmel
Information Commissioner
Office of the Victorian Information Commissioner
PO Box 24274
MELBOURNE VIC 3001

By email only: investigations@ovic.vic.gov.au

Dear Mr Bluemmel

Investigation into VicForests' handling of a series of FOI requests under s61O of the Freedom of Information Act 1982 (Vic) (FOI Act)

Thank you for your letter of 16 January 2023 inviting VicForests' response to your own-motion investigation report (**Final Report**).

The Board of VicForests has met and formally considered your letter and the Final Report, and I write subsequent to that meeting.

VicForests is, and at all times has been, committed to meeting its obligations as a public sector entity under the FOI Act. The Board considers that VicForests staff, particularly those responsible for the management of requests for information, meet their obligations diligently. I believe this is consistent with your findings.

I would like to reinforce the advice provided by the CEO and management that the response of VicForests to these requests for information needs to be considered in the context of the very substantial pressure on VicForests in meeting a range of priorities during the period when these requests were made. VicForests is a small agency with finite capacity responding to very complex challenges.

On behalf of the Board, can I make it clear that VicForests respects the role of the Commissioner in maintaining oversight over the regime established under the FOI Act and values the assistance that might be provided by the Commissioner in resolving disputes between applicants and decision-makers.

In this regard I would welcome your advice about how your office might more actively support small agencies, such as VicForests, in mediating a timely resolution of disputes with unsatisfied applicants that fairly balances the public interest in releasing information with the reality of finite public resources and competing priorities.



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Recommendations

VicForests responds to the recommendations of the Information Commissioner as follows.

RECOMMENDATIONS	VICFORESTS' RESPONSE
Recommendation 1 <i>Process the applicant's outstanding FOI request (with revised terms as agreed to by the applicant) and provide the Commissioner with updates on the progress of the request.</i>	Complete
Recommendation 2 <i>Provide guidance to VicForests' FOI staff about the values and culture that VicForests wants to inform its approach to FOI, as described to OVIC by its CEO. This should include stating the values it wants to inform its approach to FOI in relevant policies and procedural documents.</i>	Accepted
Recommendation 3 <i>When selecting staff to oversee its FOI function, and when engaging external consultants (including legal advisers) to support it in meeting its FOI obligations, VicForests should consider if their values and approach to FOI align with the object of the FOI Act and VicForests' desired approach and communicate this object and associated values to them.</i>	Accepted
Recommendation 4 <i>In consultation with OVIC, VicForests should undertake an assessment of its FOI function and practices, including an assessment of its compliance with the FOI Professional Standards, using OVIC's Self-Assessment Tool. Provide the Commissioner with the outcome of the assessment within 90 days.</i>	Accepted
Recommendation 5 <i>Update its FOI policy and procedures manual to address issues identified in the Self-Assessment Tool described in recommendation 4, and to reflect the values described in recommendation 2. Provide the Commissioner with a copy within 120 days.</i>	Accepted in principle As we currently use a third-party proprietary manual, a new instruction/procedure will be developed to apply to the specific operating environment of VicForests.

RECOMMENDATIONS	VICFORESTS' RESPONSE
	VicForests will undertake this work in 2023 and provide it to the Commissioner when finalised.
Recommendation 6 <i>Expand the range of training provided to VicForests' authorised officers and any other staff undertaking FOI functions, to include OVIC's FOI training and relevant courses such as plain English training and customer service for public sector employees training within 180 days.</i>	Agreed in principle VicForests authorised officers and other relevant staff already undertake appropriate training. We will consider opportunities to expand this.
Recommendation 7 <i>Identify ways to encourage VicForests' staff to adopt a responsive and respectful approach to FOI service delivery, including engaging in a wider range of communication techniques, such as speaking to applicants by telephone.</i>	Complete VicForests' Board is satisfied VicForests staff have been responsive and respectful and use suitable channels for communication.
Recommendation 8 <i>Provide the Commissioner with two six-month reports setting out progress against the above recommendations and details of all FOI requests received and decisions made, together with an attestation from VicForests' Principal Officer that requests were processed in accordance with VicForests' FOI procedures manual policy, the FOI Act and the Professional Standards.</i>	Accepted VicForests will provide the first report to the Information Commissioner in line with its annual reporting obligations on FOI matters to OVIC. This report will be provided in August 2023. A further report responsive to this recommendation will be provided in February 2024.

Comments on the Final Report

There were long delays in the matters that are the subject of this investigation. It is important to delineate between periods when VicForests was responsible and when the matters were with the Commissioner's office. I have attached a diagram prepared by VicForests management setting out the key milestones in relation to the four requests that are the subject of your investigation.

Despite these complexities in the delay, you will see that VicForests has largely accepted and welcomed your recommendations about further improvements VicForests might make in managing its obligations under the FOI Act.

I set out below VicForests' more detailed response to the Final Report by reference to the relevant page number(s) of the PDF copy provided to VicForests.

PAGE NO.	FINAL REPORT	VICFORESTS' COMMENTS
19 and 20	<p><i>It is hard to imagine how a document could 'relate to' a person's name. A more reasonable reading of these words is to look at it as simply meaning documents that contain the applicant's name.</i></p> <p>...</p> <p><i>... These points also refer to documents 'related to or with [the applicant's] name', but as with the first point, the only reasonable way of reading this is to understand it as meaning documents that contain the applicant's name.</i></p>	<p>The revised request sought "material; photos, emails, texts, files, documents (both complete or incomplete) related to or with" the Applicant's name. VicForests respectfully suggests a more natural interpretation of the request was that it was for any material that related to the Applicant whether by name or otherwise.</p> <p>VicForests further suggests a document might not record a person's name but contain sufficient information to allow that person's name to be readily determined. For example, the document might refer to a position the applicant holds or once held.</p> <p>This understanding is fundamental to the decision VicForests took in relation to this request.</p>
21	<p><i>Finding 2: The applicant's revised first request met the requirements of s 17(2) of the FOI Act and was a valid FOI request.</i></p> <p><i>As the applicant's revised first FOI request was valid under s 17(2), VicForests was required to process the request in accordance with the Act. It was required to either provide access to the requested documents under s 20 or provide a statement of reasons explaining its reasons for refusal under s 27.</i></p>	<p>For the reasons set out above, VicForests does not accept this finding.</p>

PAGE NO.	FINAL REPORT	VICFORESTS' COMMENTS
25	<i>The Commissioner considered whether VicForests could have provided the applicant with more helpful information in its consultation letter to help her make a valid request, especially in circumstances where the applicant would have no knowledge of the types of documents held by VicForests. VicForests' consultation letter of 10 August 2020 explains why VicForests considered the applicant's request to be invalid, but did not provide her with information that would assist her to make a valid request.</i>	VicForests was not able to provide the applicant with more helpful information in its consultation letter to help her make a valid request. At the relevant time, VicForests was genuinely at a loss to know what information it could provide to assist the applicant to make a valid request.
58	<i>Finding 16: VicForests failed to cooperate with the Information Commissioner as required by s 61E of the FOI Act.</i>	<p>VicForests does not accept and is disappointed by Finding 16.</p> <p>VicForests recognises that the tone of the correspondence could have been improved, the central purpose of the correspondence in question was to obtain clarity and understanding of the allegations being put against VicForests.</p> <p>As all correspondence with the Commissioner was timely and for the purpose of progressing the matter with OVIC, VicForests did not generally fail to cooperate with the Commissioner.</p>
59	<i>Finding 17: VicForests failed to assist the Information Commissioner in his attempt to informally resolve the complaint as required by Professional Standard 10.1.</i>	<p>VicForests does not accept and is disappointed by Finding 17.</p> <p>While acknowledging the difference in opinion on the validity of the request in question, VicForests proposed an adjusted form of the request VicForests reasonably considered it would be able to process. VicForests notes the significant delay in the Commissioner's response to this proposal.</p>

PAGE NO.	FINAL REPORT	VICFORESTS' COMMENTS
62	<p>The Commissioner “also considered that processing the applicant’s requests ‘efficiently’ and ‘legally and soundly’ did in fact appear to be a primary consideration of VicForests, consistently with the Legal Unit Manager’s original answer. For example, VicForests’ correspondence to the applicant appeared to the Commissioner to be written in a way that reflected a primary purpose of satisfying the procedural and content requirements of the FOI Act. The purpose of communicating to the applicant clearly and in plain English, and making it easy for her to provide a useful and relevant responses that would help progress her FOI request, <u>appeared to be less important secondary purposes.</u>” (Emphasis added)</p>	<p>VicForests does not consider this comment fairly reflects the clarification provided by the Legal Unit Manager in response to the draft report.</p> <p>The Legal Unit Manager confirmed that, in dealing with FOI matters “legally and soundly”, VicForests has regard to the law and the FOI framework as a whole, including the values noted in the draft report (openness, pro-disclosure, customer focused, responsive, respectful or in the public interest).</p>
63	<p>Correspondence from VicForests to OVIC in the second complaint (described above and enclosed as an Annexure) was suggestive of an unnecessarily argumentative, overly technical, and legalistic approach to FOI. It was also <u>suggestive of a lack of regard for the role and functions of the Information Commissioner and his office.</u> (Emphasis added)</p>	<p>A fair consideration of all matters the subject of this Final Report and VicForests’ dealings generally with the Information Commissioner and his office on FOI matters, would not lead to a reasonable conclusion that VicForests lacks regard for the role and functions of the Commissioner and his office.</p>
65	<p>The result is that after making four FOI requests and two complaints to OVIC, <u>two years later</u>, the applicant did not receive any documents from VicForests.</p> <p>(Emphasis added)</p>	<p>Responsibility for the length of time these matters have taken cannot be fairly attributed to VicForests as progress or resolution of various issues rested with the Commissioner and/or the Applicant for substantial periods as outlined in Attachment 1.</p> <p>The first request was in the hands of VicForests for seven weeks including the five weeks VicForests waited for a response to its two letters to the applicant seeking clarification of her request so that it could be processed. This application then rested with OVIC from 17 September 2020 to 16 August</p>

