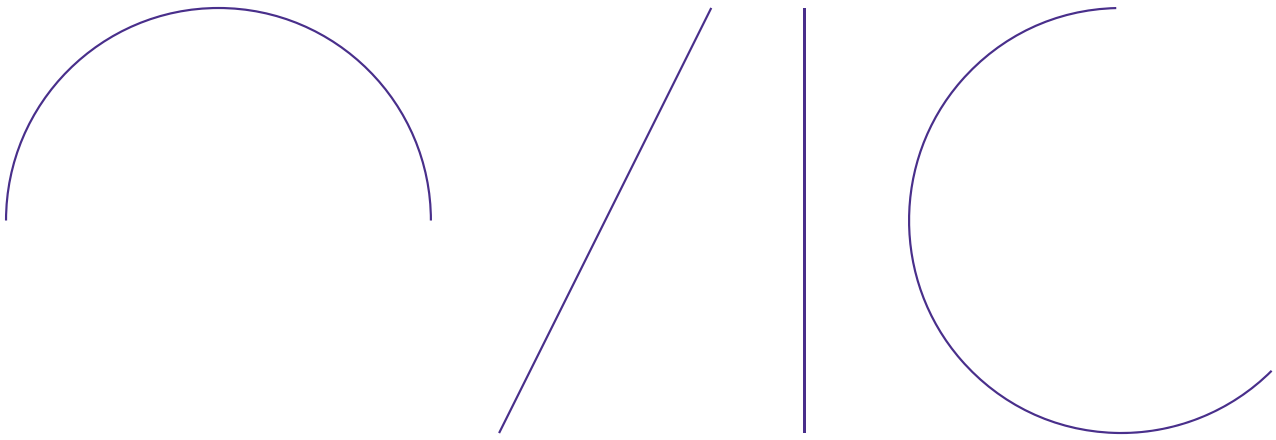
Office of the Victorian Information Commissioner

Part III – Access to documents

Freedom of Information Guidelines

FREEDOM OF INFORMATION



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References to legislation

All legislative references are to the *Freedom of Information Act 1982* (Vic) (**the Act**) unless otherwise stated.

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Section 13 – Right of access

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13 Right of access

Subject to this Act, every person has a legally enforceable right to obtain access in accordance with this Act to—

(a) a document of an agency, other than an exempt document; or

(b) an official document of a Minister, other than an exempt document.

Guidelines

Purpose and effect of the right of access in section 13

1.1. Any person has a legally enforceable right to seek access to documents of Victorian government agencies and official documents of Victorian Government Ministers.[1] However, the right of access is not absolute and it is subject to other provisions in the Act. For example, the right of access does not apply to an exempt document.[2]

1.2. Read together with section 16 and the Act's object in section 3, section 13 gives every person a 'broad and ready right of access',[3] that is limited only by exceptions and exemptions in the Act that are necessary for the protection of essential public interests, or the protection of a person's private and business affairs.

What does 'in accordance with this Act' mean?

1.3. The right of access 'in accordance with this Act' means the right is only enlivened and enforceable if the procedures in the Act are followed.[4] The Act sets out when the right of access is enlivened and what steps must be satisfied before access to a document is granted.

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[1] *Freedom of Information Act 1982* (Vic), section 13.

[2] The exemptions are contained in Part IV.

[3] *Kelly v Department of Treasury & Finance* [2002] VCAT 1019, [29].

[4] *Wallace v Health Commission (Vic)* [1985] VR 403.

1.4. For example, the right of access is only enlivened when a valid request for access is made under section 17.[5] 'Valid' means the request meets the requirements in section 17.

1.5. Similarly, an agency or Minister may require an applicant to pay access charges before access may be given.[6] The applicant must pay these charges before access is provided.[7]

What does 'subject to this Act' mean?

1.6. The phrase 'subject to this Act' refers to the exceptions and exemptions in the Act that allow agencies and Ministers to refuse access to documents in certain instances. For example, a document may not be subject to the Act because of section 14 (where the document is available for purchase or is part of a public register), or it may be an exempt document under Part IV.[8]

Who may make an FOI request?

1.7. Every person may make an FOI request. 'Person' means an individual, a body politic or corporate.[9] This means an organisation or company can make a request, in addition to individuals.

1.8. The right is granted to every person, singular, not persons, plural. This means the right of access cannot be exercised jointly by two or more persons.[10] For example, a partnership cannot exercise the right of access under the Act, because it is not an individual, body politic or corporate.[11]

Individuals

1.9. An adult or a child may make a request. However, the person making the request must have sufficient capacity to understand the nature and significance of making a request, and wish to make the request.[12]

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[5] *Wallace v Health Commission (Vic)* [1985] VR 403.

[6] Section 22 and the *Freedom of Information (Access Charges) Regulations 2014* relate to access charges.

[7] *Freedom of Information Act 1982* (Vic), section 20.

[8] However, section 16(2) outlines an agency or Minister may provide access to exempt documents where they can or are required by law to.

[9] *Interpretation of Legislation Act 1984* (Vic), section 38.

[10] *Apache Energy Pty Ltd and National Offshore Petroleum Safety and Environmental Management Authority and Lander & Rogers Lawyers* [2012] AATA 296, [94]; cited in *Moorabool Shire Council v Environment Protection Authority* [2021] VCAT 1261, [32].

[11] *Interpretation of Legislation Act 1984* (Vic), section 38. However, a law firm that is a partnership can make a request if it is made on behalf of a client and the client is a 'person. The request would be made by the client, not the law firm.

[12] *Wallace v Health Commission (Vic)* [1985] VR 403.

Agencies

1.10. While an agency can make a request to another agency for documents in the other agency's possession,[13] the request must be made by a 'person' on behalf of the agency for the right of access to be enlivened.[14]

1.11. A Council is a 'person' because it is a body corporate under section 14(1) of the Local Government Act. Councils can therefore make requests for access under the Act.[15]

Giving reasons for a request

1.12. A person does not need to give reasons for or explain why they would like access to a document to have the right to make a request under the Act.[16] A person's right to make a request applies regardless of their interest in, or motivation for, seeking access to a document.[17]

1.13. However, a person's reasons for seeking access to a document may become relevant later in the FOI process. For example:

- if the intended use of the document is a use of general public interest or benefit, this may be relevant to deciding whether to waive access charges under section 22;[18]
- when deciding whether release of personal information about a person other than the applicant would be reasonable in the circumstances; or
- an applicant's intended use of the document may assist an agency or Minister to determine whether access can be provided informally outside of the Act under section 16.

[13] *Moorabool Shire Council v Environment Protection Authority* [2021] VCAT 1261.

[14] *Interpretation of Legislation Act 1984* (Vic), section 38; *Moorabool Shire Council v Environment Protection Authority* [2021] VCAT 1261.

[15] *Moorabool Shire Council v Environment Protection Authority* [2021] VCAT 1261.

[16] *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 495, [26].

[17] *Sobh v Police Force* [1994] 1 VR 41, per Nathan J; *Ryder v Booth* [1985] VR 869, 875; Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 1982, 1063 (John Cain, Premier of Victoria), available here.

[18] *Freedom of Information Act 1982* (Vic), section 22(1)(h)(i).

What can be requested under FOI?

1.14. The right of access is to a document. 'Document' is defined broadly in section 5(1) to include any distinct record of information in any form and however stored, whether in physical, electronic or digital form.[19]

1.15. The right does not include access to information.[20] A document is different to information.

> **Example**
>
> Asking a water authority if it entered into a water by agreement on a particular property is a request for information.
>
> A request for a water agreement on a specific property is a request for a document, which a person has the right to request access to.

1.16. There may be situations where section 19 requires an agency or Minister to create a document containing the requested information, to satisfy a request. For example, extracting information from a database and producing a document containing the information.

1.17. The right of access does not apply to an exempt document or a document that is excluded from the operation of the Act.[21] If an agency or Minister decides that a document is exempt or is excluded under the Act, they may refuse access to it. If this happens, the person making the request will receive review and complaint rights in relation to the request.[22]

1.18. Even if an agency or Minister considers a document is exempt, the Act does not say agencies or Ministers cannot disclose exempt documents.[23] An agency or Minister has a discretion to release an exempt document under section 16.

1.19. There are some instances where a document may be excluded from the operation of the Act, meaning access cannot be provided under the Act. For example, this includes:

- documents in the possession of OVIC relating to FOI reviews, FOI complaints, and investigations (section 6AA);

[19] See *Monash University v EBT* [2022] VSC 561.

[20] *Schorel v Community Services Victoria* (Administrative Appeals Tribunal (Victoria), Dimtscheff DP, 10 October 1989).

[21] An exempt document is defined in section 5(1), and includes a document to which provisions in Part IV apply.

[22] See Part VI and VIA for more information on review rights and complaint rights, respectively.

[23] Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 1982, 1062 (John Cain, Premier of Victoria), available here.

- documents that are available to the public under other access arrangements (section 14); and
- where another law excludes a document from the operation Act (see 'How does the right of access in the Act interact with other State and Commonwealth laws?' below for more information).

How does the right of access in the Act interact with other State and Commonwealth laws?

State laws

Another law may exclude a document from the operation of the Act

1.20. Another law may exclude a document from the operation of the Act, meaning an agency or Minister cannot provide access to that document under the Act.

Examples

In broad terms, section 29A of the *Ombudsman Act 1973* (Vic) excludes documents held by any person or body that would disclose information relating to the work of the Victorian Ombudsman.

Other examples include:

- section 194 of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic),
- section 78 of the *Public Interest Disclosures Act 2012* (Vic),
- section 174K of the *Firearms Act 1996* (Vic),
- section 49 of the *Australian Grands Prix Act 1994* (Vic).[24]

1.21. If an agency or Minister decides a document is excluded under the Act, the agency or Minister may refuse access to it. If this happens, the person making the request will receive review and complaint rights in relation to the request.

[24] *Stewart v Australian Grand Prix Corporation* [2008] VCAT 167.

The Charter of Human Rights and Responsibilities

1.22. Under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), agencies and officers performing functions and making decisions under the FOI Act need to act compatibly with each of the human rights in the Charter and consider those rights when making a decision, unless the limitation of the right is necessary and reasonable.

1.23. The Charter requires that legislation is to be interpreted, as far as it is possible to do so, in a way that is compatible with human rights.[25]

1.24. Where the words of a statutory provision are capable of more than one meaning, courts and tribunals must give the words of the statute the meaning which best aligns with relevant human rights as far as it is possible to do so consistently with the purpose of the statutory provision.[26] Notwithstanding this, section 32(1) of the Charter does not affect an Act or provision of an Act that is incompatible with a human right.[27]

1.25. The right to freedom of expression in section 15(2) of the Charter, in particular the right to seek and receive information and ideas, includes a positive right to access information held by the government.[28]

1.26. The Act should be interpreted, so far as is consistent with its purpose, in a way that is compatible with human rights.

Commonwealth laws

1.27. The right of access does not apply to information in a document that a Commonwealth law prohibits from being disclosed. Generally, this arises where a Commonwealth law has a secrecy or confidentiality provision that applies to the information.

1.28. This is based on section 109 of the *Commonwealth Constitution*, which provides that a Commonwealth law prevails where there is an inconsistency between a State law or a Commonwealth law.

Example

[25] *Charter of Human Rights and Responsibilities Act 2006 (Vic),* section 32(1).

[26] See *Slaveski v Smith* [2012] VSCA 25; (2012) 34 VR 206, 215 [24] citing *Momcilovic v Queen* (2011) 245 CLR 1, 45-50, [40-50] (French CJ). *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 32(1).

[27] *Charter of Human Rights and Responsibilities Act 2006* (Vic), section 32(3).

[28] *XYZ v Victoria Police* [2010] VCAT 255 (16 March 2010) (Bell J).

In *Selzer v Police* [2005] VCAT 2593, the applicant could not access certain warrant information held by Victoria Police because the *Telecommunications (Interception) Act 1979* (Cth) prohibited its disclosure.

More information

For information on how to make a request under the Act, see section 17 – Requests for access.

Section 14 – Part not to apply to certain documents

Extract of legislation

14 Part not to apply to certain documents

(1) A person is not entitled to obtain access under this Part to—

(a) a document which contains information that is open to public access, as part of a public register or otherwise, in accordance with another enactment, where that access is subject to a fee or other charge;

(b) a document which contains information that is available for purchase by the public in accordance with arrangements made by an agency; or

(c) a document that is available for public inspection in the Public Record Office of Victoria;

(d) a document which is stored for preservation or safe custody in the Public Record Office of Victoria being a document which is a duplicate of a document of an agency.

(2) A document, other than a document of an agency, that has been placed in the custody of the State Library of Victoria or the Public Record Office of Victoria by a person (including a Minister or former Minister) shall be available to the public in accordance with this Act, subject to any restrictions or conditions imposed by the person at the time the document was placed in the custody of the State Library or the Public Record Office, as the case may be.

(3) Subsection (2) shall apply to a document, other than a document of an agency, which was placed in the custody of the State Library of Victoria or the Public Record Office of Victoria before the date of commencement of this section as if that document had been so placed in the custody of the institution concerned after the date of commencement of this section.

Guidelines

Purpose and effect of section 14

1.1. The purpose of section 14(1) is to ensure government information, which is available via another means of public access, is not subject to access under the Act. For example, a title search or marriage certificate are documents available from an agency for a fee.

1.2. Broadly, section 14(1) excludes from the operation of the Act, documents that are available to the public under other access arrangements.[29] This means that the right of access does not apply to documents that fall within one of the categories in sections 14(1)(a)-(d).

1.3. Section 14(1) is not an exemption. It aims to reduce duplication of ways to access the same document.[30]

1.4. If section 14(1) applies to a document, the agency must advise the applicant how the document can be accessed.[31] For example, by directing the applicant to the appropriate agency or website from which the applicant may apply for access.

Documents that contain information open to public access: section 14(1)(a)

1.5. Section 14(1)(a) applies to documents that contain information open to public access as part of a public register or otherwise, in accordance with other legislation, where that access is subject to a fee or other charge.

1.6. Documents falling within section 14(1)(a) cannot be accessed under the Act.

Elements

1.7. A document falls within section 14(1)(a) if three elements are met:

1. the information in the document must be open to public access as part of a public register or in another way;

2. there must be an enactment other than the FOI Act that governs how a person may access that information;[32]

3. access to the information must be subject to a fee or other charge (for example, an application or access fee).

[29] See *Lester v Commonwealth Scientific and Industrial Research Organisation* [2014] AATA 646, [22] where the AAT held that the equivalent provision in the Commonwealth FOI Act, section 12, was to 'exclude those documents that are available via other means'.

[30] *Smeaton v Transport Accident Commission (Review and Regulation)* [2017] VCAT 1486, [42].

[31] Professional Standard 1.2.

[32] 'Enactment' is defined in section 5(1) as "an Act or an instrument (including rules, regulations, local laws or by-law) made under an Act". 'Act' means legislation passed by the Parliament of Victoria, not another State, Territory or Commonwealth Act. *Interpretation of Legislation Act 1984* (Vic), section 38.

Information must be the same

1.8. The information that is 'open to public access' must be the same as the information being requested. If the requested information contained in a document is different in any way to information that is publicly accessible, section 14(1)(a) will not apply.[33]

Example of a document falling with section 14(1)(a)

Secretary to the Department of Justice and Community Safety v Rounds [2020] VCAT 649

Background

The applicant made a request to the agency for various documents relating to the handling of complaints by Consumer Affairs Victoria. Some of the documents falling within the request related to VCAT proceedings.

Under section 146(3) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (**VCAT Act**) a party may obtain a copy of any part of a VCAT proceeding file on payment of the prescribed fee. The prescribed fee under rule 13(b) of the *Victorian Civil and Administrative Tribunal (Fees) Regulations 2016* (Vic) (**VCAT Regulations**) is 60 cents per page.

Decision

Documents in VCAT proceeding files fall within the scope of section 14(1)(a) because:

- they are open to public access;
- under other legislation, being the VCAT Act and VCAT Regulations;
- upon payment of the prescribed fee, as specified in rule 13(b) of the Regulations.

As the documents fell within section 14(1)(a), they could not be accessed under the FOI Act.

Documents that contain information available for purchase: section 14(1)(b)

1.9. Section 14(1)(b) applies to documents containing information available for purchase by the public in accordance with arrangements made by an agency.

1.10. Documents falling within section 14(1)(b) cannot be accessed under the Act.

[33] *Re Arnold Bloch Leibler v Department of Planning & Housing* (1993) 5 VAR 600.

Document 'available for purchase by the public'

1.11. 'Available for purchase by the public' means the public generally. Section 14(1)(b) does not require that every person can in fact purchase the information.[34]

> **Example**
>
> In *McKechnie v Office of the Chief Parliamentary Counsel [2020] VCAT 506*, information was found to be available for purchase by the general public, and fell within section 14(1)(b), even though the applicant's ability to purchase the information was constrained by his detention and the rules of the prison.

1.12. However, the information must be accessible to the public at large, not just to a defined class of people.[35]

> **Example**
>
> In *Towie v Medical Practitioners Board of Victoria [2004] VCAT 2545*, section 14(1)(b) did not apply to a transcript of a hearing conducted by a medical panel because it was not shown that anyone other than the parties to the proceeding had a right to purchase the transcript.

'In accordance with arrangements made by an agency'

1.13. 'Arrangements made by an agency' refers to administrative or other arrangements an agency has in place to manage access to the document. For example, an application process on an agency's website where a person may apply for access and pay a fee to purchase a copy of a document.

Example of a document falling within section 14(1)(b)

'AC4' and Victoria Police (Freedom of Information) [2019] VICmr 22 (18 April 2019)

Background

The applicant requested access to traffic accident reports from the agency.

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[34] *McKechnie v Office of the Chief Parliamentary Counsel* [2020] VCAT 506, [27].

[35] *Towie v Medical Practitioners Board of Victoria* [2004] VCAT 2545, [28]; *McKechnie v Office of the Chief Parliamentary Counsel* [2020] VCAT 506, [29].

Decision

The requested traffic accident reports fell within the scope of section 14(1)(b) because:

- the agency provides a service to persons who wish to obtain information about traffic accidents that occur in Victoria and are reported to it;
- the service is available to the public; and
- a person may apply for access by submitting a form and paying the application fee.[36]

As the documents fell within section 14(1)(b), the applicant could not receive access under the Act.

Documents available for public inspection in the Public Record Office of Victoria: section 14(1)(c)

1.14. Section 14(1)(c) applies to documents that are available for public inspection in the Public Record Office of Victoria (**PROV**).

1.15. Documents falling within section 14(1)(c) cannot be accessed under the Act because they are already available for public inspection.

1.16. However, section 14(1)(c) does not apply to documents in PROV's collection that are 'closed' or 'restricted' records.[37]

Public Record Office Victoria

1.17. PROV is the archive of the State Government of Victoria for public records of permanent value.[38]

1.18. The Public Records Act requires agencies to transfer public records to PROV that are 25 years or older and which are no longer readily required by the agency.[39]

[36] Victoria Police, *Traffic Accident Reports* (Web Page, 21 November 2023) https://www.police.vic.gov.au/traffic-accident-reports.

[37] For further information about closed and restricted records see Public Records Office Victoria, *Closed records* (Web Page, 21 November 2023) https://prov.vic.gov.au/closed-records.

[38] Public Record Office Victoria, *About us* (Web Page, 21 November 2023) https://prov.vic.gov.au/about-us.

[39] *Public Records Act 1973* (Vic), section 8A.

1.19. Digitised public records are available on PROV's website, and hard copy public records are available to view in PROV's reading rooms on request.[40]

Documents stored for preservation or safe custody: section 14(1)(d)

1.20. Section 14(1)(d) applies to documents stored for preservation or safe custody in PROV that are duplicates of documents in the possession of an agency.

1.21. Documents that fall within section 14(1)(d) cannot be accessed under the Act. Instead, a person may apply for access under the Act to the agency who holds the duplicate document. This helps to streamline requests for access to duplicate documents, by ensuring that requests are made to the agency holding the document, not to PROV.

Documents in the custody of the State Library or PROV which are not a document of an agency: sections 14(2) and 14(3)

1.22. The purpose of section 14(2) is to ensure that non-agency documents placed in the custody of the State Library of Victoria or PROV can be accessed under the Act, subject to any restrictions or conditions imposed by the person, when the document was placed in the custody of the State Library or PROV.

1.23. Section 14(2) only applies to documents that are not documents of an agency.

Example

The Keeper of Public Records considers a document worthy of preservation and purchases the document. They place the document in the custody of PROV for safe keeping, on condition that it must not be copied and may only be inspected behind a glass cabinet.[41]

The document is not a document of an agency because it was purchased by the Keeper of Public Records. The document is in the custody of PROV.

This means the document falls within section 14(2) and can be accessed under the Act. Access will be subject to the conditions on access imposed by the Keeper of Public Records to not copy the document and only permit inspection behind a glass cabinet.

[40] Public Records Office Victoria, *Where to start?* (Web Page, 21 November 2023) https://prov.vic.gov.au/explore-collection/where-start.

[41] *Public Records Act 1973* (Vic), section 15(1).

What if the document was placed in the custody of the State Library of Victoria or PROV before the Act commenced?

1.24. Section 14(3) clarifies that section 14(2) applies to documents placed in the custody of the State Library of Victoria or PROV prior to and after the commencement of the Act.

Section 15 – Documents in the Public Record Office

Extract of legislation

15 Documents in the Public Record Office

(1) For the purpose of this Act, a document, other than a document of the kind referred to in section 14(1)(c), that has been placed in the custody of the Public Record Office of Victoria by an agency shall be deemed to be in the possession of that agency or, if that agency no longer exists, the agency to the functions of which the document is most closely related.

(3) Section 9, section 10, section 10AA and sections 23(a) and 23(c) of the **Public Records Act 1973** shall not be read so as to prevent a person from obtaining access to a document in the custody of the Public Record Office of Victoria to which that person may obtain access in accordance with this Act.

(5) Subsection (1) shall apply to a document which was placed in the custody of the Public Record Office of Victoria before the date of commencement of this section as if the document had been so placed after the date of commencement of this section.

(6) For the purposes of this Act, a document that has been placed by an agency (including the Public Record Office) in a place of deposit appointed in accordance with section 14 of the **Public Records Act 1973** shall be deemed to be in the possession of that agency or, if that agency no longer exists, the agency to the functions of which the document is most closely related if that agency concerned is entitled to access to the document.

(7) Subsection (6) shall apply to a document which was placed in a place of deposit before the commencement of this section as if the document had been so placed after the date of commencement of this section.

Guidelines

Purpose of section 15

1.1. The Act applies to documents that are in the Public Record Office of Victoria's (**PROV**) possession, except for documents available for public inspection in PROV.[42]

[42] *Freedom of Information Act 1982* (Vic), section 15. Documents available for public inspection in PROV are excluded from access under section 14(1)(c).

Documents transferred by an agency and held by PROV: sections 15(1) and 15(6)

1.2. Documents that are transferred by an agency and held by PROV are taken to be held by the transferring agency, even though PROV physically holds the transferred documents.[43]

1.3. This means an agency that transfers a document to PROV, or a place of deposit, is responsible for handling requests for access for the transferred document because it is a document in the possession of the agency (unless the document is available for public inspection at PROV).[44]

1.4. If an agency no longer exists, the agency whose functions most closely relate to the document will be taken to have possession of the document.

What is a 'place of deposit'?

1.5. Section 15(6) applies to a 'place of deposit'. A 'place of deposit' is a facility or area authorised by the Keeper of Public Records to store State archives on its behalf. These facilities or areas must have been appointed by the Minister as a place of deposit for temporary records.[45]

1.6. Section 15(6) applies where an agency has transferred a document to a place of deposit. The transferring agency (or, if that agency no longer exists, the agency whose functions most closely relate to the document) is taken to be in possession of the document and must handle requests for access for the document.

Documents placed in PROV's custody or place of deposit before the Act commenced: sections 15(5) and (7)

1.7. Even if a document was placed in the custody of PROV or place of deposit before the Act commenced, section 15 still applies and the document is taken to be in the agency's possession.[46]

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[43] *Freedom of Information Act 1982* (Vic), sections 15(1) and 15(6).

[44] This would exclude the document from access under section 14(1)(c).

[45] Under section 14 of the *Public Records Act 1973* (Vic), the Minister may appoint a place outside PROV as a place of deposit for any specified class of public records provided it appears to the Minister that the place is suitable for the safe-keeping and preservation of public records.

[46] *Freedom of Information Act 1982* (Vic), sections 15(5) and 15(7).

Seeking access to a document in the custody of PROV: section 15(3)

1.8. The Public Records Act does not prevent a person from obtaining access to a document in PROV's custody in accordance with the FOI Act.[47]

[47] *Freedom of Information Act 1982* (Vic), section 15(3).

Section 16 – Access to documents apart from Act

Extract of legislation

16 Access to documents apart from Act

(1) Ministers and agencies shall administer this Act with a view to making the maximum amount of government information promptly and inexpensively available to the public.

(2) Nothing in this Act is intended to prevent or discourage Ministers and agencies from publishing or giving access to documents (including exempt documents), otherwise than as required by this Act, where they can properly do so or are required by law to do so.

Relevant FOI Professional Standards

Professional Standard 1.1	An agency must consider whether a document in its possession, that is requested under the Act, can properly be provided to an applicant outside the Act.
Professional Standard 1.2	Where a document in the possession of an agency can properly be provided to an applicant outside the Act, the agency must either: (a) facilitate access to the document; or (b) advise the applicant how the document can be accessed. *Note: facilitating access to a document may include providing a copy, arranging inspection or viewing or otherwise providing access to the document. An applicant may otherwise be advised that access to a document can be obtained via another method such as a statutory release scheme or for purchase.*

Guidelines

Purpose and effect of section 16

1.1. Section 16 facilitates the proactive and informal release of information to the public by encouraging and permitting agencies and Ministers to provide access to as much information as possible, even if that information is exempt from release under the Act. It encourages agencies to provide the public with anything which it may legitimately provide.[48]

1.2. The effect of this section, in combination with sections 3 and 13, is to provide the public with a broad and ready right of access to information.[49] This broad right of access is subject to the requirements in section 17 in making a valid request.[50]

1.3. However, section 17 does not apply to documents provided by an agency or Minister to an applicant outside the Act. This means a request does not have to meet the requirements in section 17 for the agency or Minister to provide access to documents outside of the Act.

Administering the Act from a pro-disclosure standpoint: section 16(1)

1.4. An agency or Minister must administer the Act from a pro-disclosure standpoint.

1.5. An agency or Minister must administer the Act with a view to making the maximum amount of government information promptly and inexpensively available.[51] That is, to extend as far as possible the right of the community to access information in the possession of government.[52]

1.6. This reinforces Parliament's intention in section 3(2) to interpret the Act to further its object and to exercise discretions in a way that facilitates access to information.

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[48] *Penhalluriack v Department of Labour and Industry* (County Court of Victoria, Lazarus J, 19 December 1983) 27.

[49] *Kelly v Department of Treasury & Finance* [2002] VCAT 1019, [29].

[50] *Gordon v Mornington Peninsula Shire Council (No 2) (General)* [2011] VCAT 2421, [5], [8].

[51] *Freedom of Information Act 1982* (Vic), section 16(1).

[52] *Freedom of Information Act 1982* (Vic), section 3(1).

Proactive and informal release: section 16(2)

1.7. Section 16(2) facilitates proactive and informal release of information by outlining that nothing in the Act is intended to prevent or discourage an agency or Minister from publishing or giving access to documents outside the Act where they can properly do so or are required by law to do so.[53]

1.8. Section 16(2) makes it clear that the Act is not an "exhaustive code for dissemination of government information".[54] Agencies and Ministers can, and do, release information and documents outside of the Act.

What is proactive release?

1.9. Proactive release involves an agency or Minister making information publicly available, without an individual first making a request for it. This may involve an agency publishing certain information, reports, submissions, or other documents on its website.

1.10. Many agencies and Ministers proactively release information, whether that is publishing information about its organisational structure, a project, or a report about a particular matter relevant to the agency or its functions.

1.11. Proactive release is consistent with an agency or Minister's obligations under section 16 to make the maximum amount of government information available to the public promptly and inexpensively.

Benefits of proactive release

1.12. Proactive release promotes government transparency and accountability by increasing the public's access to government information and ability to participate in a more informed way in government decision making.

1.13. In addition to promoting open and accountable government, the proactive release of information reduces the need for formal FOI requests if the information sought is already publicly available.

1.14. Proactive release can improve public trust in government by providing more information about agencies and Ministers, what they do, and how they operate.

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[53] In *Chadwick v Department of Property and Services* (1987) 1 VAR 444, Judge Rowlands P noted section 16(2) is generally facilitative and declaratory and that it does not seek to prohibit the disclosure of documents.

[54] *Smith v Victoria Police* [2005] VCAT 654, [60].

What is informal release?

1.15. Informal release involves an agency or Minister receiving a request for information or a document and providing access to the relevant information or document outside of the Act.

1.16. Information can be informally released in response to a once off request for information, or under more structured information release schemes or policies. Informal release is also commonly referred to as administrative release, and in contrast to proactive release, is a reactive way to provide access to information.

1.17. Informal release may involve an agency or Minister providing access to a copy of a requested document without processing the request under the Act. It may also involve an agency or Minister communicating requested information over the telephone in response to an enquiry.

1.18. In some cases, an agency may decide to set up an information release scheme where it identifies a significant number of requests for a particular type of information. For example, Victoria Police provides a service to persons wishing to access information about property loss or damage that occurred in Victoria and was reported to Victoria Police.[55] Individuals can apply to obtain the relevant crime report without making an FOI request.

Benefits of informal release

1.19. Informal release is a simpler and more efficient process than responding to a formal request under the Act. It provides agencies and Ministers with flexibility in how they deal with requests for government information and fulfils the object of the Act to make information available promptly and inexpensively.

'Properly' providing access to exempt documents

1.20. Section 16(2) empowers an agency or Minister to publish or provide access to an exempt document, where they can properly do so or are required by law to do so.

1.21. The meaning of the word 'properly' is not defined in the Act. The word should be given its ordinary English meaning.[56] The *Macquarie Dictionary* defines 'properly' as 'in a proper manner; correctly; appropriately; justifiably'.[57]

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[55] See Victoria Police, *Crime Reports for Insurance* (Web page, 25 November 2021) https://www.police.vic.gov.au/crime-reports.

[56] *Chadwick v Department of Property & Services* (1987) 1 VAR 444, 453.

[57] *Macquarie Dictionary* (online at 17 January 2022) 'Properly' (def 1, 2, 3, 6).

1.22. To 'properly' release a document, an agency or Minister should consider:

- relevant enabling legislation – this may explain when the agency or Minister can release information, and where releasing information is prohibited or restricted by a secrecy provision;[58]
- the Information Privacy Principles under the Privacy and Data Protection Act when releasing personal information; and
- any court orders that restrict release.

1.23. It may not be proper to release information which the objects clause of the Act singles out for special protection from disclosure.[59] These special exemptions identified in section 3, are for documents affecting personal privacy (section 33) and commercially sensitive documents (section 34).

1.24. It would not be proper to provide access to an exempt document where to do so would be defamatory or a breach of confidence.[60]

More information

Proactive release of information

Informal release of information

The Professional Standards

Template 7: Providing informal or alternative access to documents

[58] Release under section 16(2) is not subject to the protections under section 63.

