

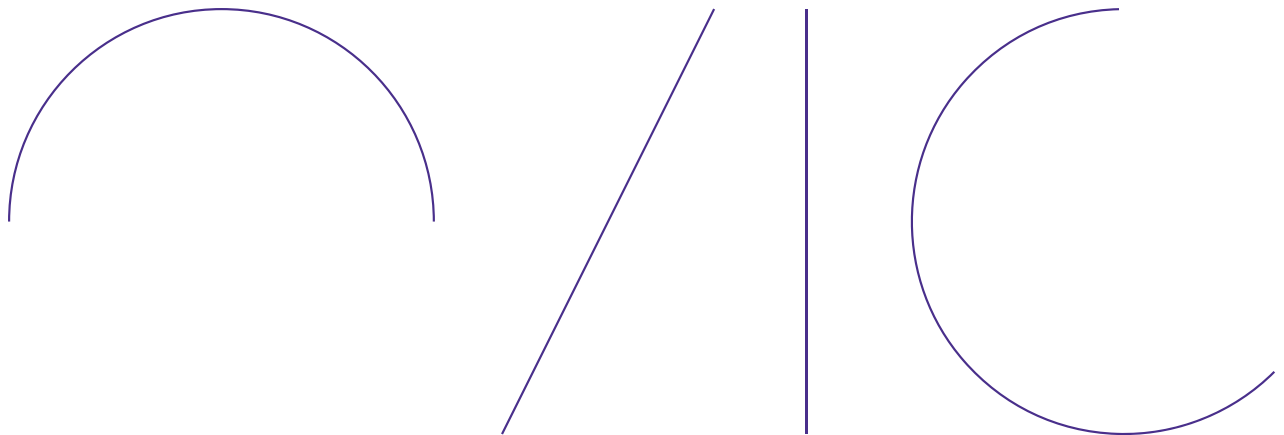


Office of the Victorian  
Information Commissioner

## Part VI – Review of decisions

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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## Division 1—Review by Information Commissioner

### Section 49A – Applications to Information Commissioner for review

#### Extract of legislation

#### **49A Applications to Information Commissioner for review**

- (1) An applicant may apply to the Information Commissioner for review of—
  - (a) a decision of an agency or a Minister refusing to grant access to a document in accordance with a request; or
  - (b) a decision under section 24 by an agency or Minister deferring the provision of access to a document; or
  - (c) a decision of an agency or Minister not to waive or reduce an application fee under section 17, whether or not the fee has already been paid by the applicant.
- (2) A person who is the subject of information in a document referred to in section 39 (or, in the case of a deceased person, that person’s next-of-kin) may apply to the Information Commissioner for a review of a decision by an agency or Minister not to amend the document pursuant to a request under section 39.
- (4) An application cannot be made under this section in relation to a decision of an agency or a Minister refusing to grant access to a document on the basis that the document is claimed to be exempt under section 29A.
- (5) If the decision of an agency or a Minister relates to a document that is claimed to be exempt under section 29A and also to another separate document that is not so exempt, an application can be made under this section in relation to the decision of the agency or Minister to the extent that it relates to the other separate document.

## Guidelines

### What is Part VI about?

- 1.1. Generally, Part VI outlines the powers of the Information Commissioner, the Public Access Deputy Commissioner and the Victorian Civil and Administrative Tribunal (VCAT) to review freedom of information (FOI) decisions made by agencies and Ministers.

For more information about reviews by VCAT, see [section 50 – Applications for review by the Tribunal](#).

### What can OVIC review?

- 1.2. An applicant may apply to the Office of the Victorian Information Commissioner (OVIC)<sup>1</sup> to review:
  - an agency or Minister’s decision to refuse to grant access to a document;<sup>2</sup>
  - an agency or Minister’s decision to defer access to a document under [section 24](#);<sup>3</sup>
  - an agency or Minister’s decision not to waive or reduce an application fee under [section 17](#) (it does not matter whether the application fee has been paid);<sup>4</sup> or
  - an agency or Minister’s decision not to amend a document under [section 39](#).<sup>5</sup>
- 1.3. OVIC cannot review an agency or Minister’s decision refusing to grant access to a document under [section 29A](#) (documents affecting national security, defence, or international relations).<sup>6</sup> However, OVIC can review other, separate, documents in the same request which are not claimed to be exempt under section 29A.<sup>7</sup>

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<sup>1</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

<sup>2</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49A(1)(a).

<sup>3</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49A(1)(b).

<sup>4</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49A(1)(c).

<sup>5</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49A(2).

<sup>6</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49A(4).

<sup>7</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49A(5).

## Where a document is excluded from the Act

- 1.4. Legislation may exclude certain documents from the operation of the FOI Act (for example, under [section 6AA](#), [section 14](#), or under a different Act). In these circumstances, the FOI Act does not apply to the requested document.
- 1.5. Where an agency or a Minister makes a decision that the Act does not apply to a document, OVIC can look at whether the documents fall within the relevant exclusionary provision. This includes by requesting submissions from the agency or Minister as to how the documents fall within the relevant exclusionary provision and compelling the production of documents where necessary.
- 1.6. Where the documents fall within the exclusionary provision, that is the end of OVIC's role.
- 1.7. Where the documents do not fall within the exclusionary provision, OVIC conducts a review with respect to those documents.<sup>8</sup>

## Decisions refusing to grant access under section 29A

- 1.8. OVIC cannot conduct a review, handle a complaint, or conduct an investigation regarding a:
  - certificate signed by a Department Head or the Chief Commissioner of Police under section 29A(2); or
  - question whether a document is, or whether a document including the information would be, of a kind referred to in section 29A(1), (1A) or (1B); or
  - decision to sign a certificate under section 29A(2).
- 1.9. However, an applicant may apply to VCAT under [section 50\(1\)\(e\)](#) to review a decision refusing access under [section 29A](#).<sup>9</sup>

## What kind of review does OVIC do?

- 1.10. The kind of review that OVIC does is called a 'merits review'. This means that OVIC reviews the merits of an agency or Minister's decision and makes a fresh decision on the application as if it were making the decision for the first time.<sup>10</sup>

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<sup>8</sup> *Luck v Independent Broad-based Anti-corruption Commissioner* (Review and Regulation) [2013] VCAT 1805; *Risson v Independent Broad-based Anti-corruption Commission* (Review and Regulation) [2014] VCAT 742; *Marke v Victoria Police FOI Division* (Review and Regulation) [2018] VCAT 1320.

<sup>9</sup> *Freedom of Information Act 1982 (Vic)*, section 50(1)(e).

<sup>10</sup> Encyclopaedic Australian Legal Dictionary, 'merits review.'

1.11. In this process, OVIC ‘steps into the shoes’ of the primary decision-maker, and:

- considers the facts, law, and policy aspects of the original decision; and
- determines what is the correct and preferable decision.<sup>11</sup>

1.12. ‘Correct and preferable’ means that the reviewing body (OVIC) must make the correct decision according to law at the time of making a fresh decision. Where there are a range of possible correct decisions, the decision must also be the preferable one where it is ‘subject to the general constraints to which the administrative officer whose decision is under review was subject.’<sup>12</sup>

1.13. OVIC can also consider additional information, including a submission provided by an applicant, agency or Minister, provided during the review and that may not have been available to the original decision-maker.

## What kind of decisions can OVIC make on review?

1.14. When OVIC reviews a decision of an agency or Minister, it may:

- make the same decision as the agency or Minister;
- make a different decision to the agency or Minister;
- dismiss the application for review; or
- if the applicant agrees, refer the decision back to the agency or Minister to make a fresh decision.<sup>13</sup>

1.15. OVIC’s decision is a fresh decision and has the same effect as a decision of the agency or Minister.<sup>14</sup> This means that the agency or Minister must give effect to OVIC’s decision, unless an application to VCAT is made to review OVIC’s decision.<sup>15</sup>

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<sup>11</sup> Administrative Review Council, ‘Commonwealth of Australia Administrative Review Council What decisions should be subject to merit review?’, *Australian Government Attorney-General’s Department* (publication, 1999) [1.1] (‘Administrative Review Council’).

<sup>12</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

<sup>13</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L.

<sup>14</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P(2).

<sup>15</sup> See [Freedom of Information Act 1982 \(Vic\)](#), section 50 for reviews by VCAT.

## More information

For more information on how to apply for a review by OVIC, see:

- [section 49B – Time for applying for review](#)
- [section 49C – Form of review](#)
- [Applying for a Freedom of Information Review](#)

Read published OVIC review decisions [here](#).

# Section 49B – Time for applying for review

## Extract of legislation

### 49B Time for applying for review

- (1) Subject to this section, an application by a person to the Information Commissioner for review of a decision under this Division must be made within 28 days after the day on which notice in writing of the decision is given to the person.
- (2) If the application for review relates to a decision to refuse to grant a person access to a document containing health information on the ground referred to in section 36 of the **Health Records Act 2001**, the application must be made within 70 days after the day on which notice in writing of the decision is given to the person.
- (3) The Information Commissioner may accept an application for review made outside the period referred to in subsection (1) or (2) if satisfied that the application is made out of time because of an act or omission of the agency or Minister concerned.

## Guidelines

### How long does an applicant have to apply for a review by OVIC?

1.1. For a review application to be valid, it must:

- be made within 28 days of receiving the decision;<sup>16</sup>
- be in writing;
- identify the relevant agency or Minister; and
- identify the decision to be reviewed.<sup>17</sup>

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<sup>16</sup> *Freedom of Information Act 1982 (Vic)*, section 49B(1).

<sup>17</sup> *Freedom of Information Act 1982 (Vic)*, sections 49C(a) and 49C(b).

- 1.2. 'Valid' means the review application meets the requirements of the Act. The Office of the Victorian Information Commissioner (OVIC)<sup>18</sup> cannot review an application that does not meet the requirements of the Act.
- 1.3. OVIC may accept an application for review outside of the 28 days if the delay was because of the agency or Minister who made the decision.<sup>19</sup>

#### Example

An agency's decision does not tell the applicant about their right to seek a review by OVIC and does not tell the applicant that they have 28 days to apply for one.

OVIC may accept the review application out of time because the agency did not include information about how to apply for a review, including the 28 day time limit.

- 1.4. The Victorian Civil and Administrative Tribunal cannot review OVIC's decision to accept or not to accept a review application outside the time limit.<sup>20</sup>
- 1.5. If an applicant applies to OVIC for a review outside the 28 days, and OVIC cannot accept it out of time, the applicant may consider making another request to the agency or Minister to receive fresh review rights.

## More information

For information on the form of a review application, see:

- [section 49C – Form of application](#);
- OVIC's online review application [form](#).

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<sup>18</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

<sup>19</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49B(3).

<sup>20</sup> [Smeaton](#) (Review and Regulation) [2015] VCAT 2022.



# Section 49C – Form of application

## Extract of legislation

### 49C Form of application

An application for review under this Division must—

- (a) be in writing; and
- (b) identify—
  - (i) the agency or Minister concerned; and
  - (ii) the decision to be reviewed; and
- (c) include any other prescribed information.

## Guidelines

### What needs to be in a review application?

1.1. For a review application to be valid, it must:

- be made within 28 days of receiving the decision;<sup>21</sup>
- be in writing;
- identify the relevant agency or Minister; and
- identify the decision to be reviewed.<sup>22</sup>

1.2. ‘Valid’ means the review application meets the requirements of the Act. The Office of the Victorian Information Commissioner (OVIC)<sup>23</sup> cannot review an application that does not meet the requirements of the Act.

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<sup>21</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49B(1).

<sup>22</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49C(a) and 49C(b).

<sup>23</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

1.3. When sending an application for review to OVIC, applicants should also include:

- a copy of the request made to the agency or Minister;
- a copy of the agency's decision letter; and
- any other relevant background information.

## How does OVIC use the information provided in a review application?

### Assessing the information and making preliminary inquiries

- 1.4. OVIC will look at the information provided in a review application to make sure OVIC can review it. For example, OVIC will check to make sure the review has been made within 28 days from when the applicant received a decision on their request.<sup>24</sup>
- 1.5. If OVIC accepts the review, OVIC must tell the agency or Minister.<sup>25</sup> OVIC will usually ask them for a copy of any documents that need to be reviewed, a copy of the request, and any other information OVIC needs for the review.
- 1.6. OVIC may need to contact the agency or Minister to clarify the exemptions they applied to the relevant documents, the range of documents involved, and to ask for more information.
- 1.7. Where possible, OVIC will try to resolve reviews informally. If it cannot be resolved informally, OVIC may make a formal decision on the review.<sup>26</sup>

For more information on:

- informal resolution, see [section 49H – Procedure on review](#), and [section 49N – Informal resolution of review](#)
- review decisions, see [section 49P – Decision on review](#).

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<sup>24</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49B(1).

<sup>25</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49D(1).

<sup>26</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P.

## When OVIC must provide information to third parties

- 1.8. OVIC must provide the applicant's name and information about the request to specific third parties where the applicant has requested information about the third party and OVIC decides to release the third party's information.
- 1.9. The information that OVIC provides to the third party includes a description of the requested documents that are relevant to the third party and the general terms of the request. OVIC must provide this information so the third party has the opportunity to appeal OVIC's decision if they disagree with it.

## More information

For information on how long you have to apply for a review with OVIC, see [section 49B – Time for applying for review](#).

See OVIC's online review application [form](#).

For more information on VCAT reviews, see [section 50 – Applications for review by the Tribunal](#).

# Section 49D – Notice and copies of application for review

## Extract of legislation

### 49D Notice and copies of application for review

- (1) The Information Commissioner must notify the principal officer of the agency or the Minister to which the application relates of the application for review.
- (2) At any time during a review, the Information Commissioner, with the consent of the applicant, may provide a copy of the application for review to an agency or the Minister affected by the review.
- (3) The Information Commissioner may provide a copy of the application to an agency or the Minister under subsection (2) on request by the agency or Minister or on the Commissioner's own initiative.

## Guidelines

### OVIC must notify an agency or Minister of a review application

- 1.1. When the Office of the Victorian Information Commissioner (**OVIC**)<sup>27</sup> receives a review application, it must tell the agency's [Principal Officer](#) or Minister of the application.<sup>28</sup>
- 1.2. OVIC may also provide a copy of the application for review to the agency or Minister, with the applicant's consent.<sup>29</sup> OVIC may ask for the applicant's consent to provide their review application at OVIC's own initiative or on request by the agency or Minister.<sup>30</sup>

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<sup>27</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

<sup>28</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49D(1).

<sup>29</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49D(2).

<sup>30</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49D(3).

## Section 49E – Parties to review

### Extract of legislation

#### **49E Parties to review**

The parties to a review under this Division are—

- (a) the applicant; and
- (b) the agency or Minister whose decision is being reviewed.

### Guidelines

1.1. There are no FOI Guidelines on section 49E.

## Section 49F – Review of decision

### Extract of legislation

#### **49F Review of decision**

Subject to this Division, the Information Commissioner may review the decision that is the subject of the application for review.

### Guidelines

1.1. There are no FOI Guidelines on section 49F.

# Section 49G – Information Commissioner may determine not to accept application or may dismiss review

## Extract of legislation

### 49G Information Commissioner may determine not to accept application or may dismiss review

- (1) The Information Commissioner may determine not to accept an application for review or dismiss a review at any stage if—
  - (a) the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith; or
  - (b) the applicant has failed to co-operate with the review without reasonable excuse; or
  - (c) the Commissioner considers that the review would be more appropriately dealt with by the Tribunal; or
  - (d) the Commissioner considers that a review is not appropriate in the circumstances; or
  - (e) the Commissioner is unable to contact the applicant following reasonable attempts to do so.
- (2) The Information Commissioner may dismiss a review if the applicant agrees in writing to the review being dismissed.
- (3) Unless subsection (1)(e) applies, the Information Commissioner must give notice to the applicant and the agency or Minister if the Commissioner decides not to accept an application for review or to dismiss a review.
- (4) The notice must set out the reasons for the decision.

## Guidelines

### When can OVIC not accept or dismiss a review?

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**)<sup>31</sup> may decide to not accept, or to dismiss, a review in certain circumstances.

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<sup>31</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

1.2. This includes where:

- the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith;<sup>32</sup>
- the applicant has failed to co-operate with OVIC without reasonable excuse;<sup>33</sup>
- OVIC consider that the review would be more appropriately dealt with by the Victorian Civil and Administrative Tribunal (**VCAT**);<sup>34</sup>
- OVIC consider that a review is not appropriate in the circumstances;<sup>35</sup>
- OVIC is unable to contact the applicant following reasonable attempts to do so;<sup>36</sup>
- the applicant agrees in writing to the review being dismissed.<sup>37</sup>

1.3. OVIC considers each review application on a case-by-case basis.

1.4. If OVIC forms a preliminary view that the review application may be dismissed, OVIC will notify the applicant and ask for a written response from the applicant before making a final decision.

1.5. If OVIC decides to dismiss a review application, OVIC must notify the applicant and the agency or Minister, and set out the reasons for dismissing the review.<sup>38</sup>

1.6. If OVIC decides to not accept, or dismisses, an application for review, the applicant may apply to the Victorian Civil and Administrative Tribunal (**VCAT**) to review the agency or Minister's decision to refuse access to a document.<sup>39</sup>

For more information on reviews by VCAT, see [section 50 – Applications for review by Tribunal](#).

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<sup>32</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(a).

<sup>33</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(b).

<sup>34</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(c).

<sup>35</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(d).

<sup>36</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(e).

<sup>37</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(2).

<sup>38</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49G(3) and 49G(4).

<sup>39</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49G(1) and 50(1)(d).



Frivolous, vexatious, misconceived, lacking in substance or not made in good faith

- 1.7. OVIC may decide to not accept, or dismiss, a review if the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith.
- 1.8. These terms are not defined in the Act. However, section 75 of the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#) (**VCAT Act**) provides some guidance. Section 75 allows VCAT to dismiss or strike out a proceeding if, in its opinion, all or part of the proceeding is frivolous, vexatious, misconceived or lacking in substance.<sup>40</sup>
- 1.9. VCAT will typically only strike out a proceeding if the proceeding is:
  - hopeless or unsustainable in fact or in law;
  - on no reasonable view can justify relief; or
  - is bound to fail.<sup>41</sup>
- 1.10. Similarly, OVIC will only dismiss an application for review under section 49G(1)(a) where the application is frivolous, vexatious, misconceived, lacking in substance or not made in good faith, where the application is hopeless or bound to fail.

Failing to cooperate without a reasonable excuse

- 1.11. An applicant must engage with the review process and respond to OVIC's requests for information or documents within requested or agreed timeframes.
- 1.12. Where an applicant does not respond to OVIC or does not provide requested material in a timely manner, OVIC may decide to not accept or dismiss a review. This is unless the applicant has a reasonable excuse (for example, a medical issue or disability).

When may a matter be more appropriately dealt with by VCAT?

- 1.13. OVIC may not accept or may dismiss an application for review if the review would be more appropriately dealt with by VCAT.<sup>42</sup>

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<sup>40</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), section 75(1)(a).

<sup>41</sup> *Rein v Australian Health Practitioner Regulation Agency (Human Rights)* [2016] VCAT 1065.

<sup>42</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(c).

1.14. Matters that may be more appropriately dealt with by VCAT may include where:

- an applicant has applied to VCAT for review of the same decision or similar documents;
- the law is not settled and OVIC is aware that VCAT is dealing with an application on the same or similar issue/s.

When will a review not be appropriate in the circumstances?

1.15. OVIC may decide to not accept or may dismiss a review when it is not appropriate in the circumstances.<sup>43</sup>

1.16. This is assessed on a case-by-case basis and may include where the applicant has been provided with the documents subject to the review.

Reasonable attempts to contact an applicant

1.17. OVIC may not accept or may dismiss a review if OVIC cannot contact the applicant after making reasonable attempts to do so.<sup>44</sup>

1.18. An applicant must engage with the review process and respond to OVIC's requests for information or documents within requested or agreed timeframes.

1.19. If an applicant does not respond to OVIC, or does not provide requested information or materials to OVIC, in a timely manner, OVIC may dismiss their application for review after OVIC has made reasonable attempts to contact the applicant. This is unless the applicant has a reasonable excuse (for example, a medical issue or disability).

Applicant agrees in writing

1.20. OVIC may dismiss a review where the applicant agrees to this in writing.<sup>45</sup> OVIC may seek an applicant's consent to dismiss the review where, for example an OVIC staff member or Commissioner provides an initial or preliminary view to the applicant that no further documents will be released, and the applicant accepts this view and no longer seeks a review.

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<sup>43</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(d).

<sup>44</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(e).

<sup>45</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(2).

1.21. Dismissing a review with the applicant's agreement informally resolves the review without a formal review decision under section 49P.<sup>46</sup>

For more information on informal resolution see [section 49H – Procedure on review](#) and [section 49N – Informal resolution of review](#)

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<sup>46</sup> Dismissing a review under section 49G(2) is treated as an informal resolution outcome for the purposes of section 49N(2).

## Section 49H – Procedure on review

### Extract of legislation

#### 49H Procedure on review

- (1) The Information Commissioner must conduct a review in a timely, efficient and fair manner, with as little formality and technicality as possible.
- (2) The Information Commissioner must give each party to the review a reasonable opportunity to make submissions in writing in relation to the review.
- (3) Subject to this section, the Information Commissioner is bound by the rules of natural justice in conducting a review.
- (4) The Information Commissioner may rely on advice and assistance provided by a member of staff of the Office of the Victorian Information Commissioner in—
  - (a) making preliminary inquiries in relation to a review; and
  - (b) conducting a review; and
  - (c) making a fresh decision under section 49P on a review.

### Relevant FOI Professional Standards

<b>Professional Standard 10.1</b>	An agency must assist the Information Commissioner or Public Access Deputy Commissioner in their attempt to informally resolve a review or complaint.
<b>Professional Standard 10.2</b>	An agency must give consideration to a preliminary view issued by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner during a review.
<b>Professional Standard 10.3</b>	An agency must respond to a request for documents and information by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner within requested or agreed timeframes.

#### Professional Standard 10.4

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

Note: section 5 of the Act defines ‘exempt matter’ to mean matter the inclusion of which in a document causes the document to be an exempt document.