PAGE NO.	FINAL REPORT	VICFORESTS' COMMENTS
		<p>2021 when OVIC advised of the closure of the applicant's first complaint.</p> <p>The second request was processed by VicForests over a period of seventeen weeks including the five weeks VicForests waited for responses to initial requests for clarification. Over the course of the 17 weeks the applicant amended her application three times.</p> <p>The third request was received by VicForests on 31 August 2021. VicForests sought clarification of this request by the applicant on 21 September and 5 November but has never received a response.</p> <p>The fourth request was also received by VicForests on 31 August 2021. This request was clarified by the applicant on 6 October 2021. The fourth application was in the hands of OVIC from 30 November 2021 onwards (when the second complaint of 29 October 2021 was communicated to VicForests).</p> <p>OVIC facilitated a revision to the request on 4 October 2022 and advised VicForests this amended request would close the second complaint. The document was released under the FOI Act on 13 February 2023 following a delay of 60 days due to an applicable period for review.</p>
67	<p><i>Finding 19: With respect to the four FOI requests and two complaints, VicForests failed to administer the FOI Act with a view to making the maximum amount of government information promptly and inexpensively available to the public, as required by s 16(1) of the FOI Act.</i></p> <p><i>Finding 20: With respect to the four FOI requests and two complaints, VicForests did not act consistently with Parliament's intention as described in s 3 of the FOI Act.</i></p>	<p>VicForests does not accept and is disappointed by these findings.</p> <p>As outlined above and at Attachment 1 the responsibility for the management of these matters moved between VicForests and OVIC.</p> <p>OVIC managed the first complaint for eleven months before closing it without any recommendations or adverse findings.</p> <p>As OVIC upheld VicForests' decision on the second request, VicForests does not understand why this matter has been re-examined by the Commissioner.</p>

PAGE NO.	FINAL REPORT	VICFORESTS' COMMENTS
		<p>The Applicant did not respond to VicForests' requests for clarification of the third request.</p> <p>VicForests' proposal to enable the processing of the fourth request and to resolve the second complaint was not responded to by OVIC for almost eight months. OVIC's alternative course to resolving the second complaint has been processed by VicForests with the relevant document being provided to the Applicant.</p>
67	<i>The Commissioner would like to see a resolution to the applicant's current request, and for her to obtain access to information. The Commissioner encourages the parties to work together to arrive at a reworded request that will identify the relevant documents the applicant seeks, and is of a size that VicForests is reasonably able to process.</i>	This has already been done.
70	<i>OVIC only examined a single applicant's FOI requests to VicForests.</i>	As VicForests understands that the Commissioner's position is that Own Motion Investigations are only considered in relation to substantial, persistent or systemic non-compliance it is difficult to understand why the Commissioner has not considered VicForests management of requests generally.

Additional material for inclusion in the Final Report

Finally, I note the request that I provide again any of the material included with my letter of 30 November 2022 that I seek to be included in VicForests' response to the Final Report. VicForests relies upon the information provided to you previously and attaches to this letter:

- a chart showing the key milestones in the management of the four FOI requests and complaints or reviews the subject of the Commissioner's investigation - identified as Attachment 1; and
- a summary of VicForests' FOI Requests for the period 1 July 2020 to 31 August 2021 - identified as Attachment 2.

VicForests is of the view that these documents add important context to the passage of events in terms of the applicant's four FOI requests and explore VicForests' processing of FOI requests generally, particularly in circumstances where the Final Report makes comments/findings about the passage of time of the subject matters and VicForests culture and approach to FOI generally.

As noted above, VicForests also requests that the Notice of Decision dated 29 September 2021 [REDACTED] be included in the final version of report to ensure transparency on the outcome of the applicant's March 2021 FOI request. A copy of that NOD is included as Attachment 3.

Yours sincerely



Ben Hubbard
Chair, VicForests

Encl.

1. Key Milestones in the Management of Requests and Complaints Relevant to the Own Motion Investigation;
2. Table summarising all of the other FOI requests VicForests dealt with in the period that it received the series of FOI requests the subject of the own-motion investigation (July 2020-August 2021); and
3. Notice of Decision dated 29 September 2021 [REDACTED]

Attachment 1

[illegible]

SUMMARY OF VICFORESTS FOI REQUEST FOR THE PERIOD 1 JULY 2020 - 31 August 2021					
Status	Request Date of Request	Decision Date	VicForests Decision Number of Days to make Decision	Referred to OVIC for review or complaint?	
Closed	23/07/2020	16/10/2020	44 days (inclusive of 2 week extension)	No	
Closed	21/12/2020	10/02/2021	30 days (consent for processing period to commence from 11/01/2021 owing to the Christmas break)	No	
Closed	20/08/2020	29/01/2021	N/A - Applicant abandoned request	No	
Closed	25/11/2020	2/12/2020	8 days	No	
Closed	11/11/2020	14/12/2020	33 days	No	
Closed	21/10/2020	10/11/2020	N/A - request withdrawn	No	
Closed	21/01/2021	22/02/2021	32 (incl. consultation and option provided to access data outside of FOI)	No	
Closed	12/01/2021	10/02/2021	29 days	No	
Closed	1/02/2021	1/03/2021	28 days	No	
Closed	3/03/2021	-	N/A - Applicant abandoned request	No	
Closed	3/03/2021	-	N/A - Applicant abandoned request	No	
Closed	3/05/2021	10/05/2021	7 days	No	
Closed	28/05/2021	25/06/2021	28 days	No	
Closed	3/05/2021	17/06/2021	45 days (incl. extension for consultation)	Yes - referred to OVIC for review	
Closed	10/05/2021	6/07/2021	57 days (access charges were negotiated by the applicant and revised on 4 June 2021)	No	
Closed	15/06/2021	14/07/2021	29 days	No	
Closed	16/06/2021	-	N/A - Document provided outside of FOI	No	
Closed	25/08/2021	21/09/2021	27 days	No	
Closed	8/09/2021	8/10/2021	30 days	No	
Closed	27/08/2021	22/09/2021	26 days	No	

Attachment 2

Notice of Decision and Reasons for Decision

Applicant:	[REDACTED]
Agency:	VicForests
Agency reference:	N/A
Our reference:	[REDACTED]
Decision date:	29 September 2021
Provision considered:	Section 25A(1)

FREEDOM OF INFORMATION – all documents concerning applicant – correspondence – video surveillance – substantial and unreasonable diversion of agency resources from its other operations – consultation requirements under section 25A(6)

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.

I am satisfied the work involved in processing the Applicant's request would substantially and unreasonably divert the resources of the Agency from its other operations.

Accordingly, I am satisfied the requirements for refusal to grant access to documents in accordance with the Applicant's request under section 25A(1) are met, and the Agency is not required to process the request.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner
29 September 2021

Reasons for Decision

Background to review

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

...any investigative documents including notes, reports, documents, texts that involve surveillance of [Applicant]. Any internal correspondence and briefings that discuss [Applicant] by name and any document in relation to the [Third party] that include my name from [date].
2. Following consultation with the Agency, the Applicant clarified the terms of their request.
3. The clarified request seeks access to the following documents:
 1. All documents from [dated] that refer to the [Applicant] and which relate to surveillance of [Applicant] by the [Agency];
 2. All correspondence from [named person] between [date] that refers to my name;
 3. All correspondence from [named person] between [date] that refers to my name;
 4. All correspondence between [Agency] and [named person] between [date] and [date] where communications relate to me, including my role as [third party]; and
 5. All documents from [date] that refers to my name as a member of the [third party] which were sent to [third parties] by one or more of the following [named persons/third parties].
4. On 23 June 2021, the Agency notified the Applicant in accordance with section 25A(6) of its intention to refuse the Applicant's request under section 25A(1) on grounds processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. The Applicant was invited by the Agency to consult with an Agency officer with a view to narrowing the terms of the request and removing the proposed grounds for refusal.
5. On 13 July 2021, the Applicant responded to the Agency, and refined the scope of their request to the following categories of documents (**amended request**):
 1. All documents from [date] that refer to your name and which relate to surveillance of [Applicant];
 2. All correspondence from [named person] between [dates] that refers to your name;
 3. All correspondence between [Agency] and [named person] between [date] where the communication relates to [Applicant]; and
 4. All documents from [date] that refer to your name and/or refer to your role as a member of the Board of [third party] which were sent to [Agency] management and/or [Agency] board by one or more of the following [named persons/third parties].
6. I note the Agency's adoption of the numbering from the amended request, that the Applicant refined the scope incorporating the following changes:
 1. No change;
 2. No change;
 3. Removed;
 4. Time period changed; and
 5. Time period changed.
7. By email dated 20 July 2021, the Agency advised the Applicant of its decision to refuse to grant access to documents in accordance with the request under section 25A(1). Its reasons included:

Despite your attempt to remove this ground for refusal by narrowing the scope of your Amended Request, the timeframes sought and the range of documents requested remain excessively broad. Therefore, significant work would still be involved were the Further Amended Request to be processed.

Review application

8. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the Applicant's amended request.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. During the review, OVIC staff consulted with the Applicant and invited them to consider whether they would like to narrow the terms of their request. The Applicant advised they wished to continue with the review based on their original request terms.
11. I have considered all communications and submissions received from the parties.
12. 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.
13. 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(1)

14. Section 25A(1) provides an FOI request may be refused in certain circumstances following an agency consulting with an applicant under section 25(6).
15. Section 25A provides:

25A Requests may be refused in certain cases

- (1) The Agency ... dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency... is satisfied that the work involved in processing the request -
 - (a) in the case of an agency – would substantially and unreasonably divert the resources of the agency from its other operations;
 - ...
- (2) Subject to subsection (3) but without limiting the matters to which the agency... may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the agency... is to have regard to the resources that would have to be used –
 - (a) in identifying, locating or collating the documents within the filing system of the agency... or
 - (b) in deciding whether to grant, refuse or defer access to documents to which the request relates, or to grant access to edited copies of such documents, including resources that would have to be used –
 - (i) in examining the documents; or
 - (ii) in consulting with any person or body in relation to the request; or
 - (c) in making a copy, or an edited copy, of the documents; or
 - (d) in notifying any interim or final decision on the request.

- (3) The agency... is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind.
- (4) In deciding whether to refuse, under subsection (1), to grant access to documents, an agency... must not have regard to –
 - (a) Any reasons that the person who requests access gives for requesting access; or
 - (b) The agency's... belief as to what are his or her reasons for requesting access.
- ...
- (6) An agency... must not refuse to grant access to a document under subsection (1) unless the agency or Minister has –
 - (a) given the applicant a written notice –
 - (i) stating an intention to refuse access; and
 - (ii) identifying an officer of the agency... with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and
 - (b) given the applicant a reasonable opportunity so to consult; and
 - (c) as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.

16. The Victorian Supreme Court of Appeal has described the purpose of section 25A(1) as:

... it is plain enough that s 25A was introduced to overcome the mischief that occurs when an agency's resources are substantially and unreasonably diverted from its core operations by voluminous requests for access to documents. The emphasis of the amendment was on the prevention of improper diversion of the agency's resources from their other operations. The provision was introduced to strike a balance between the object of the Act... and the need to ensure that the requests under the Act did not cause substantial and unreasonable disruption to the day to day workings of the government through its agencies...¹

- 17. The words 'substantially' and 'unreasonably' are not defined in the FOI Act, and are to be given their ordinary meaning.
- 18. The meaning of 'other operations' in section 25A(1) includes an agency's ability to deal with and process other FOI requests received where its ability to do so would be impaired by dealing with and processing an FOI request.²
- 19. Once an agency determines to refuse an FOI request under section 25A(1), it bears the onus of establishing it has met the requirements of this provision.³
- 20. On review, I must consider whether, at the time of my decision, the requirements of section 25A(1) are satisfied. Namely, whether processing the Applicant's request would substantially and unreasonably divert the Agency's resources from its other operations.⁴

Agency consultation requirements under section 25A(6)

- 21. In accordance with section 25A(6), an agency must notify an applicant of its intention to refuse an FOI request and nominate an agency officer with whom the applicant can consult, provide a reasonable

¹ *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at [48].