[59] *Smith v Victoria Police* [2005] VCAT 654, [62]-[63].

[60] Release under section 16(2) is not protected by section 62.

Section 17 – Requests for access

Extract of legislation

17 Requests for access

(1) A person who wishes to obtain access to a document of an agency or an official document of a Minister shall make a request in writing to the agency or Minister as the case requires for access to the document.

(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.

(2A) A request must be accompanied by a fee of 2 fee units.

(2B) An application fee may be waived or reduced, whether or not the fee has been paid, if the payment of the fee would cause hardship to the applicant.

(3) 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.

(4) 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.

Relevant FOI Professional Standards

Professional Standard 2.1	An agency must provide an applicant with an option to make a request by email.
Professional Standard 2.2	An agency requiring payment of an application fee must take reasonable steps to provide options for payment of that fee in line with accepted payment methods the agency provides for other services of a similar financial sum.
Professional Standard 2.3	An agency must not refuse to accept a request where an applicant has not utilised an agency's pro forma application form.

	Note: a request must still meet the requirements of section 17 of the Act to be a valid request.
Professional Standard 2.4	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	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.

Guidelines

Purpose and effect of section 17

1.1. Section 17 sets out the requirements for making a valid request under the Act. 'Valid' means the request meets the requirements in section 17.

1.2. An agency or Minister is not required to process a request until the requirements of section 17 are met. However, an agency or Minister must assist an applicant to make a valid request.[61] This supports Parliament's intention to facilitate the disclosure of information.[62]

Requirements of a valid request

1.3. There are three requirements for making a valid request under section 17:

1. The request must be in writing;
2. The request must provide sufficient information as is reasonably necessary to identify the documents requested; and
3. The request:
    - must include the application fee; or
    - the agency or Minister must have agreed for the fee to be reduced or waived. The request is not valid until the agency waives the application fee or the applicant pays the reduced fee.

Joint requests

1.4. The right of access under section 13 is granted to every person (singular), not persons (plural).

1.5. This means a request must come from one person.[63] A request made by two or more people is not a valid request. For example, a partnership cannot make a request under the Act, because it is not an individual, body politic or corporate.[64]

[61] *Freedom of Information Act 1982* (Vic), section 17(3).

[62] *Freedom of Information Act 1982* (Vic), section 3(2).

[63] *Apache Energy Pty Ltd and National Offshore Petroleum Safety and Environmental Management Authority and Lander & Rogers Lawyers* [2012] AATA 296, [94]; cited in *Moorabool Shire Council v Environment Protection Authority* [2021] VCAT 1261, [32].

[64] 'Person' means an individual, a body politic or corporate: *Interpretation of Legislation Act 1984* (Vic) section 38. A law firm that is a partnership can make a request if it is made on behalf of their client and the client is a 'person'. The request is made by the client, not the law firm.

Request must be in writing

1.6. A request must be in writing.[65] It cannot be made verbally. However, if an applicant is unable to make a written request (for example, due to disability), an agency or Minister must assist the applicant to make their request in writing (for example, by speaking to them on the telephone, notating their request, and reading it back to them to confirm).[66]

1.7. There are several ways an applicant can make a written request. For example, by email, post or using an online portal. A support person, advocate or lawyer can also write on behalf of an applicant.

1.8. At a minimum, Professional Standard 2.1 requires agencies to provide the option of making a request by email.

1.9. Providing a proforma application form can also be a useful tool to guide an applicant to make a valid request.[67] However, an agency cannot make an applicant use a proforma application form; it can only be offered as an option (Professional Standard 2.3).

Paying the application fee

1.10. A request must include payment of the application fee unless the application fee is waived or reduced on hardship grounds.[68]

1.11. The application fee is two fee units.[69] The value of a fee unit is set by the government and increases with indexation each year. You can find the current value of a fee unit on the website of the Department of Treasury and Finance.

1.12. When calculating a fee using fee units, the amount of the fee may be rounded to the nearest ten cents.[70] This means that the application fee can be rounded to the nearest ten cents.

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[65] *Freedom of Information Act 1982* (Vic), section 17(1).

[66] *Freedom of Information Act 1982* (Vic), sections 17(1) and 17(3).

[67] The Office of the Victorian Information Commissioner has published an FOI application form which agencies and Ministers may use.

[68] *Freedom of Information Act 1982* (Vic), section 17(2B).

[69] *Freedom of Information Act 1982* (Vic), section 17(2A).

[70] See section 7(3) of the *Monetary Units Act 2004* (Vic).

1.13. An agency must take reasonable steps to provide options for payment of the application fee that are the same as accepted payment methods the agency provides for other services of a similar financial sum (Professional Standard 2.2). For example, if the agency accepts payment by credit card, BPAY or direct debit for services less than $40, the agency should also allow applicants to pay the application fee using these payment methods.

Waiving or reducing the application fee

1.14. A request is not valid until the:

- application fee has been paid in full; or
- agency or Minister has agreed to reduce the fee, and the reduced fee has been paid; or
- agency or Minister has agreed to waive the fee in full.[71]

1.15. An applicant may request a waiver or reduction of the application fee if payment would cause the applicant hardship.[72] An applicant may request a fee reduction or waiver whether or not they paid the application fee.

1.16. An applicant has the right to apply to OVIC for a review of an agency's or Minister's decision not to waive or reduce an application fee.[73] VCAT has no jurisdiction to review a decision to refuse to waive or reduce an application fee.[74]

Assessing hardship

1.17. Consistent with the object of the Act, the application fee is not intended to impose a barrier to a person making an FOI request.

1.18. The decision to waive or reduce an application fee is a discretionary decision that must be exercised as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.[75]

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[71] *McKechnie v VCAT & Anor* [2020] VSC 454, [16]; *Gordon v Mornington Peninsula Shire Council* [2005] VCAT 1710, [13].

[72] *Freedom of Information Act 1982* (Vic), section 17(2B).

[73] *Freedom of Information Act 1982* (Vic), section 49A(1)(c).

[74] *McKechnie v VCAT & Anor* [2020] VSC 454, [98].

[75] *McKechnie v VCAT & Anor* [2020] VSC 454, [98]. *Freedom of Information Act 1982* (Vic), section 3(2).

1.19. Assessing whether paying the application fee will cause hardship to the applicant will depend on the context and merits of each situation. It involves questions of fact and degree as well as a value judgment.[76]

1.20. The word 'hardship' is not defined in the Act and should be given its ordinary meaning.[77] Agencies and Ministers are encouraged not to take a technical or overly legalistic approach when determining whether to waive an application fee.

1.21. In other contexts, the term 'hardship' has been interpreted to include any matter of appreciable detriment whether financial, personal, or otherwise'[78] and to have the quality of being 'hard to bear or a substantial detriment'.[79]

1.22. An applicant does not need to prove that paying an application fee would deprive them 'of the comforts or necessities of life', to meet the requirement of hardship. Hardship can encompass a lesser degree of suffering.[80]

1.23. An applicant should provide the agency or Minister with relevant evidence that paying the application fee would cause them hardship. This might include a health care or concession card, a bank statement, or statutory declaration detailing the circumstances of their hardship.

1.24. The amount of required evidence must be proportional to the amount of the charge involved. In a usual situation where the amounts are not large, a detailed inquiry into the applicant's means may not be justified. In most cases, an inquiry as to income, estimated weekly commitments and available cash in bank or similar accounts may be sufficient to assess hardship.[81]

Example

'BW5' and Victorian Institute of Teaching (Freedom of Information) [2020] VICmr 216 (5 August 2020)

The Office of the Victorian Information Commissioner was satisfied that paying the application fee would cause hardship to the applicant in circumstances where:

[76] *McKechnie v VCAT & Anor* [2020] VSC 454, [102].

[77] *'BW5' and Victorian Institute of Teaching (Freedom of Information)* [2020] VICmr 216 (5 August 2020), [30].

[78] *FG O'Brien Ltd v Elliott* [1965] NSWR 1473, 1475.

[79] *In the Marriage of Whitford* (1979) 35 FLR 445, 452.

[80] *'BW5' and Victorian Institute of Teaching (Freedom of Information)* [2020] VICmr 216 (5 August 2020), [31].

[81] *'BW5' and Victorian Institute of Teaching (Freedom of Information)* [2020] VICmr 216 (5 August 2020), [32].

- the applicant did not have an income or the ability to earn an income as they were in immigration detention; and
- the applicant did not have property or assets other than 'about $50 in a bank account'.

1.25. Agencies and Ministers should develop and consistently apply a policy for waiving or reducing the application fee. The policy should be accessible to the public on the agency or Minister's website. For example, this may include forms of evidence for establishing hardship that the agency or Minister accepts.

Deciding hardship

1.26. An agency or Minister must make a decision to waive or reduce the fee for the waiver or reduction to take effect. If no decision is made, and the applicant does not pay the full fee, the request will not comply with the requirement in section 17(2A) to pay an application fee of 2 fee units and will not be a valid request.[82]

1.27. However, agencies and Ministers must assist an applicant to make a valid request and should make a timely decision on a request for a fee waiver or reduction and provide guidance to the applicant on what kind of evidence the agency or Minister needs to show hardship.[83]

Request must provide sufficient information to identify the document

1.28. An applicant must provide enough information as is reasonably necessary for the agency or Minister to be able to identify the document.[84] In other words, the request must be specific and clear enough for the agency or Minister to search for the requested document.

Interpreting a request

1.29. Agencies and Ministers are encouraged not to take a technical or overly legalistic approach to interpreting the terms of a request.

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[82] *McKechnie v VCAT & Anor* [2020] VSC 454, [105].

[83] *Freedom of Information Act 1982* (Vic), section 17(3).

[84] *Freedom of Information Act 1982* (Vic), section 17(2).

1.30. Whether an applicant has provided enough information to enable an agency or Minister to identify the requested document will depend on each request.[85] In almost all cases, though, it will be possible to arrive at some type of reasonable interpretation of a request.[86]

1.31. Agencies and Ministers must use internal knowledge of its document holdings in interpreting a request and should take reasonable steps to inform itself of the subject matter of a request.[87]

1.32. Other contextual information that may assist in understanding a request might include:

- engagements by the agency or Minister with the applicant such as previous requests for access, employment, or complaints;
- communications between the agency or Minister and the 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.

1.33. An agency or Minister should expect that an applicant will usually not have detailed knowledge of what the agency or Minister does, the types of documents it holds, and how to accurately describe or identify the documents to which they seek access.[88]

1.34. A request should be interpreted fairly by an agency or Minister, with an eye to what the applicant is trying to describe, regardless of the words or terms used. Given the purpose and object of the Act, an overly technical or legalistic approach should be avoided.[89] If an applicant uses a word or term that has a common or ordinary meaning as well as technical meaning, the ordinary meaning should be used unless it is clear the technical meaning was intended.

1.35. If an agency or Minister fairly and reasonably understands what documents are sought and can search for that material, it should not insist on precise identification or description of the documents before accepting the request.[90]

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[85] *Chopra v Department of Education and Training (Review and Regulation) (No 2)* [2020] VCAT 932, [64]. *Borthwick v University of Melbourne* (1985) 1 VAR 33, 34-36.

[86] *Dr Chopra v Department of Education and Training (Review and Regulation)* [2018] VCAT 808.

[87] *MacDonnell v State Sport Centres Trust (Review and Regulation)* [2018] VCAT 1616, [40]-[60]. *Victoria International Container Terminal Limited v Port of Melbourne Corporation (Review and Regulation)* [2016] VCAT 337, [32]-[33].

[88] *O'Brien v Department of Justice* [2010] VCAT 1379, [23]-[24].

[89] *Penhalluriack v Department of Labour and Industry* (County Court of Victoria, Lazarus J, 19 December 1983) 54.

[90] *Penhalluriack v Department of Labour and Industry* (County Court of Victoria, Lazarus J, 19 December 1983) 25, 54.

1.36. On the other hand, section 17(2) does not require an agency or Minister to read between the lines of a request. If the wording of a request is ambiguous or unclear, to the point that the agency or Minister cannot undertake a search, an agency or Minister should not read into the request what it believes the applicant might be seeking.[91] Instead, the agency or Minister should contact the applicant, promptly, to clarify the request and provide assistance.

1.37. Processing a request based on an assumption about what the applicant might be seeking can lead to the agency or Minister providing access to irrelevant documents or documents not sought by the applicant. This may lead to delay to the applicant, the unnecessary use of agency and Minister resources, and the applicant making an unnecessary application for review.[92]

1.38. A request expressed as two alternative options may be sufficiently clear and capable of being understood, where the two options do not contradict one another, and it is clear the applicant will accept either option chosen by the agency or Minister.[93]

Requests for historical or future documents

1.39. Documents may only be sought if they existed at the date a valid request is received by an agency or Minister. A request cannot seek access to documents that were received or came into existence after the agency or Minister received the request. An exception to this is where an agency or Minister is obliged to create a document under section 19.

1.40. An applicant can request access to documents containing their personal affairs information up to any time in the past.[94] For documents containing information other than the applicant's personal affairs information, a request can only seek access to documents dating as far back as:

- 1 January 1989 if the agency is a local council;[95] or
- 5 July 1978 if the agency is not a local council.[96]

For more information, see section 67.

[91] *Zegaj v Victoria Police* [2010] VCAT 1132, [31].

[92] *Zegaj v Victoria Police* [2010] VCAT 1132, [31].

[93] *Proudfoot v Victoria University (Review and Regulation)* [2019] VCAT 106, [48]-[50].

[94] *Freedom of Information Act 1982* (Vic), section 67(1).

[95] *Freedom of Information Act 1982* (Vic), section 67(4).

[96] *Freedom of Information Act 1982* (Vic), section 67(2).

1.41. If an applicant requests future documents or historical documents that cannot be accessed under the Act, the agency or Minister should:

- consider whether documents can be provided informally outside the Act; or
- seek clarification from the applicant, with a view to assisting the applicant to meet the requirements of section 17(2).

Request for documents, not information

1.42. The right of access is to access a document, not information.[97] A document is different from information. For example, an enquiry made to a water authority, requesting to know whether the authority entered into a water agreement on a particular property is a request for information, not a request for a document. Whereas a request for a water agreement on a specified property is a request for a document.

1.43. A request made for information and where no document exists in physical form in the agency, may require the agency to create a written document under section 19 containing the requested information.

Example

The following requests have been found to have sufficiently identified a document for the purpose of section 17(2), despite the fact that the agency did not possess the document at the time of the request:

- a request for screen prints showing lists of documents contained in electronic folders on a computer;[98] and
- a request for screen prints of the results of a search of the agency's computers using parameters set out in the request.[99]

1.44. If a request is phrased as a request for information, and it is not clear what documents are sought, the agency or Minister should:

- consider whether the information can be provided informally outside the Act; or

[97] *Schorel v Community Services Victoria* (Administrative Appeals Tribunal (Victoria), Dimtscheff DP, 10 October 1989).

[98] *McIntosh v Victoria Police* [2009] VCAT 1923, [43].

[99] *Wooldridge v Department of Human Services* [2009] VCAT 1900.

- seek clarification from the applicant about what documents they seek, with a view to assisting the applicant to meet the requirements of section 17(2).

Broad requests

1.45. The core requirement of section 17(2) is for the applicant to provide sufficient information to allow an agency or Minister to reasonably be able to identify the requested document. If a request is broad, but it is clear what documents the applicant wants to access, the breadth of the request does not make the request invalid under section 17.[100]

1.46. The time and resources required to identify documents falling within a broad request are not relevant to deciding whether a request is valid.[101] However, these factors may be relevant for considering whether section 25A applies.

Example

Bahonko v City of Casey [2010] VCAT 241

The agency argued that the applicant's request for 'all and complete files' relating to themselves was too broad to comply with section 17(2).

VCAT rejected this, stating:

> *It is … now notorious that records are extensively kept in computerised systems. These systems amongst other things allow for 'key word' searches which enable the full text of particular documents to be identified by reference to the occurrence of a particular word, for instance 'Bahonko'.*

VCAT found the request should have been treated as:

> … a request for access to all files relating to Ms Bahonko, a request which could have been processed by searching file titles whether as part of an old style hard copy system or a computerised system by reference to the key word 'Bahonko'.

[100] *Penhalluriack v Department of Labour and Industry* (County Court of Victoria, Lazarus J, 19 December 1983).

[101] *McIntosh v Department of Justice* [2009] VCAT 92, [46]; *Luck v Victoria Police FOI Division* [2012] VCAT 1617, [29].

Multi-category requests

1.47. A request must be assessed as a whole. It cannot be broken up into multiple requests. This means that if a request contains multiple items or categories of documents, and one item or category of the request does not comply with section 17(2), the entire request is invalid.[102]

1.48. Any item or category that does not comply with section 17(2) can only be severed if the applicant agrees to sever the item and proceed with a request for the valid items only.[103]

Assisting an applicant and providing a reasonable opportunity to consult

1.49. An agency or Minister must assist an applicant to make a valid request or to assist an applicant to direct their request to the appropriate agency if the receiving agency or Minister is not the correct agency or Minister.[104]

1.50. Where a request does not provide sufficient information to enable the agency or Minister to identify the documents sought,[105] an agency or Minister must give the applicant a reasonable opportunity to consult, to rectify the issue and make a valid request.[106]

1.51. The agency or Minister cannot refuse to comply with the request until it first provides the applicant with this opportunity to consult. It is expected that an agency will provide an applicant with a reasonable opportunity to consult, which may involve more than one opportunity to consult.

Directing an applicant to the appropriate agency or Minister

1.52. An agency or Minister must direct the applicant to the appropriate agency or Minister, in circumstances where the first agency or Minister is not the correct or most relevant agency or Minister.[107]

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[102] *Chopra v Department of Education and Training* [2019] VSCA 298; *MacDonnell v State Sport Centres Trust (Review and Regulation)* [2018] VCAT 1616, [132]-[198].

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

[104] *Freedom of Information Act 1982* (Vic), section 17(3).

[105] Under section 17(2), a request must provide sufficient information as is reasonably necessary to enable the agency or Minister to identify the requested document.

[106] *Freedom of Information Act 1982* (Vic), section 17(4).

[107] *Freedom of Information Act 1982* (Vic), section 17(3).

1.53. This duty may arise if an applicant requests multiple documents, and some documents are held by the agency and some documents are held by another agency. In this circumstance, an agency or Minister should tell the applicant as soon as practicable that some of the requested documents are held by a different agency and that the applicant should make a request to that agency or Minister for those documents. The agency or Minister should then ask for the applicant's approval to sever the other agency's or Minister's documents from the request and continue processing it.

Example

An applicant makes a request to the Department of Health for two emails and a report. The report is not held by the Department of Health, but the Department of Health is aware that Service Victoria holds the report.

Section 17(3) requires the Department of Health to notify the applicant to make a request to Service Victoria for the report.

The Department of Health would then continue to assess the validity of the request under section 17 with respect to the two emails.

1.54. An agency or Minister may also be able to transfer an entire request to another agency or Minister if the requirements of section 18 are met.

Assisting an applicant and providing a reasonable opportunity to consult

1.55. If an agency receives a request that is not valid, Professional Standard 2.4 requires the agency to take reasonable steps to contact the applicant within 21 days of receiving the request to:

- explain why the request is not valid;
- provide reasonable assistance or advice to the applicant about how to make the request valid; and
- ensure the applicant is aware that the agency may refuse to comply with the request[108] if steps are not taken to make the request valid.

1.56. Reasonable assistance or advice from an agency may include:

[108] 'Refuse to comply' reflects the language of section 17(4). An agency may consider this to mean the request has lapsed or is otherwise finalised without being processed.

- discussing with an applicant what document they seek, to understand the subject matter, and to assist the applicant to articulate the terms of their request;[109]
- 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 information, subject to statutory exceptions, on the nature and types of documents the agency holds and where the information the applicant seeks might be located;[110]
- 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 the evidence that the agency requires to show that payment of the application fee would cause the applicant hardship.

1.57. If a request contains multiple items or categories of documents, and one item or category of the request does not comply with section 17(2), an agency or Minister should provide the applicant with the option to sever the non-compliant part of the request. If the agency or Minister does not provide the applicant with this option, the agency or Minister will not have satisfied the requirements of sections 17(3) and 17(4).[111]

1.58. If consultation occurs by telephone, the agency or Minister should ask the applicant to confirm the wording of any amended request in writing. An amended verbal request does not meet the requirements of a valid request until it is made in writing.[112]

1.59. The consultation process can also be used as an opportunity to narrow or refine the scope of the request. For example, an agency or Minister may ask the applicant whether third party information such as names and telephone numbers can be excluded from the request. This could save time and resources when processing the request as this kind of information typically requires an agency or Minister to consult with third parties and may not be information to which the applicant seeks access.

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[109] *Borthwick v University of Melbourne* (1985) 1 VAR 33.

[110] *Borthwick v University of Melbourne* (1985) 1 VAR 33.

[111] *Chopra v Department of Education and Training* [2019] VSCA 298, [116].

[112] *Freedom of Information Act 1982* (Vic), section 17(1).

Finalising an invalid request

1.60. After providing an applicant with the information required by Professional Standard 2.4, Professional Standard 2.5 requires an agency to wait at least 21 days for an applicant to:

- rectify the identified issue and make a valid request; or
- begin consulting with the agency to clarify or amend the request.

1.61. After 21 days, if the applicant has not rectified the issue or commenced consulting with the agency, the agency may choose to refuse to comply with the request and finalise it in accordance with their processes and procedures. Refusing to comply may mean treating the request as having lapsed or otherwise finalising the request without processing it.

1.62. The purpose of Professional Standard 2.5 is to provide guidance to agencies on when an application need not be further dealt with by an agency. It is not designed to limit the consultation time to 21 days in all situations. For example, if an applicant has begun to consult with an agency to clarify or amend a request, Professional Standard 2.5 does not require the applicant to complete the consultation, or provide all responses to the agency's consultation within 21 days.

Effect of an invalid request

1.63. An applicant may apply to OVIC for a review of an agency's or Minister's decision not to waive or reduce an application fee, regardless of whether or not the applicant has paid the fee.[113] However, a decision of an agency or Minister, or OVIC, about waiver or reduction of an application fee cannot be reviewed by VCAT or a court.[114]

1.64. VCAT may determine an application for review of an agency's or Minister's decision not to process a request because the request did not provide sufficient information about requested documents to enable the agency or Minister to identify the documents (as required by section 17(2)).[115]

[113] *Freedom of Information Act 1982* (Vic), section 49A(1)(c).

[114] *McKechnie v VCAT & Anor* [2020] VSC 454.

[115] *Chopra v Victorian Institute of Teaching* (Review and Regulation) [2023] VCAT 903 (4 August 2023).

Effect of a request becoming valid under the Act

1.65. The rights and liabilities of the applicant, agency and Minister are fixed at the date a valid request is made.[116]

1.66. The time for processing a request under section 21 starts the day after the request becomes valid under section 17.[117]

Day a request becomes valid

1.67. A request becomes valid under the Act on the day that all requirements in section 17 have been met. This may be:

- the day the agency or Minister receives payment of the application fee;
- the day the agency or Minister decides to waive the application fee;
- the day the agency or Minister receives payment of the reduced application fee (as agreed by the agency or Minister); or
- the day the applicant clarifies the request in a way that complies with section 17(2).[118]

1.68. A request becomes valid on the day the agency or Minister receives a validly made request, not the day an agency officer, such as the FOI officer, becomes aware of the validly made request.

Example

On 1 July an applicant makes a request by email to the Department of Transport. The department understands what documents have been sought in the request, but the request does not include payment of the application fee.

On 2 July, complying with section 17(3) and Professional Standard 2.4, the agency contacts the applicant by telephone to advise the request is not valid and provide information to assist the applicant to make a valid request. The information provided to the applicant:

- explains the applicant needs to pay the application fee or apply for waiver of the application fee or part of the application fee;

[116] *Baird v VicRoads* [2000] VCAT 207, [18], [20].

[117] *Freedom of Information Act 1982* (Vic) section 21; *Smeaton v Victorian Workcover Authority* [2012] VCAT 435; *Boyd v Victoria Police* [2017] VCAT 2021, [13]-[14].

[118] *MacDonnell v State Sport Centres Trust (Review and Regulation)* [2018] VCAT 1616, [28].

- informs the applicant of the application fee amount and how it can be paid; and
- explains the evidence the agency requires to show that payment of the application fee would cause the applicant hardship, and points the applicant to the agency's fee waiver policy.

On 3 July the applicant pays the application fee by EFT.

On 4 July the agency receives the EFT payment into its account.

On 8 July the agency's accounts officer becomes aware of the EFT payment.

On 10 July the account officer informs the agency's FOI officer of the EFT payment.

What day did the request become valid under the Act?

The request became valid on 4 July, when the agency received payment of the application fee.

Next steps when a request is valid

1.69. An agency or Minister should acknowledge receipt of a valid request, either verbally or in writing, and let the applicant know what to expect next.

1.70. It is good practice to notify the applicant in writing of the:

- date the request became valid;
- due date for notifying the applicant of a decision on the request;
- terms of the request (this may be the wording of an original valid request or the wording of a clarified valid request);
- possibility that the processing time may be extended by up to 15 days if third party consultation is required, or by 30 days by agreement with the applicant.

1.71. Acknowledging a request can also be a good opportunity to narrow the scope of the request. An agency or Minister may ask the applicant whether they seek access to duplicate documents or third party information such as names and telephone numbers. If the applicant advises that they do not seek this information, it could save time and resources when processing the request as the agency or Minister would not need to process duplicates and third-party consultation would not be required.

Requests for personal records

1.72. If an applicant seeks access to personal records, proof of identity should be requested to ensure the records are provided to the correct person.

1.73. Similarly, if an applicant requests personal records on behalf of someone else, an agency or Minister should ensure they have written authority to do so.

1.74. Failure to provide proof of identity or authority does not affect the validity of a request, but is a consideration when applying exemptions. In some cases, the authority can be proved by the relationship. For example, a lawyer can prove authority by stating on letterhead or in email that they represent the applicant.

1.75. Agencies and Ministers should be clear about whether a person seeks records on behalf of another person, or seeks records on their own behalf but has the consent of the person to whom the information is about to receive that person's personal information.

Obligation to consider providing documents outside the Act

1.76. The Act does not prevent or discourage agencies or Ministers from publishing or giving access to documents (including exempt documents), under or outside the Act, where they can.[119]

1.77. Professional Standards 1.1 and 1.2 require an agency to actively consider whether the documents sought can properly be provided outside the Act.

1.78. When a request is initially received, an agency may consider:

- whether a request for information (rather than a specific document) can be satisfied with a verbal or written response containing the requested information;
- whether the requested document or information is publicly available (for example, online or in an annual report), available for purchase or a fee, or available for inspection at the Public Record Office Victoria. If so, advise the applicant they can access the document without making a request;
- whether the document or information can be released informally. For example, the information may not be particularly sensitive, is a routine request, or is a document the agency has previously provided to the applicant;

[119] *Freedom of Information Act 1982* (Vic), section 16.

- whether the document relates to a current legal matter and is time sensitive. If so, the agency may consider suggesting the applicant use legal or court processes, such as a subpoena or summons to access the document.

1.79. The requirement to consider release outside the Act is an ongoing obligation on an agency. If it is not immediately clear whether a document can properly be provided outside the Act, an agency can return to this question whilst processing the request. For example, an agency may search and find 18 documents responding to a request and decide to immediately release 15 documents informally outside the Act and continue to process the remaining three documents under the Act.

For more information, see section 16 – Access to documents apart from Act.

More information

OVIC Practice Notes

Informal release of information

The Professional Standards

OVIC Templates

Template 1: Processing an FOI request checklist

Template 5: Freedom of information application form – request for documents – section 17

Template 8: Request is valid and being processed

Template 9: Request is not valid and action is required

Section 18 – Transfer of requests

Extract of legislation

18 Transfer of requests

(1) A request for access to a document may be made to any agency which has a copy of the document.

(2) Where—

(a) a request is made to an agency for access to a document; an

(b) (i) the document is not in the possession of that agency but is in the possession of another agency; or

(ii) the subject-matter of the document is more closely connected with the functions of another agency than with those of the agency to which the request is made—

the agency to which the request is made may promptly transfer the request to the other agency and inform the person making the request accordingly and, if it is necessary to do so in order to enable the other agency to deal with the request, send the document to the other agency.

(3) Where a request is transferred to an agency in accordance with this section, it shall be deemed to be a request made to that agency and received at the time at which the transfer was made or fourteen days after the date of the original request, whichever is the shorter period.

(4) Where a request is made to the Public Record Office of Victoria for access to a document of a kind referred to in section 15(1), the Public Record Office may promptly transfer the request to the agency deemed, by virtue of that subsection, to be the agency in possession of the document.

(5) In this section where appropriate ***agency*** includes a Minister.

Guidelines

Purpose and effect of section 18

1.1. An agency or Minister may transfer a request to another agency or Minister where:

- the requested document is not in the possession of the agency or Minister, but is known to be in the possession of another agency or Minister;[120] or
- the subject matter of the requested document is more closely connected with another agency or Minister's functions, than with the functions of the agency or Minister.[121]

1.2. The power to transfer a request is discretionary. This means that an agency or Minister does not have to transfer a request, even if the conditions of section 18(2) are met. However, in deciding whether to use the discretion to transfer a request, an agency or Minister should consider the object of the Act in section 3, which is to facilitate and promote the disclosure of information promptly, and at the lowest reasonable cost.

Document is not in the possession of the agency or Minister – section 18(2)(b)(i)

1.3. Section 18(2)(b)(i) applies where an agency or Minister receives a request for access to a document that is not in the possession of that agency or Minister, but the agency or Minister is aware that the document is in the possession of another agency or Minister.

1.4. In this circumstance, the agency or Minister may:

- promptly transfer the request to the other agency or Minister; and
- inform the applicant that the request has been transferred to the other agency or Minister.[122]

Document's subject matter is more closely connected with the functions of another agency – section 18(2)(b)(ii)

1.5. Section 18(2)(b)(ii) applies where the subject matter of the requested document is more closely connected with the functions of another agency or Minister, than with the receiving agency or Minister.

[120] *Freedom of Information Act 1982* (Vic), section 18(2)(b)(i).

[121] *Freedom of Information Act 1982* (Vic), section 18(2)(b)(ii).

[122] *Freedom of Information Act 1982* (Vic), section 18(2)(b)(i).

1.6. In this circumstance, the agency or Minister may:

- promptly transfer the request to the other agency or Minister;
- inform the applicant that the request has been transferred to the other agency or Minister; and
- send the requested document to the other agency or Minister if the document is in the possession of the agency or Minister and it is necessary to transfer the document to enable the other agency or Minister to deal with the request. This situation may arise where the other agency or Minister is not in possession of the document but has the right to call for the agency's or Minister's copy of the document.[123]

1.7. The subject matter of a document is to be determined from its contents, viewed in its whole context.[124]

1.8. The functions of an agency are usually found in the agency's enabling legislation.[125]

1.9. An agency or Minister should consider the purpose and role of the agency and Minister, and the connection of the document with the functions of the agency or Minister. The document must be more connected with the functions of the other agency or Minister, not simply connected. [126]

1.10. The power to transfer a request is discretionary. This means that if another agency's functions are more closely connected with the subject matter of a requested document, the agency does not have to transfer the request.[127] The agency can still choose to process the request under the Act.