## Guidelines

### How OVIC approaches reviews

- 1.1. The Office of the Victorian Information Commissioner’s (OVIC)<sup>47</sup> review process is intended to be timely, efficient and fair. OVIC aims to conduct reviews with as little formality and technicality as possible.
- 1.2. OVIC provides for natural justice in relation to reviews.<sup>48</sup> This means giving an applicant and the agency or Minister an opportunity to provide relevant information in relation to the review and to respond to a preliminary view on a review application where one is provided.
- 1.3. OVIC staff assist the Information Commissioner and the Public Access Deputy Commissioner in conducting a review, prior to a Commissioner making an FOI review decision.<sup>49</sup> This includes OVIC staff making preliminary inquiries with the applicant and the agency or Minister, reviewing documents subject to review, and providing advice in relation to review decisions.<sup>50</sup> Following this work, OVIC staff generally make a recommendation to a Commissioner about a fresh decision to be made.

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<sup>47</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

<sup>48</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49H(3).

<sup>49</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49H(4).

<sup>50</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49H(4).

1.4. OVIC typically takes the following approach in handling reviews:

- **Assess the review application and make preliminary inquiries** – this includes asking the agency or Minister for a copy of the documents subject to review, a copy of the original request, and any other information OVIC may need to conduct the review.<sup>51</sup>
- **Provide a reasonable opportunity to make submissions** – OVIC must provide the applicant and the agency or Minister with a reasonable opportunity to provide relevant information to support the review.<sup>52</sup>
- **Review and informal resolution** – OVIC will review the documents subject to review and consider any written submissions the applicant or agency or Minister provided. OVIC may make further inquiries if it requires more information to progress the review. If OVIC considers it may be possible to reach an agreement between the applicant and the agency or Minister, OVIC will try to informally resolve the review (this may include reducing the number of documents subject to review).
- **Preliminary view** – a Commissioner may form a preliminary view on the likely outcome of the review and communicate this to the applicant and the agency or Minister. OVIC will provide an opportunity to respond to a preliminary view. This may result in an applicant withdrawing the review or the agency or Minister reconsidering its original decision and making a fresh decision.<sup>53</sup>
- **Make a decision** – if OVIC is not able to informally resolve a review, a Commissioner may make a formal decision on the review.<sup>54</sup>

## Providing documents to OVIC during a review

1.5. When OVIC accepts a review, OVIC will request the agency or Minister to provide certain documents to assist OVIC to conduct the review.

### Example

For example, OVIC may ask the agency or Minister to provide:

- a copy of the FOI request;

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<sup>51</sup> OVIC may make preliminary inquiries under section 49K.

<sup>52</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49H(2).

<sup>53</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M.

<sup>54</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P.

- a completed document transfer form;
- marked-up copies of the documents claimed to be exempt; and
- copies of any third-party consultation.

1.6. OVIC will generally ask agencies and Ministers to provide documents within five business days from the date that OVIC notifies the applicant and the agency or Minister that OVIC has accepted the review.

1.7. An agency and Minister should note the following when providing copies of documents subject to review:

- electronic copies of the documents must be provided, unless there are specific reasons not to do so;
- the documents must clearly indicate the exempt matter<sup>55</sup> and which exemptions are claimed in each instance. This is typically done by highlighting or drawing boxes around the exempt matter, in such a way that it is still visible, but clearly distinguishable;<sup>56</sup> and
- follow the instructions on the document transfer form that OVIC provides with the review acceptance letter.

1.8. In providing documents to OVIC for its review, an agency or Minister should not provide a redacted copy. OVIC needs to be able to see the information that has been claimed to be exempt in order to fulfil its review function.

1.9. Where an agency or Minister does not, or refuses to, provide documents to OVIC, the Information Commissioner can:

- issue a notice to produce or attend to require the agency or Minister to produce the documents;<sup>57</sup>
- make a finding that the agency has breached the [Professional Standards](#);
- consider whether to investigate the conduct.<sup>58</sup>

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<sup>55</sup> 'Exempt matter' is defined in section 5(1) of the Act to be matter the inclusion of which in a document causes the document to be an exempt document.

<sup>56</sup> [Professional Standard 10.4](#) requires agencies to markup documents clearly and legibly to indicate exempt matter and the applicable exemption or exemptions.

<sup>57</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KB.

<sup>58</sup> Under Part VIB.

## More information

For more information on:

- OVIC's use of coercive powers, see Part VIC – Coercive powers;
- how OVIC approaches compliance with the Professional Standards, see section [6W – Compliance with professional standards](#);
- how OVIC investigates matters, see Part VIB – Investigations.

## Making preliminary inquiries

1.10. OVIC may make preliminary inquiries and consult with the parties during a review.<sup>59</sup> This helps OVIC to conduct a review in a timely, efficient, and fair way.

1.11. It also helps OVIC to:

- make sure it can review the decision, or to accept a review that is made outside the 28 day time limit;
- identify the core issues and try to informally resolve the review;
- see whether the review is still needed; and
- see whether a matter that came up through the review needs to be referred to another authority.<sup>60</sup>

## Informal resolution process

1.12. OVIC must conduct a review in a timely, efficient and fair manner, with as little formality and technicality as possible.

1.13. OVIC considers each review application to decide whether it is reasonably possible to apply an informal resolution process to the review.

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<sup>59</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49K.

<sup>60</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49O.



- 1.14. Where OVIC determines that it is reasonably possible to resolve a review informally, it must take reasonable steps to do so.<sup>61</sup>
- 1.15. The informal resolution process involves identifying what the applicant is seeking or trying to achieve with their FOI request, and talking with the relevant party or parties to try and find an agreeable outcome without the need for a formal review decision from the Commissioners.

### Examples

Examples of reasonable steps OVIC may take to try to informally resolve a review include:

#### **Providing an initial or preliminary view on the likely outcome of the review**

OVIC may provide a staff member's initial view or a Commissioner's preliminary view on the review. This view may indicate whether the staff member or Commissioner thinks the document is exempt or not or whether a provision under the Act applies to limit access. OVIC will usually provide a similar published OVIC decision and / or OVIC guidance to support the view.

If OVIC provides an initial or preliminary view, it will provide an opportunity for the person to respond to it and provide more information if needed.

Depending on the initial or preliminary view, OVIC may also invite the applicant to withdraw their review. This might be, for example, where OVIC is likely to agree with the agency or Minister's decision.

#### **Narrowing the scope of the review or the FOI request**

OVIC may identify whether there is specific information the applicant wants to access, and whether the applicant agrees to limit the review to that information. This can help to make the review quicker, because there is less information to review and helps to focus the review.

Where the applicant is seeking review of an agency's decision under section 25A(1), this may involve an applicant narrowing their FOI request to specific information only and this being put to an agency for consideration as to whether they may reconsider their decision based on the narrowed scope.

#### **Assisting the applicant to access the document another way**

If there is another way the applicant may access the same document or information, OVIC will try and provide that information to the applicant. For example, an applicant may be going through a court process, and they can subpoena the document.

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<sup>61</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49N.

A document may also be excluded from the operation of the Act because it is available for a fee through a different scheme.<sup>62</sup> OVIC will usually try and provide information about how the applicant can access the document through that scheme.

### Releasing documents outside the Act

OVIC may invite an agency or Minister to provide access to a document informally, outside the Act.<sup>63</sup>

### Making a fresh decision

An agency or Minister can reconsider its decision at any time during a review. If OVIC provides an initial or preliminary view on a review and the agency or Minister agrees with it, the agency or Minister may decide to reconsider its decision and make a fresh one.<sup>64</sup>

The applicant then has the option of advising whether they agree with the agency's fresh decision and seek no further action from OVIC or whether they seek review of the fresh decision.

OVIC may also refer a decision back to an agency or Minister to reconsider and make a fresh decision in certain circumstances.<sup>65</sup>

### Clarifying information in a document

OVIC may look at a document subject to review and let the applicant know if the specific information they want to access is in the document or not.

1.16. Positive outcomes of the informal resolution process include:

- the efficient resolution of a review where the applicant agrees to its closure without a formal review decision under section 49P;<sup>66</sup>
- an agency or Minister reconsidering its decision and making a fresh decision to process a request and release more information or documents, and the applicant being satisfied with this outcome;<sup>67</sup>
- an agency or Minister releasing more documents outside the Act;

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<sup>62</sup> See [Freedom of Information Act 1982 \(Vic\)](#), section 14 for more information about documents that are excluded from the operation of the Act.

<sup>63</sup> See [Freedom of Information Act 1982 \(Vic\)](#), section 16 for more information.

<sup>64</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49M and 49MA.

<sup>65</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49L and 49MA.

<sup>66</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49N.

<sup>67</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49M and 49MA.

- the applicant narrowing the scope of a review and reducing the time required to finalise the review where a formal decision is still sought; and
- an applicant gaining a better understanding of the matter to which their request relates or receiving advice about other ways to obtain the information they seek.

1.17. If a matter is resolved informally without the need for a formal review decision, the Information Commissioner must record the outcome in writing.<sup>68</sup>

## More information

For more information on informal resolution and when an agency or Minister makes a fresh decision, see [section 49N – Informal resolution of review](#) and [section 49M – Reconsideration at agency’s or Minister’s own initiative](#).

## Written submissions

- 1.18. OVIC must give both the applicant and the agency or Minister an opportunity to make a submission during a review.<sup>69</sup>
- 1.19. OVIC usually requests submissions when accepting a review, but OVIC may also ask for a submission at any time in the review process.
- 1.20. Submissions help OVIC to see whether a review can be informally resolved. If informal resolution is not reasonably possible, the submission helps OVIC to make a formal decision on the review. OVIC considers submissions when making decisions and will generally address relevant submissions in its notice of decision where it can, without disclosing exempt or sensitive information.
- 1.21. Applicants and agencies or Ministers can use submissions as an opportunity to provide evidence and/or expertise on a technical subject.
- 1.22. If a submission cannot be provided by the requested date, the person should contact OVIC as soon as practicable.
- 1.23. If either party to a review does not wish to make a submission, OVIC will make a decision on the information available.

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<sup>68</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49N(2).

<sup>69</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49H(2).

## Written submissions from an agency or Minister

- 1.24. An agency or Minister may make a written submission during a review. A submission can include more information on why and how the exemptions apply. The submission should further explain the decision, not merely restate the information contained in it. If any of the information in a submission is sensitive or confidential, this should be clearly indicated.
- 1.25. Submissions provide the agency or Minister with an opportunity to provide more information to OVIC than what was provided to the applicant in the original decision. For example, the agency or Minister can discuss exempt matter in a submission to OVIC.<sup>70</sup>
- 1.26. If it is not already clear from the agency's decision letter, a submission should outline:
- a description of the exempt documents and how each limb of each exemption applies;
  - an indication of whether the exemptions relate to part or the whole of each document;
  - any detail or background information that would help provide context to the document/s;
  - all material facts relied on to support the view the documents are exempt;
  - the outcome of any third-party consultation undertaken;
  - an explanation of why any required third-party consultation was not undertaken;
  - additional documents/evidence in support of the decision, this could include, for example, copies of internal consultation or advice from technical experts within the agency; and
  - any other matter the agency or Minister considers relevant.

### *Providing information about why the agency or Minister believes it is not practicable to edit documents*

- 1.27. OVIC may ask an agency or Minister to explain why they believe it is not practicable to edit documents to remove exempt or irrelevant information from a document. OVIC may also confirm whether the agency or Minister consulted the applicant about whether they agreed to receive an edited copy of the document.
- 1.28. If an agency or Minister decides that certain information is not relevant to the request, OVIC may ask the agency or Minister to explain why.

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<sup>70</sup> OVIC can disclose the nature of an exempt document to an applicant, however OVIC cannot disclose the exempt matter itself: sections 63E(2) and 63E(3).

An agency or Minister may remove exempt matter or irrelevant information from a document and provide a copy of the document to the applicant. For more information on editing a document, see [section 25 – Deletion of exempt matter or irrelevant material](#).

### *Reviews of decisions made under section 25A*

- 1.29. OVIC conducts reviews of decisions made under [section 25A](#) a little differently to how OVIC conducts reviews of other kinds of FOI decisions. This is because section 25A allows an agency or Minister to refuse a request without processing it or searching for documents. This means the agency or Minister does not have any documents subject to review to provide to OVIC.
- 1.30. Generally, when conducting a review of a decision made under section 25A, OVIC may:
- make the decision without reviewing any documents (OVIC will usually ask for information and assistance from the agency or Minister to explain how and why they refused the request);<sup>71</sup> or
  - request a reasonable sample of documents.<sup>72</sup>
- 1.31. There are two grounds for refusal in section 25A (section 25A(1) and section 25A(5)). The paragraphs below explain how OVIC approaches reviews involving each ground.
- 1.32. When conducting a review of a decision made under section 25A(1), which allows an agency or Minister to refuse to process a request because it would substantially and unreasonably divert the resources of the agency or interfere with the performance of the Minister’s functions, OVIC may ask the agency or Minister to provide information to show:
- how processing the request would substantially and unreasonably divert the resources of the agency or substantially and unreasonably interfere with the functions of the Minister; and
  - whether the agency or Minister notified the applicant about their intention to refuse access and gave them a reasonable opportunity to consult to remove the grounds for refusal, before making the decision.
- 1.33. When conducting reviews of decisions made under section 25A(5), which allows an agency or Minister to refuse to process a request because it is clear from the nature of the requested documents that they are exempt, OVIC will ask an agency or Minister to provide information to explain:

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<sup>71</sup> While section 490A(1) says OVIC cannot ask an agency or Minister to search for or otherwise identify documents relevant to the request, OVIC may give the agency or Minister a notice under section 49KA(2)(a) to process or identify a reasonable sample of relevant documents (section 490A(2)).

<sup>72</sup> Under [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(2)(a).

- how the documents as described in the request would clearly be exempt; and
- why:
  - the agency or Minister is not required to edit the documents (under [section 25](#)) to remove exempt or irrelevant information; or
  - it is clear from the request, or because of consultation with the applicant, that the applicant does not want to receive edited copies of the documents with the exempt or irrelevant information removed.

1.34. During a review, an agency or Minister may reconsider their initial decision and make a fresh decision that a request be processed in the usual way under the Act.

For more information on when and how an agency or Minister may reconsider their original decision and make a new decision, see [section 49M – Reconsideration at agency’s or Minister’s own initiative](#).

## Written submissions from an applicant

1.35. Submissions allow an applicant the opportunity to provide more information about their request (including background information) which may not have been available to the agency or Minister when they made the original decision.

### *Where access to information or documents has been refused*

1.36. If the review relates to a decision to refuse access to information or documents, an applicant’s written submission may include:

- whether the applicant is dissatisfied with the decision to refuse access to a particular document, or a certain type of information in a document;
- why the applicant is seeking access to the documents;
- why the applicant believes the documents are not exempt and should be released (for example, whether the applicant disagrees with the description of the documents, or with what the agency or Minister says the likely impact of releasing certain information will be);
- whether the applicant needs information relating to the personal affairs of other individuals that may be in the documents (such as third party names, phone numbers, email addresses, or other information from which they may be identified); or alternatively, whether the applicant can provide OVIC with those individuals’ written consent to release their information to the applicant;

- whether the applicant is willing to receive an edited copy of the documents, if a Commissioner decides that some information in the documents should be removed because it is exempt or not relevant to the request; and
- anything else the applicant would like OVIC to consider as part of the review.

### *Where a request to amend personal information is refused*

1.37. If the review relates to a request to amend information in a document relating to an applicant's personal affairs, a written submission should include evidence that the information to be amended:

- is inaccurate: explain why is the information untrue or incorrect?
- is incomplete: detail what specific information is missing?
- is out of date: explain how have the circumstances changed?
- would give a misleading impression: who would be misled and why?
- what evidence can be provided which supports the amendment request? For example:
  - a document from a third party;
  - a written account of the claimant's version of events;
  - a witness statement.

For more information on requesting an amendment to personal records, see [section 39 – Person may request amendment of record](#).

## What is natural justice?

1.38. OVIC must follow the rules of 'natural justice' (also known as procedural fairness) when conducting reviews. Natural justice refers to having a fair decision-making process.<sup>73</sup> It consists of three rules: the hearing rule, the rule against bias, and the 'no evidence' rule:

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<sup>73</sup> *Encyclopaedic Australian Legal Dictionary* (online at 27 July 2023) 'natural justice' (def 1).

- the hearing rule involves providing a person with a reasonable opportunity to put forward their case, with relevant information about any adverse material that the decision maker might take into account;<sup>74</sup>
- the rule against bias provides the right to have a decision made without bias from the decision maker (whether actual or apprehended bias);<sup>75</sup>
- the ‘no evidence’ rule requires a decision to be based upon logically probative evidence.<sup>76</sup>

1.39. For example, OVIC provides both the applicant and the agency or Minister with the opportunity to provide a written submission, and to put forward why they believe the documents should or should not be released. OVIC also makes its decision based on evidence, such as submissions from both the applicant and the agency or Minister and any other relevant material.

## More information

[Section 49I – Agency or Minister must assist Information Commissioner](#)

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<sup>74</sup> *Encyclopaedic Australian Legal Dictionary* (online at 27 July 2023) ‘natural justice’ (def 1); *Kioa v West* (1985) 159 CLR 550.

<sup>75</sup> *Encyclopaedic Australian Legal Dictionary* (online at 27 July 2023) ‘natural justice’ (def 1); *Ebner v Official Trustee in Bankruptcy* (2000) 214 CLR 1.

<sup>76</sup> Lexis Nexis, Halsbury’s Laws of Australia (online at 27 July 2023) 10 Administrative Law, V Judicial Review, (3) Grounds of Review, ‘Natural Justice or Procedural Fairness’ [10-12630].



# Section 49I – Agency or Minister must assist Information Commissioner

## Extract of legislation

### 49I Agency or Minister must assist Information Commissioner

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

## Relevant FOI Professional Standards

<b>Professional Standard 10.1</b>	An agency must assist the Information Commissioner or Public Access Deputy Commissioner in their attempt to informally resolve a review or complaint.
<b>Professional Standard 10.2</b>	An agency must give consideration to a preliminary view issued by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner during a review.
<b>Professional Standard 10.3</b>	An agency must respond to a request for documents and information by, or on behalf of, the Information Commissioner or Public Access Deputy Commissioner within requested or agreed timeframes.
<b>Professional Standard 10.4</b>	When providing documents subject to review by the Information Commissioner or Public Access Deputy Commissioner, an agency must markup documents clearly and legibly to indicate exempt matter and the applicable exemption or exemptions.

Note: section 5 of the Act defines ‘exempt matter’ to mean matter the inclusion of which in a document causes the document to be an exempt document.

## Guidelines

### Providing assistance to OVIC during a review

- 1.1. Agencies and Ministers must assist the Office of the Victorian Information Commissioner (**OVIC**)<sup>77</sup> during reviews.<sup>78</sup>
- 1.2. Ways that agencies and Ministers can help OVIC with a review include:
  - responding to inquiries promptly and within agreed timeframes (this helps OVIC to determine if the matter can be resolved informally, narrow the matters in dispute, and/or inform the Commissioners' decision);<sup>79</sup>
  - actively participating in the informal resolution process (such as suggesting alternative ways a matter may be resolved);<sup>80</sup>
  - considering a preliminary view from OVIC;<sup>81</sup>
  - avoiding taking an overly technical or adversarial approach to the review process;
  - providing requested materials as soon as practicable, and in the preferred format;<sup>82</sup>
  - avoiding introducing new issues or claiming new exemptions, unless there is good reason (such as if the circumstances have changed or there is new information that was not previously available). Any new issues or claims should be supported by detailed reasons. Where an agency or Minister applies new exemptions, OVIC will tell the applicant and give them an opportunity to respond.

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<sup>77</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

<sup>78</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49I.

<sup>79</sup> [Professional Standard 10.3](#) (the Professional Standards apply to agencies only, not to Ministers).

<sup>80</sup> Under [Professional Standard 10.1](#) agencies must assist the Commissioner to try to informally resolve a review. This can include an agency's own suggestions for how it considers the matter may be resolved.

<sup>81</sup> Under [Professional Standard 10.2](#), agencies must give consideration to a preliminary view from OVIC during a review.

<sup>82</sup> Under [Professional Standard 10.3](#), agencies must respond to requests for documents within requested or agreed timeframes.

## Considering a preliminary view from OVIC

1.3. Where a Commissioner provides a preliminary view during a review, an agency or Minister should:

- consider the reasons provided and any previous decisions referred to;
- consider whether to release additional information to the applicant or whether to make a fresh decision;
- consult with OVIC on any questions about the preliminary view; and
- if the agency or Minister disagrees with the preliminary view, provide more information to support the position.

## More information

For more information on how OVIC handles reviews, see [section 49H – Procedure on review](#).

# Section 49J – Effect of delay by Information Commissioner in relation to requests

## Extract of legislation

### **49J Effect of delay by Information Commissioner in relation to requests**

- (1) This section applies if the Information Commissioner—
  - (a) has not, within the required period, completed the review of a decision of an agency or Minister referred to in section 49A(1)(a) or (b) or (2); and
  - (b) has not, within the required period, made a determination under section 49G with respect to the application for review or the review.
- (2) At the end of the required period, the Information Commissioner is taken, for the purposes of an application to the Tribunal for review, to have made a decision—
  - (a) refusing to grant access to the document in accordance with the request; or
  - (b) deferring the provision of access to a document; or
  - (c) not to amend the document pursuant to a request under section 39—  
as the case requires.
- (3) In this section the required period is—
  - (a) 30 days after the application for review by the Information Commissioner is received; or
  - (b) if that period is extended or further extended, that period as extended.
- (4) The Information Commissioner may extend the period referred to in subsection (3)(a) by agreement in writing with the applicant, any number of times.
- (5) The period referred to in subsection (3)(a) cannot be extended or further extended under this section if that period has expired.