² *Chief Commissioner of Police v McIntosh* [2010] VSC 439 at [24].

³ *Ibid* at [11].

⁴ The general rule that applies to tribunals when conducting administrative law proceedings (by way of a *de novo* review) is that the factors to be considered and the law to be applied are as at the date of review. This principle does not appear in the FOI Act, but is established by case law, including the following authorities: *Shi v Migration Agents Registration Authority* [2008] HCA 31, *Victoria Legal Aid v Kuek* [2010] VSCA 29, *Tuitaalili v Minister for Immigration and Citizenship* [2011] FCA 1224, *O'Donnell v Environment Protection Authority* [2010] ACAT 4.

opportunity for the applicant to consult with the agency, and provide information to assist the applicant to amend the terms of their request with a view to removing the proposed ground for refusal.⁵

22. As stated above, before refusing the Applicant's request, the Agency notified the Applicant of its intention to refuse the request, and nominated an Agency officer with whom the Applicant could consult with a view to making the request in a form that would remove the proposed grounds for refusal. The Agency's correspondence provided suggestions for narrowing the scope of the request. The Agency also advised the Applicant that searches for documents relevant to the request would require searches of two separate email databases, one of which is no longer in use by the Agency. Further, the Agency advised certain documents relevant to the Applicant's request were held in paper archives and, due to the workplace restrictions in place from the COVID-19 pandemic, the Agency is currently unable to identify these hard copy documents.
23. On 13 July 2021, the Applicant responded and refined the scope of their request to the amended request, as set out in paragraph 6 above.
24. On the information before me, I am satisfied the Agency complied with its obligations to consult with the Applicant under section 25A(6) before refusing the Applicant's request.

Review of application of section 25A(1)

25. In determining whether section 25A(1) applies, firstly I am required to consider whether processing the Applicant's request would involve a substantial diversion of the Agency's resources, and secondly, whether processing the request would involve an unreasonable diversion of the Agency's resources.

Would processing the request involve a substantial diversion of the Agency's resources?

26. In estimating the resources involved in an agency determining to refuse access under section 25A(1), the Victorian Civil and Administrative Tribunal (VCAT) has observed:⁶

...in asserting section 25A, an agency cannot be obliged to specify exactly how much time and energy would be spent by the agency in processing the request. Estimates only are acceptable, as to ensure precision would mean the agency would have to do the very work that section 25A is designed to prevent.

27. In its consultation with the Applicant, and decision letter and submission to OVIC, the Agency provided details regarding initial searches it conducted, the estimated time and effort required to identify documents relevant to the terms of the Applicant's request and the Agency's available resources and workload. The Agency's submission is summarised below:
 - a. The Agency has no dedicated FOI Unit. FOI duties and responsibilities are conducted by its legal department, which comprises a four person legal team, with two officers (one full-time and one part-time) trained to process FOI requests.
 - b. At the time of the request, the Agency was processing 23 FOI requests and 16 FOI consultation requests from other agencies. In addition to FOI requests, the Agency had nine separate public interest litigation matters and one matter before VCAT.
 - c. The Agency undertook a preliminary search for documents, through two email applications, using keyword searches to estimate the number of documents that would fall within the request. The Agency submits searches would need to be conducted through computer drives and paper form,

⁵ *Lloyd v Victoria Police* [2007] VCAT 1686 at [22].

⁶ *McIntosh v Victoria Police* [2008] VCAT 916 at [11].

both of which contain large volumes of documents, to ascertain whether they contain any relevant documents. Further, hard copy documents would require manual document searches.

- d. Based on the Agency's current workload and given the timeframes for the amended request, it estimates the request would take Agency officers, excluding all other duties, 28 weeks to retrieve relevant documents for processing.
 - e. I accept the Agency's current adapted working arrangements due to COVID-19 will be impacting the Agency's ability to process FOI requests, particularly where the requested documents are in hard copy. However, I also note the Agency has legal obligations under the FOI Act and these obligations do not disappear or become less important during current remote working arrangements.
 - f. To process the Applicant's request in its entirety, further searches of other business areas within the Department would be required that would impact upon and divert those areas from their core functions and responsibilities.
28. On the information before me and having carefully considered the terms of the Applicant's amended request, I am satisfied the time required for the Agency to undertake a thorough and diligent search for all relevant documents, and then identify, assess and undertake any required consultation regarding those documents, would involve a substantial diversion of the Agency's resources from its other operations.

Would processing the request involve an unreasonable diversion of the Agency's resources?

29. The concept of 'unreasonableness' was considered in *Re SRB and Department of Health, Housing, Local Government and Community Services*, in which the Commonwealth Administrative Appeals Tribunal held:

...it is not necessary to show ... that the extent of unreasonableness is overwhelming. It is this Tribunal's task to weigh up the considerations for and against the situation and to form a balanced judgement of reasonableness, based on objective evidence.⁷

30. In determining unreasonableness for the purpose of section 25A(1), I have had regard to the approach adopted by VCAT in *The Age Company Pty Ltd v CenITex*,⁸ in which the Tribunal considered the following factors in determining if a request would involve an unreasonable diversion of an agency's resources:

- a. Whether the terms of the request offer a sufficiently precise description to permit the Agency, as a practical matter, to locate the document sought within a reasonable time and with the exercise of reasonable effort

I am satisfied the terms of the request and the nature of the documents sought are sufficiently precise to enable the Agency to locate the requested documents. However, this does not take into account the time and resources that would be required to examine and consult upon those documents.

However, I accept the Agency's submission that, given the date range for documents (back to 2009), searches would need to be conducted through computer drives and paper form to ascertain whether they contain any relevant documents and searches of hard copy documents would require manual searches.

⁷ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

⁸ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

b. The public interest in disclosure of documents relating to the subject matter of the request

Consistent with the object of the FOI Act, there is a public interest in members of the public having a right to access information and documents held by government unless it is necessary to refuse access under an exception or exemption in the FOI Act to protect 'essential public interests and the private and business affairs of persons in respect to whom information is collected and held'.⁹

In *Mildenall v Department of Education*, VCAT held:

Section 25A seeks to balance competing interests. There is a public interest in an agency not being diverted from its core work through needing to process a very broad-ranging request for documents.¹⁰

Noting the subject matter of the request, I consider the Applicant has a strong personal interest in obtaining access to the documents. However, on the information before me, I am not satisfied there is a broader public interest that would be served by disclosure of the documents sought. Nor am I satisfied the Applicant's personal interest in the documents outweighs the public interest in the Agency not being diverted from its other operations due to the broad ranging nature and time frames of the request.

c. Whether the request is reasonably manageable

In summary, the Applicant seeks access to any correspondence and surveillance documents in relation to them held by the Agency for a 12 year period. Any relevant documents would likely be emails, letters and video surveillance which, I accept would be located, should any exist, in various formats.

I am satisfied the Agency provided sufficient information about the large number of documents estimated to fall within the terms of the Applicant's request, as well as its current FOI workload and resources.

Based on the information provided, I am satisfied the broad-ranging nature of the documents sought and 12 year timeframe would involve documents searches in a variety of Agency locations and formats to identify all relevant documents and the impact of this work on the Agency's resources would be unreasonable. This includes, but is not limited to, Agency officers in other business areas identifying relevant documents and the work involved in restoring back-up or archived documents not readily accessible.

Accordingly, I accept the Agency's estimate that searching for and processing any relevant documents, limited to email applications only, would take a substantial amount of time to complete. I further note, the Agency's estimate does not include time for Agency FOI officers to undertake additional searches with other Agency business units for relevant documents and to assess/consult on all information identified before making its decision.

Based on the Agency's time estimates, as well as a detailed summary of the resources available to the Agency, I am satisfied the work involved in processing the Applicant's request would significantly impact upon the ability of the FOI Unit to process other FOI requests, and divert other Agency officers from their other duties. As such, I am satisfied the request in its current form is not a reasonably manageable one.

⁹ Section 3(1).

¹⁰ Footnote for this case and quote.

- d. The reasonableness or otherwise of the Agency's initial assessment and whether the Applicant has taken a cooperative approach to redrawing the boundaries of the application

Having reviewed copies of correspondence exchanged between the Applicant and the Agency in relation to this request, I am satisfied the Agency responded reasonably to the Applicant's request. This includes providing the Applicant with a reasonable opportunity to revise the terms of their request, discussing the matter with them, and providing suggestions to assist them in narrowing the scope of the request.

Based on correspondence between the Agency and the Applicant, I consider despite the Applicant not further narrowing the terms of their request, they took a cooperative approach to clarifying and consulting with the Agency.

- e. The statutory time limit for making a decision under the FOI Act

Based on the likely time required for the Agency to process the Applicant's request and the Agency's current working arrangements due to COVID-19 pandemic, I am satisfied the Agency would not be able to process the request and make a decision within the statutory timeframe limit.

While I note section 21(2) provides for the Agency to seek the Applicant's agreement for an extension of time, I consider the Agency would be unlikely to be able to process the request within a reasonable timeframe even if an extension of time was granted.

31. Having considered the above factors, I am satisfied processing the Applicant's request, in its current form, would involve an unreasonable diversion of the Agency's resources from its other operations.

Conclusion

32. On the information before me, I am satisfied the work involved in processing the Applicant's request would involve both substantial and unreasonable diversion of the Agency's resources from its other operations.
33. Accordingly, I am satisfied the requirements under section 25A(1) are met and the Agency is not required to process the Applicant's request.
34. Despite my decision, it is open to the Applicant to consult with the Agency regarding framing a new FOI request in terms that the Agency is able to process within a reasonable period of time. In doing so, I encourage both the Agency and the Applicant to conduct any discussions and consultation with a continued spirit of cooperation in order that a balance can be struck between the Applicant's right to access documents that concern them and the work involved in the Agency processing the request.

Review rights

35. If the Applicant is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.¹¹
36. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²

¹¹ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

¹² Section 52(5).

37. 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.
38. 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.¹³

¹³ Sections 50(3F) and (3FA).

Appendix 3: Response from external legal adviser



26 January 2023

Mr Sven Bluemmel
Information Commissioner
Office of the Victorian Information Commissioner
PO Box 24274
MELBOURNE VIC 3001

Sent by email only

Dear Mr Bluemmel

Response to Report on Own Motion Investigation
Our client: VicForests



We refer to your letter of 16 January 2023 enclosing excerpts of your report on an own motion investigation under s 61O(1) of the *Freedom of Information Act 1982* (Vic) ("FOI Act") into our client, VicForests.