The whole request must be transferred, not part of a request

1.11. The Act provides an agency or Minister with the power to transfer an entire request to another agency, not parts of a request. Individual items cannot be severed from the body of a main request.[128]

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[123] *Freedom of Information Act 1982* (Vic), section 18(2)(b)(ii).

[124] *Smeaton v Victorian Workcover Authority* [2009] VCAT 1195, [10].

[125] *Smeaton v Victorian Workcover Authority* [2009] VCAT 1195, [10].

[126] *Smeaton v Victorian Workcover Authority* [2009] VCAT 1195, [10].

[127] *Smeaton v Victorian Workcover Authority* [2009] VCAT 1195, [11].

[128] *Wright v State Electricity Commission (No 1)* (Victorian Civil and Administrative Tribunal, Megay SM, 29 July 1998).

1.12. In circumstances where an applicant makes a request to an agency or Minister for multiple documents and some documents are held by the agency or Minister and some documents are held by another agency or Minister, it may be appropriate for the agency or Minister to:

- exercise its duty to assist under section 17(3), by directing the applicant to make a separate request to the other agency or Minister for the documents held by the other agency or Minister; or
- transfer the entire request to the other agency or Minister, under section 18(2)(b)(ii), if the subject matter of the documents is more closely connected with the functions of the other agency or Minister.

Available time to make a decision on a transferred request

1.13. Transferring a request impacts the timing for providing a decision on a request.

1.14. If a request is transferred to an agency or Minister under section 18(2), section 18(3) deems the request to have been received by the agency or Minister on whichever of the following dates is the shorter period:

- at the time the transfer is made; or
- 14 days after the date of the original request.

1.15. Assuming that the transferred request is a valid request under section 17, the time for processing the request begins the day after the date determined under section 18(3).[129]

1.16. It is important that requests are transferred promptly, to ensure that the receiving agency or Minister is given the maximum allowable time to process a request under the Act.

Example

On 10 January the Department of Education and Training receives a request and determines that the subject matter of the request is more closely connected with the functions of the Victorian Institute of Teaching.

On 30 January the Department transfers the request to the Institute under section 18(2)(b)(ii).

[129] *Freedom of Information Act 1982* (Vic) section 21; *Smeaton v Victorian Workcover Authority* [2012] VCAT 435; *Boyd v Victoria Police (Review and Regulation)* [2017] VCAT 2021, [13]-[14].

Section 18(3) deems the request to have been received by the Institute on 24 January (14 days after the date of the original request), not 30 January (the date that it was transferred by the Department).

The statutory time frame to make a decision on the request starts on 25 January, not 31 January.

Who keeps the application fee?

1.17. The Act does not require an agency or Minister to transfer the application fee paid by an applicant to the other agency or Minister when transferring a request under section 18.

More information

Template 10 – Transfer of request notice – agency

Template 11 – Transfer of request notice – applicant

Section 19 – Requests involving use of computers etc.

Extract of legislation

19 Requests involving use of computers etc.

(1) Where—

(a) a request is duly made to an agency;

(b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and

(c) the agency could produce a written document containing the information in discrete form by—

(i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or

(ii) the making of a transcript from a sound recording held in the agency—

the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

(2) In this section where appropriate ***agency*** includes a Minister.

Guidelines

Purpose of section 19

1.1. The purpose of section 19 is to enable access to information that is not available in discrete form in documents of the agency or Minister. In this circumstance, section 19 requires the agency or Minister to produce a written document containing the requested information, by:

- the use of a computer or other equipment that is ordinarily available to the agency or Minister for retrieving or collating stored information; or
- the making of a transcript from a sound recording held by the agency or Minister.

1.2. A document produced under section 19 is taken to be a document in the agency or Minister's possession at the time the request for access was made and is to be processed under the Act in the normal way. For example, an exemption from access in Part IV may apply to a document produced under section 19.

1.3. An agency may have to create a document under section 19 where the information requested by an applicant does not exist in a discrete form (for example, statistical data from a case management system), but the agency can create a document containing that information.[130] The same will apply where the agency can make a transcript for a sound recording it holds.

Example

Examples where a document may be created under section 19 from information that is not available in discrete form, include:

- a document created from sections of information in multiple spreadsheets or spreadsheet tabs;
- a document compiling internet browsing history;
- a document compiling extracts from a database;
- making a transcript of disparate information contained across multiple sound recordings; or
- a screenshot of a file structure in a computer drive.

1.4. Section 19 does not apply to distinct electronic records (such as emails, Word, PDF or Excel files) that already exist at the time a request is made to an agency.[131]

1.5. The Supreme Court of Victoria in *Monash University v EBT* [2022] VSC 651 made it clear that:

- the definition of 'document' in section 5 of the Act includes a record of information stored electronically; and
- it would be contrary to the text, context and purpose of the Act to apply section 19 to electronically stored documents (e.g., emails).[132]

[130] *Monash University v EBT* [2022] VSC 651.

[131] *Monash University v EBT* [2022] VSC 651.

[132] *Monash University v EBT* [2022] VSC 651 [7], [88], [90], [91], [124], [135].

Information that is not available in a discrete form – section 19(1)(b)

1.6. For section 19 to apply, it must appear from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency or official documents of the Minister.[133]

'Document of the agency'

1.7. 'Document of the agency' is defined as 'a document in the possession of an agency, or in the possession of the agency concerned, as the case requires, whether created in the agency or received in the agency'.

1.8. Possession may be physical possession or constructive possession. Constructive possession is where an agency has the right to call for the document and to control the document, such as a document in the physical possession of a contractor.[134]

'Not available in discrete form'

1.9. The word 'discrete' in the context of a document requested under the Act means 'single, distinct or particular',[135] 'separate, individually distinct, discontinuous'.[136]

1.10. Information may not be available in discrete form where:

- the information exists, but is not stored in a single record (for example, if a database must be interrogated to extract the information);[137] or
- the information is no longer available because the agency does not have the technology to retrieve it (for example old emails backed up on magnetic tape that cannot be accessed unless the information is converted to disc format).[138]

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[133] *Freedom of Information Act 1982* (Vic), section 19(1)(b).

[134] *Office of the Premier v Herald and Weekly Times* [2013] VSCA 79; *Colonial Range Pty Ltd v Victorian Building Authority (Review and Regulation)* [2017] VCAT 1198.

[135] *Monash University v EBT* [2022] VSC 651 [7], [88], [90].

[136] *Proudfoot v Victoria University (No 2) (Review and Regulation)* [2019] VCAT 612, [51].; *Halliday v Corporate Affairs* (1991) 4 VAR 327, 337.

[137] *Monash University v EBT* [2022] VSC 651.

[138] *Smeaton v Victorian Workcover Authority* [2010] VCAT 1264.

1.11. Electronic documents (such as emails, Word, PDF and Excel files), that exist at the time a request is made, are 'documents' for the purposes of section 5.[139] Consequently, ordinary access provisions under the Act apply rather than section 19.

Production of a written document containing the information in discrete form – section 19(1)(c)

1.12. Section 19 will only operate where the agency or Minister can produce a written document from information that is in its physical possession or control.

1.13. In *Proudfoot v Victoria University*, VCAT posed the question as, 'whether the University can, by accessing its existing data, create a document which can retrieve and collate the various pieces of data to respond to the request'.[140]

1.14. VCAT found that section 19 did not require the University to retrieve and collate ATAR data from an external body, the Victorian Tertiary Admissions Centre, to produce a written document, in circumstances where the University did not hold or have the ATAR data in its possession or control.[141]

A written document

1.15. An agency or Minister can produce one or more documents under section 19 containing the information sought in a request. There is nothing in the Act to suggest that only one written document must be produced containing all of the information sought in a request.[142] For example, if a request identifies two categories of information, the agency or Minister can produce two documents under section 19 in response to each category of information.[143]

1.16. A written document produced under section 19 does not have to be hard copy document. An electronic document is a written document for the purposes of section 19.[144]

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[139] *Monash University v EBT* [2022] VSC 651 [7], [88], [90], [91].

[140] *Proudfoot v Victoria University (No 2) (Review and Regulation)* [2019] VCAT 612, [54].

[141] *Proudfoot v Victoria University (No 2) (Review and Regulation)* [2019] VCAT 612, [74].

[142] *Roberts v Department of Justice and Regulation* [2018] VCAT 1560, [73]; *Interpretation of Legislation Act 1984* (Vic) section 37(c), words in the singular include the plural.

[143] See for example, *Roberts v Department of Justice and Regulation* [2018] VCAT 1560, [77].

[144] See *Interpretation of Legislation Act 1985* (Vic), section 38; *Monash University v EBT* [2022] VSC 651 [101].

Containing the information

1.17. The document or documents produced under section 19 do not have to contain all of the information sought in the applicant's request.[145]

Example

An applicant makes a request for three categories of documents. The agency conducts a search and finds a document falling within the first category of the request. There are no documents found for the second and third categories.

The agency can produce a document under section 19 containing the information in the second category of the request. However, the agency is not able to produce a document containing the information in the third category of the request using equipment ordinarily available to the agency for retrieving or collating stored information.

The agency decides to:

- Grant access to the document in the first category.
- Produce a document under section 19 containing the information in the second category.
- Inform the applicant and provide reasons as to why it is not able to locate the requested document or produce a document under section 19 containing the information in the third category.

By the use of a computer or other equipment that is ordinarily available for retrieving or collating stored information – section 19(1)(c)(i)

1.18. Under section 19(1)(c) there are two ways an agency or Minister can 'produce a written document containing the information in discrete form'. The first way is to use a computer or other equipment that is ordinarily available to the agency or Minister for retrieving or collating stored information.

[145] *AZ4 and Monash Health (Freedom of Information)* [2019] VICmr 230.

Ordinarily available

1.19. Computer or other equipment may be considered 'ordinarily available' to the agency or Minister for retrieving or collating stored information:

- where an existing program could be easily modified to retrieve or collate the information sought in the request;[146]
- where the agency or Minister routinely commissions or retains staff to produce new computer programs to retrieve or collate information of a kind sought in the request. That is, where the agency or Minister can readily write new programs of the kind required, as an ordinary part of its ordinary use of its existing computer hardware and software;[147] or
- where the agency or Minister is required to retrieve data from backup tapes, even in circumstances where the tapes use an old technology and can be accessed only by an external IT provider.[148]

Example

Clark v Department of Justice and Regulation [2015] VCAT 1348

The applicant requested a summary list of briefings provided by the Department to Ministers in the then incoming Victorian Government in December 2014.

VCAT found that a summary list did not previously exist, but rather had to be compiled by the Department.

The document was produced by interrogating a database for relevant briefing documents and running a report to ensure that all relevant documents were captured. An officer then checked to ensure each briefing had taken place before compiling a final list of briefings through the database.

VCAT observed that this situation was 'precisely what is envisaged by section 19 and the Regulations'.

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[146] *Proudfoot v Victoria University (No 2) (Review and Regulation)* [2019] VCAT 612, [72]; *Halliday v Corporate Affairs* (1991) 4 VAR 327.

[147] *Proudfoot v Victoria University (No 2) (Review and Regulation)* [2019] VCAT 612, [72]; *Collection Point v Commissioner of Taxation* [2013] FCAFC 67.

[148] *Smeaton v Victorian Workcover Authority* [2012] VCAT 521.

1.20. Other examples where VCAT found equipment was ordinarily available and section 19 applied, include:

- retrieving and collating data from backup tapes;[149]
- taking 'screen prints' showing lists of documents contained in electronic folders on a computer in possession of an agency;[150] and
- taking 'screen prints' of an agency's search results.[151]

Not ordinarily available

1.21. Computer or other equipment may not be considered 'ordinarily available' to the agency or Minister for retrieving or collating stored information where the agency or Minister's functional computer system (comprising hardware and software) could not produce the requested document unless:

- new software was obtained; or
- a new program directed at retrieving or collating the specific information sought in the request was written.[152]

Example

Proudfoot v Victoria University (No 2) [2019] VCAT 612

VCAT held that the University was not required to produce a document under section 19 to meet the applicant's request. Facts relevant to VCAT's decision were that:

- the University did not have any need to retrieve and collate the particular combination of data sought in the request;
- the University did not routinely commission or retain staff to produce new computer programs of the necessary kind to produce a written document containing the information sought in the request; and

[149] *Smeaton v Victorian Workcover Authority* [2012] VCAT 521.

[150] *McIntosh v Victoria Police* [2009] VCAT 1923.

[151] *Wooldridge v Department of Human Services* [2009] VCAT 1900.

[152] *Proudfoot v Victoria University (No 2) (Review and Regulation)* [2019] VCAT 612, [73].

- writing a new computer program would involve time and disruption to the University's usual work and its usual use of its computer hardware and software. [153]

In the circumstances, writing a new computer program went beyond the University's obligation to respond to requests for access under the Act.[154]

By making a transcript from a sound recording – section 19(1)(c)(ii)

1.22. Under section 19(1)(c) there are two ways an agency or Minister can 'produce a written document containing the information in discrete form'. The second way is to make a transcript from a sound recording held by the agency or Minister.

1.23. There are unlikely to be many situations where this subsection will apply, given that section 23(1)(d) enables an agency or Minister to provide access to a sound recording in the form of a written transcript, without the need for the written transcript to be considered a document produced under section 19.

1.24. However, there may be a situation where it appears from the request that the desire of the applicant is for disparate information contained across multiple sound recordings. In this scenario, the information is not available in discrete form in documents of the agency or Minister, but the agency or Minister could produce a written document by making a transcript of the requested information from the sound recordings.

[153] *Proudfoot v Victoria University (No 2) (Review and Regulation)* [2019] VCAT 612, [80].

[154] *Proudfoot v Victoria University (No 2) (Review and Regulation)* [2019] VCAT 612, [81].

Section 20 – Access to documents to be given on request

Extract of legislation

20 Access to documents to be given on request

(1) Subject to this Act, where—

(a) a request is duly made by a person to an agency or Minister for access to a document of the agency or an official document of the Minister; and

(b) any charge that, under the regulations, is required to be paid before access is granted has been paid—

the person shall be given access to the document in accordance with this Act.

(2) An agency or Minister is not required by this Act to give access to a document at a time when the document is an exempt document.

Guidelines

Purpose and effect of section 20

1.1. The purpose of section 20 is to ensure that an applicant is granted access to a document under the Act where:

- the request is valid under section 17;
- the document is a document of the agency or an official document of the Minister;
- any charge that is required to be paid by the applicant under the regulations has been paid; and
- no exceptions (for example, section 14) or exemptions in Part IV apply to the document.

1.2. Section 20 also makes it clear that the Act does not require an agency or Minister to grant access to a document at a time when one or more exemptions in Part IV apply to the document.

'Subject to this Act'

1.3. The phrase 'subject to this Act' refers to the exceptions and exemptions in the Act that permit agencies and Ministers to refuse access to documents in specified circumstances. For example, a document may fall outside of the Act due to the operation of section 14, or the document may be exempt from access under Part IV.

'Request is duly made by a person'

1.4. 'Duly made' means the request complies with the requirements in section 17 and is therefore a valid request made under the Act.

1.5. See the FOI Guidelines on section 13, which provides guidance on what a 'person' means.

Charges required to be paid under the regulations have been paid

1.6. The requirement in section 20(1)(b) refers to the payment of 'access charges' under section 22 and the *Freedom of Information (Access Charges) Regulations 2014*.

1.7. Any access charges payable under the regulations must be paid by the applicant before an agency or Minister has to grant access to the document.

> For more information on access charges, see section 22.

'Access to the document'

1.8. The obligation under section 20 to provide 'access to the document' only extends to providing access to parts of the document that fall within the terms of the request.[155]

1.9. If a document contains information that is irrelevant to a request, the agency or Minister does not have to provide access to the irrelevant information. Section 20 allows irrelevant information to be removed or redacted from a document before releasing the relevant parts to an applicant.

1.10. The Victorian Civil and Administrative Tribunal (VCAT) endorsed the following submission made by the agency in *Wilson v Department of Premier and Cabinet (No 2)*:

[155] *Wilson v Department of Premier and Cabinet (No 2)* [2001] VCAT 1769, [24].

If a document relates to subject matters A, B and C, and the applicant's request is for documents relating to subject matter A, those parts of the document that relate to B and C are not 'the document' requested by the applicant. The intention of the Applicant is to obtain access only to information relating to subject matter A. It would require a strained, even contrived, construction of a request for documents relating to subject matter A to read it as extending to the whole of any document in which A was raised, however tangentially, including those parts that relate only to B and C.[156]

For information on providing access, see:

- section 23 – forms of access
- section 24 – deferment of access

Not required to give access to a document at a time when the document is an exempt document – section 20(2)

1.11. An agency or Minister does not have to grant access to a document at a time when one or more exemptions in Part IV apply to the document.[157]

1.12. The exemptions that may apply to a document are those in Part IV that were in force on the date a valid request is made under section 17. This is because the rights and liabilities of the applicant, agency and Minister are fixed at the date the request becomes valid.[158]

1.13. If, for example, a new exemption provision is inserted into Part IV after the date the request became valid, the new exemption provision cannot be applied to refuse access to the document. Instead, the agency or Minister must apply the exemption provisions in Part IV in force as at the date the request became valid. If no exemptions or exceptions apply, the agency or Minister should grant access to the document.

1.14. In contrast, laws that are imported into the Act may be applied as at the date of the decision. For example, if a secrecy provision contained in other legislation is inserted or amended after the date the request became valid, and the secrecy provision applies to the information in the document, the agency or Minister should rely on the secrecy provision in that other legislation at the date of the decision, not the date of the application, in conjunction with section 38, to refuse access to the document.

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[156] *Wilson v Department of Premier and Cabinet (No 2)* [2001] VCAT 1769, [24].

[157] *Freedom of Information Act 1982* (Vic), section 20.

[158] *Baird v VicRoads* [2000] VCAT 207, [18], [20]. See also *Mildenhall v Department of Premier & Cabinet (No 2)* (1995) 8 VAR 478.

Section 21 – Time within which formal requests to be decided

Extract of legislation

21 Time within which formal requests to be decided

(1) An agency or Minister must take all reasonable steps to enable an applicant to be notified of a decision on a request as soon as practicable but not later than—

(a) 30 days after the day on which the request is received by or on behalf of the agency or Minister; or

(b) if that period is extended or further extended, the day after that period as extended ends.

(2) An agency or Minister may extend the period for deciding a request referred to in subsection (1)(a)—

(a) if consultation is required under section 29, 29A, 31, 31A, 33, 34 or 35, by a period of not more than 15 days; or

(b) in any case, by a period of not more than 30 days, as agreed by the applicant.

(3) An agency or Minister may further extend a period for deciding a request in accordance with subsection (2)(b) any number of times.

(4) An agency or Minister must notify the applicant in writing if the period for deciding a request is extended or further extended under this section.

(5) The period for deciding a formal request cannot be extended or further extended under this section if that period has expired.

Relevant FOI Professional Standards

Professional Standard 3.1	An agency must not extend the time under section 21(2)(a) of the Act to make a decision unless third party consultation: (a) is being undertaken; or (b) will be undertaken.
Professional Standard 3.2	A notification under section 21(4) of the Act advising an applicant of an extension to the time for making a decision must state:

(a) under which subsection of section 21(2) of the Act the time has been extended or further extended;

(b) the particular reasons for the extension; and

(c) the number of days by which the agency is extending the due date.

Note: section 21(4) of the Act requires an agency to notify an applicant in writing where the time is extended or further extended.

Guidelines

Purpose and effect of section 21

1.1. Section 21 prescribes the timeframe for deciding access requests and the circumstances where an agency or Minister may extend timeframes.

1.2. Section 21:

- creates an obligation on agencies and Ministers to take all reasonable steps to notify an applicant of a decision 'as soon as practicable';
- sets a maximum period of 30 days for the decision to be notified; and
- prescribes limited circumstances where the 30 day timeframe can be extended.

1.3. The effect of section 21 is to oblige agencies and Ministers to deal with a request expeditiously.[159]

Timeframe to notify an applicant of decision

1.4. An agency or Minister must notify an applicant of its decision:

- as soon as practicable; and
- no later than 30 days after the day a valid request is received.[160]

[159] *Mildenhall v Department of Education* (Victorian Civil and Administrative Tribunal, Dr Lyons SM, 9 April 1999).

[160] *Freedom of Information Act 1982* (Vic) section 21(1)(a).

1.5. The 30 day timeframe begins the day after a valid request is received.[161] A valid request means a request that meets the requirements in section 17.

1.6. This means that time may begin to run:

- the day after the agency or Minister receives payment of the application fee;[162]
- the day after the agency or Minister decides to waive the application fee;[163]
- the day after the agency or Minister receives payment of the reduced application fee;
- the day after the applicant clarifies the request in a way that complies with section 17(2); or
- the day after whichever of the following days is the shorter period:
    - the day the request is transferred to the agency or Minister; or
    - 14 days after the date the original valid request was received by the transferring agency or Minister.

1.7. The 30 day timeframe includes all calendar days. This means weekends, public holidays, and any closedown periods – not just business or weekdays.

1.8. If the due date for a decision falls on a weekend or public holiday, the due date moves to the next business day.[164]

Example

An applicant makes a request in writing on 3 November. The agency receives payment of the application fee on 4 November.

The request does not provide such information concerning the documents sought as is reasonably necessary to enable the agency to identify the documents. This means the request does not comply with section 17(2).

On 8 November the agency requests clarification of the request. On 10 November, the applicant clarifies the request in a way that complies with section 17(2).

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[161] *Interpretation of Legislation Act 1984* (Vic), section 44(1); *Smeaton v Victorian Workcover Authority* [2012] VCAT 435.

[162] *Smeaton v Victorian Workcover Authority* [2012] VCAT 435.

[163] *Boyd v Victoria Police (Review and Regulation)* [2017] VCAT 2021, [13]-[14].

[164] *Interpretation of Legislation Act 1984* (Vic), section 44(3).

When is a valid request received?

A valid request is received by the agency on 10 November.

When does the 30 day clock start?

The 30 day clock starts on 11 November.

When is a decision due?

The agency is required to notify the applicant of a decision as soon as practicable, and no later than 11 December.

Extending the timeframe

1.9. The 30 day timeframe may be extended:

- by up to 15 days where third party consultation is required;[165] or
- by up to 30 days if the applicant agrees to the extension.[166]

1.10. The period under section 21(2)(b) may be extended any number of times, with the applicant's agreement.[167]

Date that an applicant must be notified of a decision when time is extended

1.11. The agency or Minister must notify the applicant of its decision no later than the day after the extended or further extended period ends.[168]

Example

If an agency imposes a 15 day extension to conduct consultation with third parties, the agency decision is due no later than the end of day 46 (initial 30 day period + 15 day extension + day after extended period ends).

[165] *Freedom of Information Act 1982* (Vic), section 21(2)(a).

[166] *Freedom of Information Act 1982* (Vic), section 21(2)(b).

[167] *Freedom of Information Act 1982* (Vic), section 21(3).

[168] *Freedom of Information Act 1982* (Vic), section 21(1)(b).

Extension for third party consultation

1.12. An agency or Minister may extend the initial 30 day timeframe by up to 15 days if third party consultation is required under sections 29, 29A, 31, 31A, 33, 34 or 35.[169]

1.13. Under Professional Standard 3.1, an agency must not extend the time under section 21(2)(a) unless third party consultation is being undertaken or will be undertaken. This means an agency should not extend the timeframe if third party consultation is speculative or will not be undertaken.

1.14. To determine whether consultation will be undertaken, an agency may need to wait until:

- some or all documents containing third party information have been identified; and
- it is determined third party consultation is practicable in the circumstances.

1.15. Section 21(2)(a) can only be used to extend the 30 day timeframe once. For example, where consultation is undertaken in accordance with the requirements of sections 33, 34 and 35, the agency is entitled to one extension of up to 15 days, not three separate extensions.

1.16. A third party should be given a reasonable timeframe to provide their views. However, an agency is not required to wait for a third party to provide its views before making a decision.

1.17. What constitutes a 'reasonable' timeframe for consultation will depend on the circumstances, including the number of documents, the nature of the information and the complexity of the issues involved. As the Act only allows for an extension of 15 days when undertaking third party consultation, it may be reasonable to allow two weeks for consultation to occur.

> For more information, see Practice Note: Practicability and third party consultation and notification.

Extension with an applicant's agreement

1.18. The 30 day timeframe may be extended by up to 30 days with the applicant's agreement.[170]

[169] *Freedom of Information Act 1982* (Vic), section 21(2)(a).

[170] *Freedom of Information Act 1982* (Vic), section 21(2)(b).

Multiple extensions of time with an applicant's agreement

1.19. An agency or Minister can only seek multiple extensions of time by:

- a single extension of up to 15 days for consultation in the first instance under section 21(2)(a); followed by any number of additional extensions of up to 30 days with an applicant's agreement under sections 21(2)(b) and 21(3); or
- an extension of up to 30 days with the applicant's agreement in the first instance, under section 21(2)(b); followed by any number of additional extensions of up to 30 days with the applicant's agreement under section 21(3).

1.20. Agencies and Ministers should not impose a 15 day extension under section 21(2)(a) if the agency or Minister has already extended the timeframe by up to 30 days with the applicant's agreement. This is contrary to the object and intent of these extension of time provisions.

Extension of time must be sought before timeframe expires

1.21. The timeframe for making a decision cannot be extended if it has already expired.[171]

1.22. For an extension of time to be valid under the Act, an agency or Minister must:

- impose the 15 day extension before the initial 30 day time frame expires;[172]
- obtain the applicant's agreement to a 30 day extension of time:
  - before the initial 30 day time frame expires;[173] or
  - before the 45 day time frame expires, where a 15 day extension has already been imposed under section 21(2)(a);[174]
- obtain the applicant's agreement to a further 30 day extension of time before the preceding 30 day extended time frame expires.[175]

[171] *Freedom of Information Act 1982* (Vic), section 21(5).

[172] *Freedom of Information Act 1982* (Vic), section 21(2)(a).

[173] *Freedom of Information Act 1982* (Vic), section 21(2)(b).

[174] *Freedom of Information Act 1982* (Vic), section 21(2)(b).

[175] *Freedom of Information Act 1982* (Vic), section 21(3).

Example

The due date to notify the applicant of a decision on the request is 1 November. On 1 November the applicant agreed to a 30 day extension of time under section 21(2)(b).

On 1 December the agency wrote to the applicant seeking their agreement to a further 30 day extension of time under sections 21(2)(b) and 21(3). On 2 December the applicant phoned the agency and agreed to the further extension.

The further extension of time is not valid under the Act because the applicant's agreement was obtained one day after the extended 30 day timeframe expired on 1 December.

In future, the agency should allow more time to seek an applicant's agreement to an extension of time.

Notifying the applicant of an extension of time

1.23. An agency or Minister must notify an applicant in writing if the period for deciding a request is extended or further extended.[176]

1.24. To ensure an applicant is aware of the circumstances and reasons for the extension, Professional Standard 3.2 requires this notification to state:

- under which subsection of section 21(2) the time has been extended or further extended;
- the particular reasons for the extension; and
- the number of days by which the agency is extending the due date.

1.25. Reasons for extending a timeframe might include: to undertake third party consultation, to allow further searches to be conducted, or to provide additional time to assess documents.

1.26. Agencies and Ministers should be transparent in explaining the reason for extending a timeframe.

[176] *Freedom of Information Act 1982* (Vic), section 21(4).

Other changes to the timeframe

1.27. The 30 day timeframe can also be paused, reset or waived in certain circumstances.

Suspending the timeframe – section 25A(1)

1.28. Where an agency or Minister intends to refuse to process a request on the basis it would substantially and unreasonably divert the resources of the agency from its other operations, the agency or Minister must first send a notice to the applicant under section 25A(6).

1.29. In this circumstance, the time to process the request pauses on the date the notice is provided to the applicant and does not resume until the day after the applicant confirms or alters the request. In other words, the period of time from the day an applicant is given the section 25A(6) notice to the day the applicant confirms or alters the request is not included in the 30 day time frame (or extended time frame).[177]

Example

A valid request is received on 31 October. The 30 day clock begins on 1 November. On 15 November the agency sends a notice to the applicant under section 25A(6). This stops the 30 day clock on 14 November (day 14 of the 30 day clock).

On 27 November the applicant alters the request. This starts the 30 day clock again on 28 November (day 15 of the 30 day clock).

The due date to notify the applicant of a decision on the request is 13 December.

Resetting the timeframe – access charges deposit

1.30. Where an agency or Minister requires payment of an access charges deposit in accordance with sections 22(3) and 22(4):

- the timeframe for making a decision stops when the applicant is notified about payment of a deposit for access charges; and
- the timeframe for making a decision resets to 'day one' of the 30 day timeframe on the day after the applicant pays the deposit.[178]

[177] *Freedom of Information Act 1982* (Vic), section 25A(7).

[178] *Freedom of Information Act 1982* (Vic), section 22(5).

Waiving the timeframe – access charges deposit

1.31. If a notice is sent to an applicant requesting payment of an access charges deposit, section 22(6) allows an agency and applicant or Minister and applicant to discuss practicable alternatives for altering the request, including reducing an access charge in exchange for the applicant waiving, conditionally or unconditionally, compliance with the 30 day timeframe to process the request.

1.32. Any agreement under section 22(6) should be recorded and confirmed in writing.

Notifying an applicant of a decision on the request

1.33. If an agency or Minister makes any one of the following decisions, the agency or Minister's written notice of decision must comply with the requirements in section 27:

- a decision to refuse access to a document either in part or in full;
- a decision to defer access to the document under section 24; or
- a decision that no document exists.

1.34. The Act does not prescribe a method for notifying an applicant of a decision to grant access to documents.

What happens if the applicant is not notified of a decision within the statutory timeframe?

1.35. If an applicant is not notified of a decision within the 30 day timeframe (or by a later date agreed to by the applicant or imposed by the agency or Minister to conduct third party consultation), the applicant has the right to:

- apply to the Victorian Civil and Administrative Tribunal (**VCAT**) on the basis that the agency or Minister is taken to have made a decision refusing to grant access to the requested document in accordance with the applicant's request;[179] and/or
- make a complaint to the Office of the Victorian Information Commissioner about the agency or Minister's delay in making a decision on the applicant's request.[180]

[179] *Freedom of Information Act 1982* (Vic), sections 50(1)(ea) and 53(1).

[180] *Freedom of Information Act 1982* (Vic), section 61A(1)(a) or (b).

1.36. An agency or Minister should continue to process the request and notify the applicant of its decision as soon as practicable.