## Guidelines

### How long does OVIC have to conduct a review?

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**)<sup>83</sup> has 30 days from when OVIC receives an application for review, to complete a review.<sup>84</sup> OVIC may extend this time with the applicant's agreement, any number of times.<sup>85</sup>
- 1.2. This timeframe applies where OVIC is reviewing decisions of agencies or Ministers to:
  - refuse to grant access to a document;
  - defer access to a document; or
  - refuse to amend a personal record.<sup>86</sup>
- 1.3. The timeframe does not apply when OVIC is reviewing decisions of agencies or Ministers not to waive or reduce an application fee under [section 17](#).<sup>87</sup>
- 1.4. How long it takes OVIC to finalise a review depends on many factors, including the complexity and range of issues involved, the number of documents subject to review, any new matters raised during the review process, the time applicants and agencies or Ministers take to respond to requests, and the number and complexity of other review requests on hand at OVIC.

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<sup>83</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

<sup>84</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49J(3).

<sup>85</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49J(4).

<sup>86</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49J(1).

<sup>87</sup> *McKechnie v Victorian Civil and Administrative Tribunal* (2020) 62 VR 54.

## What happens if the review is not finished within the required time?

- 1.5. If a review is not completed within the 30 days (or longer as agreed by an applicant), the applicant may apply to the Victorian Civil and Administrative Tribunal (**VCAT**) for a review of the agency or Minister's original decision. If this happens, the parties to the VCAT review are the applicant and the agency or Minister who made the original decision.<sup>88</sup> The Information Commissioner is not a party to a VCAT review.
- 1.6. An applicant can apply to VCAT for a review of an agency or Minister's original decision at any time if OVIC does not make a fresh decision within time.
- 1.7. OVIC will advise an applicant about their right to seek review by VCAT if OVIC is not able to complete its review within the required time.
- 1.8. If an applicant applies to VCAT for a review during OVIC's review process, agencies and Ministers must inform OVIC once the agency or Minister is notified by VCAT of an application made for review. When OVIC receives a notice that an applicant has exercised their right to apply to VCAT before OVIC's review process is completed, OVIC will dismiss the review application as it is not appropriate for OVIC to conduct a review where VCAT is also conducting a review.<sup>89</sup>
- 1.9. If an applicant does not apply to VCAT during OVIC's review process, OVIC's review continues until it is finalised by OVIC. After a review by OVIC, an applicant will still receive review rights to VCAT if OVIC makes a decision on the review.<sup>90</sup>

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<sup>88</sup> While VCAT technically reviews OVIC's 'deemed refusal' because OVIC did not make a decision with the required time, practically, VCAT reviews the original decision of the agency or Minister: *Marke v Victoria Police FOI Division (Review and Regulation)* [2018] VCAT 1320.

<sup>89</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49G(1)(d).

<sup>90</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(b).

# Section 49K – Preliminary inquiries

## Extract of legislation

### 49K Preliminary inquiries

The Information Commissioner may make preliminary inquiries and consult with the parties to the review to determine—

- (a) the material facts and issues in relation to the review; and
- (b) whether the matter can be resolved informally.

## Guidelines

### Making preliminary inquiries

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**)<sup>91</sup> may make preliminary inquiries and consult with the parties in a review process.<sup>92</sup>

For more information on how OVIC makes preliminary inquiries in the review process, see section [49H – Procedure on review](#).

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<sup>91</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

<sup>92</sup> *Freedom of Information Act 1982 (Vic)*, section 49K.

# Section 49KA – Power to require a further search for documents

## Extract of legislation

### 49KA Power to require a further search for documents

- (1) This section applies if the Information Commissioner reasonably believes that an agency or Minister has failed to undertake an adequate search for documents that relate to a decision that is the subject of a review under this Division.
- (2) During the review, the Information Commissioner may give a notice to an agency or Minister to require the agency or Minister—
  - (a) in the case of a decision of an agency under section 25A(1) or 25A(5), to process or identify a reasonable sample of the documents to which the request relates; or
  - (b) in any other case, to further search or to cause a further search to be undertaken for documents in the possession, custody or control of the agency or Minister.
- (3) The agency or Minister must comply with a requirement of the Information Commissioner under subsection (2) within the reasonable period stated in the notice, being not less than 10 business days.
- (4) The Information Commissioner, on request of the agency or Minister, may extend the time for complying with a notice under subsection (2).
- (5) The Information Commissioner may specify any reasonable means or method for undertaking a further search under subsection (2)(b).

#### Example

The Information Commissioner may specify that the agency is required to undertake a search of the agency's email system by searching specified keywords.

- (6) The required period for completing the review under section 49J is suspended from the time the Information Commissioner gives a notice under subsection (2).
- (7) The agency or Minister must notify the Information Commissioner within 3 business days after the end of the period referred to in subsection (2) or (3) of the following information—
  - (a) in the case of a notice under subsection (2)(a)—
    - (i) that the agency or Minister has processed or identified a reasonable sample of the documents; and
    - (ii) the nature of the documents processed or identified; and
    - (iii) whether the decision to refuse to grant access under section 25A(1) or 25A(5) is likely to be upheld;



- (b) in the case of a notice under subsection (2)(b), that the agency or Minister has completed the further search and whether or not any further documents have been located.
- (8) After receiving a notification under subsection (7), the Information Commissioner may decide to refer the matter back to the agency or Minister in accordance with section 49L.

## Guidelines

### OVIC can require document searches in certain circumstances

- 1.1. During a review, the Office of the Victorian Information Commissioner (**OVIC**)<sup>93</sup> can require an agency or Minister to conduct a search for documents, or identify a sample of documents, in certain circumstances:
- If OVIC reasonably believes that an agency or Minister has not adequately searched for documents relevant to a request, OVIC can require them to search for documents again, to try and find documents in the agency or Minister’s possession, custody, or control, which are relevant to the applicant’s request.<sup>94</sup>
  - OVIC can also require an agency or Minister to process or identify a reasonable sample of documents relevant to the applicant’s request, where the agency or Minister refused the request under [section 25A\(1\) or section 25A\(5\)](#).<sup>95</sup> Under these provisions, an agency or Minister may refuse a request without searching for, or identifying, documents relevant to the request.
- 1.2. OVIC has a similar power to require further searches under a complaint.

See [section 61GA – Power to require a further search for documents](#), for more information.

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<sup>93</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

<sup>94</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49KA(1) and 49KA(2)(b).

<sup>95</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(2)(a).

## ‘Reasonably believes’

- 1.3. What is considered ‘reasonable’ will differ according to the context. It will depend on the particular agency or Minister, the information requested, and the circumstances surrounding the request.
- 1.4. A reasonable belief is a belief based on facts that would lead a reasonable person to think that something may have occurred.<sup>96</sup> It requires more than suspicion but does not require certainty.

## Reasonable sample of documents

- 1.5. If an agency or Minister makes a decision under [section 25A\(1\) or 25A\(5\)](#), OVIC may request the agency or Minister to process or identify a reasonable sample of relevant documents.
- 1.6. The number and type of documents to be included in the sample is determined on a case-by-case basis and will depend on the number and type of documents likely to fall within the terms of the request.

## What happens if an agency or Minister receives a notice to search for documents?

### Timing

- 1.7. An agency or Minister must carry out the searches as described in a notice and within the timeframe outlined in the notice.
- 1.8. An agency or Minister will have at least 10 days to search for documents.<sup>97</sup> The agency or Minister can ask OVIC to extend the timeframe.<sup>98</sup>

### Reasonable means or methods

- 1.9. OVIC may specify any reasonable means or method for undertaking a search. For example, certain locations to be searched or certain search terms to be used when conducting a search.<sup>99</sup>

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<sup>96</sup> [George v Rockett \[1990\] 170 CLR 104](#); [Liversidge v Anderson \[1941\] UKHL 1](#).

<sup>97</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(3).

<sup>98</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(4).

<sup>99</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(5).

## Providing information to OVIC

1.10. After completing a further search for documents, the agency or Minister must tell OVIC:

- if the agency or Minister processed or identified a reasonable sample of documents for a decision made under section 25A(1) or section 25A(5):
  - that the agency or Minister has processed or identified a reasonable sample of documents;
  - the nature of the documents processed or identified (for example, what kinds of documents were found);
  - whether the agency or Minister is likely to keep its decision to refuse access under section 25A(1) or section 25A(5); or
- if the agency or Minister searched for more documents:
  - that the agency or Minister has completed their search; and
  - whether the agency or Minister located more documents relevant to the applicant's request.<sup>100</sup>

1.11. If the agency or Minister does not find more documents, OVIC may ask the agency or Minister to provide detailed information about the additional searches, including a list of all locations searched and the key words used.

1.12. The agency or Minister has three business days to provide this information to OVIC after the end of the timeframe in the notice.

## OVIC may refer the decision back to the agency or Minister

1.13. After OVIC receives this information from the agency or Minister, OVIC may refer the decision back to the agency or Minister to make a fresh decision.<sup>101</sup>

1.14. It is also open to the agency or Minister to reconsider the decision and make a fresh decision on their own initiative.<sup>102</sup>

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<sup>100</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(7).

<sup>101</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(8).

<sup>102</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M.

## Example

During a review, OVIC was not satisfied the agency had conducted a thorough and diligent search for documents. Under section 49KA(2)(b), OVIC required the agency to search for documents in its possession, custody or control that would fall within the scope of the applicant's request.

OVIC required the agency to search for documents provided by a third party within a certain timeframe.

Following a further search by the agency, additional documents were located. The agency decided to make a fresh decision and process the additional documents.

## What happens to the time to complete a review?

- 1.15. If OVIC requires an agency or Minister to conduct a further search for documents, the time to complete the review pauses from the date OVIC gives the notice.<sup>103</sup>

## More information

For more information on what 'adequate search' means, see [section 61GA – Power to require a further search for documents](#).

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<sup>103</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(6).

# Section 49KB – Information Commissioner may issue notice to produce or attend

## Extract of legislation

### **49KB Information Commissioner may issue notice to produce or attend**

During a review under this Division, the Information Commissioner may issue a notice to produce or attend on a principal officer on behalf of an agency or Minister, in accordance with Part VIC.

## Guidelines

### Issuing a notice to produce or attend during a review

- 1.1. The Information Commissioner may issue a notice to produce or attend during a review to require an agency or Minister to provide a document or attend an examination to give evidence.<sup>104</sup>

For more information on the Information Commissioner’s coercive powers, including what a notice to produce or attend is, see [section 61U – Notice to produce or attend](#).

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<sup>104</sup> *Freedom of Information Act 1982 (Vic)*, section 49KB.

# Section 49L – Referral back to agency or Minister for reconsideration

## Extract of legislation

### 49L Referral back to agency or Minister for reconsideration

- (1) This section applies if —
  - (a) the Information Commissioner has done any of the following—
    - (i) made preliminary inquiries under section 49K;
    - (ii) required an agency or Minister to conduct a sampling search under section 49KA(2)(a), or a further search under section 49KA(2)(b);
    - (iii) issued a notice to produce or attend; and
  - (b) it appears to the Information Commissioner reasonably likely that the agency or Minister will be able to make a fresh decision in a way that is satisfactory to the applicant and in accordance with law.
- (1A) The Information Commissioner, with the agreement of the applicant, may refer the matter that is the subject of the application back to the agency or Minister for reconsideration in accordance with this section.
- (2) The fresh decision must be made within 28 days after the referral under subsection (1) unless the agency and the Information Commissioner agree in writing to another period.
- (3) The required period for completing the review under section 49J is suspended from the time the Information Commissioner refers the matter back to the agency under subsection (1).
- (4) The agency must notify the Information Commissioner within 3 business days after the end of the period referred to in subsection (2) that—
  - (a) a fresh decision has been made; or
  - (b) a fresh decision has not been made.
- (5) If the agency makes a fresh decision, the agency must—
  - (a) revoke the earlier decision; and
  - (b) inform the applicant, when notifying them of the fresh decision, of the requirements of subsection (6) and the effect of subsection (7).
- (6) Within 28 days after being notified of the fresh decision by the agency, the applicant must advise the Information Commissioner in writing whether the applicant agrees or does not agree with the decision.
- (7) If the applicant fails to advise the Information Commissioner under subsection (6) within the period specified in that subsection, the applicant is taken to agree with the fresh decision.

## Guidelines

### Referring a decision back to the agency or Minister to reconsider

- 1.1. In certain instances, the Office of the Victorian Information Commissioner (**OVIC**)<sup>105</sup> may refer a decision back to the agency or Minister that made it. If this happens, the agency or Minister reconsiders the original decision and may make a ‘fresh’ decision on the request.<sup>106</sup>
- 1.2. Section 49L outlines when OVIC can refer a decision and what happens after the agency or Minister reconsiders the original decision.
- 1.3. [Section 49MA](#) sets out the process for after a fresh decision has been made (for example, what happens if the applicant agrees with the decision or does not agree).

### When may OVIC refer a decision?

- 1.4. During a review, OVIC may:
  - make preliminary inquiries to determine the material facts and issues and see whether the review can be informally resolved;<sup>107</sup>
  - require an agency or Minister to process or identify a reasonable sample of documents in relation to a decision made under [section 25A\(1\)](#) or [section 25A\(5\)](#);<sup>108</sup>
  - require an agency or Minister to further search for documents relevant to a request;<sup>109</sup>
  - issue a notice to produce or attend, which compels the person to produce a document or attend an examination to give evidence.<sup>110</sup>

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<sup>105</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

<sup>106</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L.

<sup>107</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49K.

<sup>108</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(2)(a).

<sup>109</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49KA(2)(b).

<sup>110</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 61U.

1.5. If, after doing one or more of the steps outlined above, and OVIC considers it reasonably likely that the agency or Minister can make a fresh decision that is satisfactory to the applicant, then OVIC may refer the matter back to the agency or Minister to reconsider the decision.<sup>111</sup>

1.6. Before referring the matter, OVIC must seek the applicant's agreement.<sup>112</sup>

#### *What does 'reasonably likely' mean?*

1.7. OVIC may only refer the decision back to an agency or Minister if it appears 'reasonably likely' that the agency or Minister can make a fresh decision in a way that is satisfactory to the applicant and in accordance with law.

1.8. 'Reasonably likely' means a chance of an event occurring or not occurring which is real, not fanciful, or remote.<sup>113</sup>

1.9. If there is a real chance that the agency or Minister will make a decision that is satisfactory to the applicant, and in accordance with the law, then the Information Commissioner will consider that it is reasonably likely.

#### *What happens after OVIC refers a decision?*

1.10. After referring a matter, the agency or Minister has 28 days from the day after the referral to reconsider the original decision.<sup>114</sup> The agency or Minister and the Information Commissioner may agree in writing to another period.<sup>115</sup>

1.11. The time for OVIC to conduct a review pauses when a matter is referred to the agency or Minister.<sup>116</sup>

1.12. After the 28 days ends (or longer as agreed between the agency or Minister and OVIC), the agency or Minister must notify OVIC within three business days that a fresh decision:

- has been made; or
- has not been made.<sup>117</sup>

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<sup>111</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(1).

<sup>112</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(1A).

<sup>113</sup> [Department of Agriculture and Rural Affairs v Binnie](#) [1989] VR 836 at 842.

<sup>114</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(2).

<sup>115</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(2).

<sup>116</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(3).

<sup>117</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(4).



## What happens if a fresh decision is made?

- 1.13. If the agency or Minister makes a fresh decision, they must revoke the earlier decision and notify the applicant of the fresh decision.<sup>118</sup>
- 1.14. When notifying the applicant of the fresh decision, the agency or Minister must also tell the applicant:
- that the applicant has 28 days after being notified of the fresh decision to tell OVIC in writing whether the applicant agrees or does not agree with the decision,<sup>119</sup> and
  - if the applicant does not tell OVIC whether they agree or do not agree with the decision within the 28 days, then the applicant is assumed to agree with the fresh decision.<sup>120</sup>
- 1.15. This means the applicant has 28 days after being notified of the fresh decision to tell OVIC in writing whether they agree or do not agree with the fresh decision.<sup>121</sup>
- 1.16. If after 28 days, OVIC does not hear from the applicant, the applicant is assumed to agree with the fresh decision.<sup>122</sup>

## More information

For more information on:

- what happens after a fresh decision is made (for example, what happens if the applicant does not agree with the fresh decision), see [section 49MA – Procedure after reconsideration under section 49L or 49M](#);
- when an agency or Minister can reconsider a decision on their own initiative, see [section 49M – Reconsideration at agency’s or Minister’s own initiative](#).

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<sup>118</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(5)(a).

<sup>119</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49L(5)(b) and 49L(6).

<sup>120</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49L(5)(b) and 49L(7).

<sup>121</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(6).

<sup>122</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49L(7).

# Section 49M – Reconsideration at agency’s or Minister’s own initiative

## Extract of legislation

### **49M Reconsideration at agency’s or Minister’s own initiative**

- (1) During a review under this Division, an agency may notify in writing the Information Commissioner and the applicant that the agency is reconsidering the matter that is the subject of the review at the agency’s or Minister’s own initiative and, if so, the agency or Minister may make a fresh decision.
- (2) The fresh decision must be made within 28 days after the notification under subsection (1) unless the agency or Minister and the Information Commissioner agree in writing to another period.
- (3) The required period for completing the review under section 49J is suspended from the time the agency or Minister notifies the Information Commissioner under subsection (1).
- (4) The agency or Minister must notify the Information Commissioner within 3 business days after the end of the period referred to in subsection (2) that—
  - (a) a fresh decision has been made; or
  - (b) a fresh decision has not been made.
- (5) If the agency or Minister makes a fresh decision, the agency or Minister must—
  - (a) revoke the earlier decision; and
  - (b) inform the applicant, when notifying them of the fresh decision, of the requirements of subsection (6) and the effect of subsection (7).
- (6) Within 28 days after being notified of the fresh decision by the agency or Minister, the applicant must advise the Information Commissioner in writing whether the applicant agrees or does not agree with the decision.
- (7) If the applicant fails to advise the Information Commissioner under subsection (6) within the period specified in that subsection, the applicant is taken to agree with the fresh decision.
- (8) An agency or Minister may make a fresh decision under this section only once during a review under this Division.
- (9) This section applies whether or not the Information Commissioner gives a notice under section 49KA or issues a notice to produce or attend.

## Guidelines

### Overview of section 49M

- 1.1. During a review, an agency or Minister may reconsider a request at its own initiative and make a fresh decision.<sup>123</sup> Section 49M sets out the process for an agency or Minister to make a fresh decision on its own initiative.
- 1.2. [Section 49MA](#) sets out the process for after a fresh decision has been made (for example, what happens if the applicant agrees with the decision or does not agree).
- 1.3. This section applies whether or not the Office of the Victorian Information Commissioner (**OVIC**)<sup>124</sup> gives a notice under [section 49KA](#) or issues a notice to produce or attend under [section 61U](#).<sup>125</sup>

### Reconsidering a decision at an agency or Minister's own initiative

- 1.4. During a review, an agency or Minister may decide to reconsider the decision being reviewed and consider whether to make a fresh decision.
- 1.5. An agency or Minister can only do this once during a particular review.<sup>126</sup>
- 1.6. To reconsider the decision, the agency or Minister must write to OVIC and to the applicant to notify them that the agency or Minister is reconsidering the decision at its own initiative and may make a fresh decision.<sup>127</sup>
- 1.7. The time to conduct a review stops when the agency or Minister provides this notification.<sup>128</sup>

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<sup>123</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(1).

<sup>124</sup> Section 61 sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

<sup>125</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(9).

<sup>126</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49MA(8).

<sup>127</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(1).

<sup>128</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(3).

## How long does an agency or Minister have to reconsider the decision?

- 1.8. The agency or Minister has 28 days from when it notified OVIC and the applicant, to make the fresh decision.<sup>129</sup> The agency or Minister and OVIC may agree in writing to a different period.<sup>130</sup>
- 1.9. After the 28 days ends (or longer as agreed), the agency or Minister must notify OVIC within three business days that a fresh decision:
  - has been made; or
  - has not been made.<sup>131</sup>

## What happens if a fresh decision is made?

- 1.10. If the agency or Minister makes a fresh decision, the agency or Minister must revoke the earlier decision and provide the fresh decision to the applicant.<sup>132</sup>
- 1.11. When notifying the applicant of the fresh decision, the agency or Minister must also tell them:
  - that the applicant has 28 days after being notified of the fresh decision to tell OVIC in writing whether the applicant agrees or does not agree with the decision,<sup>133</sup> and
  - if the applicant does not tell OVIC whether they agree or do not agree with the decision within the 28 days, then the applicant is assumed to agree with it.<sup>134</sup>
- 1.12. This means, the applicant has 28 days after being notified of the fresh decision to write to OVIC and advise whether they agree or do not agree with the fresh decision.
- 1.13. If after 28 days, OVIC does not hear from the applicant, the applicant is assumed to agree with the fresh decision.<sup>135</sup>

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<sup>129</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(2).

<sup>130</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(2).

<sup>131</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(4).

<sup>132</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(5)(a).

<sup>133</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49M(5)(b) and 49M(6).

<sup>134</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49M(5)(b) and 49M(7).

<sup>135</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49M(7).

## More information

For more information on what happens after a fresh decision is made (for example, what happens if the applicant does not agree with the fresh decision), see [section 49MA – Procedure after reconsideration under section 49L or 49M](#).

## Section 49MA – Procedure after reconsideration under section 49L or 49M

### Extract of legislation

#### **49MA Procedure after reconsideration under section 49L or 49M**

- (1) If an applicant agrees with a fresh decision made by an agency or Minister under section 49L or 49M, the Information Commissioner must dismiss the review.
- (2) Subject to subsection (4), if the applicant does not agree with the fresh decision the Information Commissioner must complete the review on the basis of the fresh decision within—
  - (a) 30 days after the date on which the applicant advises the Information Commissioner under section 49L(6) or 49M(6) that the applicant does not agree with the fresh decision; or
  - (b) if that period is extended or further extended, that period as extended
- (3) Subject to subsection (4), if the agency does not make a fresh decision under section 49L or 49M within the period referred to in section 49L(2) or 49M(2) the Information Commissioner must recommence the review and complete the review within—
  - (a) 14 days after the earlier of—
    - (i) the date on which the notice under section 49L(4) or 49M(4) is given; or
    - (ii) the end of the period within which the notice under section 49L(4) or 49M(4) is required to be given; or
  - (b) if that period is extended or further extended, that period as extended.
- (4) A review cannot be completed under this section in relation to a fresh decision if the decision is to refuse to grant access to a document on the basis that the document is claimed to be exempt under section 29A.
- (5) The Information Commissioner may extend a period referred to in subsection (2)(a) or (3)(a) by agreement in writing with the applicant, any number of times.
- (6) A period referred to in subsection (2)(a) or (3)(a) cannot be extended or further extended under this section if that period has expired.