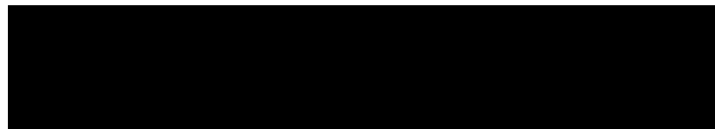
Your letter invited our firm to provide a response for publication in the report if it wished to do so. Thank you for the opportunity to respond to your report. We understand that this letter, with suitable deletion of identifying information, will be published as an appendix to your report.

In providing this response, we have been careful not to disclose any privileged information. As you correctly identified in your report, the solicitor/client relationship with VicForests has also meant there are limitations on how we may properly respond.

Mischaracterisation of our role

A small, but important, point is that parts of the report have mischaracterised or misdescribed the role of our firm. It has, with respect, exaggerated our role, especially in descriptions appearing in the earlier parts of the report. It is potentially misleading, for example, to state that as an external legal adviser to VicForests we "acted on its behalf in relation to the FOI requests and complaints".

We never acted as agents in dealing with the applicant in relation to her requests for access, but rather provided *advice* to VicForests from time to time, when requested to do so, and on specific aspects of *some* of her requests.



We acted in an advisory role¹ and were not engaged to process any of the complainant's requests.² Nor were we engaged to deal with her requests.³

Conclusions about our firm

Communications with your Office, on behalf of VicForests, was done as the agent of and *on instructions* from VicForests.

You expressed concern that our firm "adopted an overly technical approach to interpreting and applying the provisions of the FOI Act" when acting on behalf of VicForests in the complaints and (as you have assumed) advising it on the FOI requests. You have also concluded that the approach by our firm was evidenced in the style of correspondence VicForests sent to the applicant, which assumes that we drafted or advised on that correspondence.

In circumstances where no privileged communications were provided to your Office, such that you were not privy to any legal advice provided by [REDACTED] to VicForests, you were not able to determine whether or what advice was accepted, and given the limited advisory role taken by [REDACTED], it is respectfully submitted that there is no evidence, and it is unreasonable, to make a conclusion about our firm based on correspondence *from our client* to the applicant.

You also concluded that we advanced "persistent arguments" on behalf of VicForests.

As evidence of our "overly technical approach" and your assertion about "persistent arguments", you provided an example of our correspondence as an Annexure to your report. It is important to note the following points about that correspondence:

1. The sequence of correspondence selectively commences with a letter from the Public Access Deputy Commissioner dated 21 December 2021. It does not include the correspondence notifying our client of the full terms of the complaint (suitably deidentified) in order to provide a full and accurate context in which subsequent communications occurred. As far as we are aware from the excerpts of the report provided to us for response, you did not state the full terms of the complaint.
2. The sequence of correspondence in the Annexure also does not include our email of 1 December 2021 in which we provided:

We refer to your email of 30 November 2021 and letter of the same date from the Public Access Deputy Commissioner to the Chairperson of our client, VicForests.

That correspondence notified our client of a complaint made by [REDACTED] in relation to the handling by our client of an FOI request. It attached a 5 page email chain and the covering letter confirmed this constituted "a complete copy of the complaint".

Please note that we act for VicForests in relation to that matter. Could you please amend your records accordingly and ensure that any future

¹ VicForests response to OVIC request for information dated 16 March 2022, 28 March 2022; Response by VicForests to Information Commissioner Questions of 11 July 2022, p3.

² Response by VicForests to Information Commissioner Questions of 11 July 2022, p1.

³ Response by VicForests to Information Commissioner Questions of 11 July 2022, p7, 11, 12.

correspondence or other communications about this matter are directed to our office.

We note that for there to be a validly made complaint under s 61A(2) of the Freedom of Information Act 1982, it must "set out the nature of the complaint". That is, it must explain or describe in a clear and detailed way the innate or essential qualities or character of the complaint.

With respect, the purported complaint presently fails to do so. An email chain followed by an assertion that "I do not believe VicForest (sic) are complying with their obligations under the Act" does not provide any clear or detailed indication of the essential qualities or character of the purported complaint.

Accordingly, there is doubt as to whether the Commissioner's jurisdiction to entertain the purported complaint has properly been triggered at this time.

So that we can appropriately seek instructions from our client about this matter we seek via your office, in writing from the complainant, a clearer statement setting out the nature of the complaint in sufficient detail for our client to understand with precision what is being alleged against it.

Yours sincerely

Whether or not a statutory body or officer has jurisdiction depends on whether statutory requirements have been satisfied. We submit that it was reasonable for our firm to seek, on behalf of our client, information establishing that you had jurisdiction and, in particular, to ascertain sufficient details for our client to understand with precision what was alleged against it in order to be able to properly respond.

Where questions of jurisdiction are concerned, raising any potential issue does not constitute the taking of a purely technical point and is not just a matter of being concerned with practice or procedure. If it appears to an agency that a statutory decision-maker lacked jurisdiction, such as if a jurisdictional fact may not exist, that agency is "not only justified, but bound, to draw the possible absence of jurisdiction to the attention of" that decision-maker.⁴

We submit that such an approach could not properly be characterised as an overly technical approach. Nor could it properly be characterised as a persistent argument when that request was subsequently dismissed and not addressed.

We also note with concern that we were not previously provided the opportunity to comment on the concern stated in the report that our correspondence in the Annexure was "suggestive of a lack of regard for the role and functions of the Information Commissioner and his office."

To the contrary, our firm acknowledges and understands the crucial significance of your role and functions and that of your Office. It is important for an independent statutory officer to be able to support and ensure the proper administration of the FOI Act by agencies. As with any statutory body, that role and function is specified in the empowering legislation and there is nothing untoward or which could be considered as lacking regard for the role and functions if an agency, through its legal representatives, seeks information to ascertain that jurisdiction properly exists (where there is doubt that it does) and, if so, to enable it to respond fully during a complaint handling process. An

⁴ *Yong Jun Qin v Minister for Immigration and Multicultural Affairs* [1997] FCA 495, per Beaumont, Burchett and Goldberg JJ.

agency is required to assist the Information Commissioner in handling a complaint, but there must first be a complaint made, and be properly before the Information Commissioner, in accordance with the FOI Act.

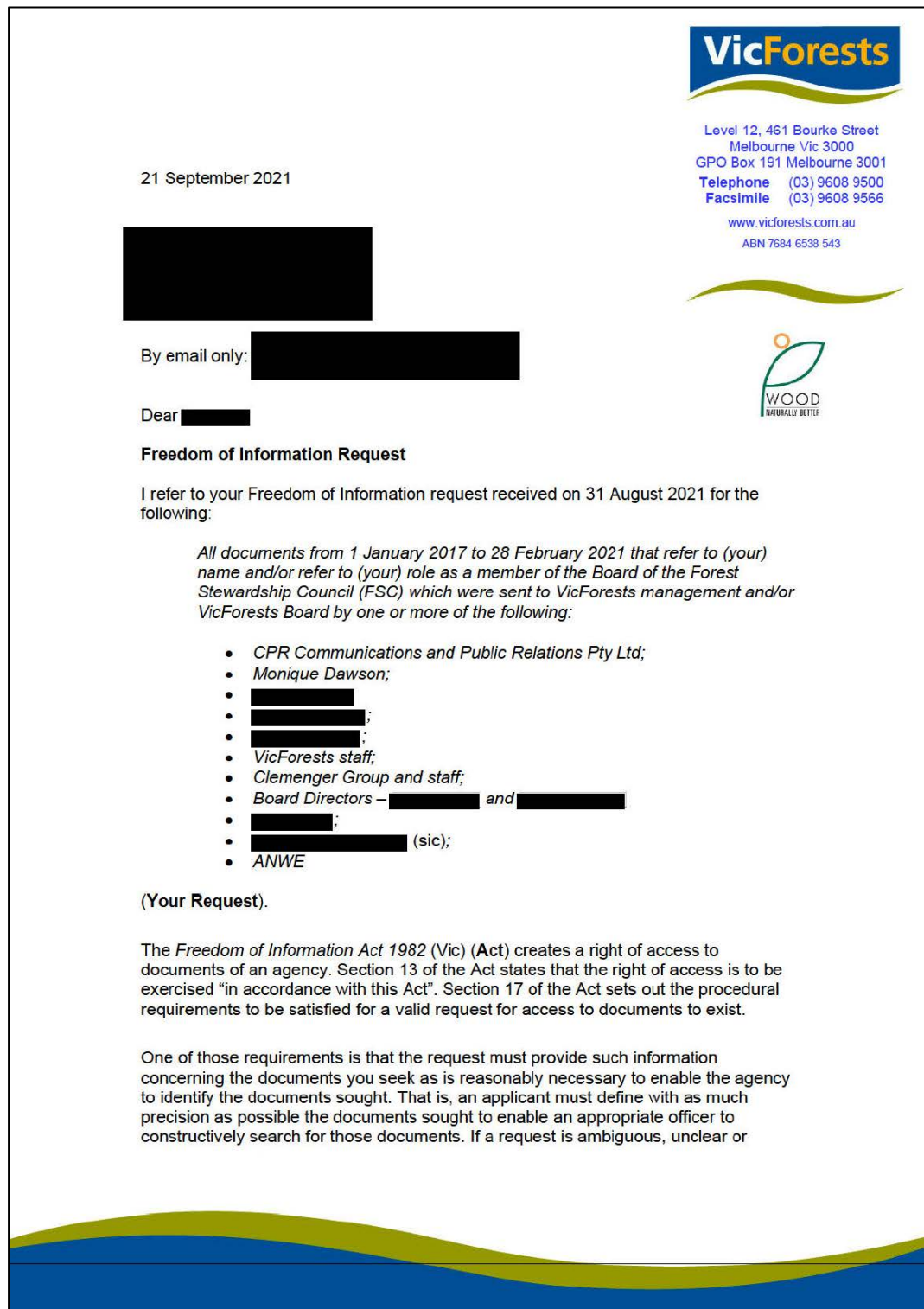
We submit that there is nothing in the Annexure or other correspondence with your Office to justify this concern. There is nothing in the correspondence that evidences a lack of regard for your role or functions or that of your Office. There was nothing but a reasonable request for information to confirm the existence of jurisdiction and to enable our client to respond to a complaint in accordance with the provisions of the FOI Act dealing with the handling of complaints by you which our client was duty bound to do.

With respect, it is submitted that our client did nothing but appropriately seek information. Correspondence was not "unnecessarily argumentative" and did not stray beyond what your report acknowledges VicForests and other agencies are entitled to do. As you stated in your report, the obligation on an agency in relation to a complaint "does not require agencies to always agree with OVIC."

Once again, we thank you for the opportunity to provide our response to parts of the report.