More information

OVIC Practice Notes

Noting and briefing processes on freedom of information decisions

OVIC Templates

Template 12 – Request for extension of time

Template 13 – Notice of extension of time

Section 22 – Charges for access to documents

Extract of legislation

22 Charges for access to documents

(1) Any charge (not being an application fee) that is, in accordance with the regulations, required to be paid by an applicant before access to a document is given, shall be calculated by an agency in accordance with the following principles or, where those principles require, shall be waived—

(a) a charge shall only cover the time that would be spent by the agency in conducting a routine search for the document to which access is requested, and shall not cover additional time, if any, spent by the agency in searching for a document that was lost or misplaced;

(b) the charge in relation to time made under paragraph (a) shall be fixed on an hourly rate basis;

(c) a charge may be made for the identifiable cost incurred in supervising the inspection by the applicant of the material to which access is granted;

(d) a charge may be made for the reasonable costs incurred by an agency in supplying copies of documents, in making arrangements for viewing documents, in providing a written transcript of the words recorded or contained in documents, or in providing a written document in accordance with section 19;

(e) a charge shall not be made for the time spent by an agency in examining a document to determine whether it contains exempt matter, or in deleting exempt matter from a document;

(f) a charge shall not be made for producing for inspection a document referred to in sections 8(1) or 11(1), whether or not that document has been specified in a statement published in accordance with sections 8(2) or 11(2) respectively;

(g) a charge shall be waived if the request is a routine request for access to a document;

(h) a charge, other than a charge for the reasonable costs incurred by an agency in making copies of documents, in making a written transcript of the words recorded or contained in documents or in making a written document in accordance with section 19, shall not be made if—

(i) the applicant's intended use of the document is a use of general public interest or benefit; or

(ii) the applicant is a member of the Legislative Council or of the Legislative Assembly of Victoria; or

(iii) the request is for access to a document containing information relating to the personal affairs of the applicant; and

(i) a charge under paragraph (d) shall be waived if the applicant is impecunious and the request is for access to a document containing information relating to the personal affairs of the applicant.

(1A) Without limiting any other power to make regulations conferred by this Act, a power conferred by this Act to make regulations for or in relation to the making of charges for access to documents may, in the case of a document referred to in section 23(1)(e)—

(a) prescribe different amounts according to the form in which access is given;

(b) prescribe amounts by reference to the usual fee of a person for a consultation of a comparable duration.

(2) Subject to subsections (3), (4) and (5), payment of a charge shall not be required before the time at which the agency has notified the applicant of the decision to grant access to a document.

(3) If in the opinion of an agency a charge may exceed $25 or such greater amount as is prescribed by regulation the agency shall notify the applicant of its opinion and inquire whether the applicant wishes to proceed with the request.

(4) In a notice given to an applicant under subsection (3), an agency must inform the applicant that the applicant will be required to pay a deposit of a prescribed amount or at a prescribed rate on account of the charge.

(5) Where an agency has required an applicant to pay a deposit on account of a charge, the applicant's request shall, for the purposes of section 21 be deemed to have been received by the agency on the day on which the applicant has paid the deposit.

(6) Where an agency has required an applicant to pay a deposit on account of a charge, the agency shall, if requested to do so by the applicant, discuss with the applicant practicable alternatives for altering the request or reducing the anticipated charge, including reduction of the charge if the applicant shall waive, either conditionally or unconditionally, the need for compliance by the agency with the time limits specified in section 21.

(7) A notice under subsection (3) from an agency to an applicant shall—

(a) state the name and designation of the person who calculated the charge; and

(b) inform the applicant of—

(i) his right to apply for a review of the charge;

(ii) the authority to which the application for review should be made; and

(iii) the time within which the application for review must be made.

(8) Subject to this section, the charges set by the regulations shall be uniform for all agencies and there shall be no variation of charges as between different applicants in respect of like services.

(9) In this section where appropriate ***agency*** includes a Minister.

Relevant FOI Professional Standards

Professional Standard 4.1

When providing a notification under section 22(3) of the Act, in addition to any other requirements of section 22, an agency must include the following details:

(a) the estimated access charges;

(b) how the estimated access charges were calculated;

(c) the required access charges deposit amount;

(d) the date by which the deposit must be paid (which must be no less than 60 days after an applicant receives the deposit notice);

Note: an applicant has 60 days from the day they receive a notification requesting a deposit to apply to the Tribunal for a review of the access charges amount where the Information Commissioner has issued a certificate – section 52(1) of the Act.

(e) information outlining the applicant may contact the agency to discuss practicable alternatives for altering the request or reducing the anticipated access charges; and

Note: where an agency requires an applicant to pay an access charges deposit, the agency must, if requested by the applicant, discuss with the applicant practicable alternatives for altering the request or reducing the anticipated charge – section 22(6) of the Act.

(f) information outlining the agency may or will finalise the request without processing it if the applicant does not do either of the following:

(i) contact the agency to discuss options to reduce the anticipated charges; or

	(ii) pay the deposit by the date specified in the notification.
Professional Standard 4.2	An agency must take reasonable steps to provide a notification under section 22(3) of the Act to an applicant within 21 days of receiving a valid request.
Professional Standard 4.3	An agency requiring payment of an access charges deposit or access charges must take reasonable steps to provide options for payment of the relevant charge in line with accepted payment methods the agency provides for other services of a similar financial sum.

Guidelines

Overview of section 22

1.1. Regulation 6 of the *Freedom of Information (Access Charges) Regulations 2014* (**Regulations**) states that an applicant who has made a request in accordance with section 17 is liable to pay a charge set out in or calculated in accordance with the Schedule to the Regulations. Section 20 makes it a condition of access that any charges payable have in fact been paid. The charges referred to in regulation 6 and section 20 are known as 'access charges'.

1.2. Subsection 22(1) sets out the principles that agencies and Ministers must follow when calculating access charges under the Regulations. The principles also set out the circumstances when access charges do not apply or must be waived.

1.3. Subsections 22(3)-(7) deal with an agency or Minister seeking an access charges deposit from an applicant.

Overarching principle to provide access at the lowest reasonable cost

1.4. When calculating access charges, agencies and Ministers must ensure they consider the object of the Act in section 3(2) – to promote the disclosure of government held information at the lowest reasonable cost.[181] Agencies and Ministers are encouraged not to take a technical or overly legalistic approach when determining whether to impose or when calculating an access charge.

[181] *Mickelburough v Victoria Police* [2016] VCAT 732, [10]-[11].

1.5. The object of the Act is supported by:

- regulation 7 which requires agencies and Ministers to calculate access charges based on the form of access with the lowest reasonable cost, where no form of access is specified by the applicant;[182] and
- section 23(4), which requires agencies and Ministers to calculate access charges based on the form of access requested by the applicant, where that form of access would have been cheaper than the form of access provided by the agency or Minister.

Example

An applicant requests access to CCTV footage held by the agency but does not specify the form in which they would like to receive it (for example, receiving a copy of the footage or viewing it by way of inspection at the agency's premises). The agency grants access to the footage in part by way of inspection at the agency's premises because of the sensitive nature of the content in the footage.

The search time to locate the footage is 1.5 fee units.

The estimated access charge to arrange for and supervise the inspection is $50.

The estimated access charge to provide a copy of the footage is $0, because access can be provided electronically using a file share platform.

Access charges:

The agency must not charge $50 for the inspection costs. This is because the inspection cost is greater than the estimated charge for providing access by way of a copy. As the applicant did not specify the form of access they sought and the agency determined inspection was the most appropriate in the circumstances, the agency must calculate charges based on the form of access with the lowest reasonable cost.

The agency must only charge 1.5 fee units of search time.

What are access charges?

1.6. Access charges are the cost associated with processing a request and providing access to documents.

[182] *Freedom of Information (Access Charges) Regulations 2014* (Vic).

1.7. Access charges are separate from payment of the application fee required under section 17(2A).[183]

1.8. Access charges are found in the Schedule to the Regulations, which outlines 10 categories of 'services', and the access charge for each type of service. A summary of common access charges is provided below.

Rounding of access charges

1.9. Some access charges are calculated using the value of a 'fee unit'. The value of a fee unit is prescribed by the Department of Treasury and Finance and it increases with indexation each year. To calculate the applicable access charge, the current value of the fee unit needs to be multiplied by the amount noted in the Schedule to the Regulations (either 1.5 or 1.9 fee units, depending on the access charge) and then further multiplied by the amount of time taken to provide access.

1.10. Section 7(4) of the *Monetary Units Act 2004* (Vic) provides that when calculating a fee provided for by an Act, the fee amount may be rounded to the nearest ten cents. This means the total access charges payable under the FOI Act may be rounded to the nearest ten cents.

Example

If the value of a fee unit was $13.08, the charge for two hours of search time (being 1.5 fee units per hour or part of an hour) would be calculated as follows:

- **Step 1:** $13.08 x 1.5 = $19.62 (this amount is the charge for search time per hour or part of an hour).
- **Step 2:** $19.62 x 2 hours search time = $39.24 (this amount is the total charge for two hours of searching).
- **Step 3:** Round $39.24 (the charge) to the nearest 10 cents.

The access charge is $39.20.

Access charges for search time

1.11. An agency or Minister must only charge for the time that would be spent in conducting a routine search for the requested documents.[184]

[183] See *Freedom of Information (Access Charges) Regulations 2014* (Vic) regulation 6, Note.

[184] *Freedom of Information Act 1982* (Vic), section 22(1)(a).

1.12. An agency or Minister must also not charge for any additional time spent searching for lost or misplaced documents. A search of this kind is not a routine search.[185]

1.13. The search time charge is fixed at an hourly rate.[186] The fixed charge amount is 1.5 fee units per hour or part of an hour.[187]

> **Example**
>
> An agency spends 1 hour and 40 minutes conducting a routine search for documents that fall within the scope of a request.
>
> The access charges will be calculated for 2 hours of search time (section 22(1)(b)).
>
> The access charges amount will be 3 fee units (1.5 fee units x 2) (Item 1 of the Schedule).

1.14. An agency or Minister may only charge search time for documents that it would need to search for in the future.[188] If a search has already taken place, before the FOI request was received, or before an applicant is informed of the estimated access charges amount, and agrees to proceed with the request,[189] an agency or Minister cannot charge an applicant for that search time.

1.15. Agencies and Ministers should calculate access charges for searching for electronically stored documents (such as emails and other printable documents including Word documents, PDF documents, and Excel spreadsheets) using Item 1 of the Schedule, not Item 7 of the Schedule.[190] That is because electronically stored documents are a '*document*' under the Act and must be processed in the ordinary way under the Act. Item 7 may only be used where an agency or Minister must create a written document under section 19.

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[185] *Freedom of Information Act 1982* (Vic), section 22(1)(a).

[186] *Freedom of Information Act 1982* (Vic), section 22(1)(b).

[187] *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Item 1.

[188] *Sunbury Progress Association v Hume City Council* [2004] VCAT 2344, [26].

[189] This refers to the situation where section 21(3) is engaged because the estimated access charges amount exceeds $50. In this situation, section 21(3) requires an agency to notify an applicant of the estimated access charges amount and inquire whether the applicant wishes to proceed with the request.

[190] *Monash University v EBT* [2022] VSC 651.

Access charges for supervising the inspection of documents

1.16. An agency or Minister may charge for the time spent supervising the applicant to inspect a document.[191] This includes inspecting a document or viewing sound or visual images under the supervision of an agency officer.

1.17. The amount an agency or Minister can charge is fixed at 1.5 fee units per hour, calculated per quarter hour or part of a quarter hour.[192]

Example

Access is granted to view 70 minutes of CCTV footage by inspection under the supervision of a Council officer at Council's offices.

The supervision time will be 1.5 fee units for the first 60 minutes plus ¼ of 1.5 fee units for the remaining 10 minutes of CCTV footage.

Access charges for reasonable costs incurred by an agency in certain circumstances

1.18. An agency or Minister may charge for the reasonable costs incurred by the agency or Minister in the circumstances set out below.[193]

1.19. Calculating reasonable costs will depend on the context of the situation. Agencies and Ministers must consider the object of the Act in section 3(2) (to promote the disclosure of government held information at the lowest reasonable cost) when calculating access charges.

1.20. Reasonable costs may be charged in the following situations:

- In supplying copies of documents, other than black and white photocopy of an A4 page.[194] For example, supplying colour copies or copies of a different size to A4.
    - Reasonable costs may not be charged for black and white A4 photocopying. The cost of black and white photocopying is fixed at 20 cents per A4 page.[195]

[191] *Freedom of Information Act 1982* (Vic), section 22(1)(c).

[192] *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Item 2.

[193] *Freedom of Information Act 1982* (Vic), section 22(1)(d).

[194] *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Item 4.

[195] *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Item 3.

- Reasonable costs for postage or delivery should be the actual cost of the service.
- Reasonable costs for providing documents on USB or CD should be the actual cost of the storage medium.
- Agencies and Ministers should not charge an applicant for supplying copies of documents digitally, such as by email or through a file share platform.
- Reasonable costs to retrieve hard-copy or soft-copy documents from an offsite location, if documents of that nature are routinely stored offsite.
    - Where an agency or Minister archives documents after a short period of time, for example 12 months after the date of creation, the costs to retrieve the document are unlikely to be considered routine or reasonable. In contrast, if documents seven years old or more are archived offsite, the costs to retrieve this type of document are likely to be considered routine and reasonable.

- In making arrangements to hear or view sounds or images.[196]
    - This charge is in addition to the charge for supervision time.[197]
    - It may be reasonable to calculate the charge based on the pay rate of the officer making the arrangements. However, charging at the pay rate of an executive level officer may not be 'reasonable', where the work could have been performed by an officer at a lower pay grade.

Example

Access is granted to view 70 minutes of CCTV footage by inspection. A council officer estimates they will spend 20 minutes making arrangements to book a room with suitable audio visual equipment at Council's offices for the inspection to take place, and checking the officer's available dates and times to supervise the viewing.

The access charges amount in the decision notice will be made up of the following charges:

- 1.5 fee units for the first 60 minutes plus 1/4 of 1.5 fee units for the remaining 10 minutes of CCTV footage (Item 2 of the Schedule); and
- 1/3 of the hourly rate of the council officer for 20 minutes making arrangements to view the CCTV footage (Item 5 of the Schedule).

[196] *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Item 5.

[197] *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Item 2.

- In providing a written transcript of the words recorded or contained in documents.[198]
    - It may be reasonable to calculate costs based on the:
        - time taken to produce the transcript, at the pay rate of the officer producing the transcript. However, charging at the pay rate of an executive level officer may not be considered 'reasonable'; or
        - costs of an external provider used to produce the transcript.
- In providing a written document produced under section 19.[199]
    - For example:
        - reasonable costs may be calculated based on the pay rate of the officer producing the document. However, charging at the pay rate of an executive level officer may not be considered 'reasonable';
        - reasonable costs may be the costs of external consultants used to retrieve data to produce a document.
    - Agencies and Ministers should not use Item 7 when calculating access charges for searching for electronically stored documents and emails.[200] Instead, the agency or Minister should charge for search time using Item 1 of the Schedule. Electronically stored documents include emails and printable documents such as Word documents, PDF's and Excel spreadsheets.

Access charges for an explanation or summary of an applicant's own health information

1.21. The Act provides for special forms of access to an applicant's own health information that align with the forms of access in the *Health Records Act 2001* (Vic).

1.22. Items 8-10 of the Schedule set out the access charges for providing access to an applicant's health information. However, as a request for an applicant's health information is a request for information relating to their personal affairs, section 22(1)(h)(iii) requires the access charges in Items 8-10 of the Schedule to be waived.

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[198] *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Item 6.

[199] *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Item 7.

[200] *Monash University v EBT* [2022] VSC 651.

When access charges do not apply

1.23. An agency or Minister may only impose access charges for the services listed in the Schedule to the Regulations. An agency or Minister must not charge applicant for any costs of providing access that do not fit within the list of services in the Schedule.

1.24. There are also specific circumstances where an agency or Minister cannot make an applicant pay access charges:

- time spent searching for a lost or misplaced document;[201]
- time spent examining a document to determine if it contains exempt matter or deleting exempt matter from a document;[202]
- inspection of a document that should be available under sections 8(1) or 11(1) of Part II;[203] and
- any tasks (other than making copies, a transcript, or producing a document under section 19) where the:
    - applicant's intended use of the document is one that is in the general public's interest or benefit;[204] or
    - applicant is a member of the Victorian Parliament;[205] or
    - request is for a document containing information relating to the personal affairs of the applicant.[206]

Intended use of the document is of general public interest or benefit

1.25. To help an agency or Minister to decide whether the applicant's intended use of the document is one that is in the general public's interest or benefit, the applicant should ask the agency or Minister to not impose access charges and explain why their intended use of the document is one of general public interest or benefit.

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[201] *Freedom of Information Act 1982* (Vic), section 22(1)(a).

[202] *Freedom of Information Act 1982* (Vic), section 22(1)(e).

[203] *Freedom of Information Act 1982* (Vic), section 22(1)(f).

[204] *Freedom of Information Act 1982* (Vic), section 22(1)(h)(i).

[205] *Freedom of Information Act 1982* (Vic), section 22(1)(h)(ii).

[206] *Freedom of Information Act 1982* (Vic), section 22(1)(h)(iii).

1.26. The phrase 'general public interest or benefit' should be interpreted in a way that supports:

- the object of the Act to extend as far as possible the right of the community to access information in the possession of government and other government bodies;
- Parliament's intention that the provisions of the Act be interpreted so as to further the Act's object; and
- Parliament's intention that any discretions in the Act, be exercised as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information.[207]

1.27. A use of general public interest or benefit includes uses that will be in the interest of or for the benefit of the general public. This is different to the interest or benefit of individual members of groups of members of the public. 'General public' does not include an individual or individuals.[208]

1.28. A use of general public interest or benefit also does not mean a use that satisfies curiosity or general public attention.[209]

1.29. A use of personal or commercial benefit may not be in the general public's benefit or interest, unless it is outweighed by some wider general public interest or benefit.[210]

Example

The Victorian Civil and Administrative Tribunal (**VCAT**) has found an intended use to not be of general public interest or benefit:

- where the applicant represents a special interest group which is not representative of the Victorian community and where the information would not have any wide or general interest;[211]
- where the applicant was only pursuing their own strong personal interests with respect to their views of council expenditure.[212] In that case, it was relevant that there was no evidence that the:

[207] *Lapidos v Office of Corrections* (1990) 4 VAR 31, 36; *Russell v Murrindindi Shire Council (Review and Regulation)* [2016] VCAT 1287, [45].

[208] *Lapidos v Office of Corrections* (1990) 4 VAR 31, 44.

[209] *Lapidos v Office of Corrections* (1990) 4 VAR 31, 44.

[210] *Lapidos v Office of Corrections* (1990) 4 VAR 31, 37.

[211] *Prospectors & Miners Association (Vic) v Office of the Mining Warden* (1987) 1 VAR 472; *Sunbury Progress Association v Hume City Council* [2004] VCAT 2344, [20]-[21].

[212] *Russell v Murrindindi Shire Council (Review and Regulation)* [2016] VCAT 1287, [46]-[47].

- applicant had any particular qualifications or track record in promoting the public interest concerning local council operations;
- applicant had support in the community for their actions;
- applicant was part of any group working together in the public interest;
- documents, if obtained, would advance the general public interest.[213]

1.30. The public value or usefulness of the intended use is relevant.[214] For example, a proposed use that is likely to meaningfully contribute to public knowledge or understanding of a subject would likely be a use of general public interest or benefit.[215]

Example

VCAT has found an applicant's intended use of the document to be of 'general public interest or benefit' in the following situations:

- an intended use by an applicant with credentials in prison reform:
  - where there was general public benefit in having the information in the documents researched, analysed and acted upon as intended by the applicant; and
  - where the intended use was likely to significantly further public understanding of the operation of prisons, the management of prisoners and their welfare and the general public interest in the due and proper administration of prisons, the fair and humane treatment of prisoners and their rehabilitation, the security and good order of prisoners, the welfare of prisoners and prison staff and community involvement and openness with respect to prisons.[216]
- A journalist's proposed use of a document to write an article in a newspaper with a high circulation concerning risks to student and teacher health and safety with respect to safety standards in school building projects, that had been publicly identified as an issue by Ministers.[217]

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[213] *Russell v Murrindindi Shire Council (Review and Regulation)* [2016] VCAT 1287, [48].

[214] *Lapidos v Office of Corrections* (1990) 4 VAR 31, 37.

[215] *Lapidos v Office of Corrections* (1990) 4 VAR 31, 37.

[216] *Lapidos v Office of Corrections* (1990) 4 VAR 31, 45-46.

[217] *Gleeson v Ministry of Education* (1987) 1 VAR 392, 394.

When access charges must be waived

Routine requests

1.31. An agency or Minister must waive access charges if the request is a routine request for access to a document.[218]

1.32. A routine request is a request that an agency or Minister receives on a regular or routine basis or relates to information that could be either proactively or informally released outside of the Act.

1.33. Documents falling within a routine request are those that can be disclosed as part of an agency or Minister's normal administrative practices.

Example

Examples of documents that may fall within a routine request:

- an individual's payment summaries;
- information provided to the agency by the applicant;
- published reports or other publicly available information.

1.34. If it is a routine request for information, an agency should consider whether documents can be properly provided to an applicant outside the Act, as required by Professional Standard 1.1. No access charges are required to apply to a document provided outside the Act.

Applicant is impecunious and a document contains their personal affairs information

1.35. If an applicant is impecunious and the document contains their personal affairs information, the agency or Minister must waive any charges.[219] This means an agency or Minister must waive charges for:

- supplying copies of documents;
- making arrangements to view documents;
- providing a written transcript; or

[218] *Freedom of Information Act 1982* (Vic), section 22(1)(g).

[219] *Freedom of Information Act 1982* (Vic), section 22(1)(d). *Freedom of Information (Access Charges) Regulations 2014*, Schedule, Items 3-7.

- producing a document under section 19.

1.36. 'Impecunious' is defined broadly. It means being poor, in want of money, having little money, or being unable reasonably to afford the access charges, rather than having no money at all.[220] The purpose of waiving an access charge is to avoid causing an applicant further financial hardship.

1.37. If an agency or Minister waived payment of the application fee based on hardship, an agency or Minister should also waive any access charges if the documents contain the applicant's own personal information.

1.38. However, if an applicant paid the application fee, the agency or Minister should not take this as evidence the applicant can pay access charges. An applicant may not be able to reasonably afford access charges, even though they paid the application fee.

1.39. An agency or Minister can also reimburse the application fee to the applicant, if the agency or Minister is satisfied payment would cause hardship to the applicant.

See section 17 for more information on waiving or reducing the application fee.

Form of access

1.40. If access to a document is provided in a different form to what an applicant requested, an agency or Minister cannot impose an access charge that is greater than the charge that would apply to provide access in the form requested by the applicant.[221]

1.41. If access could be provided in more than one form, and the applicant has not requested a particular form, the access charge must reflect access in the form that would be at the lowest reasonable cost, even if access is provided in a form that may incur greater access charges.[222]

[220] *Larson v Officer of Corrections* (Administrative Appeals Tribunal Victoria, Howie PM, 19 June 1990).

[221] *Freedom of Information Act 1982* (Vic), section 23(4).

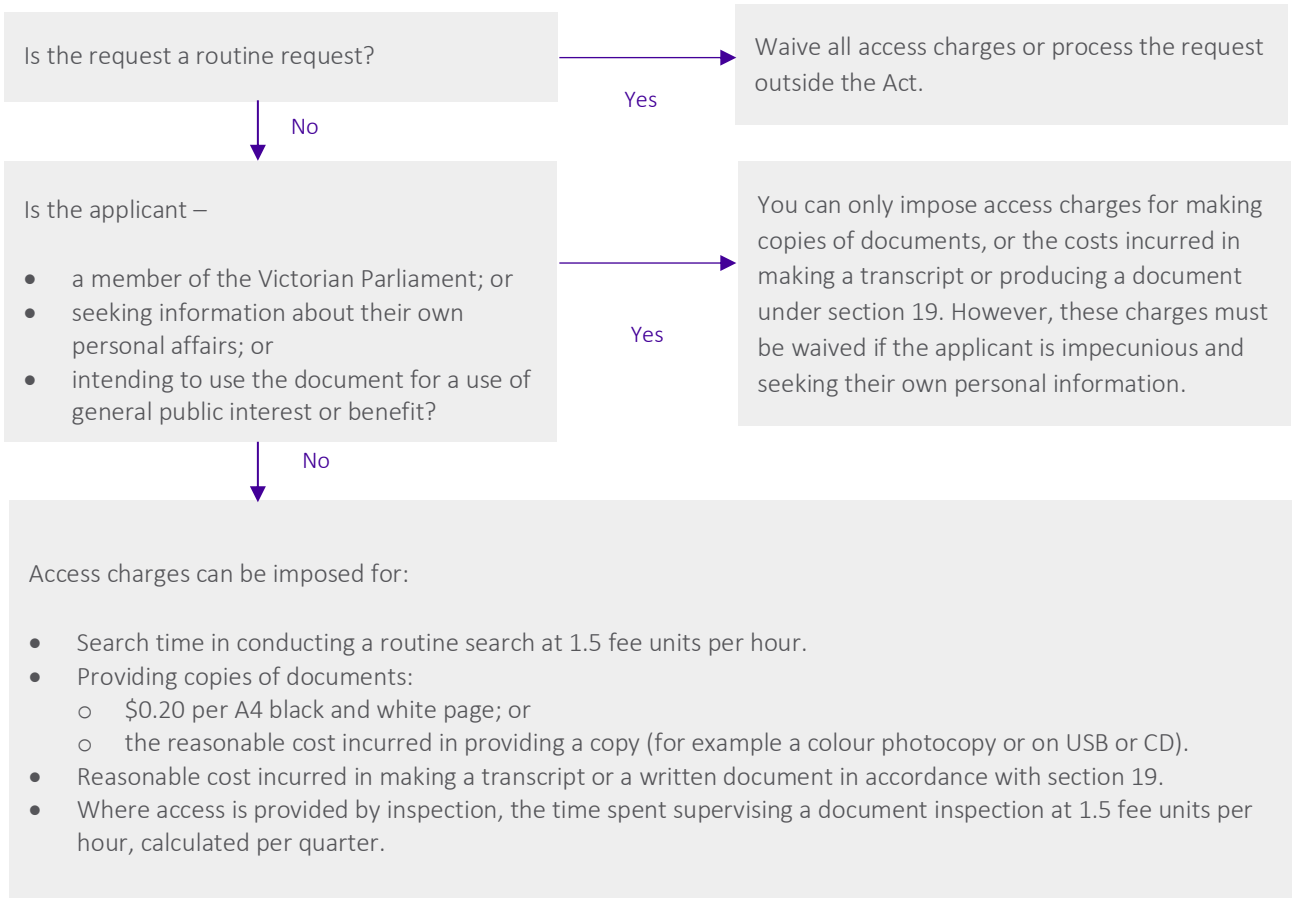
[222] *Freedom of Information (Access Charges) Regulations 2014*, Regulation 7.

Summary table of access charges

Access charges under item numbers 1 to 10 of the Schedule to the Regulations			
Category	Charge amount	Section / Regulation	Exceptions
Search time	1.5 fee units per hour or part of an hour of a routine search	Item 1 of the Schedule to the Regulations Sections 22(1)(a) and 22(1)(b)	Cannot impose charge if: - Intended use is of general public interest or benefit – section 22(1)(h)(i) - Applicant is a member of the Victorian Parliament – section 22(1)(h)(ii) - Applicant is requesting own personal affairs information – section 22(1)(h)(iii)
Supervision time	1.5 fee units per hour (calculated per quarter hour or part of a quarter hour)	Item 2 of the Schedule to the Regulations Section 22(1)(c)	Cannot impose charge if: - Intended use is of general public interest or benefit – section 22(1)(h)(i) - Applicant is a member of the Victorian Parliament – section 22(1)(h)(ii) - Applicant is requesting own personal affairs information – section 22(1)(h)(iii)
Black and white A4 photocopying	$0.20 per black and white A4 page	Item 3 of the Schedule to the Regulations Section 22(1)(d)	Charge must be waived if: Applicant is impecunious and request is for own personal affairs information – section 22(1)(i)
Supplying copies other than by A4 black and white photocopying	Reasonable costs incurred by agency in providing a copy	Item 4 of the Schedule to the Regulations Section 22(1)(d)	Charge must be waived if: Applicant is impecunious and request is for own personal affairs information – section 22(1)(i)
Arrangements to hear or view sound or visual image	Reasonable costs incurred by agency in making arrangements (and the cost of supervision time noted above)	Item 5 of the Schedule to the Regulations Section 22(1)(d)	Cannot impose charge if: - Intended use is of general public interest or benefit – section 22(1)(h)(i) - Applicant is a member of the Victorian Parliament – section 22(1)(h)(ii) - Applicant is requesting own personal affairs information – section 22(1)(h)(iii) Charge must be waived if: - Applicant is impecunious and request is for own personal affairs information – section 22(1)(i)
Providing a written transcript	Reasonable costs incurred in providing a written transcript	Item 6 of the Schedule to the Regulations Sections 19 and 22(1)(d)	Charge must be waived if: - Applicant is impecunious and request is for own personal affairs information – section 22(1)(i)

Providing a written document not available in a discrete form	Reasonable costs incurred in providing a written document	Item 7 of the Schedule to the Regulations Sections 19 and 22(1)(d)	Charge must be waived if: - Applicant is impecunious and request is for own personal affairs information – section 22(1)(i)
Providing explanation of health information where agency is a qualified health service provider	Reasonable costs incurred in providing the explanation calculated by reference to the time taken to provide the explanation. The costs must not exceed the lesser of: • 1.9 fee units per quarter hour or part of a quarter hour spent providing the explanation; or • 6 fee units.	Item 8 of the Schedule to the Regulations	Cannot impose charge because Applicant is requesting own personal affairs information – section 22(1)(h)(iii)
Providing explanation of health information where agency is not a qualified health service provider	Usual fee of the suitably qualified health service provider for a consultation of a comparable duration	Item 9 of the Schedule to the Regulations	Cannot impose charge because Applicant is requesting own personal affairs information – section 22(1)(h)(iii)
Providing a summary of health information where the summary does not exist before the request is made	Reasonable costs incurred in preparing the summary calculated by reference to the time taken to provide the summary. The costs must not exceed the lesser of: • 1.9 fee units per quarter hour or part of a quarter hour spent preparing the summary; or • 6 fee units.	Item 10 of the Schedule to the Regulations	Cannot impose charge because Applicant is requesting own personal affairs information – section 22(1)(h)(iii)

Flowchart for deciding whether access charges apply



At what stage should access charges be calculated?

1.42. An agency or Minister should estimate access charges as soon as practicable after a valid request is accepted and the request needs to be processed (for example, sections 25A(1), 25A(5) or 24A do not apply).

1.43. Access charges must be estimated before that agency or Minister searches for document. An agency or Minister cannot charge for document searches before an applicant is notified of estimated access charges and has agreed to proceed with the request.[223]

1.44. An agency or Minister should consult relevant business areas early to estimate how many documents may be relevant to a request, how many hours of search time may be required, and any other charges that may apply.

[223] *Sunbury Progress Association v Hume City Council* [2004] VCAT 2344, [26].

1.45. An online access charges calculator is available on the Office of the Victorian Information Commissioner's website to help estimate and calculate common access charges.