## Guidelines

### What happens after an agency or Minister reconsiders their decision?

- 1.1. Section 49MA sets out the process after an agency or Minister reconsiders a decision under section 49L or section 49M:
  - under [section 49L](#), the Office of the Victorian Information Commissioner (**OVIC**)<sup>136</sup> may refer a decision back to the agency or Minister that made it to reconsider it, in certain instances;
  - under [section 49M](#), during a review an agency or Minister may choose to reconsider the decision it made.

### Where the applicant agrees with the fresh decision

- 1.2. If the applicant agrees (or is assumed to agree) with the fresh decision, OVIC must dismiss the review.<sup>137</sup> If this happens, OVIC will dismiss the review, notify the parties, and close the file.<sup>138</sup>
- 1.3. If an applicant agrees (or is assumed to agree) with a fresh decision, they cannot apply to the Victorian Civil and Administrative Tribunal (**VCAT**) to review the fresh decision.<sup>139</sup>

### Where the applicant does not agree with the fresh decision

- 1.4. If the applicant does not agree with the fresh decision, OVIC will review it.<sup>140</sup>
- 1.5. OVIC has 30 days (or longer as agreed to by the applicant) to complete the review of the fresh decision from when the applicant tells OVIC they do not agree with it.<sup>141</sup>

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<sup>136</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

<sup>137</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49MA(1).

<sup>138</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49MA(1).

<sup>139</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3G)(a).

<sup>140</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49MA(2).

<sup>141</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49MA(2).

- 1.6. If the fresh decision is to refuse to grant access to a document because it is exempt under [section 29A](#) (documents affecting national security, defence or international relations), OVIC cannot review that decision. Instead, the applicant can apply to VCAT to review the decision.<sup>142</sup>

What happens if the agency or Minister does not make the decision within the required time?

- 1.7. If the fresh decision is not made within 28 days (or longer as agreed), OVIC must continue reviewing the original decision.<sup>143</sup>
- 1.8. If the agency or Minister provides a fresh decision made out of time, OVIC will consider this information in conducting the review. OVIC expects agencies and Ministers will make fresh decisions within the required time.
- 1.9. OVIC has 14 days from the date the fresh decision was given, or from three business days after the 28 day period ends,<sup>144</sup> whichever date is earlier, to complete the review.<sup>145</sup> OVIC may extend the time for review by agreement in writing with the applicant any number of times.<sup>146</sup>

### Access charges and fresh decisions

- 1.10. An agency or Minister may charge an applicant for certain activities involved in searching for and providing access to documents. These charges are known as ‘access charges’ and are calculated under [section 22](#) and under the [Freedom of Information \(Access Charges\) Regulations 2014](#).
- 1.11. Access charges are separate from the application fee required in [section 17\(2A\)](#).<sup>147</sup>
- 1.12. An agency or Minister may apply access charges when making a fresh decision and request a deposit from the applicant (the exceptions to applying access charges in section 22 still apply). However, an agency or Minister cannot charge twice for the same search.<sup>148</sup>

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<sup>142</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49MA(4) and 50(1)(e).

<sup>143</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49MA(3).

<sup>144</sup> This refers to the notice required under sections 49M(4) and 49L(4), which requires an agency or Minister to notify the Information Commissioner within three business days after the 28 days (or longer as agreed) that a fresh decision has or has not been made.

<sup>145</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49MA(2).

<sup>146</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49MA(5).

<sup>147</sup> See [Freedom of Information \(Access Charges\) Regulations 2014](#) (Vic), regulation 6, Note.

<sup>148</sup> *Sunbury Progress Association v Hume City Council* [2004] VCAT 2344.



1.13. If an agency or Minister requests the applicant to pay an access charges deposit, the agency or Minister must follow the process in [section 22](#). This includes giving the applicant 21 days to confirm that they wish to proceed with a request.<sup>149</sup>

## More information

For more information on when an agency or Minister may, or may be required to, reconsider its decision during a review, see:

- [section 49L – Referral back to agency or Minister for reconsideration](#); and
- [section 49M – Reconsideration at agency’s or Minister’s own initiative](#).

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<sup>149</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 22(3) and [Professional Standard 4.2](#).

# Section 49N – Informal resolution of review

## Extract of legislation

### 49N Informal resolution of review

- (1) If the Information Commissioner determines that it is reasonably possible to resolve the matter that is the subject of the application for review informally, the Information Commissioner must take reasonable steps to resolve the matter.
- (2) If the matter is resolved informally, the Information Commissioner must record the outcome in writing.
- (3) Informal resolution of a matter under subsection (1) is not a decision on the review for the purposes of this Act.

## Guidelines

### Informal resolution of a review

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**)<sup>150</sup> must conduct a review in a timely, efficient and fair manner, with as little formality and technicality as possible.<sup>151</sup>
- 1.2. To support this obligation, OVIC considers each review application to decide whether it is reasonably possible to informally resolve the review.
- 1.3. Where OVIC determines that it is reasonably possible to resolve a review informally, it must take reasonable steps to do so.<sup>152</sup>

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<sup>150</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner. Both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

<sup>151</sup> *Freedom of Information Act 1982 (Vic)*, section 49H.

<sup>152</sup> *Freedom of Information Act 1982 (Vic)*, section 49N. This is a new requirement, introduced on 11 September 2024 by the *Justice Legislation Amendment (Integrity, Defamation and Other Matters) Act 2024 (Vic)*, which replaced the wording of section 49N, to introduce informal resolution of reviews. The previous version of section 49N was more formal, providing for the Information Commissioner to facilitate negotiated agreements.

- 1.4. For a matter to be resolved informally under section 49N, the applicant must agree to withdraw their review application, and the Information Commissioner must record the outcome in writing.<sup>153</sup>
- 1.5. If a review is informally resolved under section 49N, it cannot be reopened by the applicant or the agency or Minister and cannot be reviewed by the Victorian Civil and Administrative Tribunal.<sup>154</sup>
- 1.6. By providing for informal resolution, section 49N removes the requirement for a formal and independent review process where it is not needed. This supports OVIC's obligation to resolve matters with as little formality and technicality as possible.

## More information

For more information on the informal resolution process, see section [49H – Procedure on review](#).

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<sup>153</sup> *Freedom of Information Act 1982 (Vic)*, section 49N(2). Dismissing a review with the applicant's agreement in writing under section 49G(2) is also treated as an informal resolution outcome under section 49N(2).

<sup>154</sup> *Freedom of Information Act 1982 (Vic)*, section 50(3G)(b).

# Section 490 – Referral of matter to a relevant authority

## Extract of legislation

### 490 Referral of matter to a relevant authority

- (1) If the Information Commissioner identifies a matter arising out of or in relation to a review as being within the jurisdiction of a relevant authority, the Information Commissioner, after consulting with the relevant authority, may refer the matter to the relevant authority if the Information Commissioner considers it appropriate to do so.
- (2) If the Information Commissioner identifies a matter arising out of or in relation to a review as being within the jurisdiction of the Information Commissioner under the **Privacy and Data Protection Act 2014**, the Information Commissioner, may decide to deal with the matter under that Act if the Commissioner considers it appropriate to do so.
- (3) The referral of, or decision in relation to, a matter under this section does not affect the role of the Information Commissioner in conducting a review under this Act.
- (4) The Information Commissioner must notify the applicant in writing of a referral or a decision under this section that affects the interests of the applicant.
- (5) In this section *relevant authority* means a person or body prescribed by the regulations for the purposes of this section.

## Guidelines

### Referring a matter to a different authority

- 1.1. When handling a review, the Office of the Victorian Information Commissioner (**OVIC**)<sup>155</sup> may identify matters that relate to:
  - OVIC’s jurisdiction under the *Privacy and Data Protection Act 2014* (Vic) (**PDP Act**) (for example, a possible breach of the Information Privacy Principles);
  - the jurisdiction of a different authority (for example, something that only that authority can deal with).

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<sup>155</sup> Section 61 sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

- 1.2. If this happens, OVIC may refer the identified matter to the right authority, or may handle it under the PDP Act, where it is appropriate.<sup>156</sup>
- 1.3. Before referring a matter to a different authority, OVIC must consult with that authority.<sup>157</sup>
- 1.4. After referring a matter to a different authority, or deciding to deal with a matter under the PDP Act, OVIC must write to the applicant to let them know, where the referral or decision affects the applicant's interests.<sup>158</sup>
- 1.5. If OVIC refers a matter to a different authority, or decides to deal with the matter under the PDP Act, this happens separately to and does not affect the review being conducted.<sup>159</sup> OVIC will otherwise continue with the review under the FOI Act.

### Who is a relevant authority?

- 1.6. Prescribed bodies are listed in Schedule 2 of the [Freedom of Information Regulations 2009 \(Vic\)](#) and currently include the:
  - Auditor-General;
  - Chief Commissioner of Police;
  - Health Complaints Commissioner;
  - Independent Broad-based Anti-corruption Commission;
  - Victorian Ombudsman;
  - Racing Integrity Commissioner;
  - Road Safety Camera Commissioner; and
  - Integrity Oversight Victoria.

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<sup>156</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 490(1) and 490(2).

<sup>157</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 490(1).

<sup>158</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 490(4).

<sup>159</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 490(3).

# Section 490A – Review of decisions under section 25A(5)

## Extract of legislation

### 490A Review of decisions under section 25A(5)

- (1) In conducting a review of a decision of an agency or Minister under section 25A(5) to refuse to grant a request for access to documents, the Information Commissioner must determine whether to refuse to grant the request under section 25A(5) without requesting the agency or Minister to search for or otherwise identify the documents to which the request relates.
- (2) Nothing in subsection (1) prevents the Information Commissioner giving a notice under section 49KA(2)(a).

## Guidelines

### Reviewing a decision under section 25A(5)

- 1.1. [Section 25A\(5\)](#) allows an agency or Minister to make a decision based on the terms of the request, without searching for any relevant documents. Broadly, this is where the documents are obviously exempt, and an edited copy of the document cannot be provided.
- 1.2. If an agency or Minister makes a decision under section 25A(5), they have usually not searched for, or located any, documents.
- 1.3. When the Office of the Victoria Information Commissioner (**OVIC**)<sup>160</sup> reviews a section 25A(5) decision, OVIC generally makes a decision in the same way as the agency or Minister (without the documents). OVIC will closely consider the nature of the documents requested and the terms of the request, to ensure both of the elements in section 25A(5) are satisfied.
- 1.4. OVIC will also consider whether:
  - third party information is likely to be in the documents;
  - it would be practicable to consult with those third parties about disclosing their information to the applicant; and

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<sup>160</sup> Section 61 sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as 'OVIC' unless otherwise stated.

- their consent to disclosure would likely mean the documents would not be obviously exempt.

## Processing or identifying a reasonable sample of documents

- 1.5. During a review, OVIC may require an agency or Minister to process or identify a reasonable sample of documents that are relevant to the request, even where the agency or Minister has made a decision under section 25A(5).<sup>161</sup>

## More information

For more information on when OVIC can require an agency or Minister to process or identify a reasonable sample of documents, see [section 49KA – Power to require further search for documents](#).

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<sup>161</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49OA(2) and 49KA(2)(a).

# Section 49P – Decision on review

## Extract of legislation

### 49P Decision on review

- (1) After conducting a review of a decision of an agency or Minister, the Information Commissioner must make a fresh decision on the original application.
- (2) The decision of the Information Commissioner has the same effect as a decision of the agency or Minister.
- (3) The Information Commissioner must give the parties notice in writing of the decision setting out—
  - (a) the reasons for the decision; and
  - (b) the rights of the parties to apply to the Tribunal for review under section 50.
- (3A) If the review relates to a decision by an agency or a Minister to refuse to grant access to a document or part of a document on the grounds that it would involve an unreasonable disclosure of personal affairs for the reason that it would increase the risk to a primary person's safety from family violence, the Information Commissioner may make the decision in terms that neither confirm nor deny the existence of that document.
- (3B) If the review relates to a decision by an agency or a Minister to refuse to grant access to a document or part of a document on the grounds that it would involve an unreasonable disclosure of personal affairs for the reason that it would increase the risk to the safety of a child or group of children, the Information Commissioner may make the decision in terms that neither confirm nor deny the existence of that document.
- (4) A decision requiring an agency or Minister to release a document does not take effect until—
  - (a) If the decision requires release of a document of a kind referred to in section 33, 34 or 35 in respect of which a person has a right of review under section 50—
    - (i) 60 days after notice of the decision is given; or
    - (ii) if an application is made to the Tribunal within that 60 day period, until a decision is made on review; or
  - (b) if the decision requires release of any other document or a document to the extent that it does not include information of a kind referred to in section 33, 34 or 35 in respect of which a person has a right of review under section 50—
    - (i) 14 days after notice of the decision is given; or
    - (ii) if an application is made to the Tribunal within that 14 day period, until a decision is made on review.



- (5) If the Information Commissioner makes a decision to disclose a document that is claimed to be exempt under section 33, 34 or 35, the Commissioner must, if practicable, notify any person or undertaking who or which has a right to make an application for review of the decision under section 50(3), (3A) or (3B) (as the case requires) of the existence of that right.

## Guidelines

### Overview of section 49P

- 1.1. The Office of the Victorian Information Commissioner (**OVIC**)<sup>162</sup> may make a fresh decision on the original application, on review. The Information Commissioner or the Public Access Deputy Commissioner may make a fresh decision under section 49P.
- 1.2. The Commissioner becomes the ‘original decision maker’ and their decision replaces the agency or Minister’s decision.<sup>163</sup>
- 1.3. If a Commissioner does not make a decision within the statutory timeframe,<sup>164</sup> the Commissioner is considered to have made a decision refusing to grant access. This means an applicant may apply directly to the Victorian Civil and Administrative Tribunal (**VCAT**) to review the decision.<sup>165</sup>

### Making a review decision

- 1.4. If OVIC does not informally resolve a review under section 49N or the review is not dismissed, the review will go to a Commissioner for a formal decision.
- 1.5. A Commissioner’s decision might disagree with the agency or Minister’s decision in full or in part (which might result in further information being released), or it might agree with the decision in full (which usually means more information is not released).

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<sup>162</sup> Section 6I sets out the functions of the Information Commissioner and the Public Access Deputy Commissioner; both are responsible for handling FOI reviews. In this section, the FOI Guidelines collectively refer to the Information Commissioner, the Public Access Deputy Commissioner, and OVIC staff as ‘OVIC’ unless otherwise stated.

<sup>163</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P(2).

<sup>164</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49J(3).

<sup>165</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49J.

- 1.6. The Commissioner must provide both the applicant and the agency or Minister with reasons for the decision.<sup>166</sup> A written notice of decision sets out the reasons for the Commissioner's decision and any directions for the agency or Minister to follow when giving effect to it.

De-identified notices of decision are published on the [OVIC](#) and the [Australasian Legal Information Institute](#) websites.

- 1.7. The Commissioner's decision must also set out the parties' rights to apply to VCAT for review under [section 50](#).<sup>167</sup>
- 1.8. Consistent with the requirement that a review be conducted in a timely, efficient and fair manner, and with as little formality and technicality as possible,<sup>168</sup> during the OVIC review process, an applicant may agree to a review being conducted of a reduced number of documents than those the subject of an agency or Minister's original decision.

## Making decisions in terms that neither confirm nor deny the existence of certain documents

- 1.9. A Commissioner may prepare a notice of decision that neither confirms nor denies the existence of a document where the review relates to a decision to refuse to grant access to a document or part of a document on the grounds that it would involve an unreasonable disclosure of personal affairs because it would increase risk to:
- a primary person's safety from family violence;<sup>169</sup>
  - the safety of a child or group of children.<sup>170</sup>

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<sup>166</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P(3).

<sup>167</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P(3).

<sup>168</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49H(1).

<sup>169</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P(3A).

<sup>170</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P(3B).

## After a decision is made

### Notifying third parties of the decision

- 1.10. If a Commissioner makes a decision to disclose a document that contains information relating to third parties (that is claimed to be exempt under [section 33](#), [section 34](#), or [section 35](#)) OVIC must (if practicable) notify a person or undertaking who or which has a right to seek review of the Commissioner's decision at VCAT, that they have that right.<sup>171</sup>
- 1.11. OVIC will exercise its reasonable and fair judgment and consider the particular circumstances of a matter when considering whether it is practicable to notify a third party that their information has been released.
- 1.12. Factors that are relevant to determining whether notification is practicable include:
- the age of the information or the document;
  - the number of third parties to be notified;
  - whether OVIC has, or is reasonably able to ascertain, current contact details for the third party;
  - the sensitivity of the information in the document.

### Applying for review at VCAT

- 1.13. If either party to the review is not satisfied with the Commissioner's decision, they may apply to VCAT to review it:
- applicants have 60 days;<sup>172</sup>
  - agencies and Ministers have 14 days;<sup>173</sup>
  - third parties have 60 days,<sup>174</sup>
- to apply to VCAT for a review of the Commissioner's decision.

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<sup>171</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P(5).

<sup>172</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(5).

<sup>173</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(9).

<sup>174</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(3).

### Example

A document contains information belonging to a third party, however, the information is from twenty years ago and neither OVIC, nor the agency have current contact details for them.

On this basis, OVIC considers that it is not practicable to notify the third party that their information has been released.

## Providing access to documents

- 1.14. If a written notice of decision requires the agency or Minister to provide access to additional information, the agency or Minister must do so within 14 days after the notice of decision is given, unless:
- the information relates to a third party (per [section 33](#), [section 34](#), or [section 35](#)) – in which case, the agency or Minister must wait 60 days to provide access to the information;
  - an appeal to VCAT is made – in which case, the agency or Minister must wait until VCAT makes a decision.<sup>175</sup>
- 1.15. The documents should be released as soon as practicable after the appeal periods end, unless a party has applied to VCAT for a review.
- 1.16. When OVIC provides a notice of decision, it usually provides a Schedule of Documents as well. The Schedule includes directions for the agency or Minister to follow when providing access to documents (for example, outlining which documents or parts of documents must be released to the applicant).
- 1.17. On a case-by-case basis, OVIC may provide agencies or Ministers with marked-up copies of documents when OVIC provides the notice of decision. This helps to streamline the process of preparing documents for release following an OVIC decision. It also helps to reduce ambiguity around what information is to be released.
- 1.18. OVIC does this as part of its commitment to taking a proactive and practical approach to reviewing decisions, and to assist agencies and Ministers in giving effect to notices of decision. It is hoped this practice will also result in more timely release of information to applicants.

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<sup>175</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49P(4).

- 1.19. It is at the agency or Minister’s discretion as to how it uses any marked-up documents from OVIC (for example, whether the agency or Minister applies the redactions from OVIC and provides the documents to the applicant, or marks-up a fresh set of documents in accordance with its own policies and procedures).
- 1.20. Once the marked-up documents are in the possession of the agency or Minister, the agency or Minister is responsible for their use, disclosure, and accuracy.

## Judicial review of a Commissioner’s decision

- 1.21. Judicial review is where the courts review the legality of a decision maker’s exercise of statutory power,<sup>176</sup> such as OVIC. Judicial review looks at how the decision-maker arrived at their decision, rather than deciding a matter on the merits (the facts) of the case.
- 1.22. Judicial review of a Commissioner’s decision will be rare. Usually, the first point of review is VCAT. VCAT stands in the shoes of the original decision maker, considers the facts of the matter, and makes the correct and preferable decision. Even where an original decision may be invalid because of a jurisdictional error, a statutory review tribunal will usually have jurisdiction to hear and determine an application for review of the decision, including making orders for an alternate remedy.<sup>177</sup> The invalidity of the decision does not affect the operation of a merits review tribunal.<sup>178</sup>

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<sup>176</sup> *Encyclopaedic Australian Legal Dictionary* (online at 27 July 2023) ‘judicial review’.

<sup>177</sup> [Garde-Wilson v Legal Services Board \[2007\] VSC 225](#).

<sup>178</sup> [Garde-Wilson v Legal Services Board \[2007\] VSC 225](#).

## Division 2—Conciliation by Health Complaints Commissioner

### Section 49Q – Conciliation by Health Complaints Commissioner

#### Extract of legislation

##### 49Q Conciliation by Health Complaints Commissioner

- (1) This section applies if a person has a right to apply for a review under section 49A of a decision of an agency or Minister in relation to a document containing health information relating to the person.
- (2) Subject to subsection (4), the person may apply to the Health Complaints Commissioner for conciliation under Division 3 of Part 6 of the **Health Records Act 2001** instead of making an application under section 49A of this Act.
- (3) Division 3 of Part 6 of the **Health Records Act 2001** (except section 63) applies to the conciliation as if it were a conciliation of a complaint made under that Act.
- (4) An application may be made under subsection (2) in relation to a document that is an exempt document referred to in section 32, 33 or 38 but an application cannot be made under that subsection in relation to any other exempt document under this Act.
- (5) An application under subsection (2) must be made within—
  - (a) 70 days, in the case of a decision referred to in section 27(1)(da); or
  - (b) 28 days, in any other case—after the day on which notice in writing of the decision is given to the applicant in accordance with section 27.
- (6) If the Health Complaints Commissioner has attempted unsuccessfully to conciliate a matter on an application under this Division, he or she must give notice in writing to—
  - (a) the applicant; and
  - (b) the principal officer of the agency or the Minister responsible for the agency or the Minister to whom the request was made; and
  - (c) the Information Commissioner.