Yours sincerely

Appendix 4: Examples of correspondence referred to in report



otherwise ill defined, it does not comply with the Act and need not be processed. Finally, a request must be for documents and not just information as such because the Act is about access to information in documentary form.

In my view, for the reasons set out below, your FOI Request does not provide sufficient information for me to identify the documents you seek.

Both the Court of Appeal and VCAT have held that requests cannot simply be for all documents that exist over a lengthy time period that refer to the applicant's name.¹ "Requests must be for specific documents or groups of documents, not for every document in a broad category".² There needs to be specificity in identifying a "document or group of documents, or the nature or category of the documents being sought."³ Your Request seeks "all documents" that "refer" to your name and/or your role as a member of the FSC. Please provide further detail around the nature or the category of the documents that you are seeking.

It is also not clear to me what you mean by "refer". A document referring to your name may include a mere passing reference (e.g. a list of VicForests stakeholders, a list of the Board members of the FSC). A document referring to your role as a member of the Board of the FSC, could include a mere reference to the Board of the FSC or a Director of the FSC. Are you seeking documents with a mere reference to you or something more detailed? In seeking documents referring to your role as a member of the Board of the FSC, are you referring to the role of a director generally, your performance in that role, the mere fact you are a director, or something else?

Your Request seeks documents sent to VicForests "management". It is not clear to me what you mean by "management". VicForests has a number of levels of management. The executive management team is set out on the VicForests website and in its annual reports (also on the VicForests website), but there is also, for example, regional and department-level management and project management staff. Please clarify what you are referring to.

Further, there are a number of sources of communication identified in Your Request which require clarification as follows:

- VicForests staff: VicForests has many full time, part time and fixed term employees, in addition to contractors and consultants. I have assumed that "staff" does not include the VicForests Board as you have referred to them elsewhere, but would be grateful if you could confirm and clarify what you mean by "staff";
- Clemenger Group and staff: "Clemenger Group" has not been defined in Your Request. Are you referring to Clemenger Group Limited, which is a very large holding company spanning Australia and New Zealand, or to one or some of its many subsidiaries? Further, as noted above, please clarify what you mean by "staff" in this context;
- Board Directors – [REDACTED] and [REDACTED]. It's not clear to me whether you are just seeking documents from [REDACTED] and [REDACTED], either of them, or

¹ *Chopra v Department of Education and Training (Review and Regulation) (No 2) [2020] VCAT 932* at 76.

² *Secretary, Department of Treasury and Finance v Kelly [2001] VSCA 246* at 6.

³ *Chopra v Department of Education and Training (Review and Regulation) (No 2) [2020] VCAT 932* at 76.

whether you are seeking documents from the whole VicForests Board (mentioning [REDACTED] by way of example), or another board, noting that [REDACTED] have positions on boards other than VicForests;

- ANWE – Noting there is more than one entity using the acronym “ANWE”, please confirm that you are referring to Allied Natural Wood Enterprises.

In accordance with the *Professional Standards* issued by the Office of the Victorian Information Commissioner (OVIC) under the Act, an agency is required to provide an applicant with a minimum of 21 days from the date on which the agency notified the applicant that their request is not valid to begin consulting with the agency to clarify their request or to otherwise make their request compliant with s17 of the Act.

Accordingly, I invite you to either submit a clarified request or contact me by email at vfs.foi@vicforests.com.au to consult on Your Request so that it is in a form which complies with s17 of the Act and provides the information necessary to enable us to identify the documents sought by 5pm on Wednesday 13 October 2021. If I do not hear from you by this time, I will consider Your Request closed.

Until the Your Request complies with s17 of the Act it will not be processed and the 30-day time period within which a decision must be made will not commence to run.

I confirm that VicForests has received your payment of \$31 for the application fee (the application fee is \$30.06). VicForests will hold that fee on the assumption that you will provide an amended request, and consider the fee submitted with that amended request. Please let me know if you do not intend to provide an amended request and would like the fee refunded.

When clarifying Your Request with me or providing an amended request can you please also confirm whether you would like access to redacted documents (where exempt or irrelevant material is removed) or whether you only wish to be provided with complete documents. If such confirmation is not provided, I will assume that you only wish to have access to complete documents.

I look forward to hearing from you or receiving an amended request so that your application may be progressed.

Yours sincerely

[REDACTED]
[REDACTED]
[REDACTED]



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ABN 7684 6538 543

21 September 2021

[REDACTED]
[REDACTED]
[REDACTED]

By email only: [REDACTED]

Dear [REDACTED]



Freedom of Information Request

I refer to your Freedom of Information request received on 31 August 2021 for the following:

All documents with (your) name or pertaining to (you) and (your) role at the FSC from June – August 2020 from Environment Victoria and/or Victoria (sic) National Parks association to VicForests staff or Board and from VicForests Staff or Board, including those from the Chair.

(Your Request).

The *Freedom of Information Act 1982* (Vic) (Act) creates a right of access to documents of an agency. Section 13 of the Act states that the right of access is to be exercised "in accordance with this Act". Section 17 of the Act sets out the procedural requirements to be satisfied for a valid request for access to documents to exist.

One of those requirements is that the request must provide such information concerning the documents you seek as is reasonably necessary to enable the agency to identify the documents sought. That is, an applicant must define with as much precision as possible the documents sought to enable an appropriate officer to constructively search for those documents. If a request is ambiguous, unclear or otherwise ill defined, it does not comply with the Act and need not be processed. Finally, a request must be for documents and not just information as such because the Act is about access to information in documentary form.

In my view, for the reasons set out below, your FOI Request does not provide sufficient information for me to identify the documents you seek.

In my letter of even date seeking clarification of your other FOI request, I raised decisions of both VCAT and the Court of Appeal that held that requests cannot simply be for all documents that exist that refer to the applicant's name.¹ "Requests must be

¹ *Chopra v Department of Education and Training (Review and Regulation) (No 2) [2020] VCAT 932 at 76.*

for specific documents or groups of documents, not for every document in a broad category".² There needs to be specificity in identifying a "document or group of documents, or the nature or category of the documents being sought."³ Your Request seeks "all documents" "with" your name "or pertaining to" you and your "role at the FSC". Please provide further detail around the nature or the category of the documents that you are seeking.

Can you also please clarify what you mean by "with (your) name or pertaining to (you) and (your) role at the FSC". A document with your name could, as noted in my earlier letter, include a mere passing reference (e.g. a list of VicForests stakeholders, a list of the Board members of the FSC). A document "pertaining to you and your role as a director at the FSC" could include documents which are merely *relevant* to you in your capacity as a director (which is likely to be very broad and impossible for me to identify with any precision) or documents that include mere mention of the fact that you are a director of the FSC. Please provide further detail on the types of references to yourself that you are seeking.

Your Request is seeking documents that include those to or from VicForests staff. Again, as noted in my earlier letter, VicForests has many full time, part time and fixed term employees, in addition to contractors and consultants. Can you please confirm and clarify what you mean by "staff"?

In referring to "Victoria National Parks association", I have assumed you are referring to the incorporated association "Victorian National Parks Association", but grateful if you could confirm.

Finally, in requesting access to documents, you've also said "including those from the Chair". Can you please clarify whether you are also seeking documents sent to or received by the VicForests chair from either or both of Environment Victoria and/or the Victorian National Parks association.

In accordance with the *Professional Standards* issued by the Office of the Victorian Information Commissioner (OVIC) under the Act, an agency is required to provide an applicant with a minimum of 21 days from the date on which the agency notified the applicant that their request is not valid to begin consulting with the agency to clarify their request or to otherwise make their request compliant with s17 of the Act.

Accordingly, I invite you to either submit a clarified request or contact me by email at vfs.foi@vicforests.com.au to consult on Your Request so that it is in a form which complies with s17 of the Act and provides the information necessary to enable us to identify the documents sought by 5pm on Wednesday 13 October 2021. If I do not hear from you by this time, I will consider Your Request closed.

Until the Your Request complies with s17 of the Act it will not be processed and the 30-day time period within which a decision must be made will not commence to run.

I confirm that VicForests has received your payment of \$31 for the application fee (the application fee is \$30.06). VicForests will hold that fee on the assumption that you will provide an amended request, and consider the fee submitted with that amended

² *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at 6.

³ *Chopra v Department of Education and Training (Review and Regulation) (No 2)* [2020] VCAT 932 at 76.

request. Please let me know if you do not intend to provide an amended request and would like the fee refunded.

When clarifying Your Request with me or providing an amended request can you please also confirm whether you would like access to redacted documents (where exempt or irrelevant material is removed) or whether you only wish to be provided with complete documents. If such confirmation is not provided, I will assume that you only wish to have access to complete documents.

I look forward to hearing from you or receiving an amended request so that your application may be progressed.

Yours sincerely

[Redacted signature block]



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ABN 7684 6539 543

5 November 2021

[REDACTED]
[REDACTED]
[REDACTED]

By email only: [REDACTED]

Dear [REDACTED]



Freedom of Information Request

I refer to your Freedom of Information (FOI) requests received on 31 August 2021 for the following:

All documents from 1 January 2017 to 28 February 2021 that refer to (your) name and/or refer to (your) role as a member of the Board of the Forest Stewardship Council (FSC) which were sent to VicForests management and/or VicForests Board by one or more of the following:

- CPR Communications and Public Relations Pty Ltd;
- Monique Dawson;
- [REDACTED];
- [REDACTED];
- [REDACTED];
- VicForests staff;
- Clemenger Group and staff;
- Board Directors – [REDACTED] and [REDACTED];
- [REDACTED];
- [REDACTED] (sic);
- ANWE

(Your First August 2021 Request); and

All documents with (your) name or pertaining to (you) and (your) role at the FSC from June – August 2020 from Environment Victoria and/or Victoria (sic) National Parks association to VicForests staff or Board and from VicForests Staff or Board, including those from the Chair.

(Your Second August 2021 Request).

I also refer to the letter of 21 September 2021 from [REDACTED] of my staff seeking to clarify Your Second August 2021 Request and to your email of 6 October 2021 in

which you raise a complaint about the handling of your previous requests and seek to clarify Your Second August 2021 Request (as set out above).

It appears there may have been some confusion in terms of the timeline of the requests for access to documents that you have made since your 31 July 2020 request (dated 22 July 2020). A chronology has been attached as Annexure 1 to this letter that sets out your multiple requests and escalation of those to the Office of the Victorian Information Commissioner (OVIC) (Chronology).

Complaint about the processing of your FOI requests

As set out in the Chronology, we have received 4 separate FOI requests from you in the period July 2020 to date. VicForests is required to process each of these requests as a new and separate request. Your email of 6 October 2021 raises a number of complaints and comments which I will address below:

1. **"I have complied with everything you have requested previously in this request, including making it specific, making it shorter than my last 16 months of personal information requests (for which I have not received a single document) and making it narrower in timeline for VicForests to oblige."**

Your comment above refers to "this request". However, your email appears to be responding to [REDACTED] letter of 21 September 2021 seeking clarification of Your Second 31 August 2021 Request. That request is a new request and is required to be processed as such. No previous clarification has been sought on that request.