Notifying an applicant of estimated access charges and seeking a deposit

1.46. If an agency or Minister estimates access charges may exceed $50,[224] the agency or Minister must notify the applicant of the estimated access charges and confirm whether the applicant wishes to proceed with their request before doing any further work on it (access charges notice).[225]

1.47. If the estimated access charges are $50 or less, the agency or Minister does not have to notify the applicant.

1.48. If an agency or Minister searches for documents before an applicant agrees to proceed with the request, the agency or Minister cannot charge for that search time.[226]

Deposit amount

1.49. In an access charges notice, an agency or Minister must inform the applicant that the applicant will have to pay a deposit.[227]

1.50. The deposit amount is:

- $25, if the estimated access charge is $100 or less; or
- 50% of the total estimated access charge if the charge exceeds $100.[228]

1.51. Before making a decision on the applicant's request, an agency or Minister can only require payment of a deposit amount, not the full estimated access charge.[229]

Timing of the notice

1.52. Professional standard 4.2 requires an agency to take reasonable steps to notify an applicant of the estimated access charges within 21 days of receiving a valid request.

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[224] *Freedom of Information (Access Charges) Regulations 2014*, Regulation 8.

[225] *Freedom of Information Act 1982* (Vic), section 22(3).

[226] *Sunbury Progress Association v Hume City Council* [2004] VCAT 2344, [26].

[227] *Freedom of Information Act 1982* (Vic), section 22(4).

[228] *Freedom of Information (Access Charges) Regulations 2014*, Regulation 9.

[229] *Freedom of Information Act 1982* (Vic), section 22(2).

Information that must be included in the access charges notice

1.53. An access charges notice must include:

- the agency's opinion that the estimated access charge may exceed $50;
- a question to the applicant asking whether the applicant wishes to proceed with the request;
- the estimated access charges and how those charges were calculated;
- the deposit amount and the requirement for the applicant to pay the deposit amount before the request is further processed;
- the date by which the deposit must be paid – which must be no less than 60 days after an applicant receives the access charges notice (an applicant has 60 days to seek review of the access charges amount);
- information outlining the applicant may contact the agency to discuss practicable alternatives for altering the request or reducing the anticipated access charges;
- information outlining the agency may or will finalise the request without processing it if the applicant does not:
    - contact the agency to discuss options to reduce the anticipated charges; or
    - pay the deposit by the date specified in the notice. The agency must take reasonable steps to provide options for payment of the deposit amount in line with accepted payment methods the agency provides for other services of a similar financial sum;
- the name and designation of the person who calculated the estimated access charge; and
- the applicant's right to apply within 60 days to VCAT for a review of the estimated access charges amount if OVIC first issues a certificate certifying the matter is of sufficient importance to be considered by VCAT.[230]

Changes to the timeframe for processing a request

1.54. There are two ways that the timeframe for processing a request can change after an access charges notice is provided to an applicant.

[230] These requirements are found in section 22 and Professional Standard 4.1. The Information Commissioner or Public Access Deputy Commissioner may issue an access charges certificate.

1.55. Firstly:

- the timeframe for making a decision stops when the applicant is notified about the requirement to pay a deposit for access charges; and
- the timeframe for making a decision resets to 'day one' of the 30 day timeframe, the day after the applicant pays the deposit.[231]

This means that after an applicant pays a deposit, an agency or Minister has the full 30 day period under section 21, as well as any applicable extensions of time, to process the request.

1.56. Any changes to the timeframe for processing a request does not affect the date range of documents relevant to a request. The request can only be for documents that existed up to the date the valid request was originally accepted. The date range is not extended to the date the deposit is paid.

1.57. Secondly, an applicant and agency or Minister may negotiate a different timeframe to process the request or waive the need to comply at all with time limits when discussing ways to alter the request or reduce the anticipated charge.[232]

Example

An agency and applicant agree to waive access charges on condition that the agency processes the request within 90 days, instead of the statutory timeframe of 30 days.

1.58. If 60 days has elapsed since an access charges notice was sent to an applicant, and the applicant has not paid the deposit amount or has not engaged with the agency or Minister to negotiate a reduced amount, the agency or Minister may treat the request as having lapsed. If a request lapses, the agency or Minister does not need to further deal with the request. If an applicant later decides to proceed with their request, the applicant should make a fresh request for the same documents.

Notifying an applicant of the access charges amount in the notice of decision

1.59. If there are outstanding access charges that the applicant must pay before receiving access to documents, an agency or Minister should outline these charges in a notice of decision.[233]

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[231] *Freedom of Information Act 1982* (Vic), section 22(5).

[232] *Freedom of Information Act 1982* (Vic), section 22(6).

[233] A notice of decision must be prepared in accordance with section 27.

1.60. An agency or Minister does not have to provide access to a document until the applicant has paid any outstanding access charges.[234]

1.61. Actual access charges can differ from the estimated access charges.

Example

The actual access charges may differ from the estimated access charge where:

- searches may not have taken as long as the estimated search time; or
- an agency estimates access charges on the assumption access will be granted in full. However, the decision is to exempt documents from release. No charge can be made for documents not released to an applicant.

1.62. Professional Standard 6.1 requires an agency to keep a record of the searches undertaken. In addition, it is good practice to include information about the time taken to conduct the search. This information will assist an FOI Officer to calculate the actual access charge amount, that is communicated to an applicant in the notice of decision.

1.63. If the actual access charge is less than the deposit paid by the applicant, the agency or Minister will need to reimburse the applicant for the overpayment.

1.64. The notice of decision on the request should advise an applicant of their right to apply for a review of the access charges decision (in addition to the right to apply for review of the access decision).

Right to apply for a review

1.65. An applicant may apply to VCAT to review a decision of an agency or Minister to impose an access charge or a decision as to the amount of the charge. Before making an application to VCAT, an applicant must first apply to OVIC to certify the matter is of sufficient importance for VCAT to consider.[235]

For more information on access charges certificates, see section 50 – Applications for review by the Tribunal.

[234] *Freedom of Information Act 1982* (Vic), section 20.

[235] *Freedom of Information Act 1982* (Vic), section 50(1)(g).

1.66. The decision under review may relate to:

- estimated access charges, notified to an applicant in the access charges notice;[236] or
- actual access charges, notified to an applicant in the notice of decision.[237]

1.67. An applicant will have this right of review whether they pay the access charges deposit or full access charges. That is, an applicant can simultaneously pay the access charges to an agency or Minister to receive access to documents and request an access charges certificate from OVIC.

1.68. An applicant must apply to VCAT for review within 60 days from the day on which the agency or Minister gives the applicant the notice of decision.[238]

Payment of access charges

1.69. Under *Professional Standard 4.3* an agency that requires payment of an access charge deposit or access charges must take reasonable steps to provide options for payment of the charges in line with accepted payment methods the agency provides for other services of a similar financial sum.

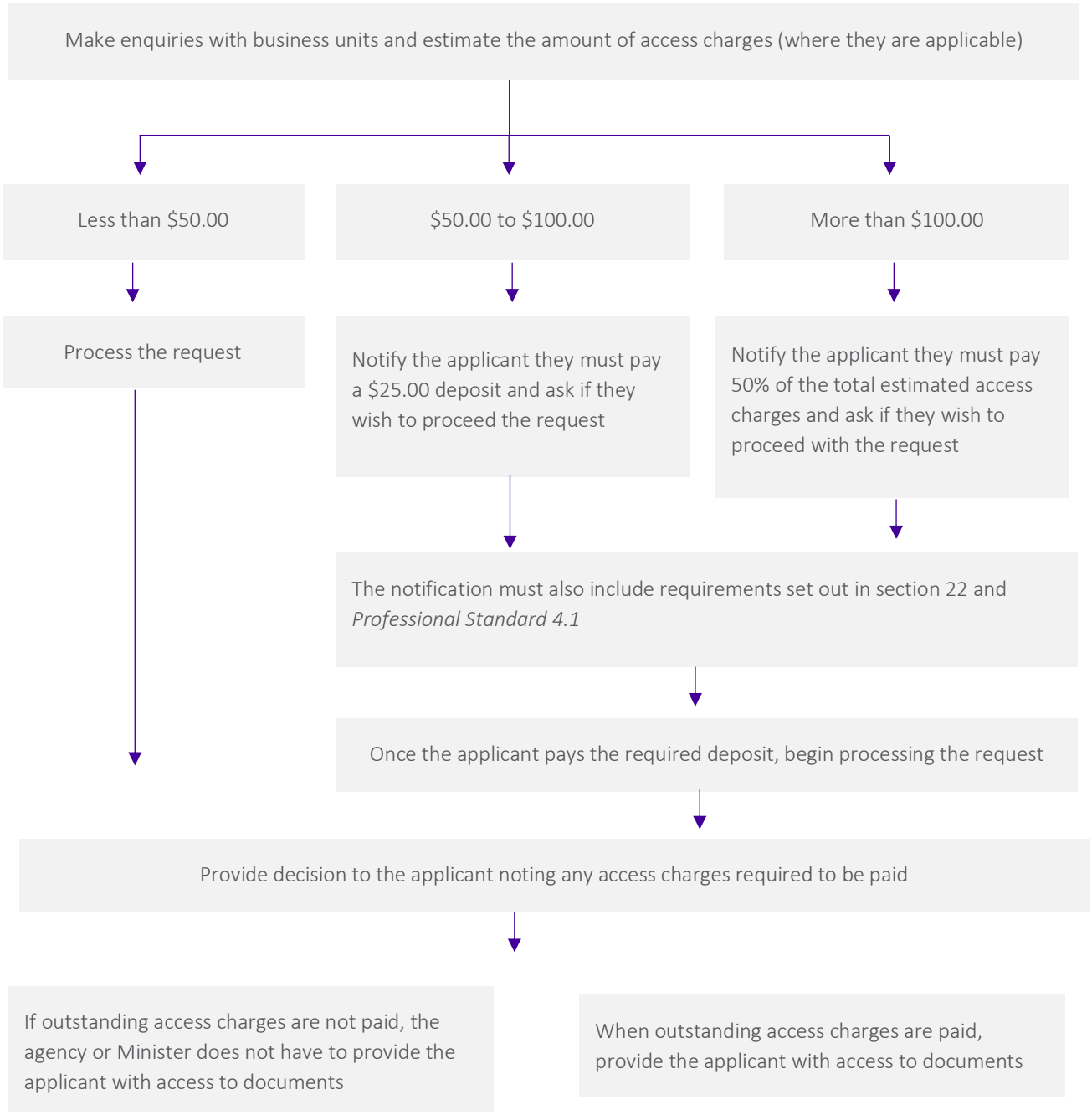
1.70. This means that if the agency has an electronic transfer facility for the payment of similar amounts to the access charges, this option should be provided to the applicant to pay the amount.

[236] In section 22(3).

[237] Made under section 27.

[238] *Freedom of Information Act 1982* (Vic), section 52(1).

Flowchart of agency process for imposing access charges



More information

Template 3 – Record of document search

Template 14 – Access charges deposit required

Section 23 – Forms of access

Extract of legislation

23 Forms of access

(1) Access to a document may be given to a person in one or more of the following forms—

(a) a reasonable opportunity to inspect the document;

(b) provision by the agency or Minister of a copy of the document;

(ba) publication to an Internet site established by the Minister for that purpose in accordance with the regulations;

(c) in the case of a document that is an article or thing from which sounds or visual images are capable of being reproduced, the making of arrangements for the person to hear or view those sounds or visual images;

(d) in the case of a document by which words are recorded in a manner in which they are capable of being reproduced in the form of sound or in which words are contained in the form of shorthand writing or in codified form, provision by the agency or Minister of a written transcript of the words recorded or contained in the document;

(e) in the case of a document containing health information relating to the person, by a way referred to in section 28(1), (2) or (3) of the **Health Records Act 2001** in the manner provided in section 29(1) of that Act.

(2) Subject to this section and to sections 19 and 25, where the applicant has requested access in a particular form, access shall be given in that form.

(3) If the form of access requested by the applicant—

(a) would interfere unreasonably with the operations of the agency, or the performance by the Minister of his functions, as the case may be;

(b) would be detrimental to the preservation of the document or having regard to the physical nature of the document, would not be appropriate; or

(c) would involve an infringement of copyright subsisting in a person other than the State, or, in the case of an application to a council, other than the council—

access in that form may be refused and access given in another form.

(4) If an applicant is given access to a document in a form that is different from the form of access requested by the applicant, the applicant shall not be required to pay a charge that is greater than the charge that would have been payable if access had been given in the form requested by the applicant.

(5) Access under subsection (1)(a) in respect of a document to which section 15(1) applies shall be given by affording the applicant a reasonable opportunity to inspect the document on the premises of the Public Record Office of Victoria.

(6) In respect of a document which is more than twenty years old or which is in the custody of the Public Record Office of Victoria, the Keeper of Public Records may determine that the granting of access in any one or more but not all of the forms referred to in subsection (1) would be detrimental to the preservation of the document or, having regard to the physical nature of the document, would not be appropriate.

(7) Where the Keeper of Public Records has made a determination in accordance with subsection (6), access shall not be granted in the form or forms specified in the determination but may be given in any of the remaining forms provided under subsection (1).

Guidelines

Overview of section 23

1.1. Section 23:

- sets out the methods or 'forms' in which an applicant can access a document under the Act;
- creates a right for an applicant to receive access to a document in the form requested;
- outlines the exceptions to the right to receive access in the form requested;
- ensures an applicant does not have to pay higher access charges for access in a different form to the form requested; and
- sets out special processes for giving access to older documents and documents in the custody of the Public Records Office Victoria (**PROV**).

1.2. An agency or Minister must provide access to documents in a way that furthers the object of the Act in section 3, which is to extend as far as possible the right of the community to access government held information. They must exercise any discretions as far as possible to facilitate and promote the disclosure of information.

Forms of access

1.3. An applicant may receive access to a document by:

- inspecting the document;

- receiving a copy of the document;
- having the document published on a website established by the Minister;
- arrangements to hear or view sounds or visual images (for example, viewing video footage);
- receiving a written transcript of sound recorded words, shorthand writing or codified words;
- special arrangements for health information under the *Health Records Act 2001*.[239]

1.4. Access can be given in more than one form.[240]

Example

An agency grants access to a sound recording by:

- arranging for the applicant to listen to the sound recording (section 23(1)(c)); and
- providing the applicant with a written transcript of the sound recording (section 23(d)).

Providing a reasonable opportunity to inspect the document – section 23(1)(a)

1.5. An agency or Minister may provide access to a document by providing a reasonable opportunity to inspect it.[241] For example, viewing council plans at council's offices.

1.6. If it would be an infringement of copyright to provide the applicant with a copy of the document, an agency or Minister may instead decide to provide access by inspection.

Documents in the custody of PROV – section 23(5)

1.7. If an agency places a document in PROV's custody, and the document is not available for public inspection at PROV, the agency or Minister must give access by providing the applicant with a reasonable opportunity to inspect the document on PROV's premises.[242]

For more information on documents available for public inspection at PROV, see section 14.

[239] *Freedom of Information Act 1982* (Vic), sections 23(1)(a)-(e).

[240] For example, section 23(1) states that access to a document may be given to a person in 'one or more' of the prescribed forms.

[241] *Freedom of Information Act 1982* (Vic), section 23(1)(a).

[242] *Freedom of Information Act 1982* (Vic), section 23(5).

Providing a copy of the document – section 23(1)(b)

1.8. An agency or Minister may provide access to a document by providing a copy of it.[243]

1.9. The Act is silent as to whether a 'copy of the document' includes an electronic copy. Given the Act came into existence in 1982, this is not surprising.[244] The Act is also silent as to how a copy of a document may be given to an applicant.[245] For example, providing a copy by email, USB, CD, DVD, file sharing platform, facsimile, or hard copy post.

1.10. While the Act does not expressly require an agency or Minister to provide a copy of a document in electronic format or using the method requested by an applicant, it would be consistent with the objects of the Act and Parliament's intention in sections 23(1) and 23(2), for agencies and Ministers to, as far as is practicable, provide a copy of a document in the format and method requested by an applicant.

Publication to a website established by the Minister – section 23(1)(ba)

1.11. An agency or Minister may provide access to a document by publishing it to a website established by the Minister in accordance with the regulations.[246] No regulations have yet been made to enable this form of access to be used.

Arrangements to view or hear sound or visual images – section 23(1)(c)

1.12. An agency or Minister may provide access to a document by arranging for the applicant to hear or view sounds or visual images from articles or things from which sounds or visual images can be reproduced. For example, a voice recorder, CD, or cassette tape with a sound recording stored on it or a CD ROM with video footage stored on it.[247]

1.13. This form of access is similar to inspecting the document.

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[243] *Freedom of Information Act 1982* (Vic), section 23(1)(b).

[244] *AB3 and Department of Justice and Community Safety* [2019] VICmr 12, [10].

[245] *AB3 and Department of Justice and Community Safety* [2019] VICmr 12, [10].

[246] *Freedom of Information Act 1982* (Vic), section 23(1)(ba). Section 23(1)(ba) was inserted by section 8 of the *Freedom of Information Amendment (Freedom of Information Commissioner) Act 2012.*

[247] *Freedom of Information Act 1982* (Vic), section 23(1)(c).

Providing a written transcript – section 23(1)(d)

1.14. An agency or Minister may provide access to a document by providing a written transcript of:

- sound recordings of words;
- documents containing shorthand writing;
- documents containing words in codified form.[248]

Shorthand writing and code

1.15. Shorthand writing is writing associated with the objective of brevity or conciseness in writing.[249] This includes the use of acronyms to abbreviate places, names, and turns of phrase.

1.16. Code is the use of symbols, figures or letters, associated with the objective of secrecy or for machine processing of information.[250]

1.17. Providing written transcripts helps to provide meaning to the document where, because of abbreviated writing or codified information, the information in the document is not meaningful to the reader.[251]

1.18. This form of access does not require an agency or Minister to create a transcript of illegible or poor handwriting, where the handwriting is not otherwise shorthand or code.[252]

Health information – section 23(1)(e)

1.19. An agency or Minister may provide access to a document containing health information relating to the applicant in one or more of the forms set out in sections 28(1), (2) or (3) of the *Health Records Act 2001*.[253]

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[248] *Freedom of Information Act 1982* (Vic), section 23(1)(d).

[249] *MacDonald v Austin Hospital* (1991) 5 VAR 67, 69.

[250] *MacDonald v Austin Hospital* (1991) 5 VAR 67, 69-70.

[251] *MacDonald v Austin Hospital* (1991) 5 VAR 67, 70.

[252] *MacDonald v Austin Hospital* (1991) 5 VAR 67, 70.

[253] *Freedom of Information Act 1982* (Vic), section 23(1)(e).

1.20. In summary, those forms are:

- inspecting the health information and having the opportunity to take notes of its contents;
- receiving a copy of the health information;
- viewing the health information, and having its content explained by a health service provider.

1.21. The access under sections 28(1), (2) or (3) must be given in way provided in section 29(1) of the *Health Records Act 2001*, which contains directions for providing access to health information in the way requested by the applicant.

An agency or Minister must give access to a document in the requested form

1.22. An applicant has the right to receive a document in the form that they requested, in most cases.[254]

1.23. However, there are some exceptions to this right.[255] This means, for example, if an applicant requests access to a copy of the document, the agency or Minister must give them a copy, unless an exception applies.

1.24. An applicant may only request access in one of the 'forms of access' outlined in section 23(1).[256]

1.25. If an agency or Minister decides to grant access to a document in a different form, a Tribunal may order the agency or Minister to also grant access in the form requested by the applicant. This is unless the agency or Minister can establish that sections 19 or 25 apply or an exception in section 23(3) applies.[257]

Example

Williams v Victoria Police [2005] VCAT 2516

Background

The applicant requested access to a CD ROM containing mobile telephone camera footage of a schoolyard incident. The 'document' is the CD ROM.

[254] *Freedom of Information Act 1982* (Vic), section 23(2); *Minogue v Department of Justice* [2004] VCAT 1194, [15].

[255] These exceptions are in sections 19, 23(3), and 25. *Minogue v Department of Justice* [2004] VCAT 1194, [15].

[256] *MacDonald v Austin Hospital* (1991) 5 VAR 67.

[257] *Williams v Victoria Police* [2005] VCAT 2516, [67]–[68].

The applicant requested access to a copy of the CD ROM.

The agency granted access to a supervised viewing of the CD ROM on the basis that it would enable the applicant to access the camera footage to consider his legal options, without compromising the privacy of other young persons who appeared in the camera footage.

In the agency's view, access by way of a copy would compromise the privacy of other young persons in the video as it amounted to unfettered access to the world at large.

Decision

The Victorian Civil and Administrative Tribunal (**VCAT**) held that if an applicant has requested access in a particular form, section 23(2) requires access to be given in that form unless an exception in section 23(3), 25 or 19 applies. The agency's reasons for providing access by way of a supervised viewing did not fit within any of the exceptions. Consequently, VCAT ordered that access be given by way of a copy, as requested by the applicant.

The agency's concerns about the privacy of young persons are relevant to considering whether any exemptions from access apply under Part IV.

Exceptions to the requirement to give access in the requested form

1.26. An agency or Minister may refuse to provide access to a document in the form that the applicant requested, and provide access in another form instead, if providing access in the requested form would be:

- an unreasonable interference with the agency's operations or the performance of the Minister's functions;
- detrimental to the preservation of the document or not appropriate given the physical nature of the document;
- copyright infringement.[258]

1.27. The power to refuse access in the requested form is conditional in the sense that it can only be exercised if one of the three exceptions applies.

[258] *Freedom of Information Act 1982* (Vic), section 23(3).

1.28. The power is discretionary in that an agency or Minister may still decline to exercise the power, even if the agency or Minister is satisfied that an exception applies.[259]

Unreasonable interference with agency's operations or performance of Minister's functions – section 23(3)(a)

1.29. This exception applies if the form of access requested by the applicant:

- would interfere with the agency's operations or the performance of the Minister's functions; and
- that interference would be unreasonable. [260]

Interference

1.30. The interference must be to the agency or Minister that is providing access, not some other agency or Minister.

1.31. The interference could arise from the work involved in providing access, as well as any future consequences of providing access in the form requested by the applicant.[261]

Unreasonable interference

1.32. The word 'unreasonably' requires the agency or Minister to look at the extent and nature of the interference with the operations of the agency or Minister and the extent to which this interference is appropriate having regard to other considerations.

1.33. For example, in *Minogue*, an important consideration was the importance of ensuring that rules and practices affecting members of the public in their dealings with agencies are readily available to persons affected by those rules and practices.[262]

1.34. The assessment requires a balancing of interests, by looking at both the 'disbenefits and benefits' of providing access in the form requested.[263]

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[259] *Minogue v Department of Justice* [2004] VCAT 1194, [19].

[260] *Minogue v Department of Justice* [2004] VCAT 1194, [55].

[261] *Minogue v Department of Justice* [2004] VCAT 1194, [56].

[262] *Minogue v Department of Justice* [2004] VCAT 1194, [57].

[263] *Minogue v Department of Justice* [2004] VCAT 1194, [57].

1.35. In *Minogue*, VCAT accepted the Department's submission of a lack of benefit in providing the applicant with the operational instructions of a prison where he was no longer a prisoner, and therefore not likely to be affected by the operational instructions.[264]

Example

Minogue v Department of Justice [2004] VCAT 1194

Background

The applicant requested access to a copy of every operational instruction for Port Phillip Prison. The applicant was a prisoner at Port Phillip Prison at the time the request was made but was a prisoner at Barwon Prison at the time of VCAT's decision.

The agency considered providing a copy of the operational instructions, whether in hard copy or on CD, would interfere unreasonably with its operations. Instead, the agency decided to offer access to the instructions by inspection at the prison library.

Decision

VCAT accepted that providing a copy of the operational instructions to the applicant would interfere unreasonably with the agency's operations.

In considering the 'benefits and disbenefits' of providing access, VCAT accepted the agency's evidence and submissions:

- of a lack of benefit in providing the applicant with the operational instructions of a prison where he was no longer a prisoner, and therefore not likely to be affected by the operational instructions (at [58]); and
- the disbenefits for the agency in providing the applicant with a copy of the operational instructions, in that it would:
    - set a precedent for a substantial number of prisoners to also request their own personal copy of the operating instructions and repeat their requests from time to time to ensure they continued to receive updated copies;
    - if the agency refused some future requests and granted access to others, this would interfere with the operations of the agency by negatively impacting on prisoners' perceptions of the agency dealing with inmates in an even-handed way;

[264] *Minogue v Department of Justice* [2004] VCAT 1194, [58].

- if all future requests were granted, this could impact on authority, discipline and good order within the prison, as prisoners may rely on outdated operational instructions in their interactions with prison officers.

Detrimental to preservation of the document or not appropriate given the physical nature of the document – section 23(3)(b)

1.36. An agency or Minister does not have to provide access to the document in the form that the applicant requested if the requested form of access:

- would be detrimental to the preservation of the document; or
- is not appropriate, having regard to the physical nature of the document.[265]

Not appropriate

1.37. The test of appropriateness involves a judgment about the physical nature of the document. This may refer to the type of document and its size.[266] The context of the matter may be considered in deciding if the physical nature of the document renders the form of access not appropriate.[267]

1.38. The test of appropriateness is not about the:

- contents of the document – the contents of a document are assessed under Part IV to decide if any exemptions apply. The decision about the form of access arises after the assessment under Part IV is done, and a decision is made to grant access to the document; or
- circumstances of the applicant.[268]

Example

Minogue v Department of Justice [2004] VCAT 1194

Background

The applicant requested access to a copy of every operational instruction for Port Phillip Prison. The applicant was a prisoner at Port Phillip Prison at the time the request was made.

[265] *Freedom of Information Act 1982* (Vic), section 23(3)(b).

[266] *Minogue v Department of Justice* [2004] VCAT 1194, [71].

[267] *Minogue v Department of Justice* [2004] VCAT 1194, [74].

[268] *Minogue v Department of Justice* [2004] VCAT 1194, [70].

The agency argued providing a copy of the operational instructions either in hard copy or on CD was not appropriate because the copies would not be kept up to date and would quickly be misleading.

Decision

VCAT rejected the agency's argument, noting the physical nature of the document and the context that 'all documents date'.[269]

VCAT acknowledged it was common for legal books to state their currency in the preface and for loose-leaf publications to mark the date on each page.

Accordingly, the exception in section 23(b) was not established.

However, VCAT did accept that providing access to a copy of the document would interfere unreasonably with the agency's operations under section 23(3)(a).

Copyright infringement – section 23(3)(c)

1.39. The copyright infringement exception applies if three conditions are satisfied:

- copyright in the document subsists in a person;
- the person is a person other than 'the State' – meaning, the 'State of Victoria';[270] and
- the form of access requested would involve an infringement of copyright.

1.40. An agency will need to look to both the provisions of section 23(3)(c) of the FOI Act and the *Copyright Act 1968* (Cth) (**Copyright Act**) to determine if this exception applies.

1.41. This exception will only apply where an agency or Minister cannot rely on the statutory permission in section 183(1) of the Copyright Act, which permits the State to provide a copy of a document to an applicant under FOI legislation without infringing copyright.

1.42. Therefore, if section 183(1) of the Copyright Act applies, then section 23(3)(c) will not apply, and the agency or Minister must provide access to the document in the form that the applicant requested (unless a different exception applies).

1.43. The statutory permission in section 183(1) of the Copyright Act is discussed further below.

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[269] *Minogue v Department of Justice* [2004] VCAT 1194, [75].

[270] *Interpretation of Legislation Act 1984* (Vic), section 38.

Copyright subsists in a person 'other than the State'

1.44. The purpose of this exception is to protect the copyright owned by third parties that are not State government departments, agencies or instrumentalities.[271] That is, the exception does not protect copyright subsisting in a state government agency, department or instrumentality.

1.45. The person 'other than the State' may be a government contractor or sub-contractor, or an estate agent appointed to sell government land.[272] In *Minogue*, VCAT accepted that copyright subsisted in Group 4, which was a sub-contractor that managed the Port Phillip Prison, and that Group 4 was a person other than the State.[273]

1.46. In the case of a request made to a council, the copyright owner must be a person other than the council.[274]

Would involve an infringement of copyright

1.47. A copyright infringement will only be established if:

- there is no statutory permission under the Copyright Act; and
- the agency or Minister does not have the licence of the copyright owner,[275]

to provide access in the form requested by the applicant.

Express or implied licence

1.48. 'Licence' means permission or consent, and the licence can be express or implied.[276]

1.49. The existence or otherwise of an implied licence must be determined by reference to the contractual relationship between the agency and the copyright owner at the time the document was created, not at a later time when the document is the subject of an FOI request.[277] The fact the copyright owner may have refused permission for the agency to provide a copy of the document to an applicant is irrelevant to deciding if there is an implied licence to copy the document.[278]

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[271] *Minogue v Department of Justice* [2004] VCAT 1194, [31].

[272] *Minogue v Department of Justice* [2004] VCAT 1194, [32].

[273] *Minogue v Department of Justice* [2004] VCAT 1194, [32].

[274] *Freedom of Information Act 1982* (Vic), section 23(3)(c).

[275] See *Copyright Act 1968* (Cth) section 36(1).

[276] See *Minogue v Department of Justice* [2004] VCAT 1194, [33].

[277] *Minogue v Department of Justice* [2004] VCAT 1194, [36].

[278] *Minogue v Department of Justice* [2004] VCAT 1194, [36].

1.50. It is a principle of copyright law that where the copyright owner has been engaged for a reward by a party (for example, a government agency) to produce material, the copyright owner grants an implied permission, consent or licence for the government agency to use the material in the manner and for the purpose in which and for which it was contemplated between the copyright owner and the agency, that the material would be used at the time of the engagement.[279]

1.51. In *Minogue,* VCAT found that the contractual relationship between the Department and Group 4 implied a permission that the Department may use the operating manual, including making copies, for the purpose of carrying out its powers and fulfilling its duties as a department. Those duties included the Department's obligations under the FOI Act to provide access to non-exempt documents.[280]

Statutory permission under the Copyright Act

1.52. The Copyright Act permits the use of a document that would otherwise have been an infringement of copyright. Section 183(1) of the Copyright Act is one of these permissions.

Who is the 'State'?

1.53. Section 183(1) provides that copyright is not infringed by a State, or a person authorised in writing by a State, doing any of the acts comprised in the copyright if this is done "for the services of the… State".

1.54. For the purposes of the Copyright Act, departments, unincorporated agencies, and administrative offices are part of the State. Statutory bodies which represent the Crown are part of the State for this purpose also. Additionally, agencies may receive a written authorisation from the Department of Treasury and Finance (DTF) for the purposes of section 183 of the Copyright Act.

1.55. Public hospitals and councils are generally not part of the State for the purposes of section 183 of the Copyright Act. However, some public hospitals have been authorised by DTF.

1.56. If an agency is not sure whether it falls within section 183, it should contact DTF at ippolicy@dtf.vic.gov.au.

[279] *Beck v Montana Constructions Pty Ltd* (1963) 80 WN (NSW) 1578, relied on by President Morris J, in *Minogue v Department of Justice* [2004] VCAT 1194, [37-38].

[280] *Minogue v Department of Justice* [2004] VCAT 1194, [41-42].

When does section 183(1) of the Copyright Act apply?

1.57. In *Minogue*, VCAT held that the Department copying a document to provide it to a member of the public under the FOI Act was an act done 'for the services of the State'. VCAT found that FOI legislation serves the purpose of good governance, in that the Act forms an important part of our democratic framework by promoting knowledge about the affairs of government and about governance practices. Providing access to a document under the FOI Act serves the State, because of the State's legitimate and proper interest in good governance.[281]

1.58. An agency falling within the meaning of the State in section 183(1) of the Copyright Act is permitted to copy a document and provide the copy to an applicant under the FOI Act. The act of copying the document is done 'for the services of the State' and therefore does not infringe copyright.[282] This means the agency cannot rely on the exception in section 23(3)(c) of the FOI Act.

