

Notice of Decision and Reasons for Decision

Applicant:	'AF1'
Agency:	Victoria Police
Decision Date:	30 May 2019
Provision considered:	Section 25A(1)
Citation:	'AF1' and Victoria Police (<i>Freedom of Information</i>) [2019] VICmr 46 (30 May 2019)

FREEDOM OF INFORMATION – disputes and complaints – would substantially and unreasonably divert the resources of the Agency from its other operations

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

Notice of Decision

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

My decision on the Applicant's request is the same as the Agency's in that I have decided the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.

Accordingly, the Agency is not required to process the Applicant's request.

My reasons for decision follow.

Joanne Kummrow
Public Access Deputy Commissioner

30 May 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to:

...the following documents regarding any complaints made about [named agency officer] by Victoria Police staff (current and former):

 1. Complaints, investigation file and documents regarding the outcome of the investigation
 2. WorkCover claims alleging bullying by [named Agency officer]
 3. Professional Standards Command files, other internal disciplinary investigation files
 2. By letter dated 7 March 2019, the Agency wrote to the Applicant stating it intended to deny access to documents under section 25A(1) as it considered the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations.
 3. The Applicant was invited to consult with the Agency, in accordance with section 25A(6)(b), with a view to remove the proposed ground of refusal by refining the scope of the request so it could be processed.
 4. The Applicant responded to the Agency by letter dated 20 March 2019 advising [they] agreed to limit the request to the following:

Documents from [year] to date regarding:

 1. Allegations of bullying/harassment in your possession relating to complaints, occupational health and safety, circumstance and other investigation reports, documents produced or obtained by the Return to Work Inspectorate and any other such documents in your possession regarding Victoria Police at the [Agency section] located in [location].
 2. WorkCover claims lodged by [named person] regarding allegations of bullying, harassment, etc, by:

[named Agency officers]
 3. Complaints as to bullying may have also been made by [named person], [named person] and [named person], we do not know if WorkCover claims were lodged as well, we believe that there were regarding allegations of bullying, harassment, etc by:

[named agency officers]
 5. By letter dated 25 March 2019, the Agency advised the Applicant that its revised request did not remove the grounds to refuse to process the request under section 25A(1) as to process the revised request would substantially and unreasonably divert the resources of the Agency from its other operations.
 6. The Agency invited the Applicant to consult prior to making a decision to refuse to process the request. The Agency also suggested limiting the scope of the Applicant's request to:

Final investigation report for Workplace Standards file [file number] and Professional Standards Command file [file number] relating to your client
 7. In response, the Applicant advised by letter dated 4 April 2019, that it agreed to revise its request to:
 1. Complaints and/or allegations of bullying /harassment made by [the Applicant] and any subsequent investigation;
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2. WorkCover claims lodged by our client, and any investigation;
 3. Final investigation report(s) for workplace standards relating to [the Applicant].
8. In its decision letter of 9 April 2019, the Agency advised the Applicant it had determined to refuse the revised request as the Agency had identified over 800 pages of documents matching the scope of the Applicant's revised request and to process the revised request would substantially and unreasonably divert the resources of the Agency from its other operations.

Review

9. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access
10. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
11. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) the correspondence between the Agency and the Applicant leading up to its decision;
 - (c) the Agency's submission dated 17 May 2019 describing its workload at that time; and
 - (d) the Applicant's request for review and correspondence dated 30 April 2019.
12. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Refusal of a request in accordance with section 25A(1)

13. In accordance with section 25A(1), a request may be refused by an agency in certain circumstances and following consultation with an applicant in accordance with section 25A(6). The provision provides:
 - (1) The Agency or Minister dealing with a request may refuse to grant access to documents in accordance with the request, without having caused the processing of the request to have been undertaken, if the Agency or Minister is satisfied that the work involved in processing the request –
 - (a) in the case of an Agency – would substantially and unreasonably divert the resources of the Agency from its other operations;
 - ...
 - (2) Subject to subsection (3) but without limiting the matters to which the Agency or Minister may have regard in deciding whether to refuse under subsection (1) to grant access to the documents to which the request relates, the Agency or Minister is to have regard to the resources that would have to be used –
 - (a) in identifying, locating or collating the documents within the filing system of the Agency, ...
 - or
 - (b) in deciding whether to grant, refuse or defer access to documents to which the request relates, or to grant access to edited copies of such documents, including resources that would have to be used –

- (i) in examining the documents; or
 - (ii) in consulting with any person or body in relation to the request; or
 - (c) in making a copy, or an edited copy, of the documents; or
 - (d) in notifying any interim or final decision on the request.
- (3) The agency or Minister is not to have regard to any maximum amount, specified in regulations, payable as a charge for processing a request of that kind.
- ...
- (6) An Agency or Minister must not refuse to grant access to a document under subsection (1) unless the Agency or Minister has –
- (a) given the Applicant a written notice –
 - (i) stating an intention to refuse access; and
 - (ii) identifying an officer of the Agency... 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.