If you are referring to your requests as a collective, as set out in the Chronology, OVICs 16 August 2021 correspondence concluded Your July 2020 Request and OVICs Notice of Decision received on 30 September 2021 closed Your Further Amended March 2021 Request (each as defined in the Chronology) noting that VicForests was not required to process that request on the basis that it would substantially and unreasonably divert its resources from its other operations.

2. **"I have been told that to meet my legal requests it will cost more than \$200,000 to collect the information on me and as you know, the matter is now in a case with OVIC."**

You appear to be referring to the cost estimate as set out in [REDACTED] letter of 23 June 2021. That estimate relates to Your Further Amended March 2021 Request (as defined in the Chronology), not to either Your First 31 August 2021 Request or Your Second 31 August 2021 Request. As noted above, the result of OVICs decision of 30 September 2021 is that VicForests is not required to process Your Further Amended March 2021 Request. You have noted that "the matter is now a case with OVIC". OVICs decision was received prior to your email of 6 October 2021 so there is no longer a case before OVIC.

3. **As to whether I pursue VCAT, as you continually raise, will be a matter for consideration if you and your company fail to meet the requirements of the law. This is nudging a matter of Human Rights now."**

I'm not sure what you mean when you say that [REDACTED] has "continually raise(d)" VCAT. As part of processing FOI requests, an agency is required to notify an applicant of their various appeal and review rights. [REDACTED] 21 September letters seeking to clarify both your First and Second 31 August 2021 Requests only referred to VCAT by way of case law. Under s50(1)(b) of the *Freedom of Information Act 1982* (Vic) (**FOI Act**), you are entitled to apply to VCAT for a review of OVICs 30 September 2021 decision, but I trust that OVIC notified you of this fact when it notified you of its decision. That is a matter for you.

I also dispute that statement that there has been any failure by either [REDACTED] or VicForests to meet the requirements of the law. The FOI process as set out under the FOI Act is prescriptive and requires certain steps to be taken. Those steps have been taken and each of your separate requests have been dealt with on their individual merits as required.

4. "You have met my request with nearly a year and a half of holding letters and I feel victimised and despairing.... I will answer your requests again."

The letters that have been sent to you have not been "holding" letters as you categorise them. There have been many attempts to seek to clarify your various requests and to get to a position where you have a request that is in a form that is able to be processed. OVICs decision of 30 September 2021 makes it clear that this has not been successful to date.

Clarification

Turning now to the part of your 6 October email in which you respond to queries raised, I note that that email only addresses Your Second 31 August 2021 Request, it does not refer to [REDACTED] letter of 21 September 2021 seeking clarification of Your First 31 August 2021 Request. That letter sought a response by 13 October 2021. As no response has been received, that Your First 31 August 2021 Request will now be considered closed.

I'll now address the clarification of Your Second 31 August 2021 Request.

[REDACTED] letter of 21 September 2021 seeking clarification of Your Second August 2021 Request noted the following:

"Requests must be for specific documents or groups of documents, not for every document in a broad category".¹ There needs to be specificity in identifying a "document or group of documents, or the nature or category of the documents being sought."² Your Request seeks "all documents" "with" your name "or pertaining to" you and your "role at the FSC". Please provide further detail around the nature or the category of the documents that you are seeking.

Your response was as follows:

¹ *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246 at 6.

² *Chopra v Department of Education and Training (Review and Regulation)* (No 2) [2020] VCAT 932 at 76.

AS PER MY ORIGINAL REQUEST I AM ASKING FOR ALL DOCUMENTS RELATING TO ME (PERSONALLY) AND IN MY ROLE/CAPACITY AS A DIRECTOR OF THE FOREST STEWARDSHIP COUNCIL ANZ DURING THE TIME FRAME PREVIOUSLY SPECIFIED (JUNE 1 - OCTOBER 1 2020) THE NATURE OF WHICH DOCUMENTS ARE RELATED TO THE FOLLOWING CATEGORIES; INTERNAL EMAILS, BOTH PUBLIC AND PRIVATE LETTERS OF RESPONSE FROM THE VF CHAIR, LETTERS TO THE CHAIR AND BOARD IN RELATION TO A MATTER RELAYED BY THE BOARD OF THE VICTORIAN NATIONAL PARKS AUTHORITY, AND TO MAKE IT CLEARER, ENVIRONMENT VICTORIA. ALL RELATED WRITTEN DOCUMENTS, EMAILS, LETTERS (HARD COPY AND SOFT COPY) AND NOTES.

It is unclear what you mean when you say "as per my original request". To which of your previous requests are you referring?

Further, the timeframe given above, 1 June – 1 October 2020, differs from that set out in Your Second August 2021 Request, which was June – August 2020. Please confirm that, based on the above, you are extending out the date range for Your Second August 2021 Request to include September and 1 October 2020 so that Your Second August 2021 Request is now for the period identified in your 6 October 2021 email, (1 June 2020 – 1 October 2020).

In terms of the categories of documents, 'all "related" written documents' remains unclear and imprecise. From the context of Your Second August 2021 Request; being for "all documents" "from" (emphasis added) *Environment Victoria and/or Victoria (sic) National Parks association*" it would seem that this could be restricted to letters and emails from Environment Victoria and the Victorian National Parks Association (thank you for confirming that this is the correct entity) "*to VicForests staff or Board and from VicForests Staff or Board, including those from the Chair.*"

██████████ letter of 21 September 2021 seeking clarification of Your Second August 2021 Request also asked:

...please clarify what you mean by "with (your) name or pertaining to (you) and (your) role at the FSC". A document with your name could, as noted in my earlier letter, include a mere passing reference (e.g. a list of VicForests stakeholders, a list of the Board members of the FSC). A document "pertaining to you and your role as a director at the FSC" could include documents which are merely relevant to you in your capacity as a director (which is likely to be very broad and impossible for me to identify with any precision) or documents that include mere mention of the fact that you are a director of the FSC. Please provide further detail on the types of references to yourself that you are seeking.

Your response was:

WHY IS IT "LIKELY TO BE BROAD" GIVEN I HAVE PROVIDED A SHORT TIMELINE?

In referring to "broad", [REDACTED] letter wasn't referring to the span of time, it was referring to the part of Your Second 31 August 2021 Request for "All documents...pertaining to (you) and (your) role at the FSC (emphasis added)...from Environment Victoria and/or Victoria (sic) National Parks association to VicForests staff or Board and from VicForests Staff or Board, including those from the Chair. Clarification was being sought on what you meant by "pertaining to" you and "with" your name. Giving consideration to the definition of "pertaining", that can include documents that are "appropriate, related or applicable to" you. Something that is appropriate or applicable to you is not the same as something that is about you. Are you looking for documents that discuss you? Would a mere reference to your name (e.g. a list of directors of the FSC) make it relevant to include in any searches for documents or does any reference to you need to be more substantive than that? What context should references to you be in?

[REDACTED] letter of 21 September 2021 seeking clarification of Your Second August 2021 Request has asked you to clarify what you mean by "VicForests Staff", noting that VicForests has many full time, part time and fixed term employees, in addition to contractors and consultants. Your 6 October 2021 email has not addressed this. Please clarify what you mean by "VicForests Staff".

You were also asked to clarify "whether you are also seeking documents sent to or received by the VicForests chair from either or both of Environment Victoria and/or the Victorian National Parks association." Your response was "SENT AND RECEIVED BY THE CHAIR OF VICFORESTS". Your Second 31 August 2021 Request was only for documents "from (emphasis added) *Environment Victoria and/or Victoria (sic) National Parks association*", so documents sent by the Chair of VicForests would not be captured. Please clarify whether your intention here is to amend Your Second 31 August 2021 Request to be for documents both to and from Environment Victoria and the Victorian National Parks Association.

Given your engagement in the clarification process, I am willing to extend a further invitation to you to clarify Your Second 31 August 2021 Request so that it is in a form which complies with s17 of the FOI Act. Please submit a clarified request by 5pm on 26 November 2021. If we do not hear from you by this time, we will consider Your Second 31 August 2021 Request closed.

Until Your Second 31 August 2021 Request complies with s17 of the FOI Act it will not be processed and the 30-day time period within which a decision must be made will not commence to run.

Yours sincerely

[REDACTED]

[REDACTED]

[REDACTED]

Annexure 1

Chronology

DATE	EVENT
22 July 2020	FOI Application form received for “all particulars relating to (you), including, but not limited to; emails, transactions, letters, all advice, instructions to third parties, test messages, surveillance records, notes (digital and hand-written) and written records from January (sic) 2010 – August 2020. This date range captures the period of formal engagement that I have had with the company. This should include all draft documents or emails, personal and professional information” (Your July 2020 Request).
23 July 2020 – 31 July 2021	Emails exchanged between you and VicForests regarding payment of the correct application fee for Your July 2020 Request dated 22 July 2020. Payment of the application fee in full was received on 31 July 2020.
10 August 2020	Letter sent to you seeking to clarify Your July 2020 Request, seeking a crystalised end date and clarification of the meaning of “particulars relating to” you.
2 September 2020	Letter sent to you noting a lack of response to VicForests’ 10 August 2020 letter and noting that Your July 2020 Request will be closed in the absence of a response.
3 September 2020	Email received from you amending Your July 2020 Request as follows: “I would like material; photos, emails, texts, files, documents (both complete and incomplete) related to or with my my (sic) name in relation to surveillance undertaken pertaining to me. I would like all documents, emails, texts that relate to or with my name in relation to; public relations, social media and media, specifically covering work with third-party media and public relations entities. I would like all documents, emails, texts that relate to or with my name in relation to the Forest Stewardship Council (FSC). I would like all documents where redaction (sic) exist or not. I would like all documents that include my name, about my name and in relation to

	my name. I would like documents in relation to the conditions outlined above from July 31, 2008 to the date July 31, 2020".
15 September 2020	Letter to you advising of the closure of Your July 2020 Request following insufficient clarification.
15 September 2020	Email received from you asking for advice as to your avenue of review for Your July 2020 Request.
16 September 2020	Email to you noting that no review rights exist as Your July 2020 Request did not comply with s17 of the <i>Freedom of Information Act 1982</i> (Vic) (FOI Act) but advising that you have a right of complaint to OVIC under s61A of the FOI Act.
17 September 2020	Notification from OVIC that correspondence had been received from you.
12 October 2020	Formal notification from OVIC notifying VicForests that OVIC had accepted a complaint from you in relation to Your July 2020 Request (Your Complaint).
November 2020 – February 2021	Communications with OVIC regarding Your Complaint.
22 March 2021	New FOI request received from you for "any investigative documents including notes, reports, documents, texts that involve surveillance of (you). Any internal correspondence and briefings that discuss (you) by name and any documents in relation to the FSC that include (your) name from January 2009 to February 2021" (Your March 2021 Request).
24 March 2021	Letter sent to you acknowledging receipt of Your March 2021 Request.
8 April 2021	Letter sent to you seeking to clarify Your March 2021 Request and the types of documents being sought.
29 April 2021	Email received from you responding to VicForests' 8 April letter and amending Your March 2021 Request (Amended March 2021 Request).
10 May 2021	Letter sent to you in response to your 8 April email seeking to understand your Amended March 2021 Request.
13 May 2021	Email received from you confirming the scope of your Amended March 2021 Request save for one further inclusion (not previously mentioned) (Further Amended March 2021 Request).
18 May 2021	Letter to you seeking a date range for the addition to your Further Amended March