1.59. Where an agency is permitted to copy a document and provide the copy to an applicant under the FOI Act, the applicant receiving the copy will still be bound by copyright in the document.

Informing the copyright owner and terms covering the use of the document

1.60. Where an agency is permitted under the Copyright Act to copy a document and provide it to an applicant, the agency must inform the copyright owner that the State has done an act comprised in the copyright.[283]

1.61. The agency should also inform the applicant in its notice of decision that copyright in the document subsists in a person other than the State, to help prevent the applicant from doing an act that would infringe the copyright (such as making a further copy of the document). Providing access to a copy of a document which is protected by copyright does not authorise the applicant receiving the copy to use the material without a licence.[284]

1.62. Section 183(5) of the Copyright Act also requires the agency and the copyright owner to agree to terms, including any licence fee, covering the use of the document.

1.63. However, an agency does not have to inform the copyright owner or agree to terms covering the use of the document if section 183A of the Copyright Act applies.[285]

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[281] *Minogue v Department of Justice* [2004] VCAT 1194, [47].

[282] *Minogue v Department of Justice* [2004] VCAT 1194, [51].

[283] *Copyright Act 1968* (Cth), section 183(4).

[284] Department of Treasury and Finance, Intellectual Property Guidelines for the Victorian Public Sector, [11.4.4].

[285] In accordance with sections 184(4) and 183(5) of the Copyright Act respectively.

1.64. Section 183A relates to special arrangements for copying for services of government. In Victoria, departments and some agencies participate in an agreement with the Copyright Agency. Under that agreement, the requirements under section 183(4) and section 183(5) of the Copyright Act are waived for government copies of works other than survey plans and computer programs.

For more information, see the Copyright Agency and DTF's Intellectual Property Policy and Guidelines for the Victorian Public Sector.

Producing a written document before providing access – section 19

1.65. Section 19 requires an agency or Minister to produce a written document, where the information requested by an applicant is not already available in a discrete document of the agency or Minister.

1.66. This may affect an applicant's ability to receive access in the form of viewing or inspecting electronic information, where that information is not yet in documentary form.

Example

In *Luck v Victoria Police FOI Division* [2012] VCAT 1617, the applicant requested information that was not available in discrete form in the agency. The applicant asked to view the requested information on the actual screen of the agency's computer system.

VCAT observed that section 19 required the agency to produce a written record of the information. As such, the effect of section 23(2) was that access could not be given in the form requested by the applicant, as the information in the computer was subject first to section 19, which required that it be collated into a written document before access could be provided.

Removing exempt or irrelevant information from a document before providing access – section 25

1.67. Section 25 allows an agency or Minister to remove irrelevant and exempt information from a document before providing access under the Act. Section 25 qualifies the form of access because the edited document is not a true copy of the document requested by the applicant.

Facilitating access at the lowest reasonable cost – section 23(4)

1.68. Where an agency or Minister provides access to a document in a different form to what an applicant requested, an agency or Minister cannot impose an access charge that is greater than the charge that would apply to provide access in the form requested by the applicant.

1.69. This means that if access is given in a form that attracts higher access charges than the form requested, the agency or Minister must only charge using the rates for access in the requested form.

For more information on access charges, see section 22 – Charges for access.

1.70. This only applies where an applicant has requested access in a particular form. Where an applicant does not request a specific form of access, and access could be provided in more than one form, regulation 7 of the *Freedom of Information (Access Charges) Regulations 2014* requires agencies and Ministers to only charge for access in the form that would be the lowest reasonable cost.

Documents more than 20 years old or in the custody of PROV – sections 23(6)-(7)

1.71. Section 23(6) deals with:

- a document which is more than 20 years old; or
- a document which is in the custody of PROV.

1.72. The Keeper of Public Records may determine that providing access a document that is more than 20 years old, or a document which is in PROV's custody, in one or more (but not all) of the forms of access in section 23(1) would be:

- detrimental to the preservation of the document; or
- would not be appropriate, having regard to the physical nature of the document.[286]

1.73. The determination must allow an agency or Minister to give access in at least one of the forms in section 23(1). A determination by the Keeper of Public Records cannot rule out all forms of access.

1.74. If the Keeper of Public Records makes a determination under section 23(6), the agency or Minister must not give access in the form or forms specified in the determination, but may give access in any of the remaining forms in section 23(1).[287]

[286] *Freedom of Information Act 1982* (Vic), section 23(6).

[287] *Freedom of Information Act 1982* (Vic), section 23(7).

Example

An applicant requests access to a document from an agency. The document is in the custody of PROV.

The Keeper of Public Records considers the process involved in making a copy of the document is likely to damage the document. Consequently, the Keeper of Public Records makes a determination under section 23(6) that access in the form of a copy would be detrimental to the preservation of the document.

Because of the determination, section 23(7) prevents the agency from providing access to a copy of the document but does allow the agency to provide access by way of inspection.

Section 24 – Deferment of access

Extract of legislation

24 Deferment of access

(1) An agency which, or a Minister who, receives a request may defer the provision of access to the document concerned if the document has been prepared—

(a) for presentation to the Parliament;

(aa) for presentation to a council;

(b) for release to the Press; or

(c) solely for inclusion, in the same or in an amended form, in a document to be prepared for a purpose specified in paragraph (a), (aa) or (b)—

and the document is yet to be presented or released, or included in a document to be presented or released, as the case may be.

(2) Where the provision of access to a document is deferred in accordance with subsection (1), the agency or Minister shall, in informing the applicant of the reasons for the decision, indicate, as far as practicable, the period for which the deferment will operate.

Guidelines

Delaying access to a document

1.1. An agency or Minister may defer (delay) access to a requested document in certain circumstances.

1.2. This reflects the public interest in presenting information to Parliament, council and the press, and the balancing of this public interest with the general right of access to government held information under the Act.

1.3. Section 24 promotes the objects of the Act to extend as far as possible the right of the community to access information held by government by giving agencies and Ministers the option to grant access to a document, but to defer the provision of access until some specified time or event.

1.4. The power in section 24 is discretionary. This means agencies and Ministers can choose not to delay access, and provide immediate access, even if one of the circumstances in section 24 is met.

When can access be delayed?

1.5. Access can be delayed if the document has been prepared for:

- presentation to the Parliament;[288]
- presentation to a council;[289] or
- release to the Press,[290]

and the document has not yet been presented or released.

1.6. Access can also be delayed if the document has been prepared solely for inclusion in a different document that is yet to be prepared for presentation to Parliament or a council or for release to the Press.[291] This applies irrespective of whether it is a complete or an amended version of the document that is included in the other document.

Example

An FOI officer asks a business unit of the agency to conduct a search for documents falling within the terms of a request.

The business unit provides a document to the FOI officer, informing them that the document has been prepared to be included in a report that is being prepared for presentation to Parliament. The business unit explains that either the entire document or a summary version of the document will be included in the report to Parliament.

The FOI officer is satisfied the document has been prepared solely for inclusion in a document that will be presented to Parliament. Accordingly, the FOI officer decides to defer access to the document until after presentation to Parliament.

[288] *Freedom of Information Act 1982* (Vic), section 24(1)(a).

[289] *Freedom of Information Act 1982* (Vic), section 24(1)(aa).

[290] *Freedom of Information Act 1982* (Vic), section 24(1)(b).

[291] *Freedom of Information Act 1982* (Vic), section 24(1)(c).

Release to the Press

1.7. An agency or Minister may delay access to a document because the document has been prepared for release to the Press.[292] For example, a press release or similar document where release is embargoed.[293]

1.8. 'Prepared for release to the Press' does not include documents prepared for release to the public generally.[294] Similarly, an agency or Minister cannot rely on this exception to delay access to a draft document that will be eventually released to the public.[295]

Example

AS7 and Department of Environment, Land, Water and Planning [2019] VICmr 170

Background

The applicant requested access to an audit document regarding VicForests' harvesting activities.

The agency deferred access 'until such time that the document has been approved for release to the Press and other stakeholders'.

The applicant sought review of the agency's decision by the Office of the Victorian Information Commissioner (**OVIC**).

In its submission to OVIC, the agency stated: 'the document is still at a draft stage and we are currently unable to identify the exact date that the document will be released'.

Decision

OVIC was not satisfied the document was 'prepared for release to the Press' for the following reasons:

- the document was in draft form and intended to be released to the public generally, as opposed to being prepared for the media; and
- the purpose of preparing the document was for the agency to meet its forestry regulations obligations, it was not prepared for the purpose of release to the media.

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[292] *Freedom of Information Act 1982* (Vic), section 24(1)(b).

[293] *AS7 and Department of Environment, Land, Water and Planning* [2019] VICmr 170, [18].

[294] *AS7 and Department of Environment, Land, Water and Planning* [2019] VICmr 170, [18].

[295] *AS7 and Department of Environment, Land, Water and Planning* [2019] VICmr 170, [18].

Notifying the applicant of reasons for decision and length of delay

Reasons for decision

1.9. An agency or Minister must provide reasons for its decision to defer access to a document, in its notice of decision.[296]

Length of deferral

1.10. An agency or Minister must, as far as practicable, specify in its notice of decision how long access is deferred for (the length of deferral).[297] If an agency or Minister cannot specify the length of the deferral, it must explain to the applicant why it cannot do so.

1.11. The phrase 'as far as practicable' has been interpreted in different contexts as requiring a common-sense approach.[298] For example, the *Macquarie Dictionary* defines 'practicable' as 'capable of being put into practice, done or effected, especially with the available means or with reason or prudence; feasible'. The *Oxford English Dictionary* defines 'practicable' as 'capable of being put into practice, carried out in action, effected, accomplished or done; feasible'.

1.12. In deciding practicability, an agency or Minister must exercise reasonable and fair judgement and consider the particular circumstances of each matter. This may include the nature of the information or documents being considered and the resources and capacity of the agency or Minister.

1.13. The notice requirement implies that access should be deferred only until the document has been published, presented, or submitted.[299]

Example

An agency makes a decision on 5 March to defer access to a document until after the document is presented to Parliament on 15 March.

The agency's decision explains that access has been deferred until 16 March, because the document will be presented to Parliament on 15 March.

The agency gives the applicant access to the document on 16 March.

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[296] *Freedom of Information Act 1982* (Vic), section 24(2). Reasons much be provided in the notice of decision prepared under section 27.

[297] *Freedom of Information Act 1982* (Vic), section 24(2).

[298] *Re Shubert v Department of Premier and Cabinet* (2001) 19 VAR 35, 45.

[299] Moira Paterson, *Freedom of Information and Privacy in Australia* (LexisNexis Butterworths, 2nd ed, 2015) ch 3 [3.62].

Section 24A – Repeated requests

Extract of legislation

24A Repeated requests

(1) An agency or Minister dealing with a request under Part III for access to documents or under Part V for the correction or amendment of information may refuse to grant access to documents or to amend a record in accordance with the request, without having caused the processing of the request to have been undertaken or at any later time, if the agency or Minister is satisfied that—

(a) the request is made by, or on behalf of, a person who, on at least one previous occasion, has made a request to the agency or Minister, or to a predecessor of the agency or Minister, for access to the same documents or the same information; and

(b) the request was refused and the Tribunal, on reviewing the decision to refuse the request, confirmed the decision; and

(c) there are not reasonable grounds for making the request again.

(2) An agency or Minister must give notice of a refusal under subsection (1) and must inform the applicant of—

(a) the right to apply for review of the decision; and

(b) the authority to which the application for review should be made; and

(c) the time within which the application for review must be made.

Guidelines

Refusing repeat requests

1.1. Section 24A places limits on the time and resources an agency or Minister spends on one applicant. If the conditions of section 24A(1) are met, an agency or Minister may:

- refuse to grant access to documents;
- refuse to amend a record under Part V;

without beginning to process the request, or at any later time.

1.2. The repeat requests exception is conditional and discretionary. It is only enlivened if the agency or Minister is satisfied the conditions in section 24A(1)(a)-(c) are met. It is discretionary in that an agency or Minister may still process the request, even if the conditions are met.

1.3. Section 24A was inserted into the Act to address an identified burden on agency resources that was affecting the administration and operation of the Act.[300]

When can an agency or Minister refuse to process a repeat request?

1.4. If the elements of section 24A(1) are met, an agency or Minister may refuse the request before the agency or Minister begins processing it, or at any later time when processing the request.

1.5. An agency or Minister may refuse to process a request, if the agency or Minister is satisfied that:

- the applicant has previously made a request to the agency or Minister, or a predecessor of the agency or Minister, for access to the same documents or to amend the same information;[301]
- the applicant's request was refused by the agency or Minister;[302]
- the Victorian Civil and Administrative Tribunal (**VCAT**) confirmed the agency or Minister's decision to refuse the request; [303] and
- there are not reasonable grounds for the applicant making the request again.[304]

Previous request for the 'same' documents or 'same' information

1.6. The request must be for the same documents or same information. The previous request does not have to be identical to the current request. It is still a request for access to the same documents, if the request is for a subset of the documents previously requested.[305]

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[300] *Freedom of Information (Amendment) Act 1993* (Vic); Victoria, *Parliamentary Debates*, Legislative Council, 20 May 1993, 1148 (Haddon Storey, Minister for Tertiary Education and Training) https://www.parliament.vic.gov.au/images/stories/volume-hansard/Hansard%2052%20LC%20V412%20May1993.pdf.

[301] *Freedom of Information Act 1982* (Vic), section 24A(1)(a).

[302] *Freedom of Information Act 1982* (Vic), section 24A(1)(b).

[303] *Freedom of Information Act 1982* (Vic), section 24A(1)(b).

[304] *Freedom of Information Act 1982* (Vic), section 24A(1)(c).

[305] *Smeaton v Victorian Workcover Authority (Review and Regulation)* [2015] VCAT 1597, [18].

1.7. However, an agency or Minister cannot refuse to process a repeat request if an applicant makes a request that is similar or related to earlier requests, but still covers 'fresh ground', in that it does not request access to the 'same' documents.

VCAT has 'confirmed the decision'

1.8. VCAT must have confirmed the decision. VCAT has held that the term 'confirmed the decision' refers to 'a previous FOI request where a primary decision was confirmed (in the sense of finalised or concluded) by a VCAT decision which determined the issues in dispute between the parties.[306]

1.9. VCAT does not need to have made an identical decision to the primary decision for an agency or Minister to use the power.[307] VCAT commented that if section 24A could only be used where VCAT makes a decision identical to the primary decision, this would prevent section 24A being used to address the issues the section was inserted into the Act to address, namely applicants lodging appeals on identical matters. VCAT found that such a result could not have been intended by Parliament.[308]

1.10. Where an agency or Minister's decision to refuse access to documents has not been the subject of review before a Tribunal, an agency or Minister cannot refuse to process the request under section 24A.

No reasonable grounds for making the request again

1.11. For an example of what can be taken into account when considering whether an applicant has reasonable grounds to make the request again, see the decision in *Smeaton v Victorian WorkCover Authority* [2015] VCAT 1597.

Notifying an applicant of the right of review

1.12. If an agency or Minister decides to refuse to process the applicant's request under section 24A, the agency or Minister must tell the applicant of their right to apply to the Office of the Victorian Information Commissioner for review of the agency or Minister's decision within 28 days of receiving the notice of decision.[309]

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[306] *Smeaton v Victorian Workcover Authority (Review and Regulation)* [2015] VCAT 1597, [21]; *Smeaton v Victorian Workcover Authority No 2 (Review and Regulation)* [2015] VCAT 453, [38].

[307] *Smeaton v Victorian Workcover Authority (Review and Regulation)* [2015] VCAT 1597, [21]; *Smeaton v Victorian Workcover Authority No 2 (Review and Regulation)* [2015] VCAT 453, [38].

[308] *Smeaton v Victorian Workcover Authority (Review and Regulation)* [2015] VCAT 1597, [22]; *Smeaton v Victorian Workcover Authority No 2 (Review and Regulation)* [2015] VCAT 453, [40].

[309] *Freedom of Information Act 1982* (Vic), section 24A(2).

1.13. An agency or Minister's decision must also otherwise meet the requirements of section 27.

More information

For more information on applying to the Office of the Victorian Information Commissioner to review an agency or Minister's decision, see:

- section 49A – Applications to Information Commissioner for review;
- section 49B – time for apply for review.

Section 25 – Deletion of exempt matter or irrelevant material

Extract of legislation

25 Deletion of exempt matter or irrelevant material

Where—

(a) a decision is made not to grant a request for access to a document on the ground that it is an exempt document or that to grant the request would disclose information that would reasonably be regarded as irrelevant to the request;

(b) it is practicable for the agency or Minister to grant access to a copy of the document with such deletions as to make the copy not an exempt document or a document that would not disclose such information (as the case requires); and

(c) it appears from the request, or the applicant subsequently indicates, that the applicant would wish to have access to such a copy—

the agency or Minister shall grant access to such a copy of the document.

Guidelines

Removing exempt or irrelevant information from a document

1.1. An agency or Minister may remove or redact exempt or irrelevant information from a document, to facilitate access to the relevant and non-exempt information in the same document. This is known as providing partial access to an edited copy of a document.

1.2. An agency or Minister may provide partial access to an edited copy of a document when:

- a document contains exempt or irrelevant information;
- it is practicable to provide access to an edited copy with exempt or irrelevant information removed; and
- the applicant wishes to receive an edited copy.[310]

[310] *Freedom of Information Act 1982* (Vic), section 25.

1.3. Editing a document to provide partial access is one way to fulfil the object of the Act to extend as far as possible the right of the community to access government held information. It requires an agency or Minister to provide access to part of a document, instead of refusing access to the whole document.[311]

1.4. Removing irrelevant information can save time and resources, as an agency or Minister does not have to process irrelevant information. This may have included considering whether any exemptions apply to the irrelevant information and consulting with third parties.

1.5. There is nothing in the Act which prevents an agency or Minister from providing edited copies of documents, even where the criteria in section 25 are not met.

1.6. Where proper to do so, an agency or Minister may release irrelevant or exempt information to an applicant outside the Act, instead of redacting or removing the information.

For more information on providing access to information outside of the Act, see:

- section 16 – Access to documents apart from Act; and
- Professional Standard 1.1.

Document contains exempt or irrelevant information

1.7. An agency or Minister will need to consider providing an edited copy of a document if:

- the agency or Minister decides to refuse access to a document because it exempt; or
- the document contains information that is not relevant to the request.

1.8. There may be irrelevant information and exempt information in the same document.

Exempt document

1.9. Exempt document means that one or more of the exemptions in Part IV have been applied to refuse access to the document.

See the FOI Guidelines on Part IV for more information.

[311] *Coulson v Freedom of Information Commissioner (Review and Regulation)* [2016] VCAT 1521, [63]; *Knight v Corrections Victoria* [2010] VSC 338, [53].

Irrelevant information

1.10. Irrelevant information is information which is clearly outside the scope, or beyond the terms of the applicant's request.

1.11. An agency or Minister should consider the overall context in which the request is made, and appreciate that an applicant cannot necessarily be expected to have an intimate knowledge of the subject matter of the documents they seek or the inner workings of government.

1.12. In many instances, an applicant will not know the types of documents or information held by an agency or Minister, or how to describe the documents they seek. This requires an agency and Minister to refrain from taking an artificial or strained interpretation of the words used in a request, and to interpret the request beneficially when considering whether information is or is not irrelevant.[312]

1.13. Common circumstances where information is generally considered irrelevant to a request include:

- information that an applicant specifically agrees to exclude from the scope of a request (for example, an applicant may agree to exclude personal information of third parties);
- information added to a document after a request is received, for example printing or email headers;
- a document created after a request is received;
- a document falling outside a specified date range requested by an applicant.

It is practicable to delete the exempt or irrelevant information

1.14. The word 'practicable' is not defined in the Act. It is not a precise term; it refers to a legislative intention to apply common-sense principles.[313] The definition in the *Macquarie Dictionary* defines 'practicable' as 'capable of being put into practice, done or effected, especially with the available means or with reason or prudence; feasible'. The *Oxford English Dictionary* definition is 'capable of being put into practice, carried out in action, effected, accomplished or done; feasible'.

[312] See comments of Deputy President Lambrick in *Country Fire Authority v Rennie (Review and Regulation)* [2021] VCAT 492, [74]. See also *AU8 and Major Transport Infrastructure Authority (Freedom of Information)* [2019] VICmr 189.

[313] *Re Shubert v Department of the Premier and Cabinet* (2001) 19 VAR 35.

1.15. Deciding whether it is 'practicable' to delete exempt or irrelevant information requires an agency or Minister to consider:

- the effort involved in making the deletions from a resources point of view;[314] and
- the effectiveness of those deletions – that is, whether the edited document still has meaning.[315]

Effort involved

1.16. In determining the effort involved in editing a document, an agency or Minister may consider the following questions:

- Is editing or deleting information capable of being carried out?
- What is the nature and extent of the work involved in deciding on and making the deletions to the document?
- Does the agency or Minister's office have the resources to edit the document?

1.17. It is practicable to edit a document if to do so would not require substantial time and effort.

Examples where it was not practicable to provide an edited copy

In *Vaughan v Department of Sustainability and Environment* [2004] VCAT 1562 VCAT held it was not practicable to provide an edited copy of two video recordings because to do so would cost at least $4,752.

In *Willner v Department Economic Development, Jobs, Training and Resources* [2015] VCAT 669 VCAT held it was not practicable to pixelate the faces of commuters in a public train carriage during 8.5 hours of CCTV footage. Relevant to the decision was evidence that pixelation would have taken 80 to 90 hours, during which time the relevant officer could not perform other important duties relating to safety and crime, and outsourcing the task would cost over $19,000.

[314] *Mickelburough v Victoria Police* [2009] VCAT 2786, [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967, [82].

[315] *Honeywood v Department of Human Services* [2006] VCAT 2048, [26]; *RFJ v Victoria Police FOI Division (Review and Regulation)* [2013] VCAT 1267, [140], [155]; *Re Hutchinson and Department of Human Services* (1997) 12 VAR 422.

Document remains meaningful

1.18. VCAT has held that deletion is not practicable where:

- it would effectively reduce the document 'to something which was meaningless, misleading or unintelligible';[316]
- what remains would be 'devoid of context';[317]
- it would lead to unnecessary speculation as to what was missing[318] or lead the reader to draw erroneous conclusions.[319]

Example

In *Flemington Kensington Community Legal Centre v Victoria Police* [2007] VCAT 1237 VCAT held it was not possible to edit a police report because removing the exempt material would 'effectively gut the report leaving it devoid of major features such that what remained would be misleading.'

Applicant wishes to receive edited copy of document with exempt or irrelevant information removed

1.19. In many instances, an applicant would prefer to receive a copy of a document with irrelevant or exempt information deleted, as opposed to not receiving any information at all. If an applicant's request is silent on whether they wish to receive a copy of the document with exempt or irrelevant material deleted, the agency or Minister should talk to the applicant to check whether they would like to receive an edited copy.

1.20. Where an applicant expresses no view as to receiving an edited document, and the document would objectively retain some meaning after editing, agencies and Ministers are encouraged to provide access.

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[316] *Stewart v Department of Tourism, Sport and the Commonwealth Games* [2003] VCAT 45, [47].

[317] *Kotsiras v Department of Premier and Cabinet* [2003] VCAT 472, [31]; *Noonan v Victoria Police* [2006] VCAT 1918, [28].

[318] *Thwaites v Department of Human Services* (Victorian Civil and Administrative Tribunal, Nedovic PM, 15 December 1998) [26].

[319] *Koch v Swinburne University* [2004] VCAT 1513, [35].

Notice of decision

1.21. When writing a notice of decision under section 27, an agency and Minister must:

- inform the applicant that the document is a copy of a document from which exempt or irrelevant matter has been deleted under section 25; and
- state its findings on each element of section 25, referring to the material on which those findings were based, and the reasons for the decision.

Section 25A – Requests may be refused in certain cases

Extract of legislation

25A Requests may be refused in certain cases

(1) The agency or Minister 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 or Minister 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; or

(b) in the case of a Minister—would substantially and unreasonably interfere with the performance of the Minister's functions.

(2) Subject to subsection (3) but without limiting the matters to which the agency or Minister may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the agency or Minister 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 the office of the Minister; 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 or Minister 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 or Minister must not have regard to—

(a) any reasons that the person who requests access gives for requesting access; or

(b) the agency's or Minister's belief as to what are his or her reasons for requesting access.

(5) An agency or Minister may refuse to grant access to the documents in accordance with the request without having identified any or all of the documents to which the request relates and without specifying, in respect of each document, the provision or provisions of this Act under which that document is claimed to be an exempt document if—

(a) it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents; and

(b) either—

(i) it is apparent from the nature of the documents as so described that no obligation would arise under section 25 in relation to any of those documents to grant access to an edited copy of the document; or

(ii) it is apparent, from the request or as a result of consultation by the agency or Minister with the person making the request, that the person would not wish to have access to an edited copy of the document.

(6) 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—

(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.

(7) For the purposes of section 21(1), the period commencing on the day an applicant is given a notice under subsection (6)(a) and ending on the day the applicant confirms or alters the request following the consultation referred to in subsection (6) is to be disregarded in the computation of the period referred to in section 21(1).

Relevant FOI Professional Standards

Professional Standard 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.
Professional Standard 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.
Professional Standard 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.

Guidelines

Overview of section 25A

1.1. Section 25A creates two circumstances where an agency or Minister can refuse a request, without processing:

- section 25A(1) allows an agency or Minister to refuse a request where the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations or interfere with the performance of the Minister's functions;
- section 25A(5) allows an agency or Minister to refuse a request where all documents, as described in the request, are obviously exempt and there is no obligation to provide edited documents.

1.2. Section 25A, subsections (2)-(4) and (6)-(7) relate to and qualify section 25A(1) only (voluminous requests). They do not relate to section 25A(5) (obviously exempt requests).

Refusing a request under section 25A(1) – substantial and unreasonable diversion of resources

1.3. Under section 25A(1), an agency or Minister may refuse to grant access to documents without processing a request if satisfied the work involved:

- in the case of an agency, would substantially and unreasonably divert the agency's resources from its other operations; or
- in the case of a Minister, would substantially and unreasonably interfere with the performance of the Minister's functions.

1.4. Section 25A(2) sets out a non-exhaustive list of matters an agency or Minister must have regard to in deciding whether to refuse a request under section 25A(1). These matters are relevant to estimating the work involved in processing a request.

1.5. Section 25A(3) and (4) set out matters the agency or Minister must not have regard to when deciding whether to refuse a request under section 25A(1). Namely:

- any maximum access charges payable under the regulations for processing the request;
- the applicant's reasons for requesting access; and
- the agency or Minister's belief as to what are the applicant's reasons for requesting access.

1.6. Section 25A(6) requires an agency or Minister to consult with and provide certain information to an applicant before refusing access under section 25A(1). This section is designed to allow an applicant to alter the request so it can be processed, rather than refused under section 25A(1).

1.7. Under subsection (7), the period of time starting on the day a notice under section 25A(6) is given to an applicant and ending on the day the applicant confirms or alters the request is not included in the calculation of the 30 day statutory time period for notifying an applicant of a decision on a request under section 21(1).

Purpose of section 25A

1.8. Section 25A was introduced because substantial and unreasonable diversion requests were seen to be causing severe disruption to agencies, even though the number of such requests was relatively small.[320]

[320] *Freedom of Information (Amendment) Act 1993* (Vic); Victoria, *Parliamentary Debates*, Legislative Council, 20 May 1993, 1148 (Haddon Storey, Minister for Tertiary Education and Training) https://www.parliament.vic.gov.au/images/stories/volume-hansard/Hansard%2052%20LC%20V412%20May1993.pdf.

1.9. The section gives effect to a 1989 report by the Legal and Constitutional Committee of the Victorian Parliament,[321] which recommended a provision be inserted into the Act to strike a balance between two public interests. Firstly, the public interest, as expressed in the object of the Act, to facilitate and promote the maximum disclosure of information held by government, and secondly, the public interest in efficient government administration.

1.10. The purpose of section 25A is to prevent the mischief that occurs when an agency or Minister's resources are substantially and unreasonably diverted from its other operations.[322]

Power is intended to apply in clear and limited circumstances

1.11. Section 25A(1) should only be applied in a clear case of substantial and unreasonable diversion of agency or Minister resources.[323] This is because section 25A(1) must be read consistently with the object of the Act,[324] which is to extend as far as possible the right of the community to access information in the possession of the government and the requirement to exercise discretions in a way that facilitates and promotes the disclosure of information.[325]

1.12. Applying section 25A(1) only in a clear case, is also consistent with the right of access granted by section 13[326] and the positive requirement in section 16 for an agency and Minister to maximise public access to information.

1.13. An agency or Minister that refuses access under section 25A(1) must establish the requirements of the section.[327] These requirements are not easily satisfied and will only apply in limited circumstances.[328]

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[321] Victorian Parliament Legal and Constitutional Committee, *A report to Parliament upon freedom of information in Victoria* (Parliamentary Paper, 38th report to Parliament, 1989) [5.19].

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

[323] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [6]; applied in *Davis v Suburban Rail Loop Authority (Review and Regulation)* [2021] VCAT 627, [48].

[324] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [6]; applied in *Davis v Suburban Rail Loop Authority (Review and Regulation)* [2021] VCAT 627, [48].

[325] *Freedom of Information Act 1982* (Vic), section 3.

[326] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [6]; applied in *Davis v Suburban Rail Loop Authority (Review and Regulation)* [2021] VCAT 627, [48].

[327] As noted in *McIntosh v Victoria Police* [2008] VCAT 916, [11].

[328] *Chief Commissioner of Police v McIntosh* [2010] VSC 439, [32]. See *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [6], [46].

1.14. It will depend on the facts of each case, with detailed evidence usually required by an agency or Minister to establish that the consultation requirement under section 25A(6) has been met and the work involved in processing a request would substantially and unreasonably divert the agency or Minister's resources from its other operations.[329]

1.15. An agency or Minister cannot avoid their statutory duty by deliberately withholding resources or deliberately failing to provide proper resources for its FOI function.[330] Professional Standard 9.1(a) requires a principal officer of an agency to ensure their agency is sufficiently resourced to receive and process requests.

1.16. If the processing of requests is regularly constrained by the level of FOI resourcing, the agency or Minister must review the adequacy of its resourcing.

Scope of section 25A(1)

Section 25A(1) must be applied to the whole request

1.17. Section 25A(1) can only be used to refuse access to the whole request. An agency or Minister cannot apply section 25A(1) to part of a request only, and process the documents falling within the remaining part of the request.[331]

1.18. If the request comprises several parts, the agency or Minister should advise the applicant at the earliest possible time, the parts that would be able to be processed, so the applicant can consider not pursuing those parts that would bring the request within section 25A(1).

