

Notice of Decision and Reasons for Decision

Applicants:	AA1
Agency:	Monash University
Decision Date:	28 February 2019
Provision Considered:	Section 25A(1)

FREEDOM OF INFORMATION – disputes and complaints – emails to and from more than 20 Agency staff and the Applicant and a named third party – requests may be refused in certain circumstances – processing the request would substantially and unreasonably divert the resources of the Agency

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

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is that the Agency is not required to grant access to documents in accordance with section 25A(1) on grounds I am satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. The Agency's decision letter sets out the reasons for its decision.

My reasons for decision follow.

Joanne Kummrow
Acting Public Access Deputy Commissioner

28 February 2019

Reasons for Decision

Background to review

1. On 28 November 2018, the Applicant made a request to the Agency for access to the following documents:
 1. All documents about me and my FOI requests up until 28 November 2018.
 2. All communications and records about [named person] sent to or by any of the following persons from [date] to [date]:
[13 named people]
 3. All communications and records about [named person] sent by the following persons from [date] to [date]:
[9 named people]
2. On 6 December 2018, the Applicant made a second request, on behalf of [named person], for access to the following documents:
 1. All records, documents and emails and texts sent by, received by, or sent to the following:
[20 named people]
from [date] to [date] about or referring to [named person].
 2. All communications between [date] and [date] about myself sent to or from any person at Monash University who seen or heard my communications to the Freedom of Information Office.
 3. All communications and processing records of my previous requests for access made or apparently made under the FOI Act and complaints to the Freedom of Information Office between [date] and [date].
3. The Agency decided to combine the requests. The outcome of the combined request was to refuse access to the documents under section 25A(1).

Review

4. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
5. The Applicant advised [they] had requested a small number of documents and did not specifically object to the Agency's decision to combine the requests.
6. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
7. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's invitation to consult letter to the Applicant dated 20 December 2018;
 - (b) the Agency's decision on the FOI request;

- (c) the Agency's submission dated 12 February 2019; and
 - (d) the Applicant's review application.
8. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

9. The Agency relied on section 25A(1) to refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, as it was satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. The Agency's decision letter sets out the reasons for its decision.

Combining of separate FOI requests

10. As part of my review, I considered whether it was open to the Agency to aggregate or combine the two FOI requests as a single request for the purpose of considering the application of section 25A(1).
11. In its submission, the Agency referenced the decision in *Department of Treasure and Finance v Kelly*¹ in which the Supreme Court of Victoria Court of Appeal determined that an agency may, in certain circumstances, aggregate multiple requests made at or about the same time by the same person as a single request when deciding whether section 25A(1) applies.
12. The factors that may permit an agency to aggregate multiple FOI requests include (but are not limited to) requests made within the same time period for documents that relate to the same general subject matter or have common aspects.
13. In this case, the Applicant made two FOI requests to the Agency within a week or so of each other in near identical terms concerning the Applicant and [named person]. In these circumstances, I am satisfied it was open to the Agency to combine the two separate requests into a single request for the purpose of section 25A(1).

Section 25A(1)

14. Section 25A(1) provides:

25A Requests may be refused in certain cases

- (1) The Agency ... dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the agency... is satisfied that the work involved in processing the request -
- (a) in the case of an agency – would substantially and unreasonably divert the resources of the agency from its other operations;
- ...
- (2) Subject to subsection (3) but without limiting the matters to which the agency... may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the agency... is to have regard to the resources that would have to be used –

¹ (2001) 4 VR 595 at [45].

- (a) in identifying, locating or collating the documents within the filing system of the agency... or
 - (b) in deciding whether to grant, refuse or defer access to documents to which the request relates, or to grant access to edited copies of such documents, including resources that would have to be used –
 - (i) in examining the documents; or
 - (ii) in consulting with any person or body in relation to the request; or
 - (c) in making a copy, or an edited copy, of the documents; or
 - (d) in notifying any interim or final decision on the request.
- (3) The agency... is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind.
- (4) In deciding whether to refuse, under subsection (1), to grant access to documents, an agency... must not have regard to –
- (a) Any reasons that the person who requests access gives for requesting access; or
 - (b) The agency's... belief as to what are his or her reasons for requesting access.
- ...
- (6) An agency... must not refuse to grant access to a document under subsection (1) unless the agency or Minister has –
- (a) given the applicant a written notice -
 - (i) stating an intention to refuse access; and
 - (ii) identifying an officer of the agency... with whom the applicant may consult with a view to making the request in a form that would remove the ground for refusal; and
 - (b) given the applicant a reasonable opportunity so to consult; and
 - (c) as far as is reasonably practicable, provided the applicant with any information that would assist the making of the request in such a form.
- ...
15. In the Victorian Supreme Court of Appeal decision of *Secretary, Department of Treasury and Finance v Kelly*,² Chernov JA described the purpose of section 25A(1) as follows:

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

16. The onus is on the Agency to establish it has met the requirements of the exemption.³

Consultation

17. I am satisfied that, before making its decision, the Agency in its letter dated 20 December 2018, provided the Applicant with an opportunity to consult and provided information that would assist the Applicant in making the request in a form that would remove the proposed ground for refusal, as required under section 25A(6).
18. The Applicant responded to the Agency stating [they] did not wish to narrow the scope of [their] request.