## Guidelines

### Applying to the Health Complaints Commissioner for a review of a document containing health information in certain cases

- 1.1. An applicant may apply to the Health Complaints Commissioner for conciliation where:
  - the applicant has the right to apply for a review of a decision;<sup>179</sup>
  - the document being reviewed contains health information relating to the applicant,<sup>180</sup> and
  - the document is claimed to be exempt under section [32](#), [33](#), or [38](#).<sup>181</sup>
- 1.2. If these conditions are met, an applicant may elect to use the conciliation process under the [Health Records Act 2001 \(Vic\)](#), instead of under the FOI Act.
- 1.3. The Health Complaints Commissioner may only try to conciliate the matter. It cannot make a formal decision on the review, like OVIC. OVIC's processes also try to informally resolve matters.<sup>182</sup>
- 1.4. If an applicant chooses to apply for conciliation by the Health Complaints Commissioner, they must apply within 28 days after receiving the agency or Minister's decision.<sup>183</sup>
- 1.5. However, if the agency or Minister's decision refuses to grant access to a document containing health information on the grounds that providing access would pose a serious threat to the life or health of the individual, then the applicant has 70 days to apply for conciliation.<sup>184</sup>

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<sup>179</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49PQ(1).

<sup>180</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49PQ(1).

<sup>181</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49PQ(4).

<sup>182</sup> See [Freedom of Information Act 1982 \(Vic\)](#), section 49N.

<sup>183</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49PQ(5)(b).

<sup>184</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49PQ(6).

## If conciliation is not successful

- 1.6. If the Health Complaints Commissioner's attempt to conciliate is not successful, they must write to the applicant, the [principal officer](#) of the agency or the Minister to whom the request was made, and the Office of the Victorian Information Commissioner and notify them of the result of the conciliation.<sup>185</sup>
- 1.7. If conciliation is not successful, the Victorian Civil and Administrative Tribunal may review the decision.<sup>186</sup>

## More information

For more information on conciliation by the Health Complaints Commissioner, see the Health Complaints Commissioner's [website](#).

For more information on reviews by VCAT, see [section 50 – Applications for review by Tribunal](#).

For more information on informal resolution by OVIC see [section 49H – Procedure on review](#) and [section 49N – Informal resolution of review](#).

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<sup>185</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49PQ(5)(a) and 27(1)(da); [Health Records Act 2001 \(Vic\)](#), section 36.

<sup>186</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3C).



## Division 3—Review by the Tribunal

### Section 50 – Applications for review by the Tribunal

#### Extract of legislation

#### 50 Applications for review by the Tribunal

- (1) Subject to this section, an applicant may apply to the Tribunal for review of—
  - (b) a decision of the Information Commissioner refusing to grant access to a document in accordance with a request;
  - (c) a decision of the Information Commissioner deferring the provision of access to a document;
  - (d) a decision of an agency or Minister refusing to grant access to a document in accordance with a request, if the Information Commissioner has made a determination under section 49G(1) in respect of that request;
  - (e) a decision of an agency or a Minister refusing to grant access to a document that is claimed to be exempt under section 29A;
  - (ea) a decision of an agency or a Minister refusing to grant access to a document or refusing to amend a document, or a decision of a principal officer refusing to specify a document in a statement, that is taken to have been made under section 53;
  - (g) a decision as to the amount of a charge that is required to be paid before access to a document is granted, whether or not the charge has already been paid by the applicant, if the Information Commissioner has certified that the matter is one of sufficient importance for the Tribunal to consider.
- (2) A person who served a notice under section 12(1) may apply to the Tribunal for a review of a decision under section 12(2)(a) not to specify a document in a statement.
- (3) Subject to subsection (3AC), a person who is the subject of information in a document referred to in section 33(3) (or in the case of a deceased person, that person's next of kin) may apply to the Tribunal for a review of a decision to disclose that document.
- (3AA) Subject to subsection (3AC), a business, commercial or financial undertaking may apply to the Tribunal for a review of a decision to disclose a document referred to in section 34.
- (3AB) Subject to subsection (3AC), a person who communicated information or a matter in confidence, or on whose behalf information or a matter was communicated (or in the case of a deceased person, that person's next of kin), may apply to the Tribunal for a review of a decision to disclose a document referred to in section 35(1).

- (3AC) A person or undertaking may not apply for review under subsection (3), (3A) or (3AB) if that person or undertaking consented to the disclosure of the document, and the document was disclosed in accordance with that consent.

**Note**

A person or undertaking may consent to disclosure of a document subject to the deletion of certain information in that document—see sections 33(2B), 34(3) and 35(1A).

- (3B) A person who is the subject of information in a document referred to in section 39 (or, in the case of a deceased person, that person's next-of-kin) may apply to the Tribunal for a review of a decision by the Information Commissioner or a principal officer of an agency or a Minister not to amend the document pursuant to a request under section 39.
- (3C) An applicant who has applied to the Health Complaints Commissioner under Division 2 for a conciliation in relation to a decision of an agency or Minister refusing to grant access to a document in accordance with a request may apply to the Tribunal for a review of the decision of the agency or Minister if the matter is not conciliated under that Division.
- (3D) An agency or Minister may apply to the Tribunal for review of a decision of the Information Commissioner under section 49P.
- (3F) An agency or Minister must notify the Information Commissioner in writing as soon as practicable of an application for review under subsection (3D).
- (3FA) If an application for review is made under subsection (1)(b), (c), (d) or (g), the agency or Minister concerned must, as soon as practicable, notify the Information Commissioner in writing.
- (3G) An application for review of a decision cannot be made under this section by a person if—
- (a) a fresh decision has been made by the agency or Minister under Division 1 and the person has accepted the fresh decision; or
  - (b) the decision was made by the Information Commissioner in accordance with section 49N.
- (3H) A person is not entitled to apply to the Tribunal for review of a decision in relation to which subsection (1), (3), (3A) or (3AB) applies if the person has made or caused to be made an application for review of the decision to the Visitor of a University unless—
- (a) the Visitor has declined to conduct that review; or
  - (b) a period of 30 days has elapsed since the day on which that application for review was made.
- (4) On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 29A, section 31(3), section 31A, or in section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act.
- (5) Where a certificate has been given in respect of a document under section 61ZA(2), the powers of the Tribunal do not extend to reviewing the decision to give the certificate

and shall be limited to determining whether a document has been properly classified as an exempt document within the meaning of section 28.

- (5A) Where a certificate has been given in respect of a document under section 29A(2), the powers of the Tribunal do not extend to reviewing the decision to give the certificate and shall be limited to determining the question whether there exist reasonable grounds for the claim that the document is an exempt document under section 29A.
- (6) The Tribunal may refuse to review a decision of an agency or Minister to refuse the request of a person for access to a document if the Tribunal is satisfied that it has previously reviewed a decision of the agency or Minister to refuse access to the same document or the same information.

## Guidelines

### Review by the Victorian Civil and Administrative Tribunal

- 1.1. The Victorian Civil and Administrative Tribunal (**VCAT**) is an appeal body that can review freedom of information (**FOI**) decisions.
- 1.2. VCAT is generally the second avenue for appeal, after the Office of the Victorian Information Commissioner (**OVIC**).<sup>187</sup> For example, if the applicant or the agency or Minister is not happy with OVIC's review decision, they can apply to VCAT for a review.
- 1.3. This section of the FOI Guidelines outlines:
  - the kinds of decisions that VCAT can and cannot review;
  - costs involved in a VCAT review;
  - when agencies and Ministers have to notify OVIC of a VCAT review;
  - what kind of powers VCAT has when reviewing a decision under the Act including the kinds of decisions VCAT can make and its public interest override;
  - when a VCAT decision can be appealed.

For more information about:

- VCAT and its processes, visit VCAT's [website](#); and

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<sup>187</sup> The FOI Guidelines refers to 'OVIC' to mean the Information Commissioner and the Public Access Deputy Commissioner and OVIC staff who assist in the conduct of reviews under the Act.

- the timeframes for applying to VCAT for a review, see [section 52 – Time for applying for review](#).

## VCAT’s FOI review role

- 1.4. Like OVIC, the kind of FOI review that VCAT does is called merits review. This means VCAT considers the facts, law and policy of a decision and decides what the correct and preferable decision is. VCAT steps into the shoes of the original decision maker and makes its own decision on the application as if it were making the decision for the first time.<sup>188</sup>
- 1.5. When reviewing an FOI decision, VCAT will apply the same legal test that the original decision-maker applied.<sup>189</sup> For example, if an agency refused access to a document under section 35(1)(b), VCAT will apply the test in section 35(1)(b) to determine if the exemption applies.
- 1.6. ‘Correct and preferable’ means that VCAT must make the correct decision according to law. Where there are a range of possible correct decisions, the decision must also be the preferable one.<sup>190</sup> A ‘correct’ decision might be taken to be one rightly made. A ‘preferable’ decision refers to a decision that involves discretion.<sup>191</sup>
- 1.7. VCAT is not restricted to the findings, evidence or arguments considered by the original decision-maker.<sup>192</sup> This means that in a review, an agency or Minister may raise new grounds of exemption that were not relied upon by the original decision-maker. An applicant or agency can also submit new evidence or make different submissions.
- 1.8. During a review, VCAT will only look at the FOI decision that was made. VCAT:
  - does not express views on a particular government policy being correct or otherwise;
  - does not determine whether an agency has gone beyond its statutory powers or unlawfully used information obtained (those are legal questions for the courts);<sup>193</sup>
  - will not reopen disputes that have already been finalised in the courts.

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<sup>188</sup> Encyclopaedic Australian Legal Dictionary, ‘merits review.’

<sup>189</sup> [BFK v Victims of Crime Assistance Tribunal](#) [2017] VSC 736 [21].

<sup>190</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

<sup>191</sup> *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 [147] per Kiefel J (with whom Crennan J agreed).

<sup>192</sup> *Osland v Department of Justice* (2008) 234 CLR 275; *Towie v Medical Practitioners Board (Vic)* [2004] VCAT 2545 [20].

<sup>193</sup> *Roy Morgan Research Centre Pty Ltd v State Revenue Office* (unreported, VCAT, Coghlan DP, 17 June 1999).

- 1.9. If an agency is alleged to have acted poorly in performing functions under the Act, VCAT does not carry out investigations. This is more properly dealt with by OVIC under [section 610](#).<sup>194</sup>
- 1.10. When reviewing a decision under the Act, VCAT has the same powers as an agency or a Minister. In addition, VCAT can decide that access should be granted to an exempt document where it is of the opinion that the public interest requires that access to the document should be granted (this is known as the ‘public interest override’).<sup>195</sup>

When conducting an FOI review, VCAT operates under the:

- FOI Act;
- [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#); and
- [Victorian Civil and Administrative Tribunal Rules 2018 \(Vic\)](#).

## Decisions that VCAT can review

- 1.11. This part outlines when certain parties can apply to VCAT for a review. This includes, applicants, agencies or Ministers, and third parties.

### When can an applicant apply to VCAT?

- 1.12. Generally, an [applicant](#) must apply to OVIC for a review before applying to VCAT. However, there are some instances where an applicant may apply directly to VCAT without first going through OVIC.
- 1.13. OVIC’s review process can be less formal than VCAT’s, as OVIC tries to informally resolve matters where it is possible to do so. This helps to resolve matters without needing a formal decision, which can save time.

For more information on OVIC reviews, see Division 1 of Part VI.

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<sup>194</sup> *Roy Morgan Research Centre Pty Ltd v State Revenue Office* (unreported, VCAT, Coghlan DP, 17 June 1999).

<sup>195</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(4).

### *Where there is a decision to refuse or defer access to a document*

1.14. An applicant must first apply to OVIC, to seek review of an agency or Minister’s decision to refuse access to part or all of the requested documents. If OVIC makes a formal review decision, the applicant can apply to VCAT for a review, where a Commissioner:

- makes a review decision which refuses or [defers](#) access to a document;<sup>196</sup>
- does not accept, or dismisses, the review;<sup>197</sup> or
- does not complete the review within the required time (30 days or longer if agreed) and is deemed to have refused access to the document.<sup>198</sup>

#### **Example**

An applicant made a request to an agency for access to a document.

The agency provided the applicant with a decision to refuse access to the document in full, so the applicant applied to OVIC to review the agency’s decision.

On review, OVIC agreed that the document was exempt, and refused access to the document in full.

The applicant may apply to VCAT to review the decision to refuse access to the document. The applicant must apply to VCAT within 60 days of receiving OVIC’s notice of decision.<sup>199</sup>

1.15. An applicant may apply directly to VCAT without first applying to OVIC where:

- the agency or Minister has not made a decision within the [required time](#), and the agency or Minister is deemed to have refused the request (this is called a deemed refusal);<sup>200</sup>

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<sup>196</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 50(1)(a) and 50(1)(b).

<sup>197</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(d).

<sup>198</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49J. See section 49J(3) for information on timeframes and OVIC’s review.

<sup>199</sup> See section 52 for more information about how long an applicant has to apply for review at VCAT.

<sup>200</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 50(1)(ea) and 53.

- the agency or Minister decides to refuse access to a document under [section 29A](#) (documents affecting national security, defence or international relations).<sup>201</sup> OVIC cannot review these kinds of decisions.<sup>202</sup> If a certificate has been issued under section 29A(2), VCAT cannot review the decision to grant the certificate. Instead, VCAT will consider whether reasonable grounds exist for the claim that the document is exempt under 29A.<sup>203</sup>

### Example

An applicant made a request to an agency for access to a document.

The agency accepted the request and started processing it. More than 30 days have passed, and the applicant has not received a decision from the agency.<sup>204</sup> The agency does not need to consult third parties and did not ask for an extension of time.

Because the agency has not made a decision within the required time, the agency is taken to have refused access to the requested document.<sup>205</sup>

The applicant may apply directly to VCAT to review the agency's deemed refusal.<sup>206</sup>

- 1.16. An applicant cannot apply to VCAT on a deemed refusal if the agency or Minister has asked the applicant to pay access charges but the applicant has not paid a deposit (if required) or the actual charges.<sup>207</sup>

### Where there is a decision to refuse to amend a document

- 1.17. Part V outlines the process for requesting an amendment to a document containing the individual's personal information.
- 1.18. An applicant may apply to VCAT to review the Information Commissioner's, agency's, or Minister's decision to not amend a document containing the individual's personal information.<sup>208</sup>

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<sup>201</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(e).

<sup>202</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 49A(4).

<sup>203</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(5A).

<sup>204</sup> See section 21 for more information on how long an agency or Minister has to make a decision on a request.

<sup>205</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53.

<sup>206</sup> See section 52 for more information about how long an applicant has to apply for review at VCAT.

<sup>207</sup> *Chopra v Victorian Institute of Teaching (Review and Regulation)* [2023] VCAT 341.

<sup>208</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3B).

- 1.19. If the agency or Minister has not made a decision within 30 days of receiving a valid amendment request, the agency or Minister is deemed to have refused to amend the document. The applicant may apply to VCAT to review this deemed refusal.<sup>209</sup>

For more information on making an amendment request, see [section 39 – Person may request amendment of record](#).

## Where there is a decision to not specify a document as required under Part II

- 1.20. Sections 8 and 11 require agencies to make certain documents available for inspection or purchase and to publish a statement which outlines certain kinds of documents. Under [section 12\(1\)](#), a person may serve a notice on a principal officer of an agency which states the person's belief that a statement prepared under sections [8\(2\)\(a\)](#), [8\(2\)\(b\)](#), [11\(2\)\(a\)](#) or [11\(2\)\(b\)](#) is missing one or more documents.
- 1.21. If the agency decides not to specify the document, the person who served the notice on the agency may apply to VCAT to review that decision.<sup>210</sup>
- 1.22. The agency has 21 days from when it received the notice to decide whether to specify the document in the next statement.<sup>211</sup> If the agency has not made a decision on the notice within 21 days, the agency is deemed to have refused to specify the document in the notice.<sup>212</sup> If this happens, the person who served the notice may apply to VCAT to review the deemed refusal.<sup>213</sup>

For more information, see Part II – Publication of certain documents and information.

## Where there is a decision to apply access charges

- 1.23. An agency or Minister can ask the applicant to pay access charges under [section 22](#). If the applicant is not satisfied with the amount of access charges they have been asked to pay, the applicant may apply to VCAT to review the amount being charged. They may apply to VCAT even if they have previously paid a deposit or the actual access charges.

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<sup>209</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 50(1)(ea) and 53.

<sup>210</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(2).

<sup>211</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 12(2)(a).

<sup>212</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53(2).

<sup>213</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(ea).



- 1.24. However, before an applicant can apply to VCAT to review the access charges amount, they must apply to OVIC first. The Information Commissioner must certify that the matter is one of sufficient importance for VCAT to consider before an applicant can apply to VCAT.<sup>214</sup>
- 1.25. In reviewing an access charges decision, VCAT may order the agency or Minister to waive or reduce the access charges.<sup>215</sup> However, VCAT cannot make an order of this kind if it agrees with the amount of access charges imposed by the agency.<sup>216</sup>

*Considering whether the matter is of 'sufficient importance'*

- 1.26. The Act does not set out what matters to consider when deciding if the matter is of sufficient importance for VCAT to consider. However, the following matters are generally considered relevant:
- A real or significant argument that there is an error in the decision to either impose the access charges or to impose the amount of access charges to be paid:
    - Whether there has been an error in calculating the access charges (for example, the agency incorrectly applied items in the Regulations resulting in substantially higher access charges than permitted).
    - Whether access charges should be waived because of financial hardship where the requested documents relate to the personal affairs of the applicant.
    - Whether access charges for search time have been imposed where the applicant seeks access to a document containing their own personal affairs information.
    - Whether an applicant has been charged for a search that was previously completed by an agency during an earlier FOI request.
    - Whether access charges for search time have been imposed where the applicant's intended use of the document is of general public interest or benefit.
    - Whether access charges have been imposed for a routine request.
  - A matter of public or general importance in the context of the Act that VCAT should determine includes:

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<sup>214</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(g).

<sup>215</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 59.

<sup>216</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 59(2).

- Whether the access charges have been calculated in a manner that furthers the object of the Act – to facilitate and promote the disclosure of information at the lowest reasonable cost.
- Whether there has been a change in the way an agency stores information resulting in changes to how access charges are calculated.
- Whether there is a rare, unconventional, or new method of storing information that agencies use to retrieve or make copies of documents which increases access charges.
- Whether the matter should otherwise be certified for VCAT to review in the interests of fairness and justice.
- Whether the agency has, at the request of the applicant, discussed practicable alternatives for altering the request or reducing the anticipated charge.
- The significance of the error in calculating the access charges, that resulted in substantially higher access charges than permitted:
  - The circumstances of the request and the access charges decision. This may include factors such as the type of applicant and the documents requested, the applicant’s proposed use of the documents and the agency’s decision on the request, including the type or number of documents proposed to be released.

*How OVIC approaches a request for an access charges certificate*

Informal resolution

1.27. Where possible, OVIC will try to resolve access charges matters informally. OVIC may ask for more information from an agency or Minister about its reasons for imposing access charges and discuss this with the applicant.

1.28. A Commissioner may also form a preliminary view on whether the matter may be of sufficient importance for VCAT to consider:

- Where the preliminary view is that the Commissioner will likely decline to certify the matter, OVIC will tell the applicant and provide them with an opportunity to respond. Alternatively, the applicant may decide to withdraw their request for an access charges certificate.
- Where the Commissioner’s preliminary view is that they will likely certify the matter, OVIC will provide the agency or Minister with the Commissioner’s reasons and an opportunity to respond. The agency or Minister may decide to reconsider the access charges decision. This may result in an agency or Minister revising the amount of access charges or providing a full or partial refund.

Formal determination

- 1.29. If OVIC is satisfied the matter is of sufficient importance for VCAT to consider, OVIC will issue a certificate which permits the applicant to apply to VCAT for review.
- 1.30. If OVIC is not satisfied the matter is one of sufficient importance for VCAT to consider, the applicant cannot apply to VCAT for review of the access charges amount.
- 1.31. In these circumstances, the applicant may consider taking the following steps:
- pay the access charges that have been imposed by the agency to release the documents;
  - narrow or re-scope the request to reduce the number of documents, which may result in a reduction in the access charges amount;
  - withdraw the request and make a new amended or narrower request; or
  - do not pay the access charges and no further action will be taken by the agency or Minister.

## When can an agency or Minister apply to VCAT?

- 1.32. If a Commissioner makes a decision under [section 49P](#) on review and the agency or Minister is not satisfied with the decision, the agency or Minister may apply to VCAT for review.<sup>217</sup>

## When can a third party apply to VCAT?

- 1.33. Third parties may apply to VCAT to review a decision to release their information under [section 33](#), [34](#) or [35](#) provided the third party did not consent to the disclosure of their information.<sup>218</sup> If they consented to the disclosure, they cannot apply for a review.

### Example

An agency decides to release a document containing a third party's personal information. When processing the request, the agency consulted with the third party and the third party did not agree to release their information to the applicant.

Despite the third party's preference to not release their information, the agency considered it was not unreasonable to release the third party's information in the circumstances and decided to release their personal information.

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<sup>217</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 50(3D).

<sup>218</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 50(3), 50(3A), 50(3AB) and 50(3AC).

The agency notified the third party of its decision to release their personal information. The third party may apply to VCAT if they are not happy with the agency's decision. The third party has 60 days to apply to VCAT from when they were notified of the decision.

1.34. VCAT can review a decision:

- to disclose a document containing a third party's personal affairs information (as referred to in [section 33\(3\)](#)) where a person (or, in the case of a deceased person, that person's next of kin) is the subject of information in that document and they did not consent to the disclosure;<sup>219</sup>
- to disclose a document containing a business, commercial or financial undertaking's trade secrets or business affairs (as referred to in [section 34](#)) where the undertaking did not consent to the disclosure;<sup>220</sup>
- to disclose a document containing information communicated in confidence (as referred to in [section 35\(1\)](#)) where the person (or, in the case of a deceased person, that person's next of kin) did not consent to the disclosure.<sup>221</sup>

## Decisions that VCAT cannot review

1.35. There are some decisions VCAT cannot review.

1.36. VCAT cannot review:

- a decision to disclose a third party's information for the purpose of sections 33, 34 or 35 if the third party consented to the disclosure;<sup>222</sup>
- a fresh decision made under [section 49L](#) or [49M](#) if the applicant agrees with the decision (or the applicant is taken to agree with the fresh decision because they have not advised OVIC within 28 days of being notified of the decision whether they agree with it or not);<sup>223</sup>
- the decision was made by the Information Commissioner under section 49N;<sup>224</sup>

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<sup>219</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 50(3) and 50(3AC).