Request must be valid before considering section 25A(1)

1.19. An agency or Minister must determine if a request is 'valid' under section 17 before considering section 25A(1). 'Valid' means the request meets the requirements of section 17. One of these requirements is that it provides information reasonably necessary for the agency or Minister to identify the documents sought.[332]

1.20. If the request does not enable the agency or Minister to identify what documents are sought, it will not be a valid request. The agency or Minister must help the applicant make a valid request.[333]

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[329] See example, *Davis v Suburban Rail Loop Authority (Review and Regulation)* [2021] VCAT 627.

[330] *Re A v Department of Human Services* (1998) 13 VAR 235, 247.

[331] *XYZ v Victoria Police* [2007] VCAT 1686, [25].

[332] *Freedom of Information Act 1982* (Vic), section 17(2).

[333] *Freedom of Information Act 1982* (Vic), section 17(2).

1.21. It is only once it is clear what documents are sought and the request meets the requirements of section 17, that an agency or Minister should consider whether section 25A(1) applies.

1.22. In practice, assisting an applicant to clarify a request can result in the breadth of a request being reduced to something manageable, so that the agency or Minister can process the request.

For more information on the requirements of a valid request, see section 17 – Requests for access.

Combining multiple requests for the purposes of section 25A(1)

1.23. Section 25A(1) is intended to apply to each separate FOI request. However, in certain circumstances, multiple requests may be treated as a single request for the purposes of deciding if section 25A(1) applies.[334]

1.24. Requests should only be combined where there is a clear connection between the requests, such as whether:

- the multiple requests are made by or on behalf of the same person;
- the multiple requests seek documents that concern the same subject matter;
- the requests were lodged at or about the same time; or
- treating the requests as separate requests would allow the applicant to evade the purpose of section 25A(1), which is to avoid an agency's or Minister's resources being substantially and unreasonably diverted from its core operations or functions.[335]

1.25. The above list of factors is not exhaustive, and not all of them need to exist to enable requests to be treated as one request for the purposes of section 25A(1).

Example

An applicant lodges five requests over a five week period. Each request relates to the applicant's complaint made to the agency and is for documents generated or coming into the possession of the agency in the week prior to each request being made.

The agency could choose to combine the five requests for the purposes of assessing whether section 25A(1) applies, because the requests are made by the same applicant, concern the same subject matter and were lodged around the same time.

[334] *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [49]-[50].

[335] In *Secretary, Department of Treasury and Finance v Kelly* [2001] VSCA 246, [48], the applicant made 321 separate requests, including 54 identical requests to five government departments. All requests were transferred to a single department for processing.

Applying section 25A(1)

Step 1: Make a reasonable estimate of the work involved in processing the request

1.26. Once a request is valid under section 17, in considering whether section 25A(1) applies, the first step is to determine the work involved in processing the request.

1.27. An agency or Minister does not have to specify exactly how many documents would fall within a request or calculate exactly how much time and resources would be needed to process the request. Estimates are acceptable. For an agency or Minister to provide an exact number would be to do the work that section 25A(1) is designed to prevent.[336]

1.28. The onus is on the agency or Minister to establish their estimate is reasonable.[337]

1.29. When estimating the work involved in processing the request an agency or Minister must consider the resources that would have to be used in:

- identifying, locating or collating the documents in the agency's or Minister's filing systems or office of the Minister;
- deciding whether to grant, refuse, or defer access to the documents or edited copies of the documents, including resources for examining the documents or undertaking consultation;
- making copies or edited copies of the documents;
- notifying the applicant of an interim or final decision.[338]

1.30. The estimate should not include time spent by the FOI unit in handling an anticipated high number of internal inquiries from agency staff due to the sensitive nature of a request.[339]

1.31. In practice, calculating an estimate will usually involve identifying the:

- number of documents likely to fall within the scope of the request;
- nature and type of documents falling within the scope of the request;

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[336] *McIntosh v Victoria Police* [2008] VCAT 916, [10].

[337] *McIntosh v Victoria Police* [2008] VCAT 916, [26].

[338] *Freedom of Information Act 1982* (Vic), section 25A(2).

[339] *McIntosh v Victoria Police* [2008] VCAT 916, [33].

- kinds of document searches that would be required and the resources required to conduct those searches (for example, searching multiple email accounts, manual search of hard copy records, consulting with the agency's IT department to access archived emails or documents);
- content of the documents;
- number and range of possible exemptions and the time needed to assess the documents for exemptions;
- extent of consultations required, and the time needed to conduct the consultation;
- time needed to edit the documents;
- time needed to copy the documents or arrange an inspection of the documents; and
- time needed to prepare a notice of decision on the request.

1.32. An agency or Minister may estimate the time and resources involved by extrapolating from a reasonably representative sample of the documents falling within the request. The sampling should be undertaken diligently, by someone with appropriate expertise, considering each document briefly as if they were making a decision on access, and making detailed records of the process.

1.33. Where the person making the estimate is familiar with the type of documents and has experience in conducting consultation and in assessing documents of that nature, it may be possible to estimate the work involved without reviewing a sample of documents. For example, the decision maker may be confident that it will take one minute per page to process the request.

1.34. However, where sampling has not been undertaken, an agency or Minister should bear in mind that if the applicant applies for a review of the decision, the agency or Minister must produce evidence to establish the estimate was reasonable. This may be in the form of a witness statement from the person who made the estimate, detailing their familiarity with the documents and previous experience, or may require the agency or Minister to later undertake sampling to justify its decision.

1.35. Whatever method is used, it must result in an estimate that is reasonable. For example, referring to the equivalent provision in the Commonwealth FOI Act, the Administrative Appeals Tribunal stated the methods used 'must not be such as to allow substantial error to enter into the estimate'.[340]

[340] *Re Swiss Aluminium Australia Ltd v Department of Trade* [1986] AATA 179, [9].

Example

Estimating the number of documents falling within a request

Where an agency identifies folders that may contain documents relevant to a request, the agency must also identify how many documents are within each folder and estimate how many of those would fall within a request.[341]

It may be there are 10 folders with varying amounts of documents, totalling 500 documents, and the agency estimates only 200 of the 500 documents fall within the scope of the request.

This is a very different outcome to an estimate of 1,000 documents, based on an agency finding 100 documents in the first folder and assuming that all 10 folders contain the same number of documents and all documents are within scope of the request.

1.36. Examples of VCAT not accepting an agency's estimate are outlined in the yellow text box below.

Examples

- In *Kelly v Department of Treasury and Finance*, VCAT criticised an estimate based on a random sample of 21 files out of a list of 2,600 relevant files, of which only 10 were examined by an inexperienced officer.[342]
- In *Asher v Department of innovation, Industry and Regional Development*, VCAT did not accept the Department's estimate of 5.5 weeks full time work and 5.5 weeks part-time to process the request. VCAT said the task was 'nowhere near as complicated' as claimed.[343]
- In *McIntosh v Victoria Police*, VCAT preferred the applicant's estimate of 55 hours and concluded the agency 'had not grappled with the question of what time and resources would reasonably be involved' and there was 'no credible evidence of a large or unreasonable workload' being generated by the request.[344]

[341] *Re Swiss Aluminium Australia Ltd v Department of Trade* [1986] AATA 179.

[342] *Kelly v Department of Treasury & Finance* [2001] VCAT 419, [26]-[28].

[343] *Asher v Department of Innovation, Industry and Regional Development* [2005] VCAT 1734.

[344] *McIntosh v Victoria Police* [2008] VCAT 916.

Step 2: Assess whether the work involved in processing the request would substantially and unreasonably divert the resources of the agency from its other operations

1.37. Once the estimate of the work involved in processing the request has been made, the agency or Minister must be satisfied that the diversion of the agency's resources, or the interference with the Minister's functions, is both substantial and unreasonable.

1.38. The question is about the impact of processing the request at that point in time, not some future or past time where the agency or Minister may have or had less or more available resources.[345]

'Resources of the agency'

1.39. The resources to be considered are those the agency or Minister reasonably requires to process the request while serving their other operations.[346] This includes:

- the resources of the agency's or Minister's internal FOI division;[347]
- the resources of an agent of the agency or Minister that is responsible for responding to the request, because it is in possession of requested documents;[348] and
- refers to the capacity of the agency or Minister overall to process the request, not just the capacity of the FOI unit of the agency or Minister.[349]

1.40. An agency or Minister is not required to obtain external assistance to process a request, such as hiring a consultant to process a request or hiring IT consultants to carry out substantial work before electronic documents may be accessed.

1.41. However, an agency must not deliberately fail to provide resources to respond to FOI applications.[350] Professional Standard 9.1(a) requires a principal officer of an agency to ensure their agency is sufficiently resourced to receive and process requests.

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[345] *Re SRB v Department of Health, Housing, Local Government & Community Services* (1994) 19 AAR 178, 187; applied in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550, [24].

[346] *Re SRB v Department of Health, Housing, Local Government & Community Services* (1994) 19 AAR 178, 187; applied in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550, [24].

[347] *Chief Commissioner of Police v McIntosh* [2010] VSC 439, [25].

[348] *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550, [24] - [25].

[349] *Chief Commissioner of Police v McIntosh* [2010] VSC 439, [31].

[350] *Re A v Department of Human Services* (1998) 13 VAR 235.

'Other operations'

1.42. 'Other operations' refers to all of the other things that an agency or Minister does (apart from processing the request), including dealing with and processing other FOI requests.[351]

Substantial diversion

1.43. 'Substantial' has been interpreted to mean the diversion of resources must be more than merely nominal (minor).[352]

1.44. Each case must be determined on an individual basis. What is substantial for one agency or Minister may not be for another. The fact a request would involve a large number of documents does not necessarily mean it meets the threshold of 'substantial', as the documents may still be relatively easy to identify, collate, and assess.

1.45. Factors that may be relevant to determining whether the diversion of resources would be substantial may include the:

- nature and size of the agency;
- level of resourcing allocated to FOI processing;
- number of other FOI requests on hand, and whether requests received are increasing or decreasing; or
- number of employees who may help process the request, and their other responsibilities.

1.46. For example, it may be relevant to consider, in the case of a request to a Minister, whether the Minister can get help from an agency and whether the special attention of the Minister or a senior officer is needed. In the case of a request to an agency, it would be relevant to consider whether the work can only be undertaken by one specialist officer who has competing responsibilities.

Unreasonable diversion

1.47. Determining whether the diversion of resources would be unreasonable involves balancing the estimated impact on the agency or Minister of processing the request against the object of the Act, which is to extend as far as possible the community's right to access information held by government.[353] It is not necessary to show the extent of unreasonableness is overwhelming.[354]

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[351] *Chief Commissioner of Police v McIntosh* [2010] VSC 439, [23]-[24].

[352] *Re A and Department of Human Services* (1998) 13 VAR 235, 247.

[353] *Freedom of Information Act 1982* (Vic), section 3(1).

[354] *Re SRB v Department of Health, Housing, Local Government & Community Services* (1994) 19 AAR 178, 187; followed in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1236, [24].

1.48. An agency or Minister must not have regard to any:

- maximum amount that may be charged for processing the request; or
- reasons given by an applicant for making the request, or any belief by the agency or Minister as to the reasons why the request was made.[355]

1.49. VCAT set out the following factors to be considered when deciding if the diversion of an agency's resources would be unreasonable:[356]

- whether the terms of the request offer a sufficiently precise description to allow the agency to locate the documents sought within a reasonable time and with reasonable effort;
- the public interest in disclosure of documents relating to the subject matter of the request;[357]
- whether the request is a reasonably manageable one, giving due but not conclusive regard to the size of the agency and the extent of its resources usually available for dealing with FOI requests;
- the estimated number of documents covered by the request, the number of pages and the amount of officer time and salary cost;
- the reasonableness or otherwise of the agency's initial assessment and whether the applicant had taken a co-operative approach in revising the application;[358]
- the statutory time limit under the Act for making a decision;
- the degree of certainty that can be attached to the documents and processing time estimates, and whether there is a real possibility that the processing time may exceed the estimate;
- whether the applicant is a repeat FOI applicant.

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[355] *Freedom of Information Act 1982* (Vic), sections 25A(3) and 25A(4).

[356] *The Age Company Pty Ltd v CenITex (Review and Regulation)* [2013] VCAT 288, [43-45]. A similar approach was followed in *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550. The decisions drew on a non-exhaustive list of factors set out in the NSW decision of *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137, which drew in part on the decision of the former Victorian Administrative Appeals Tribunal in *Re Borthwick and University of Melbourne* (1985) 1 VAR 33.

[357] In *The Age Company Pty Ltd v CenITex (Review and Regulation)* [2013] VCAT 288,, importance was placed on the public interest in the transparency of gift giving to state agencies.

[358] See also *Re A v Department of Human Services* (1998) VAR 235, 246, where it was stated the applicant's refusal to limit the ambit of a broad request in any way was relevant to unreasonableness.

1.50. In relation to the last factor, being a repeat applicant is irrelevant if the applicant is a media organisation[359] or a Member of Parliament.[360] For other applicants, it may be a relevant factor where the applicant had an extraordinary history of numerous previous requests to an agency.[361]

1.51. It may also be relevant to consider the steps an agency or Minister has already taken to inform the public about the subject matter of the request.[362] The nature of the agency's activities may also be significant.[363]

1.52. There is no threshold number of hours beyond which processing a request would be held to be a substantial and unreasonable diversion. However, most VCAT decisions have agreed that section 25A(1) applies where processing the request would take hundreds of hours.

Example

Diversion of resources not unreasonable

The Age Company Pty Ltd v Cenitex [2013] VCAT 288

VCAT decided that whilst the diversion of resources to process the request would be substantial, it was not unreasonable.

VCAT estimated 51-58 hours to process the request, compared with the agency's estimate of 72 hours.

VCAT accepted the agency only had one authorised decision maker, and the capacity to draw on other parts of the organisation was limited.[364] However, VCAT did not accept that the decision maker was limited to one hour a day to process the request, as claimed by the agency.

The following factors were relevant to VCAT's decision:

- the public interest in transparency of gift giving to the State;

[359] *The Age Company Pty Ltd v CenITex (Review and Regulation)* [2013] VCAT 288, [45].

[360] *Davis v Suburban Rail Loop Authority (Review and Regulation)* [2021] VCAT 627.

[361] *Smeaton v Victorian WorkCover Authority (Review and Regulation)* [2015] VCAT 1760, [19], [25].

[362] *The Age Company Pty Ltd v CenITex (Review and Regulation)* [2013] VCAT 288, [46].

[363] For example, in *Cainfrano v Director General, Premier's Department* [2006] NSWADT 137, [60], the NSW Administrative Decisions Tribunal stated the NSW Premier's Department, which could 'be expected to have substantial bodies of documents that involve important areas of government activity', should not be given the 'degree of liberality … that might be appropriate to a very small statutory body with a small staff complement, and consequently a very limited capacity to deal with FOI requests of scale'.

[364] *The Age Company Pty Ltd v CenITex (Review and Regulation)* [2013] VCAT 288, [24].

- the request was a reasonably manageable one given the size of Cenitex (upwards of 550 employees) and the resources usually available for dealing with FOI requests (one FOI officer). VCAT commented that '[i]f an organisation of this size chooses to have only one FOI officer, it can expect from time to time a request requiring a substantial amount of time will largely occupy that person'; and

- the decision could be made within 'or within a reasonable distance' of the statutory time limit to make a decision on the request.

1.53. Examples of VCAT and OVIC decisions upholding section 25A(1) are set out below. Each decision was made in the context of the size of the agency and its available resources.

Examples

Diversion of resources unreasonable

- A decision based on evidence of approximately 1,000 pages of emails and 3,000 pages of attachments falling within the scope of the request. This would take upwards of 270 hours, over 50 weeks, to identify, locate and collate the documents, assess them, consult internally and externally, make edited copies of documents, and make a decision.[365]

- A decision to refuse to process two applications that would include examining more than 1 million emails from a 33 month period was upheld. The agency had not historically had many FOI requests and its general operations did not appear to warrant more than one FOI officer.[366]

- A decision based on an estimate of the time of an FOI Unit of approximately 170 hours, substantial time of a school principal and some time of other areas of the agency.[367] The request was very detailed and similar in scope to the applicant's previous request arising from the same circumstances.

- A decision based on an estimate that processing approximately 1,000 pages of printed e-mails would take 160 hours.[368]

[365] *Davis v Suburban Rail Loop Authority (Review and Regulation)* [2021] VCAT 627.

[366] *The Age Company Pty Ltd v Cenitex* [2012] VCAT 1523. See also *The Age Company Pty Ltd v Cenitex* [2013] VCAT 288.

[367] *AB v Department of Education* [2012] VCAT 1233.

[368] *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1236.

- A decision based on a VCAT estimate of 90 hours rather than the 400 hours claimed by the agency. VCAT commented the unreasonableness was 'closely related to the resources' the agency had allocated over many years to dealing with the applicant's many requests, and suggested that 90 hours was below the 'low end' of what would generally be considered unreasonable.[369]

- A decision based on an estimate of 75 hours to process 4,525 emails. Relevant to the decision was the fact the agency had 140 other FOI requests on hand and 8.6 FTE FOI staff members to process the requests.[370]

- A decision based on an estimate of one agency officer working full time for six weeks to process a request for 48 hours of CCTV footage. The time required to review the CCTV footage was longer than usual due to a requirement to view the footage from different angles, staff availability and the fact the agency was processing a high number of FOI requests. OVIC considered that reducing the request to 24 hours of CCTV footage would still have been an unreasonable diversion of agency resources.[371]

Step 3: Consult with the applicant under section 25A(6)

1.54. An agency or Minister cannot decide to refuse a request under section 25A(1) without first giving the applicant a reasonable opportunity to rescope or narrow their request, and the consultation fails to remove the ground for refusal.

1.55. Under section 25A(6) and Professional Standard 5.2, the agency or Minister must:

- give the applicant a written notice:
    - stating its intention to refuse the applicant's request;
    - inviting the applicant to consult with an identified agency officer or member of the Minister's staff with a view to making the request in a form that would be able to be processed; and
    - explaining to the applicant why the request would substantially and unreasonably divert the resources of the agency from its other operations;
- give the applicant a reasonable opportunity to consult; and

[369] *Smeaton v Victorian WorkCover Authority* [2012] VCAT 1550.

[370] *BR6 and Department of Transport* [2020] VICmr 169 (24 June 2020).

[371] *CN2 and Victoria Police* [2021] VICmr 10 (12 January 2021).

- as far as is reasonably practicable, give the applicant any information or suggestions that would assist them to make a request in a form that would remove the ground for refusal.[372]

For more information, see Template 15 – Section 25A(6) Consultation notice – Unreasonable Diversion of Resources.

Consultation must meet requirements of section 25A(6) before request can be refused

1.56. An agency or Minister must comply with all of the requirements in section 25A(6) before it can refuse a request under section 25A(1).[373]

1.57. The agency or Minister bears the onus of establishing that the requirements of section 25A(6) have been met.[374]

1.58. If an applicant seeks review of an agency or Minister's decision to refuse a request under section 25A(1), and the Office of the Victorian Information Commissioner (**OVIC**) determines the agency or Minister's consultation with the applicant did not meet the requirements under section 25A(6), OVIC's decision will require the agency or Minister to process the applicant's request.

Impact on time frame to make a decision on the request

1.59. The 30 day statutory processing time is suspended from the date an applicant is given notice under section 25A(6) of an agency or Minister's intention to refuse the request until the date the applicant confirms or alters the terms of their request.[375]

1.60. It is important to give an applicant a notice under section 25A(6) as soon as possible after a request is received, to allow sufficient time to process a revised request without undue delay.

1.61. Under Professional Standard 5.1, an agency must take reasonable steps to notify an applicant under section 25A(6) within 21 days of receiving a valid request.

1.62. The 30 day timeframe resumes if an applicant confirms or alters the terms of the request. For example, the applicant sends the agency an amended request or instructs the agency that they wish to continue with the original request.[376]

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[372] *XYZ v Victoria Police* [2007] VCAT 1686, [22].

[373] *Tabcorp Holdings Limited v Secretary to the Department of Treasury and Finance (Review and Regulation)* [2013] VCAT 1731, [35].

[374] *Freedom of Information Act 1982* (Vic) section 55(2).

[375] *Freedom of Information Act 1982* (Vic), section 25A(7).

[376] See *Smeaton v Victorian WorkCover Authority* [2011] VCAT 2386; and *Smeaton v Victorian WorkCover Authority* [2012] VCAT 73.

Providing a reasonable opportunity to consult

1.63. The Act does not specify what constitutes providing an applicant with a reasonable opportunity to consult. The timeframe will depend on the facts in each case.

1.64. Professional Standard 5.2 requires an agency to provide an applicant with at least 21 days to respond to a section 25A(6) notice. However, there may be situations where a longer period is reasonable. For example, if the agency knows the applicant is away for three weeks, it would not be reasonable to only provide 21 days to respond to the section 25A(6) notice. Further, where there is correspondence between the agency and the applicant, it is likely more than 21 days would be required.

Assisting an applicant to revise a request

1.65. The agency or Minister must explain why the request is too broad and if possible offer suggestions and information to help the applicant to rescope or narrow the request to avoid the ground for refusal under section 25A(1).

1.66. This could include:

- giving the applicant information about the types or classes of documents the agency or Minister holds in relation to the subject matter, or information about how records are made and stored in the agency or Minister's office;
- asking the applicant for more information about the incident or subject matter that interests them, and suggesting specific documents or types of documents that are likely to be of interest;
- making suggestions as to how the request could be rescoped or narrowed (for example, by reducing the time period, reducing the categories of documents and/or eliminating material that involves third parties). Sometimes getting the applicant to discuss their request with a staff member from the relevant operational area may help them to identify the documents they want and refine their request accordingly.

1.67. An agency or Minister does not have to give the applicant lists of all relevant documents. However, an agency or Minister must provide relevant, useful information to assist the applicant to make an request that can be processed.

Agency must keep records of consultation

1.68. Professional Standard 5.3 requires an agency to keep records of the consultation undertaken including any responses from the applicant and the final terms of any amended request.

1.69. OVIC is likely to request records of consultation if OVIC is reviewing the decision.

Example OVIC decision to illustrate the elements of section 25A(6)

Example

'DT7' and Fire Rescue Victoria (Freedom of Information) [2021] VICmr 305

Background

The agency provided a notice to the applicant under section 25A(6) advising that it intended to refuse to process the request under section 25A(1) on the grounds it was satisfied the work involved in processing the request would divert the agency's resources substantially and unreasonably from its other operations.

The notice provided advice to the applicant on how to amend the request in a way that would enable the agency to process it.

In response to the notice, the applicant revised the scope of the request in accordance with the agency's advice. This resulted in a substantially narrowed request.

The agency decided to refuse to process the revised request under section 25A(1).

Issue

Did the agency provide the applicant with a reasonable opportunity to consult under section 25A(6)?

Decision

Whilst the agency had provided the applicant with a written notice, as required under section 25A(6)(a), OVIC was not satisfied that the agency had provided the applicant with a reasonable opportunity to consult, as required under section 25A(6)(b).

OVIC considered that 'a reasonable opportunity to consult' would have included:

- a further attempt by the agency to describe why the work involved in processing the narrowed scope, that had been made in accordance with the agency's advice, would substantially and unreasonably divert its resources from its other operations; and
- providing an opportunity for the applicant to respond.

OVIC disagreed with the agency's contention that it did not have to provide 'specific guidance' to applicants. OVIC decided that for consultation to be meaningful and constructive, the agency must provide information to the applicant that actually assists them to remove the grounds for refusal.

OVIC stated that while the agency is not required to conduct searches and precisely calculate the time it would take to process a request, it is required to provide reasonable estimates. Information like reasonable estimates helps to enable the agency and the applicant to negotiate the scope of a request in a way that

assists the applicant to make a request. If an agency needs to revisit those estimates following the narrowing of the request's scope, OVIC considered the agency has an obligation to communicate any revisions.

As the agency had not complied with section 25A(6), the agency could not refuse the request under section 25A(1). OVIC's decision required the agency to process the request.

Step 4: Make a decision or process an altered request

If consultation does not remove ground for refusal

1.70. If an applicant does not respond to a section 25A(6) notice, or has not confirmed or altered the request in a way that removes the ground for refusal after being given a reasonable opportunity to consult, the agency or Minister can make a decision to refuse access under section 25A(1).

1.71. A notice of decision with reasons under section 27 must be given to the applicant. The notice should include:

- a description of the estimated number and types of documents covered by the request, including an estimate of the number of pages or other description of size (such as hours of audio visual recordings);
- a description of the agency's or Minister's efforts to help the applicant revise their request, and any response from the applicant;
- the reasons why the request is considered a substantial and unreasonable diversion of the agency's resources or a substantial and unreasonable interference with the Minister's functions, including the estimate of the resources that would be involved in each of the processing steps, an indication of the complexity of the decision and why it would be an unreasonable diversion with reference to the particular circumstances of the matter;
- details of the applicant's review rights.

1.72. An agency or Minister should provide detailed reasons in the notice of decision to explain why section 25A(1) applies.

For more information, see Template 20 – Decision letter – refusal under section 25A(1).

If consultation removes ground for refusal

1.73. If the request for access is sufficiently rescoped or narrowed during the consultation process, so that it is no longer considered a substantial and unreasonable diversion of the agency's resources (or interference with a Minister's functions), the agency or Minister must process the request.

1.74. The agency or Minister should confirm the terms of the altered request in writing to the applicant and advise the applicant of the due date for providing a notice of decision on the request, taking into account the consultation period during which the 30 day timeframe for processing the request was suspended under section 25A(7).

Refusing a request under section 25A(5) – obviously exempt documents

1.75. An agency or Minister may refuse a request without processing it, if:

- it is apparent from the nature of the documents described in the request, that all of the documents are exempt;[377] and
- the agency or Minister cannot provide access to an edited copy of any of the documents, or the applicant does not want to receive an edited copy of the documents.[378]

1.76. If section 25A(5) applies, it allows an agency or Minister to refuse the request without:

- having identified any or all of the documents to which the request relates; and
- specifying, in respect of each document, the exemption(s) that make the document exempt.

Power will only apply in clear and limited circumstances

1.77. Section 25A(5) is designed to save the resources of an agency or Minister that would have been spent in processing a request. It is intended to prevent applicants from misusing the Act, similar to the safeguards in sections 24A and 25A(1).[379]

1.78. An agency or Minister may only rely on section 25A(5) in clear and limited circumstances.[380] An agency or Minister must interpret and apply section 25A(5) consistently with the Act's objects to extend, as far as possible, the right of the community to access government held information through a general right of access to documents.[381]

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[377] The exemptions are contained in Part IV – Exempt documents.

[378] As required by section 25 – Deletion of exempt matter or irrelevant material.

[379] *Knight v Corrections Victoria* [2010] VSC 338, [58].

[380] *Knight v Corrections Victoria* [2010] VSC 338, [58].

[381] *Freedom of Information Act 1982* (Vic), section 3.

1.79. The power under section 25A(5) is discretionary. The Act's objects require an agency and Minister to exercise the discretion as far as possible to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information. Ministers and agencies are also required to administer the Act with a view to maximising public access to information.[382]

1.80. If an agency or Minister wishes to refuse a request because the requested documents are exempt, it must normally identify, locate, and examine the documents and explain why the exemptions apply. In contrast, the power under section 25A(5) significantly limits a person's right to access information under the Act. It limits transparency and procedural fairness by preventing an applicant from knowing if and how many documents exist, and whether the exemptions apply to each document or class of document.

1.81. Establishing the elements of section 25A(5) is a heavy burden for agencies and Ministers. It can be difficult to establish that all documents captured by a request would be exempt, without searching for and inspecting the documents.[383] It is also less likely that section 25A(5) will be established if multiple exemptions must be used to exempt all the documents captured by the request.

1.82. Section 25A(5) will only apply in the limited circumstance where, as an objective fact, it is clear from how the documents are described in the request that all of the documents are exempt. This is more likely to happen if the request is narrow, compared with a broadly drafted request.

1.83. Section 25A(5) will not apply where it is practicable to provide an edited copy of any of the requested documents, or the applicant would like to receive edited documents. If an agency or Minister has to provide edited documents, the request must be processed.

Engaging with an applicant to rescope a request

1.84. Before refusing a request under section 25A(5), an agency or Minister should engage with an applicant and help them to change their request so the agency or Minister can process it in the usual way under the Act.

Example

An applicant seeks access to documents concerning a workplace investigation in which they were involved or were interviewed. They could frame their request by seeking 'an edited copy of all investigation documents concerning me with any personal information relating to other persons deleted from the documents in accordance with section 25 of the Act'.

[382] *Freedom of Information Act 1982* (Vic), section 16(2).

[383] See *Knight v Corrections Victoria* [2010] VSC 338; *'CI6' and Court Services Victoria (Freedom of Information)* [2020] VICmr 326.

1.85. The Act does not require an agency or Minister to help an applicant to rescope a request that might be refused under section 25A(5). However, rules of procedural fairness require a decision maker to give a person an opportunity to respond before making an adverse decision affecting their rights or interests.

1.86. Engaging with an applicant before refusing a request under section 25A(5) is consistent with the object and purpose of the Act, and the requirement in section 17 to assist an applicant to make a valid request.

First element – apparent on the face of the request that all documents exempt – section 25A(5)(a)

1.87. For section 25A(5) to apply, the first element is: it is apparent from the nature of the documents as described in the request that all of the documents to which the request is expressed to relate are exempt documents.

1.88. The nature of a document refers to the 'inherent or essential quality and character of the documents as described'.[384] An agency or Minister cannot 'go behind the description of the documents in the request'.[385]

1.89. It must be objectively apparent from the face of the request that all requested documents are exempt by their nature (under one or more exemption).[386] This requires agencies and Ministers to consider the elements of the exemptions to determine whether all documents would fall within one more exemption.

1.90. If one document out of multiple documents or classes of documents falling within a request would not be exempt, the agency or Minister cannot rely on section 25A(5) to refuse the request.[387] An agency or Minister cannot apply section 25A(5) to only some documents in a request and process the remainder under the Act. All documents must be exempt for section 25A(5) to apply.

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[384] *Knight v Corrections Victoria* [2010] VSC 338, [39].

[385] *Knight v Corrections Victoria* [2010] VSC 338, [38].

[386] *Knight v Corrections Victoria* [2010] VSC 338, [38]-[39].

[387] *Knight v Corrections Victoria* [2010] VSC 338, [40]; See also *'CI6' and Court Services Victoria (Freedom of Information)* [2020] VICmr 326 and *Victorian Legal Services Commissioner v Grahame (No 2)* [2019] VCAT 1878.

Examples

All documents exempt

Example 1

An applicant makes a request for access to Cabinet submissions submitted to and considered by Cabinet. It is apparent from the face of the request that all documents are exempt under the Cabinet exemption in section 28(1).

The request could be refused under section 25A(5) if it would not be practicable to provide access to any of the documents in edited form, or if the applicant tells the agency they do not want to receive an edited copy of the documents.

Example 2

In *Parker v Court Services Victoria* [2021] VCAT 461, VCAT decided that a request for unedited footage of two CCTV cameras for a two hour period inside Dandenong Magistrates Court would, based on the nature of the document as described in the request, be exempt under sections 33(1) and 31(1)(d).

Example 3

In *'AT6' and Department of Health and Human Services* [2019] VICmr 178, the nature of the requested documents was child protection records including documents relating to a child protection notification and/or investigation.