11. The Victorian Supreme Court of Appeal in the decision of *Secretary, Department of Treasury and Finance v Kelly*,¹ described the purpose of section 25A(1) as:

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

12. When determining whether to refuse a request, it is only possible for an agency to estimate how much time and effort would be sent to process the request. To require that the issue be determined with absolute certainty would compel the agency to undertake the very work that section 25A(1) is designed to avert.²
13. Once an agency decides to refuse access under section 25A(1), it bears the onus of establishing it has met the requirements of the exemption, namely, that processing the request would substantially and unreasonably divert the resources of the agency from its other operations.³
14. I am required to consider whether section 25A(1) applies as at the time of my review. That is, I must assess whether processing the FOI request *now* would substantially and unreasonably divert its resources from its other operations under section 25A(1) rather than when the Agency decided to refuse to process the request.⁴

¹ [2001] VSCA 246 at [48].

² *McIntosh v Victoria Police* [2008] VCAT 916 at [10].

³ *Ibid* at [11].

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

Consultation

15. A decision to refuse to a request under section 25A(1) cannot be made unless the agency gives notice to the applicant stating its intention to refuse the request and nominates an Agency officer with whom the Applicant can consult, provides a reasonable opportunity for the Applicant to consult and lastly, provided information to assist the Applicant to assist them in amending their request to a form that would remove the proposed ground for refusal.⁵
16. I am satisfied, before making its decision, the Agency provided the Applicant with notice of its intention to refuse access, provided reasonable opportunity to consult and provided information that was sufficient to assist the Applicant in making the request in a form that would remove the proposed grounds for refusal.
17. If agreement from the applicant to narrow the scope of the FOI request cannot be reached, I must complete my review on the basis of the scope of the applicant's original request.

Review of the application of section 25A(1)

18. I have considered the preliminary view of the Agency in its letter dated 7 March 2019, which advised the following:

I am advised there are over 700 pages of documents matching the scope of [the Applicant's] request.

In view of the above, I am satisfied that the work involved in processing the request (copying, viewing, and assessing the document) would substantially and unreasonably divert the resources of Victoria Police for its other operations.

In making this decision to give you notice I have, as required by section 25A(2), taken into account the resources which would be used:

- a) in identifying, locating or collating the documents within our filing system;
- b) in deciding whether to grant, refuse or defer access to the documents or to grant access to edited copies of such documents, including resources which would have been used:
 - i) in examining the documents; or
 - ii) in consulting with any person or body in relation to the request;
- c) in making a copy, or an edited copy, of the documents;
- d) in notifying [the Applicant] of any interim or final decision on the request.

19. I have also considered the Agency's submission dated 17 May 2019 regarding its current workload in which the Agency advised:

1. There are over 800 pages of documents matching the terms of the Applicant's revised request.
2. Files relating to investigations completed by the PSC and Workplace Standards are complex and in this case also large and it is impossible to give an estimate of how long it would take to assess these documents.
3. The office is currently dealing with 341 active requests.
4. The FOI office has 24 staff of which only 5 of 7 assessors can assess the documents. There is no Assessor that has any free time for a particular file.

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

Unreasonable diversion

20. The term 'unreasonableness' was considered by the Commonwealth Administrative Appeals Tribunal in *Re SRB and Department of Health, Housing, Local Government and Community Services*, 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.⁶

21. In determining unreasonableness for the purposes of section 25A(1), I have had regard to the approach adopted by the Victorian Civil and Administrative Tribunal (VCAT) in *The Age Company Pty Ltd v CenITex*.⁷

22. I consider the following factors particularly relevant in the circumstances of this case:

- (a) Whether the terms of request offer a sufficiently precise description to permit [the Agency], as a 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 location of documents relating to the Applicant to be identified within a reasonable time. This does not however take into account the time and resources that would be required to interrogate databases, examine, and if necessary consult upon, those documents.

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

I consider that 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 that there is a personal interest in the documents. However, having considered the subject matter of the request I do not consider that 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.

As set out above, I consider the Agency has provided sufficient information about the number and complexity of the documents subject to the Applicant's request, as well as its current workload and resources to demonstrate that 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.

I have reviewed correspondence between the Agency and the Applicant sent prior to the decision to refuse to process the request. I am satisfied the Agency responded reasonably in response to the Applicant's request, including by providing reasonable opportunities for the Applicant to revise the request, and by providing suggested wording that would allow the Agency to process the request.

⁶ *Re SRB and Department of Health, Housing, Local Government and Community Services* (1994) 19 AAR 178 at [34].

⁷ *The Age Company Pty Ltd v CenITex* [2003] VCAT 288 at [43]-[45].

- (e) The 45 day statutory time limit for making a decision in this application.

Due to the work required to process the request, the number of requests the Agency has on hand, and the resources available both to the FOI unit and the business unit conducting the search, I consider it would be difficult for the Agency to process the request within the statutory timeframe under section 21 of the FOI Act and would likely interfere with the other operations of those areas.

23. Having considered the above factors, I am satisfied the diversion of resources would be unreasonable in this matter.

Conclusion

24. On the information before me, I am satisfied the work involved in processing the request would substantially and unreasonably divert the resources of the Agency from its other operations. Therefore, I accept it was open to the Agency to invoke section 25A(1) to refuse to process the Applicant's FOI request.

Review rights

25. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.⁸
26. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁹
27. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.¹⁰
28. 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.
29. 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.¹¹

When this decision takes effect

30. 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.

⁸ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁹ Section 52(5).

¹⁰ Section 52(9).

¹¹ Sections 50(3F) and (3FA).