<sup>220</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 50(3A) and 50(3AC).

<sup>221</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3AB).

<sup>222</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3AB).

<sup>223</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49MA(1), 49L(7), 49M(7), 50(3G)(a).

<sup>224</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 49N, 50(3G)(b).

- a decision to refuse to waive or reduce the application fee (OVIC can review this);<sup>225</sup>
- a decision to give a certificate under [section 61ZA\(2\)](#), which certifies that information or a document is, or would be if it existed, an exempt document under [section 28](#). VCAT cannot review the decision to issue the certificate, but VCAT can review whether a document has been properly classified as an exempt document under section 28;<sup>226</sup>
- a decision to give a certificate under section 29A(2), which certifies that a document is, or would be if it existed, exempt under section 29A(1), 29A(1A), or 29A(1B). VCAT cannot review the decision to give a certificate, but VCAT can determine whether there are reasonable grounds to claim that the document is exempt under [section 29A](#).<sup>227</sup>

1.37. VCAT may refuse to review an agency or Minister’s decision to refuse access to a document or information if VCAT is satisfied that it has previously reviewed the agency or Minister’s decision to refuse access to the same document or the same information.<sup>228</sup>

### Example

#### [Parker v Court Services Victoria](#) <sup>229</sup>

The applicant requested access to unedited CCTV footage at the Magistrates’ Court at a particular time and date. He was concerned that someone had signed in as him at the front desk for a nefarious purpose and wished to identify who that person was.

The agency refused access to the document.

On appeal, VCAT agreed with the decision to refuse access.

The applicant made another request asking for edited footage to remove the faces of everyone except himself and two other specified persons. He also asked for an opportunity to view the unedited footage so he could see if there were any other people present.

VCAT dismissed the proceeding under section 75(1)(b) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) because the second request was the same as the first one which VCAT had refused.

<sup>225</sup> *Gordon v Mornington Peninsula Shire Council* (2005) 23 VAR 394; [2005] VCAT 1710 at [13]; [McKechnie v Department of Justice and Community Safety](#) [2019] VCAT 432. [Freedom of Information Act 1982](#) (Vic), section 49A(1)(c).

<sup>226</sup> [Freedom of Information Act 1982](#) (Vic), section 50(5).

<sup>227</sup> [Freedom of Information Act 1982](#) (Vic), section 50(5A).

<sup>228</sup> [Freedom of Information Act 1982](#) (Vic), section 50(6).

<sup>229</sup> [Parker v Court Services Victoria](#) (Review and Regulation) [2022] VCAT 431 (21 April 2022).

Although the applicant tried to exclude identifying information of some people, his request to have access to the faces of certain people meant he was still seeking the same information as in his first request.

VCAT also said that requesting access by viewing is not material to whether the requests are the same for the purposes of the Act. That is because regardless of the form of access, access is still being sought for the same information.

1.38. An applicant cannot use section 50 to ask VCAT to consider disciplinary action against an agency or Minister under [section 61](#).<sup>230</sup>

Where a certificate has been issued under section 61ZA(2) or 29A(2)

1.39. For documents claimed to be exempt under [section 28](#) (Cabinet documents) or [section 29A](#) (documents affecting national security, defence or international relations), the agency or Minister may certify that the document is (or would be if it existed) of the kind described in the exemption.

1.40. These kinds of certificates are called ‘conclusive certificates’. They claim that the document is or, if it existed, would be an exempt document.

1.41. OVIC cannot conduct a review, handle a complaint or conduct an investigation in relation to a conclusive certificate.<sup>231</sup> Similarly, OVIC cannot question whether a document is of a kind falling within the categories over which a conclusive certificate can be issued.

1.42. While VCAT cannot review the decision to issue a certificate, VCAT can determine on review:

- for certificates under section 61ZA(2) (Cabinet documents), whether a document has been properly classified as an exempt document within the meaning of section 28.<sup>232</sup>
- for certificates under section 29A(2) (documents affecting national security, defence or international relations), the question as to whether reasonable grounds exist for the claim that the document is an exempt document under section 29A.<sup>233</sup>

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<sup>230</sup> *Roberts v Southern Rural Water* (unreported, VCAT, Preuss SM, 20 April 2000).

<sup>231</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 29A(3).

<sup>232</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(5).

<sup>233</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(5A).

## Deciding whether reasonable grounds exist

1.43. Deciding whether reasonable grounds exist for the claim that the document is exempt under section 29A is objective and requires consideration of competing facets of the public interest.<sup>234</sup>

### Example

In *Willner v City of Melbourne*,<sup>235</sup> the applicant requested 24 hours of continuous CCTV footage recorded at the entrance to Flinders Street Station on a particular day for an art installation.

A certificate was issued under section 29A(2).

VCAT considered whether reasonable grounds existed for the certificate.

VCAT found that there were reasonable grounds for issuing a certificate for the following reasons:

- the entrance to Flinders Street is iconic and integral to Victoria's public transport network;
- tens of thousands of people pass through the station every day. It is a possible, even likely, target for a terrorist attack;
- the CCTV footage would permit the identification of the location of CCTV cameras where the precise location of the cameras is not publicly known;
- disclosure would allow the viewer to determine the scope of coverage of the cameras;
- disclosure would identify premises or parts of premises which are not within the view of the camera;
- disclosure would provide information to the viewer of the horizontal movement, tilt and swivel capacity and default settings of the cameras;
- access would provide information as to the capacity of the cameras to operate in different light conditions
- disclosure would provide information as to the use of the cameras for law enforcement and evidence collection purposes;
- disclosure could increase the risk of vandalism or damage to the cameras; and
- disclosure may cause embarrassment to persons observed by the cameras.

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<sup>234</sup> *McKinnon v Secretary, Department of Treasury* [2006] HCA 45, 10.

<sup>235</sup> [Willner v City of Melbourne \(Review and Regulation\) \[2015\] VCAT 1594](#).

## *VCAT process for deciding whether reasonable grounds exist for section 29A*

- 1.44. VCAT's procedures in relation to determining the question whether reasonable grounds exist for the claim in a section 29A certificate are set out in Schedule 1 Part 8 of the VCAT Act (clauses 29B, 29C and 29D).
- 1.45. VCAT must hold in private any part of the proceeding during which evidence or information is given or any documents are produced by:
- an agency or an officer of an agency; or
  - a Department Head or a member of staff of a Department Head; or
  - the Chief Commissioner of Police or a member of Victoria Police personnel.<sup>236</sup>
- 1.46. VCAT must also hold the proceeding in private where a submission is made to it by or on behalf of an agency, Department Head or the Chief Commissioner of Police in relation to the claim that the document is an exempt document.<sup>237</sup>
- 1.47. For any other part of the proceeding, VCAT must hold the hearing in public.<sup>238</sup> This may be subject to VCAT's other powers to hold the hearing in private. For example, under section 17 of the [Open Courts Act 2013 \(Vic\)](#), VCAT may make a suppression order to prohibit or restrict the disclosure by publication or otherwise of:
- a report of the whole or any part of a proceeding;
  - any information derived from a proceeding.<sup>239</sup>

## How much does a VCAT review cost?

- 1.48. There are fees associated with a VCAT review (such as an application fee in some instances, hearing fees in some instances and additional fees after VCAT makes an order).
- 1.49. If an applicant is facing financial hardship, they may be eligible for [fee relief](#).

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<sup>236</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), Schedule 1, clause 29D(1)(a)(i)-(iii).

<sup>237</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), Schedule 1, clause 29D(1)(b).

<sup>238</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), Schedule 1, clause 29D.

<sup>239</sup> [Open Courts Act 2013 \(Vic\)](#), section 17.



1.50. However, there are no application fees for FOI matters where:

- the agency has not made a decision on time (deemed refusal); or
- the document relates to the applicant's own personal affairs.<sup>240</sup>

1.51. For matters where no application fee applies, there is also no hearing fee (normally, there are daily hearing fees).<sup>241</sup>

1.52. The default position is that each party is to meet its own costs.<sup>242</sup> However, in some instances, VCAT may order one party to pay the other party's costs. This might be where:

- one party conducted the proceedings in a way that unnecessarily disadvantaged another party;
- a party was responsible for unreasonably prolonging the time taken to complete the proceeding;
- the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;
- the nature and complexity of the proceeding; and
- any other matter the Tribunal considers relevant.<sup>243</sup>

Answer a few quick questions on VCAT's [website](#) to get a better understanding of the fees that might apply to your matter.

## Agencies and Ministers must notify OVIC of a VCAT review

1.53. An agency or Minister must tell OVIC when it or someone else applies to VCAT for a review of the agency or Minister's FOI decision or decision to require the applicant to pay access charges.

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<sup>240</sup> Victorian Civil and Administrative Tribunal, Fees at VCAT, viewed online 1 September 2023 (<https://www.vcat.vic.gov.au/fees>).

<sup>241</sup> Victorian Civil and Administrative Tribunal, Fees at VCAT, viewed online 1 September 2023 (<https://www.vcat.vic.gov.au/fees>).

<sup>242</sup> *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*, section 109(1).

<sup>243</sup> See sections 109(3)(a)-(e) of the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*.

1.54. As soon as practicable, the relevant agency or Minister must notify OVIC if:

- the agency or Minister applies to VCAT to review OVIC’s review decision made under [section 49P](#);<sup>244</sup> or
- an application for review has been made to VCAT by the applicant about:
  - OVIC’s review decision made under section 49P;
  - a review of an agency or Minister’s decision to refuse access to a document where OVIC decides to not accept or dismisses the review;
  - the amount of access charges to be paid, where OVIC has certified the matter.<sup>245</sup>

## VCAT’s FOI review powers

What kind of decision can VCAT make on review?

1.55. If a VCAT review goes to a hearing, VCAT has the same powers as an agency or Minister regarding a request.<sup>246</sup>

1.56. VCAT may make an order to:

- affirm the decision under review (this means VCAT upholds the decision being reviewed as the correct and preferable decision and the decision does not change);<sup>247</sup>
- vary the decision under review (this means VCAT changes part of, but not the entire, decision);<sup>248</sup>
- set aside the decision under review and make another decision in substitution for it (this means VCAT replaces the original decision with a new decision);<sup>249</sup> or

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<sup>244</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3F).

<sup>245</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3FA).

<sup>246</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(4).

<sup>247</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), section 51(2)(a).

<sup>248</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), section 51(2)(b).

<sup>249</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), section 51(2)(c).

- set aside the decision under review and send the matter back to the decision-maker to reconsider in line with any VCAT directions or recommendations.<sup>250</sup>

1.57. VCAT will provide a written decision with reasons for its decision.<sup>251</sup>

For more information on VCAT decisions and orders, visit VCAT’s website ([decisions and orders](#)). VCAT publishes decisions on the Australasian Legal Information Institute (AustLII) website. Read VCAT decisions [here](#).

## The public interest override

1.58. In addition to having the same powers as an agency or Minister during an FOI review, VCAT also has the power to grant access to an exempt document.<sup>252</sup>

1.59. VCAT may decide that access should be granted where VCAT is of the opinion that the public interest requires that access to the document should be granted under the Act.<sup>253</sup> This is referred to as the ‘public interest override’.

1.60. VCAT cannot exercise the public interest override in relation to:

- documents that are exempt under [section 28](#), [section 29A](#), [section 31A](#), [section 31\(3\)](#) and [section 33](#); or
- a decision under [section 25A\(1\)](#).<sup>254</sup>

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<sup>250</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), section 51(2)(d).

<sup>251</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), sections 116 and 117.

<sup>252</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(4).

<sup>253</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(4).

<sup>254</sup> *Wright v State Electricity Commission* [No 1] (unreported, VCAT, Mega SM, 29 July 1998).

1.61. VCAT can exercise the public interest override in relation to:

- documents that are exempt under sections 29, 30,<sup>255</sup> 31, 32,<sup>256</sup> 34,<sup>257</sup> 35, 36,<sup>258</sup> 37, 38,<sup>259</sup> and 38A;<sup>260</sup> and
- a decision under section 25A(5).<sup>261</sup>

1.62. The agency or Minister must show that disclosure under the Act would be contrary to the public interest.<sup>262</sup>

*What is the public interest?*

1.63. Public interest refers to matters such as standards of human conduct and the functioning of government and government instrumentalities that are accepted and acknowledged as being for the good order of society and for the wellbeing of its members.<sup>263</sup>

1.64. The interest is the interest of the public, not the interest of an individual or individuals.<sup>264</sup>

1.65. However, there may be a public interest in righting injustice done to an individual.<sup>265</sup>

### Example

In *AB v Department of Human Services*, VCAT noted that where an individual has been the victim of an unlawful act, there is a public interest in facilitating that individual's right to discover the circumstances giving rise to that unlawful act and the identity of the person responsible.<sup>266</sup>

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<sup>255</sup> See *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331.

<sup>256</sup> See *Osland v Department of Justice* (2010) 241 CLR 320; 84 ALJR 528; [2010] HCA 24.

<sup>257</sup> See *Marple v Department of Agriculture* (1995) 9 VAR 29; *Thwaites v Department of Health and Community Services* (unreported, AAT of Vic, Nedovic PM, 22 August 1994).

<sup>258</sup> See *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331.

<sup>259</sup> See *David Syme & Co Ltd v Victorian Casino & Gaming Authority* (1995) 8 VAR 212; *Department of Premier & Cabinet v Hulls* [1999] 3 VR 331.

<sup>260</sup> *Osland v Department of Justice* (2008) 234 CLR 275; 82 ALJR 1288; [2008] HCA 37, 287-288 (CLR) (Gleeson CJ, Gummow, Heydon and Keifel JJ).

<sup>261</sup> *Knight v Corrections Victoria* [2010] VSC 338 [58].

<sup>262</sup> *Department of Premier & Cabinet v Hulls* [1999] VSCA 117, *Coulson v Department of Premier and Cabinet* [2018] VCAT 229.

<sup>263</sup> *Director of Public Prosecutions v Smith* [1991] 1 VR 63 per Kaye, Fullagar and Ormiston JJ, 75.

<sup>264</sup> *Director of Public Prosecutions v Smith* [1991] 1 VR 63 per Kaye, Fullagar and Ormiston JJ, 75. *Pratt v Psychologists Registration Board of Victoria* (unreported, AAT of Vic, Judge Wood p, 28 April 1998).

<sup>265</sup> *Ambikapathy v Victorian Legal Aid* [1999] VCAT 1361.

<sup>266</sup> *AB v Department of Human Services* [2001] VCAT 2020.

1.66. The Act does not define or limit what may be relevant to the public interest.<sup>267</sup> The expression ‘public interest’:

*... classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.'*<sup>268</sup>

#### *Using the public interest override*

1.67. VCAT may exercise the public interest override if:

- VCAT is of the view that the document is exempt (if it is not exempt, the document should be released);<sup>269</sup>
- there is sufficient evidence to support an opinion that the public interest requires that access should be granted to the exempt document; and
- VCAT actually forms the opinion that the public interest requires that access should be granted (this is an evaluation that VCAT does based on the facts).<sup>270</sup>

1.68. Whether the public interest requires disclosure is a question of fact in each case.

1.69. In deciding whether to use the public interest override, the public interest must require release of the document (it is not enough that it is in the public interest to release the document).<sup>271</sup> The public interest must be so strong that it overrides the factors that made the document exempt in the first place.<sup>272</sup> The strength of the public interest depends on the nature and strength of the factors that made the document exempt.<sup>273</sup>

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<sup>267</sup> [Osland v Department of Justice \[2010\] HCA 24, \[13\]](#).

<sup>268</sup> [O'Sullivan v Farrer \(1989\) 168 CLR 210, 216](#).

<sup>269</sup> [Department of Premier and Cabinet v Hulls \[1999\] VSCA 117, 24](#).

<sup>270</sup> [Osland v Department of Justice \(2010\) 241 CLR 320; 84 ALJR 528; \[2010\] HCA 24](#).

<sup>271</sup> [Department of Premier and Cabinet v Hulls \[1999\] VSCA 117, 31](#).

<sup>272</sup> [Department of Premier and Cabinet v Hulls \[1999\] VSCA 117, 26, 35](#).

<sup>273</sup> [Department of Premier and Cabinet v Hulls \[1999\] VSCA 117, 31](#); [Trotter v Department of Justice \[2003\] VCAT 394](#) (27 March 2003) [15].

1.70. Release must be in the public interest, not just ‘of public interest’.<sup>274</sup>

#### Example

In *Director of Public Prosecutions v Smith*, the Supreme Court said:

*... in the daily affairs of the community events occur which attract public attention. Such events of interest to the public may or may not be ones which are for the benefit of the public; it follows that such form of interest per se is not a facet of the public interest.*<sup>275</sup>

1.71. Factors in favour of establishing the public interest:

- the documents reveal some illegality, impropriety, sharp practice, or wrongdoing by government;<sup>276</sup>
- holding government to account for its actions and enabling the public to have enough information consider and debate the issues at hand.

#### Example

In *Thwaites v Department of Health and Community Services* (unreported, AAT of Vic, Nedovic OM, 22 August 1994), the Administrative Appeals Tribunal found that there was a public interest in disclosing the amount that the government spent on offices for Ministers and other persons funded by the taxpayer.

1.72. The need to ‘clear the air’ or to have ‘transparency in government’ may not be sufficient.<sup>277</sup>

#### *The public interest override and exemptions with public interest tests*

1.73. Some exemptions in Part IV have a public interest test. To find a document is exempt under those exemptions means it has been decided that it would be contrary to the public interest to release the document (or otherwise depending on the wording of the public interest test).

1.74. In these scenarios, considering whether the public interest requires disclosure of the document may involve considering a wider range of public interests than what may be considered under the specific exemption.<sup>278</sup>

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<sup>274</sup> [Director of Public Prosecutions v Smith \[1991\] 1 VR 63.](#)

<sup>275</sup> [Director of Public Prosecutions v Smith \[1991\] 1 VR 63.](#)

<sup>276</sup> [Gill v Department of Industry, Technology and Resources \(1985\) 1 VAR 97.](#)

<sup>277</sup> [Osland v Department of Justice \(2008\) 234 CLR 275.](#)

<sup>278</sup> [Mildenhall v Department of Education \[1998\] VCAT 465.](#) [Department of Premier and Cabinet v Hulls \[1999\] 3 VR 331.](#)

- 1.75. Because of the nature of the public interest in preserving confidentiality of documents that are exempt under section 32 or section 38, there must be public interest factors ‘of a high order’ requiring disclosure for the override to apply.<sup>279</sup>

## Examples

### Section 32

#### [Roberts v Southern Rural Water \[2002\] VCAT 1423](#)

The applicant argued that documents that were exempt under section 32 should be released because the public interest required it. The applicant believed the agency had conducted a malicious prosecution campaign against him, was involved in corruption, provided false answers to questions, tampered with witnesses and tampered with tape recordings.

VCAT acknowledged that there is an element of public interest in knowing that the officers of a public authority conducted themselves in a proper and just manner. However, in this case there was no evidence that the applicant’s allegations were true. VCAT was not satisfied the public interest in disclosure overrode the public interest in preserving legal professional privilege.

### Section 38

#### *David Syme and Co v Victorian Casino and Gaming Authority* (1995) 8 VAR 212

The AAT held that Parliament’s intention that certain documents remain secret under the *Casino Control Act 1991* had to be taken into account in deciding whether the public interest required disclosure.

The AAT said that:

*... if it could be established that there has been a breakdown in the licensing process or if some illegality, impropriety or potential wrongdoing can be demonstrated, and the documents would reveal that, then it would be in the public interest to release the documents.*

#### *Seaman v Victoria Legal Aid* [2008] VCAT 589

The applicant sought access to an unrevised transcript of a Judge’s charges to a jury in a criminal trial and the full statement of appeal grounds prepared by a Legal Aid solicitor.

The documents were claimed to be exempt under section 38 (with section 43 of the *Legal Aid Act 1978*).<sup>280</sup>

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<sup>279</sup> *Chadwick v Department of Property and Services* (1987) 1 VAR 444 455-456. [Seaman v Victorian Legal Aid \[2008\] VCAT 589](#) at [32]. *Re Coburg Brunswick Community Legal and Financial Counselling Centre and Department of Justice* (1999) 15 VAR 208.

<sup>280</sup> The documents were also claimed to be exempt under section 33 (unreasonable disclosure of a person’s personal affairs).

VCAT was satisfied that section 38 applied to the documents.

VCAT then had to consider whether the public interest override applied. VCAT noted that the protection afforded by section 38 is of the utmost importance and did not use the public interest override to grant access to the documents.

Explaining the decision not to use the override, VCAT stated:

*To release these documents would be to place an impediment in the way of VLA giving frank and fearless advice, of obtaining relevant documents, and would destroy the trust between practitioner and client which was essential to the operation of VLA.*

## What if a party does not agree with a VCAT decision?

- 1.76. A party to a VCAT review may appeal a VCAT decision on a question of law only (if the person believes VCAT made a mistake in the way it applied the law).<sup>281</sup> There are time limits and certain permissions a person must seek before they may apply for an appeal.

For more information on how to appeal a VCAT decision (including who to apply to, time limits, fees, and legal advice), visit VCAT's webpage '[Appeal a VCAT decision](#)'.

- 1.77. The Supreme Court can hear appeals from VCAT and conduct judicial reviews of administrative decisions.<sup>282</sup> Relief may also be available from the Supreme Court via originating motion for judicial review under order 56 of the *Supreme Court (General Civil Procedure) Rules 2015*.
- 1.78. See also, [section 63BA](#) which relates to applications to the Supreme Court for determining whether the Information Commissioner or the Public Access Deputy Commissioner has jurisdiction to serve a notice to produce or attend.

## More information

For more information on:

- VCAT and its processes visit VCAT's [website](#);
- who the parties are in a VCAT review, see [section 54 – Parties](#);

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<sup>281</sup> [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#), section 148(1).

<sup>282</sup> [Administrative Law Act 1978 \(Vic\)](#), section 3; Supreme Court of Victoria, *How the Court Works*, Trial Division (viewed on 4 August 2023) <https://www.supremecourt.vic.gov.au/about-the-court/how-the-court-works>.



- applying to OVIC for a review, see [section 49A – Applications to Information Commissioner for review](#);
- the Victorian Supreme Court and its processes, visit the Court's [website](#).