OVIC decided all requested documents would be exempt under section 38 with sections 41, 191 and 209 of the *Children, Youth and Families Act 2005* (Vic).

Example 4

All documents not exempt

An applicant's request for a complete workplace investigation file about their conduct may include correspondence sent to and from the applicant. The file may also contain general information about investigation methods and recommendations, as well as information that would remain meaningful if personal affairs information was removed.

In these circumstances, it would not be possible for a decision maker to determine from the face of the request alone that the nature of all documents sought would be obviously exempt and that there is no requirement to provide an edited copy of one or more of the documents.

For instance, section 25A(5) could not be relied on if:

- the correspondence included letters or emails sent or received by the applicant, as such documents are unlikely to be exempt; or
- the report would contain purely factual information that would not be subject to an exemption under section 30(1) and no other exemption would apply.

Second element – no obligation to provide an edited copy of any document – section 25A(5)(b)

1.91. The second element in section 25A(5)(b) relates to providing access to edited copies of a requested document.

1.92. If the first element (outlined above) is satisfied, an agency or Minister can only apply section 25A(5) if:

- it is not practicable to provide an edited copy of any of the documents that removes the exempt information;[388] or
- it is apparent from the request or through consultation by the agency or Minister with the applicant, that the applicant does not want access to an edited copy of the document that removes the exempt information.[389]

Not practicable to provide an edited copy – section 25A(5)(b)(i)

1.93. It must be objectively apparent from the nature of the documents, as described in the request, that it would not be practicable to provide an edited copy of any of the documents, under section 25.[390]

1.94. If it is practicable to provide an edited copy of one document out of multiple documents falling within a request, the agency or Minister cannot rely on section 25A(5) to refuse the request.[391]

For more information on assessing whether it is practicable to provide an edited copy, see section 25 – Deletion of exempt matter or irrelevant material.

[388] *Freedom of Information Act 1982* (Vic), sections 25(b) and 25A(5)(b)(i).

[389] *Freedom of Information Act 1982* (Vic), sections 25(c) and 25A(5)(b)(ii).

[390] *Knight v Corrections Victoria* [2010] VSC 338, [50].

[391] *Knight v Corrections Victoria* [2010] VSC 338, [50].

Example

A request seeks access to correspondence and reports, including correspondence sent between the applicant and the agency in relation to an investigation.

The correspondence is unlikely to be exempt. Or, at the very least, section 25 will require the decision maker to provide access to an edited copy of the correspondence with any exempt information removed.

If the reports quote information provided by the applicant (for example, information provided by the applicant at an interview), this kind of information is also unlikely to be exempt. Section 25 will require the decision maker to provide an edited copy of the report to the applicant.

Applicant does not wish to have access to an edited copy – section 25A(5)(b)(ii)

1.95. An agency or Minister does not have to provide access to an edited copy of a document if it appears the applicant does not want one.[392] This may be apparent from the applicant's request, or through consultation by the agency or Minister with the applicant.

1.96. If an applicant indicates they want access to edited copies of documents, the agency or Minister can only refuse the request under section 25A(5) if it is not practicable to provide one.[393]

1.97. An agency or Minister cannot assume that an applicant does not want to receive edited copies of documents, merely because the applicant was silent about this in their request.[394] If an applicant does not indicate in their request whether they want access to edited copies of documents, an agency or Minister must consult with the applicant to find out whether they would not wish to have access to edited copies of documents.

Instances when section 25A(5) is unlikely to apply

1.98. Section 25A(5) will not apply where:

- a decision maker grants access to some of the requested documents, or part of a requested document;
- a request seeks access to multiple categories of documents, not all of which are obviously exempt on the face of the request;

[392] *Freedom of Information Act 1982* (Vic), section 25A(5)(b)(ii).

[393] *Freedom of Information Act 1982* (Vic), section 25A(5)(b)(ii).

[394] *Victorian Legal Services Commissioner v Grahame (No 2)* [2019] VCAT 1878.

- a request seeks access to documents concerning the applicant, including correspondence that was sent to or received by the applicant, and that would not be exempt; or
- the applicant indicates in their request, or through consultation, they are willing to accept an edited copy of the documents and it is practicable for the agency or Minister to provide an edited copy.

Section 26 – Decision to be made by authorized person

Extract of legislation

26 Decision to be made by authorized person

(1) A decision in respect of a request made to an agency may be made, on behalf of the agency, by the responsible Minister or the principal officer of the agency or, by an officer of the agency acting within the scope of authority exercisable by him in accordance with arrangements approved by the responsible Minister or the principal officer of the agency.

(2) Where a request is made to an agency for a document, and no arrangements in respect of documents of that type have been made and published under the regulations, a decision on that request shall, for the purpose of enabling an application for review to be made to the Tribunal, be deemed to have been made by the principal officer of the agency.

Guidelines

Who is an authorised decision maker?

1.1. Decisions made under Part III (requests for access to documents) and Part V (requests for amendment) must made by an authorised decision maker.[395] Authorised decision makers include:

- the responsible Minister of the agency; or
- the principal officer of the agency; or
- other officers of the agency where the responsible Minister or principal officer of the agency approved arrangements for those officers to be authorised decision makers under the Act.

Example

The principal officer may approve arrangements for persons within the agency holding the job title 'FOI Officer' to be authorised persons under section 26(1).

[395] *Freedom of Information Act 1982* (Vic), section 26(1). For the purpose of this section, a reference to a 'decision' refers to a decision made under either Part III or Part V.

Other officers under approved arrangements of the responsible Minister or principal officer

1.2. It is sufficient for the approved arrangements to identify officers of an agency by job title only. The approved arrangements do not require the officer to be personally named.

1.3. Holding the job title 'FOI Officer' does not automatically authorise the person to make decisions under the Act. An agency must ensure that the responsible Minister or principal officer has approved arrangements for FOI Officers to make decisions, if the agency intends for FOI Officers to be FOI decision makers.

1.4. If an officer is not authorised, they can still assist in processing a request for access or a request for amendment and communicate with the applicant during the processing of the request. However, only an authorised officer can make the decision.[396]

What if the decision maker is not authorised?

1.5. If a decision is made by a person who was not authorised under section 26(1), the agency and the person who made the decision cannot rely on the protections in the Act in relation to legal action and criminal and civil liability that may arise from a decision to grant access to a document under the Act.[397]

Right to apply for review of a decision made by an unauthorised person

1.6. Section 26(2) preserves an applicant's right to apply to the Victorian Civil and Administrative Tribunal for review of an agency or Minister's decision, even where the decision maker was not an authorised person under section 26(1) or where no principal officer has been appointed.[398]

1.7. The reference to 'published under the regulations' in section 26(2) is a reference to the previous method for authorising decision makers when the Act first came into force.[399]

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[396] *Freedom of Information Act 1982* (Vic), section 26(1).

[397] *Freedom of Information Act 1982* (Vic), sections 62 and 63.

[398] *Evans v Martin* (County Court of Victoria, Rendit J, 27 July 1984) 20–21.

[399] See comments of Macnamara J in *Luck v Victoria Police* [2013] VCAT 206.

Section 27 – Reasons etc. to be given

Extract of legislation

27 Reasons etc. to be given

(1) Where, in relation to a request for access to a document of an agency or an official document of a Minister, a decision is made under this Part that the applicant is not entitled to access to the document in accordance with the request or that provision of access to the document be deferred or that no such document exists, the agency or Minister shall cause the applicant to be given notice in writing of the decision, and the notice shall—

(a) state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision;

(b) where the decision relates to an agency, state the name and designation of the person giving the decision;

(c) where access is given to a document in accordance with section 25 state that the document is a copy of a document from which exempt or irrelevant matter has been deleted;

(d) inform the applicant of—

(i) his right to apply for a review of the decision;

(ii) the authority to which the application for review should be made; and

(iii) the time within which the application for review must be made;

(da) where the decision relates to a refusal to grant access to a document containing health information on the ground referred to in section 36 of the **Health Records Act 2001**, inform the applicant of the time within which—

(i) a written notice may be given under section 38(1) of the **Health Records Act 2001** nominating a health service provider for the purposes of Division 3 of Part 5 of that Act;

(ii) an application for a review of the decision may be made under Division 1 of Part VI of this Act;

(iii) an application for conciliation may be made under Division 2 of Part VI of this Act;

(db) where the decision relates to a refusal to grant access to a document containing health information on a ground other than the ground referred to in section 36 of the **Health Records Act 2001**, inform the applicant of the time within which—

(i) an application for a review of the decision may be made under Division 1 of Part VI of this Act;

(ii) if applicable, an application for conciliation may be made under Division 2 of Part VI of this Act;

(e) where, in the case of a decision of an agency or a Minister, the decision does not relate to a request for access to a document that if it existed would be, an exempt document under section 28, 29A, 31 or 31A but the decision is to the effect that the document does not exist or cannot, after a thorough and diligent search, be located, inform the applicant of his right to complain to the Information Commissioner.

(2) In a notice under subsection (1), an agency or Minister—

(a) is not required to include any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document;

(ab) is not required to confirm or deny the existence of any document, if confirming or denying the existence of that document would involve the unreasonable disclosure of information relating to the personal affairs of any person for the reason that it would increase the risk to a primary person's safety from family violence;

(ac) is not required to confirm or deny the existence of any document, if confirming or denying the existence of that document would involve the unreasonable disclosure of information relating to the personal affairs of any person for the reason that it would increase the risk to the safety of a child or group of children;

(b) if the decision relates to a request for access to a document that is an exempt document under section 28, 29A, 31 or 31A or that, if it existed, would be an exempt document under section 28, 29A, 31 or 31A, may state the decision in terms which neither confirm nor deny the existence of any document.

Relevant FOI Professional Standards

Professional Standard 6.1	Where a search for documents is conducted, an agency must ensure it keeps a record of the searches undertaken, including information relating to: (a) the locations searched by the agency; (b) the method or type of searches undertaken; and (c) where applicable, the key words used in the searches

Note: a record may include a completed proforma template, email response, or file note.

Professional Standard 8.1 An authorised officer must not be directed to make a particular decision under the Act, when properly exercising their statutory decision making power.

Professional Standard 8.2 In a written decision, other than in accordance with sections 27(2) or 33(6) of the Act, where an agency relies on an exemption or exception, the agency must:

(a) explain its reasons for why each exemption or exception applies; and

(b) address each limb of the relevant exemption or exception.

Professional Standard 8.3 In a written decision, other than in accordance with sections 27(2) or 33(6) of the Act, an agency must take reasonable steps to:

(a) identify whether documents are being released in full, released in part, or denied in full; and

(b) describe the documents or types of documents discovered.

Note: an agency may consider a page or pages as a document, a file containing multiple records as a document or however else an agency typically describes a document in the agency.

Professional Standard 8.4 In a written decision, other than in accordance with sections 27(2) or 33(6) of the Act, where an agency cannot locate a document or a document does not exist in relation to a request or part of a request, the agency must:

(a) where a search is conducted, provide a summary of the searches undertaken for the document, which may include:

(iii) the locations searched by the agency;

(iv) the method or type of searches undertaken; and

(v) where applicable, the key words used in the searches; and

(b) where practicable, explain why the relevant document does not exist or could not be located.

Guidelines

Overview of section 27

1.1. In response to an applicant's FOI request, an agency or Minister must provide an applicant with a written notice of decision in certain situations and must, amongst other things, include the reasons for the decision.[400]

1.2. The notice of decision must be made by an authorised decision maker.[401]

1.3. There is certain information an agency or Minister must include in a notice of decision, and some information that an agency or Minister does not have to include.[402] This is outlined below.

Purpose of section 27

1.4. Section 27 facilitates good decision making, transparency and accountability. Detailed decisions:

- help ensure agencies and Ministers meet their obligations under the Act and the Professional Standards;
- help applicants understand what was considered in making a decision, why a particular decision was made, and the reasons for that decision; and
- can reduce follow-up enquiries an agency or Minister receives regarding the decision, and can reduce complaint and review applications to the Office of the Victorian Information Commissioner.

When is a written notice of decision required?

1.5. In response to a request for access made under section 17, an agency or Minister must provide an applicant with a written notice of decision for:

- a decision to not grant access to a document in accordance with the request;
- a decision to defer access to a document under section 24;

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[400] *Freedom of Information Act 1982* (Vic), section 27.

[401] *Freedom of Information Act 1982* (Vic), section 26(1).

[402] *Freedom of Information Act 1982* (Vic), section 27, Professional Standard 8.

- a decision that the document does not exist or cannot be found.

1.6. A notice of decision may contain one or more types of decision in response to the request.

Example

In response to a request, an authorised decision maker decides:

- one document does not exist;
- two documents are exempt in full under section 35(1)(b);
- one document is released in part, with exempt information removed under section 33(1);
- one document is released in full, but access is deferred for one month under section 24(1); and
- five documents are released in full.

1.7. If access is granted in full to all requested documents, an agency or Minister does not have to provide a written notice of decision. However, it is still best practice to provide a written decision to the applicant as this can help the applicant to understand the type and number of documents they have been granted access. A written decision can also help to reduce follow up enquiries about whether an agency or Minister has complied with its obligations under the Act. Follow up enquiries may occur where an applicant believes the agency or Minister misunderstood the terms of the request or did not conduct a thorough and diligent search.

Access was not given 'in accordance with the request'

1.8. An agency or Minister must provide a written notice of decision where the agency or Minister decides not to provide access to a document in accordance with the applicant's request.[403] This includes where an agency or Minister decides:

- to apply an exception under sections 24, 25A(1) or 25A(5), to refuse a request without processing it;
- to apply an exemption to a document in full or in part under Part IV;
- to delete irrelevant information from a document under section 25;

[403] *Freedom of Information Act 1982* (Vic), section 27(1).

- to grant access in a form different to the form requested under section 23;
- to produce a document under section 19, when this was not requested by the applicant;
- Part III does not apply to the requested document. For example, due to section 14, or a provision in other legislation that excludes the operation of the Act.

Requests for amendment of personal records

1.9. In response to a request to amend a record made under Part V, section 45 requires an agency or Minister to provide an applicant with a written notice of decision under section 27 for a decision to not amend a record in accordance with the request.

Information to include in a notice of decision

1.10. Section 27 and Professional Standards 8.1, 8.2, 8.3 and 8.4 outline what an agency or Minister must include in a notice of decision.[404] When drafting a decision, an agency or Minister should include the following information.

The request

1.11. The terms of the request should be clearly set out, and if relevant, detail any information as to how the request was interpreted.

1.12. If there was any initial consultation with an applicant to clarify the scope of the request, or an original request was not valid, the consultation should be noted in the decision along with the applicant's confirmation of the final terms of the request.

Background information

1.13. It is good practice to:

- set out any background information that is relevant to the documents or decision. This might include explaining how the documents were created or the matters to which they relate; and

[404] The Professional Standards apply only to agencies, not to Ministers. For the purpose of this section, a reference to a Professional Standard in the context of a Minister is a suggestion rather than a requirement.

- set out any relevant timeframes for processing the request. For example, any extension of time agreed by the applicant or required for consultation; any time during which the processing time was suspended in accordance with section 25A(7); or, if the applicant paid a deposit under section 22, the date when the processing period commenced.

1.14. This type of background information provides context for the decision and can assist an applicant's understanding of the documents identified and the way the request has been processed.

Document searches

1.15. An agency or Minister must undertake a thorough and diligent search for documents falling within the scope of the request.

Conducting a thorough and diligent search

1.16. An agency or Minister must take all reasonable steps to identify all relevant documents in the agency's or Minister's possession.[405]

1.17. Reasonable steps will depend on the circumstances of each request. An agency or Minister should take a practical and common sense approach to undertaking a document search with reference to the terms of the request and an understanding of the agency's or Minister's record keeping practices.

1.18. At a minimum an agency or Minister must:

- determine which documents or types of documents the applicant is seeking access to, with reference to the terms of the applicant's request;
- identify the most appropriate business area or unit to conduct the search (depending on the applicant's request and the agency's or Minister's record keeping practices, this could involve multiple business units and individuals, including external consultants or businesses engaged or employed by the agency or Minister);
- conduct a thorough and diligent search to locate all relevant electronic and hard copy documents;
- ensure a record is kept of searches undertaken (Professional Standard 6.1).

1.19. An agency or Minister should consider the nature, age and type of documents being requested to assist in determining where and how to search for them. For example, if an applicant seeks access to emails related to a particular agency officer that is still employed at the agency, that officer should be consulted and asked to provide relevant documents.

[405] *Roberts v Southern Rural Water* (Victorian Civil and Administrative Tribunal, Preuss SM, 20 April 2000).

1.20. It may be useful, and necessary in some cases, to refer to the context in which the documents were created. For example, if the documents relate to a particular incident, this may clarify the types of documents that may exist – such as incident forms, investigation reports, and internal improvement briefings – or it may be the case that no relevant documents exist because no such incident occurred.

1.21. In most cases it will be helpful to have a conversation with the applicant, to ensure the agency's or Minister's understanding of the request is clear. Establishing a relationship with the applicant can also assist an agency or Minister to write a clear decision that is tailored to the applicant's request.

1.22. To ensure all relevant places are searched, it is important for an agency or Minister to understand where and how documents are stored. Therefore, an agency or Minister should ensure it understands its own record holdings and records management systems (including digital, hard copy and archived systems), and identify its document storage policies and practices where relevant.

Consulting internally with business areas to perform a thorough and diligent search

1.23. Conducting a thorough and diligent search will usually require an FOI Officer to consult internally with one or more business areas of the agency or Minister as they will likely be the subject matter expert for the requested documents and know where to find them.

1.24. Internal consultation can take some time, so it is important to identify this, consult early, and let the applicant know of any possible delays.

1.25. When consulting internally, an agency or Minister should ensure the business area understands:

- the terms of the request;
- the time frame for responding to the search request (noting the statutory time frame for responding to a request and any extensions of time)
- that all relevant documents in existence at the time the request was made must be provided to the FOI unit or officer for assessment, including documents the business unit may consider are sensitive, marked 'privileged' or 'confidential', draft and duplicate documents;
- multiple document storage systems may need to be searched, including electronic files, hard copy and archived files;
- details of all searches must be recorded (Professional Standard 6.1);
- Professional Standard 9.5 requires the agency business unit or officer to assist and cooperate with the FOI unit in processing the request; and
- the decision whether to release documents in response to a request is made by the agency's principal officer or authorised officer under section 26 (for example, the FOI Officer).

1.26. To help with assessing the documents, it is also useful to ask the business area to:

- explain the background and context in which the documents were created (for example, why they were created and their significance); and
- identify any particular sensitivities or concerns with releasing the documents to the applicant.

1.27. While consulting internally can provide helpful and often crucial information to assess a document, it should not impede the decision-making process, nor cause unnecessary delay.

1.28. Only an authorised officer may make an FOI decision and the business area cannot direct an authorised officer to make a particular decision under the Act (Professional Standard 8.1).

For more information, see:

- section 26 – Decision to be made by authorised person;
- Template 2 – Internal search request with checklist;
- Practice Note – Overview of the FOI Act and the Responsibilities of Victorian public sector officers.

Recording document searches

1.29. Under Professional Standard 6.1, where a document search is conducted, an agency must ensure it keeps a record of the searches, including information about the locations searched, the method or type of searches undertaken, and where applicable, the key words used in the searches. To comply with this standard, a record may include a completed proforma template, email response, file note or some other type of record.

1.30. Keeping a record of document searches undertaken is a good record keeping practice and will help an agency develop a more precise understanding of the nature of the search required for requests, including the time and resources involved. This will enable the agency to ensure a thorough and diligent search has been completed by agency officers, enable the agency to accurately calculate access charges where applicable, and respond to complaints made to the Office of the Victorian Information Commissioner (**OVIC**) under section 61A.

For more information, see Template 3 – Record of Document Search.

Document does not exist or cannot be found

1.31. Where a requested document cannot be located or does not exist, Professional Standard 8.4 requires an agency to include in the written notice of decision:

- the fact the document cannot be found;

- a summary of the document searches, including the locations searched, method or type of searches undertaken and where applicable, the key words used; and
- where practicable, explain why the requested document does not exist or could not be located.

1.32. Professional Standard 8.4 applies to part of a request or the entire request.

Example

An applicant requests access to three categories of documents. The agency locates documents falling within categories 2 and 3 but cannot locate documents falling within category 1.

The agency must comply with Professional Standard 8.4 in its written notice of decision, in relation to the category 1 documents.

1.33. There may be several reasons why a document cannot be located. For example:

- the document may never have existed or been held by the agency;
- the document may have previously been in the agency's possession, but it was destroyed in accordance with a Public Record Office Victoria Retention and Disposal Authority and the agency's internal processes; or
- the document may have been created but cannot be found, despite conducting a thorough and diligent search.

1.34. In some circumstances, an agency or Minister may not be able to explain why a document cannot be found. In those instances, it will be sufficient for an agency or Minister to note in its decision letter that it is unsure why a document does not exist or could not be located, provided it describes the searches undertaken to locate the document.

1.35. Where a document does not exist or cannot be located, the notice of decision must inform an applicant of their right to complain to OVIC.[406]

For more information, see Template 19 – Decision letter – documents do not exist or cannot be located.

[406] *Freedom of Information Act 1982* (Vic), section 27(1)(e).

Describing documents discovered

1.36. Professional Standard 8.3(b) requires an agency to take reasonable steps to describe in the notice of decision, the documents or types of documents discovered. For example, the documents may be emails, a file note, a letter, photographs, screen shots or a video recording. Wherever reasonable, the description should include who authored the document and the subject matter of the document.

1.37. It is also good practice to provide a brief summary of searches undertaken to demonstrate to an applicant the steps taken to locate the documents.

Decision on each document

1.38. Professional Standard 8.3(a) requires an agency to identify in the notice of decision whether documents are being released in full, released in part, or denied in full.

1.39. An agency or Minister must also identify in the decision, the documents from which exempt or irrelevant information has been deleted in accordance with section 25.[407]

1.40. An agency or Minister must make a decision about each document falling within a request. Where a request is made for access to a file which contains multiple documents, a decision must be made for each document in the file.[408]

Example

In a decision notice an agency states:

'After conducting a thorough and diligent search the agency identified 10 documents falling within the scope of your request. The documents are made up of 8 emails, 1 Cabinet submission and 1 report.

I have decided to:

- release 3 emails in full;
- release the report in full;
- release 5 emails in part, because they contain exempt information under section 33(1) that has been deleted under section 25; and

[407] *Freedom of Information Act 1982* (Vic), section 27(1)(c).

[408] *Sobh v Victoria Police Force* [1994] 1 VR 41.

- deny access to the Cabinet submission in full, because it is exempt under section 28(1)(b).

The reasons for my decision are set out below.'

1.41. Agencies and Ministers should consider using a schedule of documents to outline the decision on each document. At a minimum, a schedule contains a brief description of each document, how many pages the document contains, and the agency's decision on each document.

See Template 18 – Decision letter – release in full, in part, deny in full for an example of a document schedule.

Explain the reasons for the decision

1.42. Providing reasons for the making of an administrative decision by an agency or Minister is an important part of the FOI process.

1.43. In a notice of decision, an agency or Minister must state the findings on any material questions of fact, referring to the material on which those findings were based, and the reasons for the decision.[409]

1.44. Similarly, Professional Standard 8.2 requires an agency to explain why each exception or exemption applies, and address each limb of the exception or exemption. It is not sufficient to simply state a document is exempt, or that relevant limbs of an exemption or exception are satisfied. The agency must explain how it reached its decision with respect to each specific document, by referring to the facts that were considered when assessing each document and explaining how those facts apply to each document to support the exemption or exception.

1.45. If third parties were consulted about the disclosure of their information (for example, personal affairs information), their response and its impact on the decision should be explained in the notice of decision.

1.46. If an agency or Minister applies the exemption in section 30(1), the decision must state the public interest considerations on which the decision is based.[410]

[409] *Freedom of Information Act 1982* (Vic), section 27(1)(a).

[410] *Freedom of Information Act 1982* (Vic), section 30(5).

Access charges

1.47. Where access charges are imposed under section 22, the decision should outline how much the applicant is required to pay, how the charges were calculated and how the charges can be paid.

1.48. The decision should outline the effect of non-payment and that, in accordance with section 20(1)(b), the applicant will receive the relevant documents once the access charges are paid.

1.49. Professional Standard 4.3 requires an agency to take reasonable steps to provide options for payment of the access charges that are the same as the payment methods the agency provides for other services of a similar financial sum.

1.50. An agency or Minister should tell an applicant that they have the right to seek a certificate from OVIC to enable the applicant to seek review by the Victorian Civil and Administrative Tribunal (**VCAT**) of any access charges imposed.

> For more information, see section 50(1)(g) – Applications for review by Tribunal.

Release of documents

1.51. If an agency or Minister decides to provide access to documents, it should explain how and when those documents will be provided to the applicant so the applicant understands when they can expect to receive the documents, and in what form.

Third party review rights

1.52. It is important to note any third party review rights in the decision letter. Third party review rights arise when third parties were consulted, they objected to the release of their information or they did not respond, and the agency's or Minister's decision is to release that information.

1.53. Where a third party is provided with review rights, an agency or Minister must make it clear in its decision that the applicant cannot access the documents until after the 60 day third party appeal period ends. It should also be made clear to the applicant that if they are not happy with the decision, they may apply for a review by OVIC within 28 days rather than waiting for the release of documents subject to the third party appeal period. This will preserve the applicant's review rights while they wait for the third party appeal period to expire.

1.54. Only the documents containing the third party information need to be withheld until the third party appeal period ends. If there are other documents to which access has been granted, the agency or Minister does not have to wait for the third party appeal period to end before releasing those documents to the applicant.

Review rights

1.55. An agency or Minister must tell an applicant of their right to apply to OVIC for a review of a decision if the agency or Minister decides to:

- refuse access to a document in accordance with a request;
- defer access to a document under section 24; and
- not amend a document pursuant to a request under section 39.

For more information, see section 49A – Applications to Information Commissioner for review.

1.56. An agency or Minister must inform the applicant of the time frame in which the applicant must apply for a review.[411]

1.57. If an agency or Minister decides to make the applicant pay access charges, the agency or Minister should also inform an applicant of their right to apply to OVIC for a certificate to enable the applicant to apply to VCAT for review of the decision to impose access charges or the access charges amount.

More information, see section 50(1)(g) – Applications for review by Tribunal.

Complaint rights

1.58. An agency or Minister must tell an applicant in the notice of decision of their right to complain to OVIC if the agency or Minister cannot locate a document or the document does not exist.[412]

For more information, see section 61A – Complaints.

Decision maker's details

1.59. An agency or Minister must include in the notice of decision, the name and position of the person making the decision.[413]

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[411] *Freedom of Information Act 1982* (Vic), section 27(1)(d). See also section 49B – Time for applying for review.

[412] *Freedom of Information Act 1982* (Vic), section 27(1)(e).

[413] *Freedom of Information Act 1982* (Vic), section 27(1)(b).

Exceptions to providing certain information

1.60. Section 27(2) outlines certain information that an agency and Minister do not have to include in a notice of decision. These are outlined below.

Exempt information

1.61. An agency or Minister does not have to include exempt information in the notice of decision.[414]

1.62. An agency or Minister should consider whether the mere description of documents or the explanation of the reasons for decision would reveal exempt information.

Confirming or denying whether certain documents exist

1.63. An agency or Minister is not required to confirm or deny the existence of a document in a decision, where:

- confirming or denying the existence of a document would involve the disclosure of section 33 exempt information;[415] or
- the decision relates to a document that is (or would be if it existed) an exempt document under sections 28, 29A, 31 or 31A.[416]

1.64. An agency or Minister may neither confirm nor deny the existence of a document where acknowledging that a document exists would be an unreasonable disclosure of personal affairs information for the reason that it would increase the risk to a primary person's safety from family violence or increase the risk to the safety of a child or group of children.[417]

1.65. An agency or Minister may neither confirm nor deny the existence of a document where such a disclosure, would, in and of itself, disclose information the exemption was designed to prevent from being disclosed.[418] For example, disclosing that a document exists or does not exist may prejudice the investigation of a breach of the law by disclosing whether the applicant is a person of interest. If so, this information is exempt under section 31(1)(a), and the agency can decide to apply the exemption and neither confirm nor deny the existence of the document.

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[414] *Freedom of Information Act 1982* (Vic), sections 33(6), 27(2)(ab), 27(2)(ac).

[415] *Freedom of Information Act 1982* (Vic), section 27(1)(e).

[416] *Freedom of Information Act 1982* (Vic), section 27(2)(b). For an example see *'AH3' and Victoria Police (Freedom of Information)* [2019] VICmr 66 (19 July 2019).

[417] *Freedom of Information Act 1982* (Vic), sections 27(2)(ab) and 27(2)(ac).

[418] *Freedom of Information Act 1982* (Vic), section 27(2)(b).

1.66. If an agency or Minister relies on section 27(2)(b) and the decision is reviewed, the agency or Minister will need to produce evidence specific to the context of the request and the document in issue, to justify its decision.

Example

In *Akers v Victoria Police* [2021] VCAT 1060, VCAT was not satisfied that disclosure of the existence or otherwise of the requested documents would prejudice the effectiveness of police surveillance methods and procedures.

In rejecting the agency's argument, VCAT was critical of the non-specific, generalised evidence presented by the agency and commented that taken to its extreme, the agency's position was an 'unsustainable universal policy' that would 'operate to provide a blanket exemption for any documents revealing surveillance'.

VCAT found the agency's position to be inconsistent with the objects of the Act to facilitate and promote access to government held information.

Health information – sections 27(1)(da) and 27(1)(db)

1.67. There is a different way to provide a decision to an applicant in the case of the applicant's own health information, in specific instances.

1.68. If an agency or Minister decides to refuse access to a document containing the applicant's own health information because it is exempt under section 33(4), the agency or Minister must tell the applicant in the notice of decision of the time within which the applicant must:

- provide a written notice under section 38 of the *Health Records Act 2001* (Vic) nominating a health service provider to assess the ground for refusal;
- apply to the Information Commissioner for a review of the decision; and
- apply to the Health Complaints Commissioner for conciliation.[419]

1.69. Section 33(4) is where a principal officer or Minister believes on reasonable grounds that the ground in section 36 of the *Health Records Act 2001* (Vic) is engaged. That ground allows an agency or Minister to refuse access to a person's own health information where 'providing access would pose a serious threat to the life or health of the individual'.

[419] *Freedom of Information Act 1982* (Vic), section 27(1)(da).

1.70. If the decision is to refuse access to a document containing health information for a reason other than the ground in section 36 of the *Health Records Act 2001*, the agency or Minister must tell the applicant in the notice of decision of the time within which the applicant must:

- apply to OVIC for a review of the decision; and
- if applicable, apply to the Health Complaints Commissioner for conciliation.[420]

For more information, see:

- section 33 – Document affecting personal privacy;
- section 49B – Time for applying for review;
- *Health Records Act 2001* (Vic) Part 5, Division 3.

More Information

Overview of the FOI Act and the Responsibilities of Victorian public sector officers

Template 2 – Internal search request with checklist

Template 3 – Record of document search

Template 18 – Decision letter – release in full, in part, deny in full

Template 19 – Decision letter – documents do not exist or cannot be located

[420] *Freedom of Information Act 1982* (Vic), section 27(1)(db).

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