² [2001] VSCA 246 at [48].

³ [2008] VCAT 916 at [11].

Estimated time to process

19. With respect to determining the resources that would be required by an agency in deciding whether to refuse access under section 25A(1), the Victorian Civil and Administrative Tribunal (VCAT) observed in *McIntosh v Victoria Police*:⁴

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

20. In its submission, the Agency advised:

- (a) the volume of documents falling within the terms of the request is likely in excess of 4,200 pages;
- (b) in order to identify the documents, searches would need to be conducted by 20 Agency staff members;
- (c) the staff members, who would be required to conduct the searches, have limited time to respond to such requests;
- (d) the Agency's FOI officer would then need to view the contents of each document, which would likely take 65-70 hours;
- (e) the request would require a significant amount of time to conduct the required consultation; and
- (f) the process of examining each document to determine whether it is exempt in full or in part would require a significant amount of time.

21. I am satisfied, based on the information provided by the Agency in its consultation letter, decision letter, and submission, that the Agency resources required to identify, examine and consult in relation to the documents falling within the terms of the Applicant's request would involve a substantial diversion of the Agency's resources.

22. It is therefore necessary for me to consider whether the diversion of resources would be 'unreasonable' in the circumstances.

Unreasonable diversion

23. The term 'unreasonableness' was considered by the Commonwealth Administrative Appeals Tribunal in the decision of *Re SRB and Department of Health, Housing, Local Government and Community Services*,⁵ where the Tribunal held:

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

⁴ [2008] VCAT 916 at [11].

⁵ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

24. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the approach adopted by VCAT in *The Age Company Pty Ltd v CenITex*.⁶ I consider the following factors particularly relevant in the circumstances of this case:

- (a) Whether the terms of the request offer a sufficiently precise description to permit [the agency], as practical matter, to locate the documents sought within a reasonable time and with the exercise of reasonable effort.

I consider the terms of the request were sufficiently precise to enable the documents within the scope of the request to be identified. However, I do not consider, given the volume of documents concerned, that it would take a reasonable amount of time to locate the documents, or they could be located with the exercise of reasonable effort.

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

I consider members of the public should have access to official records, unless there is a compelling reason to deny that access. However, I also consider it reasonable for agencies to be able to consult with applicants to ensure that their requests do not unreasonably divert the resources of agencies.

For the Applicant, I acknowledge there is a strong personal interest in the documents, however, having considered the subject matter of the request I do not consider there is an interest shared by the broader public that would compel access to the documents in this instance.

- (c) Whether the request is a reasonably manageable one, giving due but not conclusive regard, to the size of the agency and the extent of its resources usually available for dealing with FOI applications.

The Agency advised that, at the time of receiving the Applicant's request, it had 12 FOI requests on hand and one authorised FOI decision maker. The Agency advised the resources available to the Agency is usually sufficient to deal with the Agency's FOI requests. The Agency further advised the FOI officer has other duties as well as processing FOI requests and would be available to process the request for up to two hours per day. It would therefore take approximately 10 weeks to process the request.

I consider the Agency has demonstrated the work involved in processing the Applicant's request would impact the ability of the FOI unit to complete its current work.

- (d) The reasonableness or otherwise of the agency's initial assessment and whether the applicant has taken a co-operative approach to redrawing the boundaries of the application.

Based on the information supplied by the Agency, I am satisfied it responded reasonably to the Applicant's request.

I also note, due to the nature of the information the Applicant seeks, that it would be relatively easy to narrow the scope of the FOI request – for example to limit the request to certain Agency staff members and a shorter date range for the documents sought. However, the Applicant declined to narrow the scope of the request.

⁶ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43-45].

(e) The statutory time limit under the FOI Act for making a decision.

Due to the work required to process the request, the number of requests on hand, and the resources available to the FOI unit, I accept it would be difficult for the Agency to process the request within the statutory timeframe and would likely interfere with the other operations of the FOI unit, namely the processing of other current FOI requests.

25. Having considered the above factors, I am satisfied the diversion of Agency's resources would be unreasonable in this matter.

Conclusion

26. On the information before me, I am satisfied processing of the Applicant's request would substantially and unreasonably divert the resources of the Agency. Therefore, it was open to the Agency to rely on section 25A(1) to refuse to grant access to documents in accordance with the request.

Review rights

27. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.⁷
28. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁸
29. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁹
30. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
31. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.¹⁰

When this decision takes effect

32. My decision does not take effect until the relevant review period (stated above) expires, or if either party applies to VCAT for a review, until the VCAT proceeding is concluded.

⁷ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁸ Section 52(5).

⁹ Section 52(9).

¹⁰ Sections 50(3F) and (3FA).