# Section 51 – Information Commissioner may be called on to assist Tribunal

## Extract of legislation

### 51 Information Commissioner may be called on to assist Tribunal

- (1) The Tribunal, on its own motion or on the application of the Information Commissioner, may call on the Commissioner to assist the Tribunal in respect of a review.
- (1A) If a review under section 50 relates to a decision made by the Public Access Deputy Commissioner, the Tribunal, on its own motion or on the application of the Deputy Commissioner, may call on the Deputy Commissioner to assist the Tribunal in respect of the review.
- (2) Despite anything to the contrary in the **Victorian Civil and Administrative Tribunal Act 1998**, the Information Commissioner is not and cannot be joined as a party to a review under section 50 unless it is a review of a decision of the Information Commissioner as the principal officer of the office of the Information Commissioner.

## Guidelines

### OVIC’s involvement in a VCAT review

- 1.1. If a person applies to the Victorian Civil and Administrative Tribunal (**VCAT**) for a review of a decision, the parties to the VCAT review are the agency or Minister and the person applying for the review.<sup>283</sup>
- 1.2. The Office of the Victorian Information Commissioner (**OVIC**) is not a party to the VCAT review, even where the review relates to a review decision made by OVIC.<sup>284</sup>
- 1.3. OVIC will only be a party to the VCAT review if the applicant made a request to OVIC, and the Information Commissioner made a decision on the request as OVIC’s [principal officer](#).<sup>285</sup>

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<sup>283</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 54.

<sup>284</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 51(2).

<sup>285</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 51(2).

1.4. However, VCAT can ask OVIC to assist with a VCAT review, even if OVIC is not a party to it.<sup>286</sup>

1.5. OVIC can also apply to assist VCAT.<sup>287</sup> In deciding whether to apply to assist VCAT, OVIC considers:

- Whether there are significant legal questions that arise under the Act. For example, if the case involves a new or unsettled area of law, or it would clarify a disputed interpretation of the Act.
- Whether there are broader implications for FOI policy and practice. For example, where the information rights of third parties not in VCAT or a strategic function of OVIC is affected.
- The impact to VCAT and the parties to the proceeding. For example, whether OVIC's issue is central or peripheral to the proceeding and whether OVIC can help VCAT by making new or informed submissions.

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<sup>286</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 51(1) and section 52(1A).

<sup>287</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 51(1) and section 52(1A).

## Section 52 – Time for applying for review

### Extract of legislation

#### 52 Time for applying for review

- (1) An application to the Tribunal under section 50(1)(e) or (g) must be made within 60 days from the day on which notice in writing of a decision on the request is given to the applicant.
- (2) An application to the Tribunal under section 50(2) must be made within 60 days from the day on which notice in writing of the decision under section 12(2)(a) is given to the person.
- (3) An application to the Tribunal under section 50(3), (3A) or (3AB) must be made within 60 days from the day on which notice in writing of a decision to disclose the document is given to the person or undertaking, as the case requires.
- (4) An application to the Tribunal under section 50(3B) in relation to a decision by the principal officer of an agency or a Minister must be made within 60 days from the day on which notice in writing of the decision is given to the applicant.
- (5) An application to the Tribunal under section 50(1)(b) or (c) must be made within 60 days from the day on which notice in writing of the decision of the Information Commissioner on the review is given to the applicant under Division 1.
- (6) An application to the Tribunal under section 50(3B) in relation to a decision by the Information Commissioner must be made within 60 days from the day on which notice in writing of the decision of the Information Commissioner on the review is given to the applicant under Division 1.
- (7) An application to the Tribunal under section 50(1)(d) must be made within 60 days from the day on which notice in writing of a decision of the Information Commissioner under section 49G is given to the applicant.
- (8) An application to the Tribunal under section 50(3C) must be made within 60 days from the day on which notice in writing of the decision under Division 2 is given to the applicant.
- (9) An application to the Tribunal under section 50(3D) must be made within 14 days from the day on which notice in writing of the decision under Division 1 is given to the agency or Minister.

### Guidelines

#### Overview of section 52

- 1.1. Section 52 outlines the time within which a person must apply to the Victorian Civil and Administrative Tribunal (**VCAT**) to review a decision, with reference to the different kinds of decisions that VCAT can review in [section 50](#).

## Time for applying for review by VCAT

- 1.2. The following table outlines the timeframe within which a person must apply to VCAT for review, based on the type of decision that was made.
- 1.3. Generally, a person will have 60 days to apply to VCAT for a review. One exception is if an agency or Minister would like to appeal the Office of the Victorian Information Commissioner’s (OVIC) review decision (made under [section 49P](#)). In this circumstance, the agency or Minister has 14 days to apply to VCAT for review.

Type of decision	Timeframe for applying to VCAT
	60 days
Decision to refuse access under <a href="#">section 29A</a> (documents affecting national security, defence or international relations). <sup>288</sup>	Application must be made within 60 days from the day the decision was given to the applicant. <sup>289</sup>
Decision to apply access charges under <a href="#">section 22</a> and the Information Commissioner certified the matter. <sup>290</sup>  An applicant may apply to VCAT to review an agency or Minister’s decision to request the applicant to pay access charges if the Information Commissioner certifies the matter as one of sufficient importance for VCAT to consider.	Application must be made within 60 days from the day the decision was given to the applicant. <sup>291</sup>
Decision under <a href="#">section 12(2)</a> not to specify a document in section 8(2)(b) or section 11(2)(b). <sup>292</sup>	Application must be made within 60 days from the day the decision was given to the person. <sup>293</sup>

<sup>288</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(e).

<sup>289</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(1).

<sup>290</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(g).

<sup>291</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(1).

<sup>292</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(2); see Part II for more information.

<sup>293</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(2).

<p>Third party applications – personal affairs information (<a href="#">section 33</a>)</p> <p>Decision to disclose a third party’s personal affairs information (where the third party did not consent to the disclosure).<sup>294</sup></p>	<p>Application must be made within 60 days from the day the decision was given to the person.<sup>295</sup></p>
<p>Third party applications – information communicated in confidence (<a href="#">section 35(1)</a>)</p> <p>Decision to disclose information communicated in confidence (where the third party did not consent to the disclosure).<sup>296</sup></p>	<p>Application must be made within 60 days from the day the decision was given to the person.<sup>297</sup></p>
<p>Third party applications – business, commercial or financial undertaking (<a href="#">section 34</a>)</p> <p>Decision to disclose a business, commercial or financial undertaking’s trade secrets, or other matters of a business, commercial or financial nature (where the undertaking did not consent to the disclosure).<sup>298</sup></p>	<p>Application must be made within 60 days from the day the decision was given to the undertaking.<sup>299</sup></p>
<p>Decision to not amend a document containing the individual’s personal affairs information (<a href="#">section 39</a>).<sup>300</sup></p>	<p>Application must be made within 60 days from the day the decision was given to the person.<sup>301</sup></p>
<p>Review decision by OVIC to refuse access to a document.<sup>302</sup></p>	<p>Application must be made within 60 days from the day the decision was given to the person.<sup>303</sup></p>

<sup>294</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3).

<sup>295</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 52(3) and 52(3AC).

<sup>296</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3AB).

<sup>297</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 52(3) and 52(3AC).

<sup>298</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3A).

<sup>299</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 52(3) and 52(3AC).

<sup>300</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 50(1)(ea) and 50(3B).

<sup>301</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(4).

<sup>302</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(b).

<sup>303</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 52(4) and 52(6).

Review decision by OVIC to defer access to a document. <sup>304</sup>	Application must be made within 60 days from the day the decision was given to the person. <sup>305</sup>
Decision by an agency or Minister to refuse access to a document and OVIC does not accept, or dismisses, the review under <a href="#">section 49G(1)</a> . <sup>306</sup>	Application must be made within 60 days from the day the decision by the Information Commissioner to not accept, or to dismiss, the review was given to the person. <sup>307</sup>
Where conciliation by the Health Complaints Commissioner under <a href="#">section 49Q</a> is not successful. <sup>308</sup>	Application must be made within 60 days from the day the written notice was given to the person. <sup>309</sup>
14 days	
Decision made by OVIC under <a href="#">section 49P</a> . <sup>310</sup>	An agency or Minister may apply for a review of the Information Commissioner’s decision within 14 days from the day the written notice of decision was given to the agency or Minister. <sup>311</sup>
No time limit	
<p>The required time for making a decision in <a href="#">section 21</a> has passed and no decision has been made (deemed refusal).</p> <p>An applicant may apply for review of a decision of an agency or Minister that has been taken to be made under <a href="#">section 53</a>. An applicant may apply directly to VCAT.</p>	Application may be made at any time until a decision is made.

<sup>304</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(c).

<sup>305</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(5).

<sup>306</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(1)(d).

<sup>307</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(7).

<sup>308</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3C).

<sup>309</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(8).

<sup>310</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(3D).

<sup>311</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 52(9).

## More information

For more information on:

- what VCAT can review, see [section 50 – Applications for review by the Tribunal](#);
- VCAT, visit its website [here](#).



## Section 53 – Reviews where decisions delayed

### Extract of legislation

#### 53 Reviews where decisions delayed

- (1) Subject to this section, where—
  - (a) a request has been made to an agency or Minister;
  - (b) the time period provided in section 21(1) or section 43 as the case may be has elapsed; and
  - (c) notice of a decision on the request has not been received by the applicant—

for the purposes of making an application to the Tribunal under section 50(1)(ea), the agency or Minister is taken to have made a decision refusing to grant access to the document in accordance with the request or, in the case of a request under section 39, refusing to amend the document in accordance with the request, on the last day of the relevant period.
- (2) Subject to this section, where—
  - (a) a notice has been served on the principal officer under section 12(1); and
  - (b) the time period provided in section 12(2) has elapsed; and
  - (c) notice of the principal officer's decision has not been received by the applicant—

for the purposes of making an application to the Tribunal under section 50(1)(ea), the principal officer is taken to have made a decision refusing to specify the document in a statement on the last day of that period.
- (5) Where, after an application has been made to the Tribunal by virtue of this section but before the Tribunal has finally heard the application, a decision is given, subject to subsection (5A), the Tribunal may, at the request of the applicant, treat the application as extending to an application for review of that decision in accordance with this Part.
- (5A) Subsection (5) does not apply to—
  - (a) a decision of the agency or Minister to grant access to the document without deferment; or
  - (b) in the case of a request under section 39, a decision of the agency or Minister to amend the document in accordance with the request; or
  - (c) in the case of a notice under section 12(1), a decision of the principal officer to specify the document in a statement.
- (6) Before further hearing an application made by virtue of this section, the Tribunal, may on the application of the agency or Minister concerned, make an order allowing further time to the agency or Minister to deal with the request.
- (7) The Tribunal may make an order under subsection (6) subject to such conditions as the Tribunal thinks fit, including a condition that if a decision is made during the further time

to grant access to a document any charge that, under the regulations, is required to be paid before access is granted shall be reduced or waived.

## Guidelines

### Where a decision is not made within the required time

- 1.1. Section 53 'deems' the agency or Minister to have refused the request if they have not provided the decision to the applicant within the required time. This is known as a deemed refusal.
  - 1.2. It allows an applicant to apply directly to the Victorian Civil and Administrative Tribunal (VCAT) for review (without applying to the Office of the Victorian Information Commissioner for review first), before receiving a decision from the agency or Minister once the time for providing the decision has passed.
  - 1.3. Section 53 applies to:
    - a request for access to documents made under [section 17](#);
    - an amendment request made under [section 39](#); and
    - a notice made under [section 12\(1\)](#) for an agency to specify a document in Part II.
  - 1.4. There is no time limit by which an applicant must apply to VCAT, provided they have not received the decision before applying to VCAT.<sup>312</sup>
- For more information on when to apply for a VCAT review, see [section 52 – Time for applying for review](#).
- 1.5. An applicant is not required to apply to VCAT in relation to a deemed refusal. They may decide to wait until the agency or Minister makes the decision.<sup>313</sup>
  - 1.6. Section 53 sets out what happens if an agency or Minister makes a decision after the applicant applies to VCAT for review, but before VCAT makes a decision on the review.<sup>314</sup> It also allows an agency or Minister to apply to VCAT for more time to deal with the request.<sup>315</sup>

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<sup>312</sup> See [OVIC website](#).

<sup>313</sup> *Borthwick v University of Melbourne* (1985) 1 VAR 33; *Burns v Victorian WorkCover Authority* [2003] VCAT 958.

<sup>314</sup> *Freedom of Information Act 1982 (Vic)*, section 53(5).

<sup>315</sup> *Freedom of Information Act 1982 (Vic)*, section 53(6).

## When can a person apply to VCAT on a deemed refusal?

1.7. To apply to VCAT on a deemed refusal, three conditions must be satisfied:

- an FOI request for documents, request for amendment of personal records, or notice requiring documents be specified in Part II, has been made to an agency or Minister;
- the relevant time period in [section 21](#), [section 43](#), or [section 12\(2\)](#) respectively has passed;
- a notice of a decision on the request has not been received by the applicant, claimant or person who served the notice respectively.

When is a decision ‘deemed’ to have been made?

1.8. An agency or Minister is deemed to have made a decision on the last day of the relevant period, where that period has passed.<sup>316</sup>

1.9. The relevant period refers to how long the agency or Minister has to provide a decision to the person depending on the kind of request that was made:

- For a request made under section 17 – the relevant period is outlined in [section 21](#), an agency or Minister has 30 days to provide a decision to the applicant however this period may be extended where third party consultation is required or with the consent of the applicant.<sup>317</sup>
- For an amendment request made under section 39 – the relevant period is outlined in [section 43](#). An agency or Minister has 30 days to provide a decision to a claimant.<sup>318</sup>
- For a notice made under section 12(1) – the relevant period is outlined in [section 12\(2\)\(a\)](#). An agency must make a decision within 21 days of receiving the notice and provide the decision to the person who served the notice on the agency.<sup>319</sup>

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<sup>316</sup> [Freedom of Information Act 1982 \(Vic\)](#), sections 53(1) and 53(2).

<sup>317</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 21(1).

<sup>318</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 43.

<sup>319</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 12(2).

## VCAT may allow an agency or Minister more time to decide

- 1.10. VCAT may make an order that allows an agency or Minister more time to make a decision before VCAT starts hearing the review. This may be done before the hearing so that VCAT can postpone hearing the matter until the agency or Minister has searched for documents, assessed them, and made a decision.
- 1.11. When making this order, VCAT may include any conditions it thinks fit. This may include adding a condition that any [access charges](#) should be reduced or waived.<sup>320</sup>

## Making a decision after the time has passed

- 1.12. An agency or Minister should continue processing a request until or unless the applicant applies to VCAT for review on a deemed refusal. An agency or Minister may make a decision even after the time period has run out.
- 1.13. If the agency or Minister makes a decision before the applicant applies to VCAT, then the applicant must first apply to OVIC for review.<sup>321</sup> If the applicant is not satisfied with OVIC's decision, they can then apply for a VCAT review.<sup>322</sup>

### Example

*Burns v Victorian WorkCover Authority* [2003] VCAT 958

VCAT received the applicant's review application the day after the agency faxed its decision to the applicant. This meant the applicant could not apply to VCAT for review under section 53(1) and VCAT dismissed the application.

VCAT endorsed Judge Rowlands's reasoning in *Borthwick v University of Melbourne* that an applicant can either wait for the agency's decision or apply for review on a deemed refusal under section 53(1).<sup>323</sup>

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<sup>320</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53(6).

<sup>321</sup> See section 50 for the grounds on which a person may seek review at VCAT. See also *McLeod v Police (Vic)* [2013] VCAT 1912 [16].

<sup>322</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50.

<sup>323</sup> *Borthwick v University of Melbourne* (1985) 1 VAR 33.

## After the applicant applies to VCAT for review

- 1.14. If an agency or Minister makes a decision after an applicant applies to VCAT, VCAT may, at the applicant's request, treat the application as including a review of the agency or Minister's actual decision.<sup>324</sup>
- 1.15. The actual decision does not replace the deemed decision.<sup>325</sup> VCAT will review both the deemed refusal and the actual decision.<sup>326</sup> However, practically speaking, VCAT generally only reviews the actual decision because the decision outlines the exemptions that the agency or Minister claims.<sup>327</sup>
- 1.16. It has been argued that where an agency makes a decision, but that decision is one that VCAT does not have power to review under section 50 (for instance, a decision that no documents falling within the request exist), then VCAT loses jurisdiction to review the deemed refusal.<sup>328</sup>
- 1.17. However, VCAT has said that where its jurisdiction has been properly engaged by an application to review a deemed refusal, it retains its jurisdiction to consider whether or not there are documents relevant to a request, and to order further searches where there is evidence that documents responsive to a request exist. This proposition was later qualified in *Myers*, where VCAT found that it did not have jurisdiction to review a subsequent decision that no documents exist because there was no evidence that the documents existed.<sup>329</sup>

### *Where the decision is to grant access to, amend, or specify, a document*

- 1.18. If an agency or Minister makes a decision after an application to VCAT has been made, VCAT cannot extend the application for review to the new decision where the decision is to:
  - grant access to a document (without deferring access under section 24);
  - amend a document; or
  - specify a document under Part II.<sup>330</sup>

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<sup>324</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53(5).

<sup>325</sup> [Davis v Department of Health](#) (Review and Regulation) [2021] VCAT 1490 [69].

<sup>326</sup> *Re Corrs Pavey Whiting and Byrne and Department of Health* (1987) 14 ALD 239, 240; *Cashman & Partners v Department of Human Services & Health* (1995) 61 FCR 301, 30; *Davis v Department of Premier and Cabinet* (Review and Regulation) [2022] VCAT 254.

<sup>327</sup> *Davis v Department of Premier and Cabinet* (Review and Regulation) [2022] VCAT 254.

<sup>328</sup> [Davis v Department of Health](#) (Review and Regulation) [2021] VCAT 1490.

<sup>329</sup> *Myers v Victoria Police* (Review and Regulation) [2022] VCAT 749.

<sup>330</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53(5A).

## Section 53AA – Procedure where Tribunal determines that there do not exist reasonable grounds for claim under section 29A

### Extract of legislation

#### **53AA Procedure where Tribunal determines that there do not exist reasonable grounds for claim under section 29A**

- (1) If, after hearing a proceeding referred to in clause 29C(1) of Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998**, the Tribunal determines in relation to a document in respect of which a certificate under section 29A(2) is in force that there do not exist reasonable grounds for the claim that the document is an exempt document under section 29A, the Tribunal must notify the responsible Minister in writing of that determination.
- (2) The responsible Minister must, within 28 days after being notified under subsection (1), make a decision to revoke, or not to revoke, the certificate.
- (3) If the responsible Minister makes a decision under subsection (2) to revoke a certificate—
  - (a) any claim made in the certificate is to be taken, for the purposes of this Act, to have been withdrawn; and
  - (b) the Minister must immediately inform the applicant of the existence or non-existence of the document to which the certificate related.
- (4) If the Minister makes a decision under subsection (2) not to revoke a certificate, he or she must—
  - (a) cause written notice of the decision to be given to the applicant immediately; and
  - (b) cause a copy of the notice to be laid before each House of the Parliament within 5 sitting days of that House after the notice is given.
- (5) A notice under subsection (4) must state the Minister's findings on any material question of fact, the material on which those findings are based, the reasons for the decision and attach a copy of the Tribunal's notification to the responsible Minister of its determination.
- (6) The Minister is not required to include in a notice under subsection (4) 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 under section 28, 29A, 31(3), 31A or 33.
- (7) The Minister is not required to include in a notice under subsection (4) information as to the existence or non-existence of a document or the existence or non-existence of a state of fact if that information would, if included in a document of an agency, cause that document to be an exempt document under section 28, 29A, 31(3), 31A or 33.
- (8) Nothing in this section is to be taken to imply that a certificate under section 29A(2) cannot be revoked otherwise than in accordance with this section.

## Guidelines

### When VCAT decides section 29A does not apply

- 1.1. The Victorian Civil and Administrative Tribunal (**VCAT**) cannot review a decision to issue a certificate under section 29A(2), but VCAT can determine whether reasonable grounds exist for claiming that [section 29A](#) applies.<sup>331</sup> Section 53AA sets out the procedure where VCAT determines that there are no reasonable grounds for the claim under section 29A.
- 1.2. If VCAT decides there are no reasonable grounds for claiming the exemption in section 29A, VCAT must notify the responsible Minister of that decision.<sup>332</sup>
- 1.3. The Minister has 28 days to decide whether or not to revoke the certificate.<sup>333</sup>

### Minister revokes the certificate

- 1.4. If the Minister revokes the certificate, any claim made within the certificate is taken to be withdrawn.
- 1.5. The Minister must immediately inform the applicant of the existence or non-existence of the relevant document.<sup>334</sup>

### Minister does not revoke the certificate

- 1.6. If the Minister does not revoke the certificate, the Minister must immediately give a written notice of that decision to the applicant.
- 1.7. The Minister must also give a copy of the notice to each House of Parliament within five sitting days of that House.<sup>335</sup>

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<sup>331</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 50(5A).

<sup>332</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53AA(1).

<sup>333</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53AA(2).

<sup>334</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53AA(3).

<sup>335</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53AA(4).

1.8. The notice must:

- state the Minister’s findings on any material questions of fact;
- state the material on which those findings are based;
- state the reasons for the decision; and
- attach a copy of VCAT’s notification of its determination.<sup>336</sup>

1.9. The agency or Minister does not have to include any material in the notice that would make it exempt under section 28, 29A, 31(3), 31A, or 33.<sup>337</sup> The notice is also not required to include information about whether a document or a fact exists or not, if that information would make the notice exempt under section 28, 29A, 31(3), 31A or 33.<sup>338</sup>

1.10. A Minister may revoke a certificate under section 29A(2) at any time. They do not need to wait for a determination from VCAT.

## More information

[Section 50 – Applications for review by the Tribunal](#)

[Section 29A – Documents affecting national security, defence or international relations](#)

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<sup>336</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53AA(5).

<sup>337</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53AA(6).

<sup>338</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53AA(7).