	2021 Request and raising a query.
24 May 2021	Email from you responding to VicForests' 18 May 2021 email providing the information sought thereby confirming the terms of your Further Amended March 2021 Request.
23 June 2021	Letter to you giving notice under s25A(6) of the FOI Act of an intention to refuse to process your Further Amended March 2021 Request on the grounds that processing it would substantially and unreasonably divert the resources of VicForests from its other operations and inviting you to consult and amend your Further Amended March 2021 Request to remove the grounds of refusal. That letter set out a detailed estimate of the likely cost to VicForests of processing your Further Amended March 2021 Request that was in the range of \$131,552.47 - \$149,218.65. That letter sought a response by 14 July 2021.
6 July 2021	Email received from you advising that you were "going to apply for the costs to be waived by the Minister(s), possibly with an application the Premiers office also" and seeking "an extension of time to continue this process".
7 July 2021	Email sent to you clarifying VicForests' letter of 23 June and seeking clarification as to whether you were intending to accept the invitation to consult.
13 July 2021	Email received from you amending and narrowing the scope of your Further Amended March 2021 Request.
20 July 2021	Decision letter sent to you formally refusing to process your Further Amended March 2021 Request under s25A(6) of the FOI Act noting that the amendments made were not sufficient to remove the grounds for refusal – processing that request would substantially and unreasonably divert the resources of VicForests from its other operations (The July 2021 Decision).
5 August 2021	Notification received from OVIC of an application received from you for a review of The July 2021 Decision. This date marks the commencement of OVICs review of your Further Amended March 2021 Request and The July 2021 Decision on that request.
16 August 2021	Notification received from OVIC that you

	had agreed to close Your Complaint (in relation to Your July 2020 Request). This date marks the closure of Your Complaint and Your July 2020 Request.
31 August 2021	<p>On this day, two new FOI requests were received from you.</p> <p>The first was for: "All documents from 1 January 2017 to 28 February 2021 that refer to (your) name and/or refer to (your) role as a member of the Board of the Forest Stewardship Council (FSC) which were sent to VicForests management and/or VicForests Board by one or more of the following: CPR Communications and Public Relations Pty Ltd Monique Dawson [REDACTED] [REDACTED] [REDACTED] VicForests staff Clemenger Group and staff Board Directors – [REDACTED], [REDACTED] [REDACTED] [REDACTED] (sic) [REDACTED] ANWE" (Your First 31 August 2021 Request).</p> <p>The second request was for: "All documents with (your) name or pertaining to (you) and (your) role at the FSC from June – August 2020 from Environment Victoria and/or Victoria National Parks association to VicForests staff or Board and from VicForests Staff or Board, including those from the Chair" (Your Second 31 August 2021 Request).</p>
21 September 2021	<p>On this day, VicForests sent you two letters.</p> <p>The first was seeking to clarify Your First 31 August 2021 Request. Amongst other queries raised, you were advised of decisions of both the Court of Appeal and VCAT that "have held that requests cannot simply be for all documents that exist over a lengthy period of time that refer to (an) applicant's name".</p> <p>The second letter was seeking to clarify Your Second 31 August 2021 Request. You were again referred to decisions of VCAT and the Court of Appeal, noting that</p>

	<p>"requests must be for specific documents or groups of documents, not for every document in a broad category".</p> <p>Both of those letters required responses by 13 October 2021.</p>
30 September 2021	<p>VicForests received OVICs Notice of Decision in relation to its review of The July 2021 Decision on your Further Amended March 2021 Request. OVICs decision was that it was satisfied that processing your Further Amended March 2021 Request would involve both a substantial and unreasonable diversion of VicForests' resources from its other operations and that VicForests was not required to process your Further Amended March 2021 Request. This date marks the conclusion of OVICs review of your Further Amended March 2021 Request and The July 2021 Decision on that request and closes that request.</p>
6 October 2021	<p>This is your most recent correspondence. Two emails were received, but you advised that the first was prematurely sent so I will treat them a singular. That email set out sections of VicForests' letter of 21 September 2021 seeking clarification of Your Second 31 August 2021 Request. It sought to clarify Your Second 31 August 2021 Request and raise matters of complaint.</p>

Our ref: [REDACTED]

21 December 2021

[REDACTED]

Via email: [REDACTED]

Dear [REDACTED]

Complaint regarding processing of a freedom of information request – preliminary view

Agency ref: N/A

Applicant: [REDACTED]

I refer to the complaint made by [REDACTED] under section 61A(1)(a) of the *Freedom of Information Act 1982* (Vic) (**FOI Act**) about a freedom of information request made to VicForests (the **Agency**) on 31 August 2021 (the **request**). I also refer to your letter on behalf of the Agency sent to the Applicant dated 5 November 2021 (**clarification letter**).

Scope of complaint

In an email to OVIC on 1 December 2021, you assert on behalf of the Agency that the complaint has not been validly made under section 61A(2) of the FOI Act, and consequently this office does not have jurisdiction to handle the complaint.

Having reviewed the correspondence on this matter I am satisfied I have jurisdiction to accept [REDACTED] complaint.

Preliminary view

The Agency decided not to process the Applicant's request finding that the request was still not clear after it was clarified by the Applicant. By letter dated 5 November 2021, the Agency stated:

Given your engagement in the clarification process, I am willing to extend a further invitation to you to clarify Your Second 31 August 2021 Request so that it is in a form which complies with s17 of the FOI Act. Please submit a clarified request by 5pm on 26 November 2021. If we do not hear from you by this time, we will consider Your Second 31 August 2021 Request closed.

Until Your Second 31 August 2021 Request complies with s17 of the FOI Act it will not be processed and the 30-day time period within which a decision must be made will not commence to run.

The Applicant's clarified request seeks access to:

All documents relating to me (personally) and in my role/capacity as a director of the forest stewardship council anz[sic] during the time frame previously specified (June 1 - October 1 2020) the nature of which

Freedom of Information | Privacy | Data Protection

documents are related to the following categories; internal emails, both public and private letters of response from the VF chair, letters to the chair and board in relation to a matter relayed by the board of the Victorian National Parks Authority, and to make it clearer, Environment Victoria. All related written documents, emails, letters (hard copy and soft copy) and notes.

Having reviewed correspondence between the Agency and the Applicant following the FOI request, my view is the clarified request is sufficiently clear to process in accordance with section 17 of the FOI Act in that it is confined to specific types of documents bearing the Applicant's name within a reasonable time period and relating to her role as a Director of the Forest Stewardship Council.

The Agency's options

The Agency is invited to consider the following options:

- process the Applicant's clarified FOI request; or
- provide a submission as to why the Agency considers the Applicant's clarified request is not clear, or why the Agency cannot conduct a search for documents captured by the clarified request.

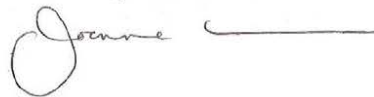
Please email [REDACTED] with the Agency's response and note reference number [REDACTED]. Please ensure you respond by **5 January 2022**.

Further information

For your information, Professional Standard 10.3 prescribes that an agency must respond to a request for documents and information within requested or agreed timeframes.

If you have any questions, please contact OVIC via telephone or email, using the details at the top of this letter.

Yours sincerely



Joanne Kummrow
Public Access Deputy Commissioner

From: [REDACTED]
To: "Complaints"
Bcc: [REDACTED]
Subject: RE: OVIC Complaint [REDACTED] (your ref: [REDACTED]) [SEC=OFFICIAL:Sensitive]
Date: Thursday, 23 December 2021 2:47:00 PM
Attachments: [image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)

Attention: Ms Joanne Kummrow

Dear Ms Kummrow

We refer to your letter of 21 December 2021.

That letter was sent in response to our email of 1 December 2021. You have stated that:

1. Our email of 1 December 2021 "asserts on behalf of the Agency that the complaint has not been validly made...and consequently [your] office does not have jurisdiction to handle the complaint."
2. Our firm sent a letter on behalf of the Agency to the Applicant on 5 November 2021.

With respect, we note the mischaracterisation of our email as follows. First, we have no record of a letter being sent by us to [REDACTED] on behalf of our client on 5 November 2021. Could you please provide us with a copy of the letter referred to in the first paragraph of your letter.

Further, our email raised a question about jurisdiction and sought a clearer statement setting out the nature of the complainant's complaint in sufficient detail for our client to understand with precision what is being alleged against it. The purpose for seeking more information was so that we could get appropriate instructions from our client about the matter, including about jurisdiction. Your letter fails to address the request for that information.

Any person or body against whom a complaint is made is entitled as a matter of natural justice to know with precision what is alleged against it *by a complainant*. This is reflected in the provisions in the FOI Act providing jurisdiction to the Information Commissioner to handle complaints and the prerequisites that must be satisfied before that jurisdiction is triggered.

The material contained in your letter does not appear in [REDACTED] written communications to your office which were provided to our client as the complete complaint. Neither in the material forwarded to our client notifying it of the "complaint" nor in your letter is the *actual* complaint of [REDACTED] articulated. Your letter merely assumes that there has been a validly made "complaint" in circumstances where you have been unable or unwilling to identify where in the complainant's material that "complaint" arises.

We renew our request that you provide a clearer statement of the complaint *as made in writing by the complainant* in sufficient detail for our client to understand with precision what is being alleged against it.

Please note that as the practitioner with the care and conduct of this matter, I will be away on leave from 24 December 2021 to 16 January 2021 inclusive. In those circumstances our client we will be unable to address any further information provided by you until after my return from leave. We will address any such material as soon as practicable after my return and once we are able to obtain instructions.

We look forward to hearing from you.

Yours sincerely

[REDACTED]

[REDACTED]

Our ref: [REDACTED]

20 January 2022

Mr Christopher Lovell
Chair of the Board
VicForests

By email only: vfs.admin@vicforests.com.au

Dear Mr Lovell

Complaint regarding processing of a freedom of information request made by [REDACTED]

I refer to the complaint made by [REDACTED] under section 61A(1)(a) of the *Freedom of Information Act 1982* (Vic) (FOI Act) concerning a freedom of information request made to VicForests (your Agency) and your Agency's letter to the Applicant dated 5 November 2021 (clarification letter).