# Section 53A – Notification of reviews regarding documents affecting personal privacy

## Extract of legislation

### 53A Notification of reviews regarding documents affecting personal privacy

- (1) If—
- (a) an agency or Minister or the Information Commissioner makes a decision refusing to grant access to a document; and
  - (b) a reason for the decision is that the document is an exempt document under section 33(1) because its disclosure would involve the unreasonable disclosure of information relating to the personal affairs of a person; and
  - (c) an application is made to the Tribunal under section 50(1)(b) or (d) for review of the decision—
- the agency or Minister or the Information Commissioner (as the case requires), as soon as practicable after being notified of the application, must, if practicable, give written notice in accordance with subsection (2) to the person to whom the information relates.
- (2) A notice under subsection (1) must—
- (a) inform the person to whom it is directed of their right to intervene in the review; and
  - (b) request the person to inform the Tribunal, within 21 days after the day on which the notice was given, whether or not the person intends to intervene.
- (3) If—
- (a) the person does not intervene in the review; and
  - (b) the Tribunal orders that access be granted to the document—
- the Tribunal must, if practicable, give notice of the order to the person.
- (4) An order referred to in subsection (3)(b) does not take effect until 28 days after the day on which it is made.

## Guidelines

### Notifying third parties of a VCAT review

- 1.1. Section 53A requires that third parties are notified of a review at the Victorian Civil and Administrative Tribunal (**VCAT**), and that they have a right to intervene in that review. This allows the third party to be involved in the review proceeding and provide information to VCAT about whether releasing their information would be reasonable or not.<sup>339</sup>
- 1.2. Where practicable, a third party must be notified of their right to intervene at VCAT where:
  - an agency or Minister refused access to a document containing the third party's personal affairs information under [section 33\(1\)](#);
  - the applicant applied to the Office of the Victorian Information Commissioner (**OVIC**) to review the agency or Minister's decision to refuse access;
  - OVIC refused access to the document on review, or OVIC did not accept or dismissed the review; and
  - the applicant applied to VCAT to review the decision to refuse access.<sup>340</sup>
- 1.3. When notifying the third party, the agency or Minister must let the third party know of their right to intervene in the review and request that the third party tell VCAT within 21 days after the day of the notice whether or not the third party intends to intervene in the review.<sup>341</sup>
- 1.4. VCAT must notify the third party if the third party does not intervene in the review and VCAT decides to grant access to a document containing their personal affairs information.<sup>342</sup> If VCAT orders release of the personal affairs information, the agency or Minister cannot release the information to the applicant until 28 days after the day on which the order was made.<sup>343</sup>

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<sup>339</sup> [Second reading speech](#), Freedom of Information (Amendment) Bill 1999, Wade.

<sup>340</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53A(1).

<sup>341</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53A(2).

<sup>342</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53A(3).

<sup>343</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 53A(4).

## 'If practicable'

- 1.5. A third party only needs to be notified under section 53A where it is practicable to do so. This involves applying common sense principles.<sup>344</sup>
- 1.6. Agencies and Ministers should exercise their judgment when deciding whether providing notice is practicable. The following factors may be relevant:
  - the age of the information or a document;
  - the number of third parties to be notified;
  - whether the agency or Minister has, or is reasonably able to ascertain, current contact details for a third party.

### Examples

#### *Coulston v Office of Public Prosecutions Victoria (General) [2010] VCAT 1234*

The applicant sought photographs and hand-drawn plans of a house where he committed murder.

VCAT agreed that it was not practicable to provide notice under section 53A because it would cause the victims' family distress and cause anxiety for the new residents of the house.

#### *Vaughan v Department of Sustainability and Environment 12 VAR 207*

The documents in this case were two videotapes containing visual images of over 20 Departmental officers, over 10 Police Officers, many protestors, and other individuals such as bulldozer and crane operators.

While Departmental Officers were notified, it was not practicable to notify all third parties.

## More information

[Section 33 – Document affecting personal privacy](#)

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<sup>344</sup> *Schubert and Department of Premier and Cabinet* (2001) 19 VAR 35 [45]. *Schubert and Department of Premier and Cabinet* (which considered the meaning of 'practicable' in section 25), VCAT considered that the use of the word 'practicable' 'connotes a legislative intention to apply common sense principles.

# Section 54 – Parties

## Extract of legislation

### 54 Parties

For the purposes of this Division and of the application of the **Victorian Civil and Administrative Tribunal Act 1998** in respect of proceedings under this Division—

- (a) a decision given by a person on behalf of an agency shall be deemed to have been given by the agency; and
- (b) in the case of proceedings by virtue of section 53, the agency or Minister to which or to whom the request was made shall be a party to the proceedings.

## Guidelines

### Parties in a VCAT review

- 1.1. If an authorised officer or [Principal Officer](#) makes a decision on a request on behalf of the agency, the agency is taken to have made the decision.<sup>345</sup> This means the agency is a party to a Victorian Civil and Administrative Tribunal (**VCAT**) review proceeding instead of the individual agency officer who made the decision.
- 1.2. If a decision on a request is not provided to the applicant within the required time, the agency or Minister is deemed to have refused access to the requested documents.<sup>346</sup> If an applicant applies to VCAT on this deemed refusal, the agency or Minister to whom the request was made is a party to the review proceeding.

### OVIC’s role at VCAT

- 1.3. The Office of the Victorian Information Commissioner (**OVIC**) is not a party to a VCAT review.<sup>347</sup> This includes where the applicant is seeking a review of OVIC’s review decision. The parties will be the applicant and the agency or Minister that made the decision.

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<sup>345</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 54(a).

<sup>346</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 54(b).

<sup>347</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 51(2).

- 1.4. VCAT may call on OVIC to assist in a review.<sup>348</sup>
- 1.5. OVIC can only be a party to a VCAT review proceeding where the applicant made a request to OVIC for access to a document, the Information Commissioner (as OVIC's Principal Officer) refused access to it, and the applicant applied for a review of the decision.<sup>349</sup>

## More information

[Section 51 – Information Commissioner may be called on to assist Tribunal](#)

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<sup>348</sup> *Freedom of Information Act 1982 (Vic)*, section 51(1).

<sup>349</sup> *Freedom of Information Act 1982 (Vic)*, section 51(2).

# Section 55 – Onus

## Extract of legislation

### 55 Onus

- (1) In proceedings under this Division by virtue of section 12, the principal officer upon whom the notice was served has the onus of establishing that the document concerned is not a document as described in section 8(1) or section 11(1).
- (2) In proceedings under this Division (except under section 50(3D)), the agency or Minister to which or to whom the request was made has the onus of establishing that a decision given in respect of the request was justified or that the Tribunal should give a decision adverse to the applicant.

## Guidelines

### Onus of showing or establishing certain matters in a VCAT review

- 1.1. Section 55 outlines which party is required to show or establish certain matters in a Victorian Civil and Administrative Tribunal (**VCAT**) review. This is referred to as the ‘onus.’

#### Where a decision is made to refuse access to a document

- 1.2. If an agency or Minister refuses access to a document, the agency or Minister that made the decision must show that their decision was justified or that VCAT should make a decision that is adverse to the applicant.<sup>350</sup> For example, if an agency refuses access to a document under an exemption, the agency must establish why the document is exempt.
- 1.3. If an agency or Minister is appealing a review decision from the Office of the Victorian Information Commissioner, VCAT will determine what is the correct and preferable decision.<sup>351</sup> The agency or Minister does not have the onus of establishing that a decision on the request was justified.<sup>352</sup>

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<sup>350</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 55(2).

<sup>351</sup> [Department of Health and Human Services v Herald and Weekly Times Pty Ltd](#) [2015] VCAT 291 [9].

<sup>352</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 55(2).

Where notice is given under section 12 to specify a document in a Part II statement

- 1.4. If a person gives an agency a notice under [section 12](#) to specify a document in the agency's Part II statement, in a VCAT review the principal officer upon whom notice was served must show that the relevant document is not a document as described in [section 8\(1\)](#) or [section 11\(1\)](#).

Where a decision is to refuse to amend a record

- 1.5. An applicant and the agency or Minister bear the onus of showing different matters.
- 1.6. The applicant must establish why the document should be amended or corrected.<sup>353</sup> The agency or Minister must then justify the decision to not amend the document.

### Example

*Roberts v Victoria Police* [2004] VCAT 1660

The applicant made several applications to the agency requesting amendment of records in police documents.

VCAT decided that the applicant bore the initial burden to provide evidence making out the case against the agency.

After this, the burden fell on the agency to justify the decision it had made to not correct the documents.

Other circumstances

- 1.7. VCAT has articulated which party bears the onus in certain circumstances:
  - If a factual matter is disputed, the party who bears the onus will be expected to tender some evidence.<sup>354</sup>
  - If an agency refuses to neither confirm nor deny the existence of certain documents (under [section 27\(2\)](#)), they must show that they are entitled to do so.<sup>355</sup>

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<sup>353</sup> *Mawkes v Department of Human Services* [2001] VCAT 1758.

<sup>354</sup> *Penhalluriack v Department of Labour and Industry* (unreported, County Court, Vic, Lazarus J, 19 December 1983) 56.

<sup>355</sup>

## Section 56 – Inspection of exempt documents by Tribunal

### Extract of legislation

#### 56 Inspection of exempt documents by Tribunal

- (2) Subject to subsection (3) and to any order made by the Tribunal under section 51(2) of the **Victorian Civil and Administrative Tribunal Act 1998**, the Tribunal shall do all things necessary to ensure that any document produced to the Tribunal in proceedings under this Act that is claimed to be an exempt document, or the contents of that document, is not disclosed to any person other than a member of the Tribunal as constituted for the proceedings, or a member of the staff of the Tribunal in the course of the performance of his duties as a member of that staff, and to ensure the return of the document to the defendant at the conclusion of the proceedings.
- (3) The Tribunal may make any orders as it thinks fit having regard to the nature of the proceedings, including where the applicant is represented by an Australian lawyer, an order that the contents of a document produced to the Tribunal that is claimed to be an exempt document be disclosed to that practitioner.
- (4) In making an order under subsection (3), the Tribunal must be guided by the principle that the contents of a document should not normally be disclosed except in accordance with an order of the Tribunal under section 51(2) of the **Victorian Civil and Administrative Tribunal Act 1998**.
- (5) Where an application under section 50(1) or (3D) relates to a document or part thereof in relation to which disclosure has been refused on the grounds specified in section 28, section 29A, section 31 or section 31A, the Tribunal may, if it regards it as appropriate to do so, announce its findings in terms which neither confirm nor deny the existence of the document in question.
- (5A) If an application under section 50(1) or (3D) relates to a document or part of a document in relation to which disclosure has been refused on the grounds that it would involve an unreasonable disclosure of personal affairs for the reason that it would increase the risk to a primary person's safety from family violence, the Tribunal may, if it regards it as appropriate to do so, announce its findings in terms which neither confirm nor deny the existence of the document in question.
- (6) If an application under section 50(1) or (3D) relates to a document or part of a document in relation to which disclosure has been refused on the grounds that it would involve an unreasonable disclosure of personal affairs for the reason that it would increase the risk to the safety of a child or group of children, the Tribunal may, if it regards it as appropriate to do so, announce its findings in terms which neither confirm nor deny the existence of the document in question.



## Guidelines

### What is section 56 about?

- 1.1. Section 56 relates to how the Victorian Civil and Administrative Tribunal (**VCAT**) may handle and talk about documents in a review proceeding.

### Maintaining confidentiality of exempt documents

- 1.2. Generally, when an agency or Minister provides a document that is claimed to be exempt to the Victorian Civil and Administrative Tribunal (**VCAT**) for the purpose of the VCAT review, VCAT cannot disclose the exempt document to anyone outside of VCAT.<sup>356</sup> However, there is an exception to this, outlined below.
- 1.3. The VCAT member who is handling the review and VCAT staff may receive the exempt document for the purpose of the review.<sup>357</sup> VCAT must return the document to the agency or Minister after the review is complete.<sup>358</sup>

### When can VCAT disclose an exempt document during a review?

- 1.4. While VCAT must generally maintain the confidentiality of documents claimed to be exempt, VCAT may make any orders it thinks fit.<sup>359</sup> In making an order, VCAT is guided by the principle that the contents of a document should not normally be disclosed except in accordance with an order under section 51(2) of the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#) (**VCAT Act**).<sup>360</sup>
- 1.5. Section 51(2) of the VCAT Act outlines that VCAT may make the following orders:
  - affirm the decision under review; or
  - vary the decision under review; or
  - set aside the decision under review and make another decision in substitution for it; or

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<sup>356</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(2).

<sup>357</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(2).

<sup>358</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(2).

<sup>359</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(3).

<sup>360</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(4).

- set aside the decision under review and remit the matter for re-consideration by the decision-maker in accordance with any directions or recommendations of VCAT.
- 1.6. VCAT may order that the contents of an exempt document produced to VCAT be disclosed to an Australian lawyer representing an applicant.<sup>361</sup>
  - 1.7. By looking at the exempt documents, the applicant’s lawyer may consider there is little interest in them, or it may be agreed that large sections of the documents are not in dispute.<sup>362</sup> It can also help with taking evidence, making submissions, and making enquiries.<sup>363</sup>
  - 1.8. If a qualified legal practitioner gives an undertaking that confidentiality will be observed, VCAT may consider this as a factor in support of granting inspection access under section 56(3).<sup>364</sup> Lawyers have an overarching duty to the courts.<sup>365</sup> Breaching an undertaking may constitute serious misconduct.<sup>366</sup>

### Example

*Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39

The agency’s lawyer opposed the applicant’s lawyer having access to the documents. The agency’s lawyer argued that the documents contained material that delved deeply into the Cabinet process.

VCAT ordered that access be given to the applicant’s lawyer because the lawyer was well aware of the seriousness of the undertaking she would be giving, including that it could continue to operate indefinitely, beyond the end of the case.

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<sup>361</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(3). An Australian lawyer is a person who has been admitted to practice as a lawyer in Victoria or another Australian jurisdiction (see section 6 of the *Legal Profession Uniform Law Application Act 2014*).

<sup>362</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 [14].

<sup>363</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 [14].

<sup>364</sup> *Stewart v Department of Tourism, Sport and the Commonwealth Games* (2003) 19 VAR 363; [2003] VCAT 45 [14]; *Environment Victoria Inc v Department of Primary Industries* [2013] VCAT 39.

<sup>365</sup> *Australian Solicitors Conduct Rules*, r 3.

<sup>366</sup> *Australian Solicitors Conduct Rules*, r 6.

1.9. VCAT will not always make an order allowing an applicant’s lawyer to see the documents.

### Examples

[Rizza v Boroondara CC \[2000\] VCAT 2062](#)

VCAT declined to allow the applicant’s lawyer to inspect relevant documents because the lawyer was the applicant’s daughter.

[Thompson v Department of Infrastructure \[2003\] VCAT 44.](#)

VCAT observed that if a claim for inspection had been made, it would unlikely have granted it, as the applicant’s wife was acting as his instructing solicitor.

Neither confirming nor denying the existence of certain documents

1.10. Where the review relates to a document claimed to be exempt under:

- [section 28 \(Cabinet documents\);](#)
- [section 29A \(documents affecting national security, defence and international relations\);](#)
- [section 31 \(law enforcement documents\);](#) or
- [section 31A \(documents relating to IBAC\),](#)

VCAT may announce its findings in terms which neither confirm nor deny the existence of the document.<sup>367</sup>

1.11. VCAT may also announce its findings in terms which neither confirm nor deny the existence of a particular document where the review relates to a document claimed to be exempt because it would involve an unreasonable disclosure of personal affairs information because it would increase the risk to:

- a primary person’s safety from family violence;<sup>368</sup> and
- the safety of a child or group of children.<sup>369</sup>

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<sup>367</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(5).

<sup>368</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(5A).

<sup>369</sup> [Freedom of Information Act 1982 \(Vic\)](#), section 56(6).

## Sampling documents

- 1.12. Where there is a high volume of documents, VCAT can order that a proceeding be conducted with reference to a sample of documents. VCAT has power to decide the matter on the basis of a representative sample of documents.
- 1.13. To ensure the sample is representative, VCAT can inspect all relevant documents.<sup>370</sup>
- 1.14. It has been submitted that VCAT must be careful when making and supervising orders about sampling to ensure that such orders do not operate unfairly to either party.

### Example

[Tucker v Commissioner of State Revenue \(Review and Regulation\) \(No 2\) \[2020\] VCAT 273](#)

The applicant submitted that VCAT's task was not complete because it had only made decisions in relation to sample documents.

In response, VCAT said:

*Considering each of these documents individually would prolong the time until final resolution of these proceedings in circumstances where it was envisaged by both parties and the Tribunal, that the matter would be decided by sample.*

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<sup>370</sup>

## Section 59 – Tribunal may reduce or waive charges

### Extract of legislation

#### 59 Tribunal may reduce or waive charges

- (1) In a review under this Division, the Tribunal may order that any charge payable under this Act or the regulations in respect of access to a document be reduced or waived.
- (2) The Tribunal cannot make an order under subsection (1) if it confirms the decision the subject of the review.

### Guidelines

#### Reducing or waiving charges during a VCAT review

- 1.1. The Victorian Civil and Administrative Tribunal (VCAT) may order an agency or Minister to reduce or waive access charges.<sup>371</sup>
- 1.2. However, VCAT may only order the charge to be reduced or waived if VCAT does not agree with the agency or Minister's decision.<sup>372</sup> If VCAT confirms the decision, then VCAT cannot order the charge to be reduced or waived.

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<sup>371</sup> *Freedom of Information Act 1982 (Vic)*, section 59(1).

<sup>372</sup> *Freedom of Information Act 1982 (Vic)*, section 59(1).

# Section 61 – Disciplinary action

## Extract of legislation

### 61 Disciplinary action

- (1) Where the Tribunal, at the completion of proceedings under this Act, is of opinion that there is evidence that a person, being an officer of an agency, has been guilty of a breach of duty or of misconduct in the administration of this Act and that the evidence is, in all the circumstances, of sufficient force to justify it in doing so, the Tribunal shall bring the evidence to the notice of—
  - (a) if the person is the principal officer of a department or prescribed authority—the responsible Minister of that department or prescribed authority; or
  - (aa) if a person is the principal officer of a council—to the council;
  - (b) if the person is an officer of an agency but not the principal officer of that agency—the principal officer of that agency.
- (2) In the circumstances set out in subsection (1), the Tribunal must also bring the evidence to the notice of the Information Commissioner.

## Guidelines

### Where there is evidence of breach of duty or misconduct

- 1.1. During a review, the Victorian Civil and Administrative Tribunal (**VCAT**) may come across evidence that an agency officer is guilty of a breach of duty or misconduct when administering the Act.
- 1.2. Where there is sufficient evidence, VCAT may bring the evidence of this breach of duty or misconduct to the attention of the responsible person.<sup>373</sup> VCAT must also tell the Office of the Victorian Information Commissioner.<sup>374</sup>

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<sup>373</sup> *Freedom of Information Act 1982 (Vic)*, section 61(1).

<sup>374</sup> *Freedom of Information Act 1982 (Vic)*, section 61(2).

- 1.3. Section 61 is not intended to give VCAT the power to conduct a broad enquiry into concerns an applicant may have.<sup>375</sup> Instead, it allows VCAT to act on evidence that comes to light during the review process.

### Can an applicant ask VCAT to consider evidence of breach of duty or misconduct?

- 1.4. An applicant cannot apply to VCAT to ask that it take action under section 61 (bring the evidence of the breach of duty or misconduct to the attention of the responsible person). Section 61 requires VCAT to consider disciplinary action when the proceedings are complete.<sup>376</sup>
- 1.5. The exercise of that power is subject to the requirement in section 98(1) of the [Victorian Civil and Administrative Tribunal Act 1998 \(Vic\)](#) which requires VCAT to act fairly. This would normally require VCAT to give the officer against whom the allegations are being brought, an opportunity to be heard first.

### ‘In the administration of the Act’

- 1.6. If the breach is due to the administrative burden the Act imposes on an agency, invoking section 61 may not be justified. Similarly, VCAT may be reluctant to use the powers in section 61 if the misconduct is by a new FOI officer, still undertaking the learning process.<sup>377</sup>
- 1.7. If the misconduct of one officer represents the broader attitudes of an agency, it has been said that it would be unfair to single out that officer, which VCAT may also take into account.<sup>378</sup>

#### Examples

*Birnbauer v Department of Industry, Technology & Resources* (Nos 1, 2 and 3) (1986) 1 VAR 279

The applicant said the Administrative Appeals Tribunal (AAT) should take disciplinary action under section 61 against certain agency officers because some aspects of how they handled the request had prolonged the hearing.

The applicant argued that the agency had told him there were no documents responding to his request. However, the agency then found documents but said that they could not be released because they were covered by confidentiality clauses.

After proceedings had started, the agency found a further hundred relevant documents.

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<sup>375</sup> *Chopra v Department of Education and Training* (Review and Regulation) [2019] VCAT 1941.

<sup>376</sup> *Roberts v Southern Rural Water* (unreported, VCAT, Preuss SM, 20 April 2000).

<sup>377</sup> *Birnbauer v Department of Industry, Technology & Resources* (Nos 1, 2 and 3) (1986) 1 VAR 279, 292–294.

<sup>378</sup> *Birnbauer v Department of Industry, Technology & Resources* (Nos 1, 2 and 3).

While the AAT agreed that the agency had misled the applicant, it did not exercise its powers under section 61.

*Roberts v Southern Rural Water* (unreported, VCAT, Preuss SM, 20 April 2000)

VCAT found the agency had misled them by describing documents as 'draft' witness statements, and that the agency failed to list three documents when required.

VCAT said that it was essential that agencies take all reasonable steps to ensure that the existence of all documents relevant to the request are disclosed to the applicant. However, VCAT chose not to invoke section 61.

*Chopra v Department of Education and Training* (Review and Regulation) [2019] VCAT 1941

The applicant invited the Tribunal to take action under section 61. The applicant alleged there had been breaches of the Act in relation to the search for documents. The applicant said that a document released under FOI was different to a version he had received earlier.

The agency did a search and found the earlier version and released it to the applicant.

VCAT found that because the differences between the documents were minimal, they were not satisfied that there was evidence of a breach of the Act.



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