I also refer to the lengthy correspondence between your legal representative and my office challenging my office's jurisdiction and making technical arguments about whether both the freedom of information request and complaint to my office are clear.

I correspond with you as the principal officer of your Agency – statutorily responsible to ensure your agency complies with its obligations under the FOI Act and the FOI Professional Standards.

Terms of the FOI request

The Applicant's FOI request, as clarified, is set out in their email of 6 October 2021:

All documents relating to me (personally) and in my role/capacity as a director of the forest stewardship council anz [sic] during the time frame previously specified (June 1 - October 1 2020) the nature of which documents are related to the following categories; internal emails, both public and private letters of response from the VF chair, letters to the chair and board in relation to a matter relayed by the board of the Victorian National Parks Authority, and to make it clearer, Environment Victoria. All related written documents, emails, letters (hard copy and soft copy) and notes.

Your Agency claims this FOI request is not sufficiently clear for your Agency to process.

In my view, it is clear the applicant seeks documents about herself, in a specific capacity, during a short, identified, timeframe.

Scope of complaint

The Applicant made a complaint to my office about this FOI request. She complained that despite having refined her FOI request as requested by your Agency, your agency refused to process her FOI request and

[Freedom of Information](#) | [Privacy](#) | [Data Protection](#)

did not comply with the FOI Act by raising technical objections. The complaint was provided to your Agency in its entirety.

Your Agency responded to this complaint with technical challenges to my office's jurisdiction and claims that the complaint is not clear enough to be progressed.

In my view, the Applicant's complaint is clear and my office has jurisdiction to entertain this complaint.

The Freedom of Information Act 1982

The object of the FOI Act is to create a general right of public access to information held by Victorian agencies, limited only by exemptions necessary to protect essential public interests, privacy and business affairs. Parliament intended the object of the FOI Act be furthered by agencies requiring that, as far as possible, agencies facilitate and promote disclosure of information in a timely manner and at the lowest reasonable cost.

In the context of this matter, section 17(3) of the FOI Act imposes a duty on agencies to assist a person who wishes to make a request to make a request in a manner that complies with the Act. That obligation is reinforced by Professional Standards under the FOI Act made by my office, including Professional Standard 2.4.

Part VIC of the FOI Act sets out the coercive powers available to me in responding to complaints under the FOI Act. Section 61U of the FOI Act provides that I may issue a notice for a person to attend an examination before me to give evidence under oath.

Part VIB of the FOI Act empowers me to, on my own motion, investigate the performance of, purported performance of, or failure to perform, functions and obligations under the FOI Act by an agency or principal officer.

Progressing this matter

On 21 December 2021, the Public Access Deputy Commissioner wrote to your Agency through your legal representative inviting your Agency to either:

- process the Applicant's clarified FOI request; or
- provide a submission as to why your Agency considers the Applicant's clarified request is not clear, or why your Agency cannot conduct a search for documents captured by the clarified request.

Your agency's legal representative declined to take either step, instead responding by re-agitating jurisdictional challenges and requesting the Deputy Commissioner provide "a clearer statement of the complaint as made in writing by the complainant in sufficient detail to understand with precision what is being alleged against it".

It is not for the Deputy Commissioner or my office to explain this complaint so that your agency can understand it "with precision".

In the circumstances, I once again invite your Agency to process the Applicant's FOI request and seek your response about whether your Agency will do so by 28 January 2022.

If your Agency declines to do so, I may take any or all of the following actions:

- Conclude this complaint, potentially by making and publishing a finding that your Agency breached the FOI Act or Professional Standards. In my view, your agency has spent more time and resources taking complex technical arguments and jurisdictional points than processing what I consider to be a reasonably simple freedom of information request.

- Issue a Notice under Part VIC of the FOI Act compelling you and an appropriate officer to attend an examination and answer questions on oath or affirmation about why you believe the freedom of information request and complaint are not clear enough to progress.
- Investigate your Agency's performance and capacity to progress what I consider to be a reasonably simple freedom of information request under Part VIB of the FOI Act.

You are also invited to provide relevant comments on why I should, or should not, take each of these actions.

Yours sincerely

Sven Bluemmel
Information Commissioner





27 January 2022

Mr Sven Bluemmel
Information Commissioner
Office of the Victorian Information Commissioner
PO Box 24274
MELBOURNE VIC 3001

Email: enquiries@ovic.vic.gov.au

Sent by: Email only
Our ref: [REDACTED]
Your ref: [REDACTED]

Dear Mr Bluemmel

Complaint by [REDACTED]
Your ref: [REDACTED]

We refer to your letter of 20 January 2022 sent directly to our client, VicForests, in relation to a complaint made to your office by [REDACTED] under the *Freedom of Information Act 1982* ("FOI Act").

Preliminary matters

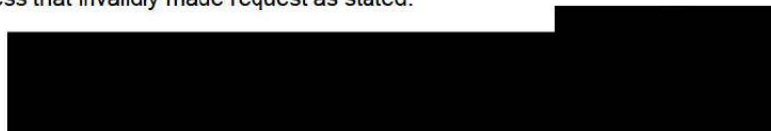
Our client is concerned that, in circumstances where your office was clearly informed that our firm acts on its behalf as its agent, you have chosen to address your letter directly to our client. As [REDACTED] acts as agent for VicForests in this matter, please direct any future communications about this matter to [REDACTED].

We are instructed that while our client acknowledges that a complaint has been made to your office, the terms of the complaint made by [REDACTED] are unclear and have not been particularised to our client despite our requests to your office. It appears the complaint is connected to an email to our client and copied to your office dated 6 October 2021. Our client responded to that communication from [REDACTED] in a detailed letter dated 5 November 2021. Our client provided a copy of that letter to your office.

Despite our clients' position on the validity of the request, in the genuine spirit of assisting you to resolve the complaint from [REDACTED], our client provides the response set out in the remainder of this letter.

Summary

In summary, for the reasons set out in this letter, VicForests maintains that the applicant's request for access as set out in their email of 6 October 2021 was not validly made in accordance with s 17(2) of the FOI Act. Accordingly, our client does not propose to process that invalidly made request as stated.



However, in order to assist with the resolution of this matter, our client seeks your assistance to ascertain from the applicant whether the applicant seeks access to documents according to a suggested re-wording of the proposed request (as set out later in this letter). If so, and the complaint is withdrawn, our client will entertain a fresh request being made to it in those precise terms by [REDACTED], in writing (s 17(1)), and our client would not seek a further application fee.

Detailed response

We disagree with the view that our client's concerns about the intended request are technical objections. Further, and with respect, your position that the applicant "seeks documents about herself, in a specific capacity, during a short, identified, timeframe" takes a simplistic view of the language in the intended request and does not recognise the detail (which our client maintains is unclear) in the language of the application. .

A simple examination of the terms of the request, in circumstances where all words used are to be given some meaning, and taking a broad interpretation, result in the intended request not providing such information as is reasonably necessary under s 17(2) of the FOI Act.

An agency such as our client should not be left guessing what documents are sought where there is clear ambiguity in the terms of the request and reasonable steps have been taken to seek to clarify the request. Similarly, an agency ought not presume to know what is being sought where there is ambiguity in the terms of the request.

As stated by His Honour Judge Misso:

"It is not the task of the responsible officer to try to tease out from such a request what the applicant might be getting at. Firstly, for the responsible officer to do that would be a failure on the part of that responsible officer to undertake the statutory task set by section 17(2), and secondly, the responsible officer might inadvertently provide documents which are not what the applicant was seeking which would inevitably lead to unnecessary and possibly protracted correspondence between the applicant and the responsible officer in an effort to try to work out what is constituted by the request, and at worst the making of an unnecessary application for review."¹

For the reasons set out below, the applicant set a near impossible task for VicForests in endeavouring to determine what the request sought in order to provide access to *all documents*. This is so bearing in mind that the responsibility rests on the applicant to strive to define with as much precision as the applicant can what it is she wants.²

[REDACTED]' intended request as per her email of 6 October 2021 was as follows:

All documents relating to me (personally) and in my role/capacity as a director of the forest stewardship council anz [sic] during the time frame previously specified (June 1 - October 1 2020) the nature of which documents are related to the following categories; internal emails, both public and private letters of response from the VF chair, letters to the chair and board in relation to a matter relayed by

¹ *Zeqaj v Victoria Police* [2010] VCAT 1132, [31].

² *Id*, [34]-[35].

the board of the Victorian National Parks Authority, and to make it clearer, Environment Victoria. All related written documents, emails, letters (hard copy and soft copy) and notes.

It is clear from the first sentence that:

1. The applicant sought "All documents...the nature of which documents are related to the following categories. There then follows a number of categories. In short, it is not a request for all documents. It is for specific categories of documents.
2. The categories of documents sought which appear to be clear are:
 - internal emails
 - letters from the VicForests chair
 - letters to the chair *and* the board in relation to a matter relayed by the Board of the Victorian National Parks Authority (although it is understood that "Authority" was intended to be read as "Association").
3. However, what is not clear is:
 - (a) whether the applicant sought letters that were directed to the chair *or* the board, as well as letters that were directed to the chair *and* the board;
 - (b) what letters from the VicForests Chair are sought as the terms of the application are "letters in response" – in response to what?
 - (c) what is meant by the last part of the first sentence, namely, "and to make it clearer, Environment Victoria". What category of documents is this a reference to given all the preceding words in the first sentence? Is it meant to somehow narrow and confine the reference to the "Victorian National Parks Authority"?
 - (d) what is meant by the words "in relation to matters relayed by" either of the above mentioned organisations? Is it anything or is reference to matters supposed to somehow limit what the applicant seeks?

Even if the first sentence was otherwise considered clear (which is denied), the second sentence introduces a further level of confusion and uncertainty which makes the request impossible to interpret and understand. Having just completed a list of categories of documents sought, the words in the last sentence create confusion. The request refers to "(a)ll **related** written documents, emails, letters....and notes" (emphasis added), but it is not clear to what they are related.

Proposed way forward

Our client suggests the following re-wording of the request by the applicant:

"I seek the following categories of documents dated between 1 June 2020 to 1 October 2020 inclusive, that refer to me by name:

- internal emails;
- letters from the VicForests Chair;
- letters to the Chair or Board of VicForests (or both) received from the Board of the Victorian National Parks Association;
- letters to the Chair or Board of VicForests (or both) received from Environment Victoria."

In order to assist with the resolution of this matter, our client seeks your assistance to ascertain from the applicant whether the applicant seeks access to documents according to the suggested re-worded request (above). If so, and the complaint is withdrawn, our client will entertain a fresh request being made to it in those precise terms by [REDACTED], in writing (s17(1)), and our client would not seek a further application fee.

We look forward to hearing from you in due course.

Yours sincerely

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]



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